

(1986) 12 GUJ CK 0001

In the Gujarat High Court

Case No : Spl. Criminal Application No's. 427 and 518 of 1986 and
Miscellaneous Application No. of 970 of 1986

Vedprakash Devkinandan Chiripal and etc.

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 03-12-1986

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 226
Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities
Act, 1980 — Section 7(I)

Citation : AIR 1987 Guj 253 : (1987) 2 GLR 1345

Hon'ble Judges : P.R. Gokulakrishnan, C.J.; S.B. Majmudar, J.; A.P. Ravani, J

Bench : Full Bench

Advocate : M.G. Karmali, M.R. Kolwala, S.V. Raju and K.S. Nanavati, for the
Appellant; J.D. Ajmera, S.D. Shah, A.S.C., J.M. Thakore, General and J.U. Mehta,
Public Prosecutor, for the Respondent

Judgement

Gokulakrishnan, C.J.—Special Criminal Application No. 427 of 1986 comes up before the Full Bench on a reference made by a Division Bench of our High Court. The petitioner herein is sought to be detained under the provisions of the Prevention of Blackmarketing and Maintenance of Supply of Essential Commodities Act, 1980. On 6-12-1985, his premises were searched and kerosene tins were seized. On 20-2-1986, a detention order was made under S. 3(I) of the said Act. Since the petitioner was absconding, a notification was issued in the Official Gazette as provided under S. 7(I)(b) of the said Act. This was on 29-3-1986. On 34-1986 this Special Criminal Application was filed wherein the petitioner prayed for quashing the detention order as ab initio void and illegal. There is a further prayer for grant of stay against the execution of the order of detention passed by the second respondent, who is the Deputy Secretary to Government, Food and Civil Supplies Department, Government of Gujarat. A Division Bench of our High Court presided over by D. C. Gheewala and J. P. Desai, JJ. issued rule nisi on 7-4 -1986 and granted stay as prayed for. Since the

Division Bench felt difficulty in answering the question of maintainability of the Special Criminal Application under Art. 226 of the Constitution in cases where the detention orders had not been served upon the petitioner, it formulated the following questions and referred the matter to the Full Bench :

1. Whether the petition under Art. 226 of the Constitution either for praying a writ of habeas corpus or a writ of mandamus would be maintainable before the detenu has been served with the order of detention and has been detained in custody?

2. Whether the issuance of Notification under S. 7(I)(b), Prevention of Blackmarketing and Maintenance of Supply of Essential Commodities Act, 1980 would make any difference so far as the aspect of maintainability is concerned on the premises that the issuance of such a Notification can be equated with the service of the order on the detenu?

3. If point No. 1 is answered in the affirmative, can the Detaining Authority be required to produce before the Court the grounds of detention, subjecting them for judicial review before they are served on the detenu?

2. Special Criminal Application No. 518 of 1986 comes up before the Full Bench on a reference made by a Division Bench of our High Court. The petitioner herein is sought to be detained under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA Act). The brief facts of this case are as follows

On the night of 14-12-1985, truck No. GTK 4459 was intercepted by the local police officers near Jamnagar and in that it was found that 62 packages were concealed under 225 bags of lime. Those packages contained watch parts, watch movements, imitation stones, digital wristwatches and various other things. The intelligence gathered regarding contraband goods revealed that they were illicitly imported by MSV Safina Al Farooki BDI 768 belonging to Smt. Ayshabai wife of Jusab Haji Abdulla. Bhaya alias Jusab Patel, which arrived at Salaya on 14-12-1985 round about 5-30 A. M. Accordingly, MSV Safina All Farooki BDI 768 which was used for carrying and transporting the contraband goods, viz. 62 packages, was seized on 14-12-1985 and it was also placed under seizure on 17-12-1985. It was valued at Rs. 2,00,000/-, since the petitioner was absconding, the 2nd respondent passed an order on 30-4-1986 declaring the petitioner as absconding and as such the detention order dated 19-2-1986 was not executed. According to the petitioner herein, inasmuch as the order dated 30-4-1986 has been affixed along with the detention order dated 19-2-1986 at the residence of the petitioner, it must be deemed that the detention order has been served upon the petitioner. Hence, according to the petitioner, the present Special Criminal Application is maintainable. After referring to various facts, the petitioner herein contended that both the orders of detention and declaring the petitioner as absconding are illegal and they were passed without any authority or materials on record to connect the petitioner with the alleged activities. The

petitioner further submitted that there is no material on which a reasonable person can come to the conclusion that the petitioner is connected with the alleged illegal activities. For all these reasons, the petitioner wants the order of detention and the declaration made subsequently to be quashed. In this petition, the petitioner has also made mention of the reference made by a Division Bench of this Court in Special Criminal Application No. 427 of 1986 and finally prayed for quashing the detention order and also the declaration order dated 19-2-1986 and 30-4-1986 respectively.

3-4. S. B. Majmudar and I.C. Bhatt, JJ., by their oral order dated 6-8-1986 framed three questions, which are identical to the questions framed by another Division Bench (D.C. Gheewala and J. P. Desai, JJ.) in Special criminal Application No. 427 of 1986 and referred the matter to the Full Bench. In view of such references made by two Division Benches, both the matters are placed before this Full Bench. Since the points involved in the references are the same in both the Special Criminal Applications, both the matters have been taken up together for disposal.

5. Special Criminal Application No. 518 of 1985 is in respect of the order of detention passed under the COFEPOSA Act, 1974. This Act was enacted to prevent the smuggling activity, which is in increase and which affects the national economy and also the security of the State. Section 3 of the Act empowers the authorities mentioned therein to pass an order of detention in respect of the activities mentioned in that section. Section 3(2) of the Act reads as follows :-

"When any order of detention is made by a State Government or by an officer-empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order."

Section 3(3) of the Act reads as follows:

"For the purposes of clause (5) of Art. 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been, made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention."

Section 7 of the Act deals with the powers of the appropriate Government in relation to absconding persons and it reads as follows :-

"7. Powers in relation to absconding persons : -

(1) If the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, the Government may -

(a) make a report in writing of the fact to a Metropolitan Magistrate or a

Magistrate of the First Class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of Ss. 82, 83, 84 and 85 Criminal P.C. 1973, shall apply in respect of the said person and his property as if the order directing that he be detained under a warrant issued by the Magistrate;

(b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction, he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence under clause (b) of sub-s. (1) shall be cognisable."

Section 8 of the Act deals with the constitution of Advisory Boards and their powers.

6. Special Criminal Application No. 427 of 1986 deals with the case pertaining to the Prevention of Blackmarketing and Maintenance of Supply of Essential Commodities Act, 1980. To appreciate the points involved in these cases, it is necessary for us to state the relevant provisions in the Act and also discuss the same in relation to the constitutional provisions in Arts. 21 and 22. Article 21 deals with protection of life and personal liberty and states that no person should be deprived of his life or personal liberty except according to the procedure established by law. Art. 22 deals with protection against arrest and detention in certain cases. Article 22(3) is an exception to Article 22(1) and (2) and deals with arrest and preventive detention. Such detention must be in accordance with the provisions of any law made by the Legislature and specifies certain limitations in Arts. 22(4), 22(5), 22(6) and 22(7). The procedural requirement for detaining a person in accordance with Art. 22(3) onwards has been held to be mandatory in character. Thus, it is clear that the Constitution itself visualizes the situation wherein an Act in the nature of preventive detention has to be invoked, and for that purpose, there must be a procedure established by law. As per the Constitution, such a law's prescription for preventive detention cannot be for a period of more than three months unless the Advisory Board contemplated in this provision has opined before the expiration of the said period of three months that there is sufficient cause for extending the period of detention. In any event, such detention cannot be beyond the maximum period of detention prescribed by any law made by the Parliament under sub-clause (b) of clause (7) of Art. 22 of the Constitution. Article 22(5) of the Constitution makes it incumbent on the authority concerned to communicate to the person detained, the grounds on which the order has been made and shall afford him an earliest opportunity for making a representation against the order. Article 22(6) of the Constitution gives power to the authority concerned making such detention order not to disclose

the facts which such authority considered to be against the public interest to disclose.

7. In the light of the aforesaid constitutional provisions we may examine the Prevention of Blackmarketing and Maintenance of Supply of Essential Commodities Act. It is clear from S. 3 that the Central Government or a State Government or any Officer of the Central Government not below the rank of a Joint Secretary to that Government specially empowered for the purpose of this section by the Government or any officer of a State Government not below the rank of a Secretary to that Government specially empowered for the purpose of this section by the Government, may, if satisfied, with respect to any person that with a view to preventing him from acting prejudicially to the maintenance of supplies of commodities essential to the community, it is necessary so to do can make an order directing that person to be detained.

8. As per S. 3(4) of the said Act, the State Government, after it approves the order of detention, shall within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order. Such an order can be executed at any place in India in the manner provided for the execution of warrants of arrest under the Code of Criminal Procedure, 1973. As per S. 5 of the said Act, the person against whom the detention order has been made is liable to be detained in such place and under such conditions including conditions as to maintenance, discipline and punishment for breaches of discipline, as the appropriate Government may by general or special order specify, and that the appropriate Government can also make an order to remove him from one place to another. Section 7 of the said Act deals with the powers of the Government in relation to absconding persons. Section 8 of the said Act reads as follows :-

"8(1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than ten days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government. (2) Nothing in sub-s. (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose."

9. From the narration of relevant sections in both the Acts (COFEPOSA Act and Prevention of Blackmarketing and Maintenance of Supply of Essential Commodities Act), it is clear that a detained person is entitled to have the grounds of detention not later than maximum of fifteen or ten days from the date of his detention as the case may be. This section (S. 8 of the P.B. Act) also states that the authorities concerned have a right to withhold certain facts and not to disclose the same in the interest of public. There is a provision in this Act for the constitution of the Advisory Board and laying down as to how the

Advisory Board is governed by certain procedures. If the Advisory Board opines that there is no sufficient cause for detention, the appropriate Government shall revoke the detention order. The Scheme of the said Act, as narrated above, describes the procedure in respect of the detention under the said Act and in the ordinary course, a person detained cannot have the grounds for such detention before a prescribed time; he has the right to represent before the Advisory Board, and also sending his explanation to the Government as soon as the order of detention is served. If these mandatory provisions are not satisfied, in our opinion, the detention under the order will be void, irrespective of the grounds on which such an order has been passed. In other words, there may be cases where the detention is *ex facie* illegal and arbitrary.

10. Mr. Karmali, learned counsel for the petitioner in Special Criminal Application No. 427 of 1986, after citing various decisions, contended that once a detention order is passed, even though it is not served upon the detenu concerned, petition under Art. 226 of the Constitution is maintainable to quash such an order. The learned counsel further submitted that once a Notification is issued under the provisions of the Act in respect of an absconding person, it should be deemed that there is a legal service of the order of detention on the detenu concerned and as such a petition under Art. 226 of the Constitution to quash such a detention order is maintainable. Reading the provisions of the said Act, Mr. Karmali submitted that if the order itself is *ab initio* void, a person has to be protected before he is sent to prison. Threatened action to curb the liberty of a person on an illegal order can be questioned before a Court of Law in order to protect the liberty of the person and to safeguard the constitutional guarantee envisaged under Art. 21 of the Constitution. To send a person to prison, according to Mr. Karmali, there must be a valid order and if such an order is *ab initio* void, the Courts are not powerless to question such an invalid order passed on grounds which are extraneous to the issue in question and are also illegal. Hence, according to Mr. Karmali a petition under Art. 226 of the Constitution is maintainable (a) before the detention order is served; (b) during the operation of the detention order, and (c) even after the order of detention has been revoked or exhausted by efflux of time.

11. As far as a petition under Art. 226 of the Constitution is concerned, there cannot be any difficulty in filing such a petition after the service of the detention order, and after the person concerned is detained. The question is whether a person, on whom the detention order has not been actually served except issuing a Notification on the ground that such a person is absconding can invoke the jurisdiction of the Court under Art. 226 of the Constitution even before he receives such an order of detention and surrenders before the authority concerned. According to Mr. Karmali, if there is a threat to the liberty of a person and if such an order is *ab initio* void, the Courts have power to interfere and protect the liberty of the person under Art. 226 of the Constitution. As regards the question, whether the Court has jurisdiction to entertain a writ after the period of detention is over, Mr. Karmali brought to our notice that such a writ is

maintainable and for this proposition he relied on the cases decided under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act (SAFEMA Act), No doubt, Mr. Karmali fairly states that challenge in respect of such preventive detention orders can be only by way of writ of mandamus if the party concerned is not under detention.

12. Mr. Karmali has also submitted that the Court has powers to scrutinise the grounds even before the detention order is served upon the party concerned in order to satisfy itself as to whether there is any ground at all or whether any ground germane to the purpose for which the detention order was passed is there. To highlight his argument, Mr. Karmali submitted that in a given case, the purpose for which the detention has to be made is not at all stated in the grounds, or the purpose stated has nothing to do with the offences mentioned in the particular detention Act, it will be too much for the authorities concerned to detain person without any basis. On the facts of the present case Mr. Karmali: submitted that the goods seized are only terpineum while the grounds alleged are that the petitioner has concealed kerosene. Mr. Karmali has also submitted that if in a given case, an order of detention is passed by an authority who is not empowered to pass such an order, the Court cannot be a silent spectator in encouraging such an illegal order; necessarily the Court has to interfere and quash such an order even before the detenu surrenders before the authorities concerned.

13. Mr. K. S. Nanavati, learned counsel appearing for the petitioner in Special Criminal Application No. 518 of 1986 adopted the arguments of Mr. Karmali and added that there cannot be any fetter upon the jurisdiction of the Court under Art. 226 of the Constitution when a person comes to Court alleging that his liberty is being threatened. To substantiate his content, he has cited a number of decisions, which we will be dealing in paragraphs hereunder. According to Mr. Nanavati in his case the detention order is passed only on suspicion and as such the detenu has every right to approach this Court before surrendering and before receiving the order of detention, in order to safeguard his liberty. Mr. Nanavati finally submitted that there cannot be any legislation preventing the Court's interference under Art. 226 until a person is detained under the concerned preventive detention Act.

14. The learned Advocate General, assisted by Mr. S. D. Shah, after citing various decisions, submitted that the scheme of the detention laws prescribes certain procedures and one has to go through such procedures for the purpose of establishing his innocence According to the learned Advocate General in the ordinary course, a person detained has, the right to represent before the Advisory Board and also send his explanation to the Government as soon as the order of detention is served. If that be so, according to the learned Advocate General, the petitioners herein, who have not surrendered in spite of the notification of the detention order, cannot circumvent the order by invoking the jurisdiction of the Court under Art. 226 of the Constitution and get the order of

detention and grounds thereof much earlier to the time prescribed under law. The learned Advocate General further contended that a person, who is dangerous to the public tranquility and national interest may circumvent the procedure set up by law for preventive detention by going scot free without surrendering before the authority concerned. This will, according to the learned Advocate General, encourage anti-social elements to take advantage of Art. 226 of the Constitution: and can keep away from the jurisdiction of the lawful authority and at the same time, circumvent the procedure set up by law, by invoking the jurisdiction of the Court under: Art. 226 of the Constitution. If such indulgence is shown, that will definitely go against the constitutional mandate enshrined under Art. 22 of the Constitution.

15. The learned Advocate General further contended that the detention order is passed as per the procedure established by law. If that be so, there is no scope for any person to enter into the precincts of the Court before he surrenders to the authority concerned as per the procedure established. Hence, according to the learned Advocate General, the petitioners herein have no locus standi to come before the Court until the procedure prescribed under the Act is complied with. The learned Advocate General, after taking us through the discussion in the Constituent Assembly regarding Arts. 21 and 22, and after citing various decisions, submitted that he is not questioning, the jurisdiction of the Court under Art. 226 of the Constitution but he questions the right of the petitioners herein to maintain such a petition without going through the procedure established by law.

16. Mr. S. D. Shah, supplementing the arguments of the learned Advocate General, submitted that Court should not entertain a petition under Art. 226 of the Constitution at the instance of the proposed detenu and if such a petition is entertained, it will make the validly enacted detention laws otiose and inoperative. The learned counsel further submitted that the Constitutional guarantee for the personal liberty under Art. 21 of the Constitution is subject to the provision under Art. 22. If any procedure is established for issuing a detention order by virtue of the powers under Art. 22 of the Constitution, the same cannot be circumvented by approaching the Court under Art. 226 of the Constitution. The learned counsel then submitted that it is: not the power of the Court that is questioned but the right of an individual to invoke the jurisdiction of the Court in such circumstances that is being questioned. According to Mr. S. D. Shah, learned counsel, entertaining any petition at a stage when an order of detention is simply issued and not executed under a preventive detention law validly enacted by the competent legislature and granting any relief against the execution of such an order is in substance not permitting Art. 22 of the Constitution to have its play at all. It is further submitted that a person against whom an order is issued can complain about the same only if he is arrested or detained. The power which is thus expressly recognised by virtue of Art. 22 of the Constitution cannot be stultified by invoking the Court's jurisdiction under Art. 226 of the Constitution at a stage when in fact the order is not yet

implemented.

17. In the light of the above said narration of facts and arguments submitted by the, respective counsel, we can now usefully refer, to the points referred to the Full Bench. The first question referred to the Full Bench is :

Whether the petition under Art. 226 of the Constitution either for praying a writ of habeas corpus or a writ of mandamus would be maintainable before the detenu has been served with an order of detention and has been detained in custody?

18. Mr. Karmali, learned counsel appearing for the petitioner in Special Criminal Application No. 427 of 1986, fairly stated that habeas corpus petition would not lie before the actual detention of the detenu. The basis of habeas corpus petition itself visualises the detention of the person concerned at the time of such a petition. That is why in various decisions of the Supreme Court it has been made clear that the legality or otherwise of the detention has to be judged at the time of the return and not with reference to the date of the institution of the proceeding. This proposition of law is abundantly made clear in *Kanu Sanyal Vs. District Magistrate, Darjeeling and Others*, , and *Naranjan Singh Nathawan Vs. The State of Punjab*, . In the above decisions the Supreme Court has laid down that a detention order may at any time be revoked or modified and that such revocation shall not bar the making of a fresh detention order under the relevant section against the same person. It has been further made clear in those decisions that once it is conceded that in habeas corpus proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of the proceeding, it is difficult to hold, in the absence of proof of bad faith, that the detaining authority cannot supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from defects and duly complies with the requirements of the law in that behalf.

19. It is the admitted position that in these cases, there is no question of detention as Such since the order of detention itself has not been actually served upon the petitioner concerned. Considering the abovesaid decisions of the Supreme Court, it is clear that a writ of habeas corpus is not maintainable in such circumstances.

20. Then the next question is whether a writ of mandamus is maintainable before the detenu has been served with an order of detention and has been detained in custody.

Only on this aspect elaborate arguments were advanced. In a concise way we have already extracted the arguments in the paras supra. The main thrust of the argument for the petitioners is that even a threatened violation of the liberty of a person can be questioned in the Court of law in view of Art. 21 of the Constitution. In this connection we have to carefully consider the ambit of Art. 21 and Art. 22 of the Constitution. Article 21 applies at all stages even prior to

actual detention or subsequent to the actual detention while Art. 22 applies after detention or arrest as the case may be. The protection under Art. 21 of the human liberty in relation to Art. 22 of the Constitution has been considered in *A.K. Gopalan Vs. The State of Madras*, of the judgment, the Supreme Court observes as follows :

"The question next arises as to how far the protection under Art. 21 such as it has been found to be is available to persons under preventive detention. The learned Attorney General contended that Art. 21 did not apply to preventive detention at all, as Art. 22, cls. (4) to (7) formed a complete code of constitutional safeguards in respect of preventive detention and, provided only these provisions are conformed to, the validity of any law relating to preventive detention could not be challenged. I am unable to agree with this view. The language of Art. 21 is perfectly general and covers deprivation of personal liberty or incarceration, both for punitive and preventive reasons. If it was really the intention of the framers of the Constitution to exclude the application of Art. 21 to cases of preventive detention, nothing would have been easier than to add a reference to Art. 21 in Clause (3) of Art. 22 which provides that Cls. (1) and (2) of the latter shall not apply to any person who is arrested or detained under any law providing for preventive detention. Nor is there anything in the language of Cls. (4) to (7) of Art. 22 leading necessarily to the inference that Art. 21 is inapplicable to preventive detention. These clauses deal only with certain aspects of preventive detention such as the duration of such detention, the constitution of an Advisory Board for reviewing the order of detention in certain cases, the communication of the grounds of detention to the person detained, and the provision of an opportunity to him of making a representation against the order. It cannot be said that these provisions form an exhaustive code dealing with all matters relating to preventive detention and cover the entire area of protection which Art. 21 interpreted in the sense I have indicated above would afford to the person detained. I am, therefore, of opinion that Art. 21 is applicable to preventive detention as well."

21. In order that a legislation permitting preventive detention may not be contended to be an infringement of the Fundamental Rights provided in Part III of the Constitution, Art. 22 lays down the permissible limits of legislation empowering preventive detention. Article 22 prescribes the minimum procedure that must be included in any law permitting preventive detention and as and when such requirements are not observed the detention, even if valid *ab initio*, ceases to be "in accordance with procedure established by law" and infringes the fundamental right of the detenu guaranteed under Arts. 21 and 22(5) of the Constitution. In Art. 22(5) it is first considered that the person so detained has a right to be given as soon as may be the grounds on which the order has been made. He may otherwise remain in custody without having the least idea as to why his liberty has been taken away. This is considered an elementary right in a free democratic State. Having received the grounds for the order of detention, the next point which is considered is, "but that is not enough; what is the good

of the man merely knowing grounds for his detention if he cannot take steps to redress a wrong which he thinks has been committed either in belief in the grounds or in making the order". The clause, therefore, further provides that the detained person should have the earliest opportunity of making a representation against the order. The representation has to be against the order of detention, because the grounds are only steps for the satisfaction of the Government and on which satisfaction the order of detention has been made. The third thing provided is in cf. (6). It appears to have been thought that in conveying the information to the detained person there may be facts which cannot be disclosed in the public interest. The authorities are, therefore, left with a discretion in that connection under clause (6). The grounds which form the basis of satisfaction when formulated are bound to contain certain facts, but mostly they are themselves deductions of conclusions from facts. That is the general structure of Art. 22, Cls. (5) and (6) of the Constitution.

22. In *Additional District Magistrate, Jabalpur Vs. Shivakant Shukla*, , the Supreme Court had occasion to consider the effect of Presidential Order suspending the enforcement of the rights conferred under Part III during emergency. In that judgment, the majority view is that no person has locus standi to move writ petition under Art. 226 before a High Court for habeas corpus or any other writ or order or direction to enforce any right to personal liberty or a person detained under MISA on the grounds that the order of detention or the continued detention is for any reason not under or in compliance with the Act or is illegal or mala fide, during the currency of the Presidential Order promulgated under Clause (1) of Art. 359 of the Constitution. In this judgment, Beg, J., concurring with the majority view observed at paras 317 and 400 as under :-

"317. It is possible that, if a case so patently gross and clear of a detention falling on the face of the order of detention or the return made to a notice from the Court, outside the provisions of the Act on the ground of personal malice of the detaining authority or, some other ground utterly outside the Act arises so that no further investigation is called for it may be possible to contend that it is not protected by the Presidential Order of 27th June 1975, and by the provisions of Art. 359 of the Constitution at all. If that could be patent without any real investigation or inquiry at all, it may stand on the same footing as an illegal detention by a private individual. The mere presence of an official seal or signature on a detention order, in such a purely hypothetical case, may not be enough to convert it into a detention by the State or its agents or officers. That is the almost utterly inconceivable situation or type of case which could still be covered by the general power to issue writ of habeas corpus. There may, for example, be a case of a fabricated order of detention which, the alleged detaining officer, on receipt of notice, disclaims. It is admitted that Part III of the Constitution is only meant to protect citizens against illegal actions of organs of the State and not against wrongs done by individuals. The remedy by, way of a, writ of Habeas Corpus is more general. It lies even against illegal detentions by

private persons although not under Art. 32 which is confined to enforcement of fundamental rights vide *Shrimati Vidya Verma, through next Friend R.V.S. Mani Vs. Dr. Shiv Narain Verma*, . The Attorney General also concedes that judicial proceedings for, trial of accused person would fall, outside the, interdict of the Presidential Order under Art. 359(1). Therefore, it is unnecessary to consider hypothetical cases of illegal convictions where remedies under the ordinary law are not suspended"

"400. A prima facie valid detention order that is to say, one duly authenticated and passed by an officer authorised to make it recording a purported satisfaction to detain the petition under the Maintenance of Internal Security Act, which is operative either before or after its confirmation by the Government is a complete answer to a petition for a writ of Habeas Corpus. Once such an order is shown to exist in response to a notice for a writ of Habeas Corpus, the High Court cannot inquire into its validity or vires on the ground of either mala fides of any kind or if noncompliance with any provision of the Act in Habeas Corpus proceedings. The preliminary objection of the State must be accepted in such a case."

From the abovesaid observation, it is clear that a detention order must be prima facie a valid one, that it should be duly authenticated and passed by an officer authorised to make such an order that there should be a record of purported satisfaction of the detaining authority under the Act and if all these things are there that itself would be a complete answer to a petition for writ of Habeas Corpus when right to move the court for enforcing of Art. 21 is suspended. If once such an order ended. If once such an order is shown to exist "in response to a notice for a writ of Habeas Corpus, the High Court cannot inquire its validity or otherwise on the ground of either mala fides of any kind or of non-compliance of any provisions of the Act concerned in the Habeas Corpus proceedings.

23. In view of the aforesaid legal position enunciated by the Supreme Court, it appears clear that before detention, if writ of mandamus is moved for challenging unauthorised detention order which is already passed on the ground that the order is a nullity because it is passed (a) by an incompetent person or (b) it is a mala fide order, or (c) it is contrary to the legal procedure prescribed for passing such order, or (d) it is otherwise a nullity for any other reason, for example, passed against a wrong person, it cannot be said that such challenge would be per se not maintainable especially when such a challenge would have been maintainable despite Presidential Order taking away locus standi to enforce, specified fundamental rights like Art. 21. It would be a challenge to an existing order which is posing imminent threat to the fundamental right of the prospective detenu guaranteed under Art. 21. Consequently, in such exceptional and rare cases, detention order, even before it is served on the detenu, can be legally brought in challenge. It is not necessary to cite any decision for establishing the right to question a threatened violation of the individual liberty. There is also no difficulty in accepting the proposition that a writ is maintainable for violation of any fundamental right. Even in cases where the detention is no

more operative a writ is maintainable to wipe out the stigma of such detention made against the, person concerned. In this connection we can usefully quote the decision of the Supreme Court reported in Union of India (UOI) and Others Vs. Haji Mastan Mirza, . In this case the Supreme Court had occasion to consider Smugglers and Foreign Exchange Manipulators (Forfeiture of Property), Act 1(13 of 1976) in relation to COFEPOSA. The person concerned in that case was detained under COFEPOSA and subsequent to the period of detention Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act was invoked and in those circumstances, the Supreme Court held that the detention under the COFEPOSA if it is bad can be questioned and if such an order of detention passed on the strength of COFEPOSA is set aside, there is no question of invoking the provisions of Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act to confiscate the properties of the detenu concerned. Thus, it is clear, as correctly put forth by Mr. Karmali, that the Court has jurisdiction to entertain a petition before detention, during detention and subsequent to the detention period. The only question is, to what extent the court can go after entertaining the petition under Art. 22 of the Constitution for a writ of mandamus in case where the detenu is not served with such a detention order.

24. Our Constitution has given highest priority to the individual liberty. Individual liberty is a cherished right; one of the most valuable fundamental rights guaranteed by our Constitution to the citizens of this country. If that right is invaded, excepting strictly in accordance with law, the aggrieved party is entitled to appeal to the judicial power of the State for relief. However, in upholding the individual liberty, the social interest has also to be kept in view. Our Constitution has made provision for safeguarding the interests of the society. Its provisions harmonise the liberty of the individual with social interests. The authorities have to act solely on the basis of those provisions. They cannot deal with the liberty of the individual in a casual manner. The indifference that may be shown to individual liberty is bound to erode the basic structure of the democratic society. Our democratic Constitution inhibits blanket and arbitrary deprivation of a person's liberty by authority. It guarantees that no one shall be deprived of his personal liberty except in accordance with procedure established by law. It further permits the State, in the larger interests of the Society to so restrict that fundamental right in a reasonable but delicate balance is maintained on a legal fulcrum between individual liberty and social security. The slightest deviation from, or displacement or infraction or violation of the legal procedure symbolised on that fulcrum upsets the balance, introduces error and aberration and vitiates its working. The symbolic balance, therefore, has to be worked out with utmost care and attention. The preventive detention Act restricts citizens' personal liberty which is a fundamental right under the Constitution. It is to be reviewed strictly as far as possible and in a manner that does not restrict that right to an extent greater than is necessary to effectuate that object. Therefore, the provisions of such preventive detention Act have to be applied with watchful care and circumspection. It is the duty of the court to see that the efficacy of the

limited yet crucial safeguards provided in the law of preventive detention is not lost in mechanical routine, dull casualness and chill indifference on the part of the authorities entrusted with their application. It has been held by High Courts and the Supreme Court that where the liberty of a subject is involved and he has been detained without trial, under a law made pursuant to Art. 22 which provides certain safeguards, it is the duty of the Court as the Custodian, sentinel and ever vigilant guard of the freedom of an individual to scrutinise with due care and anxiety that this precious right which he has under the Constitution is not in any way taken away capriciously, arbitrarily or without any legal justification. The power to detain without trial is an extraordinary power constituting encroachment on personal liberty and it is the solemn duty of the Court to ensure that this power is exercised strictly in accordance with the requirement of the Constitution and the law. The Courts should always lean in favour of upholding personal liberty, for it is one of the most cherished values of mankind. Without it life would not be worth living. It is one of the pillars of free democratic society. Men have rightly laid down their lives at its altar in order to secure it, protect it and preserve it. Therefore, the Constitution has, while conceding the power of preventive detention, provided procedural safeguards with a view to protecting the citizen against arbitrary and: unjustified invasion of personal liberty and the courts have always zealously tried to uphold and enforce these safeguards. The Supreme Court and High Courts have, through their judicial pronouncements, created various legal bulworks and breakwaters into the vast powers conferred on the executive by the laws of preventive detention prevalent at different points of time.

25. In *Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others*, , the Supreme Court has observed that:

"It is true that sometimes even a smuggler may be able to secure his release from detention if one of the safeguards or requirements laid down by the Constitution or the law has not been observed by the detaining authority but that can be no reason for whittling down or diluting the safeguards provided by the Constitution and the law. If the detaining authority wants to preventively detain a smuggler, it can certainly do so, but only in accordance with the provisions of the Constitution and the law and if there is a breach of any such provision, the rule of law requires that the detenu must be set at liberty, however wicked or mischievous he may be. The law cannot be subverted, particularly in the area of personal liberty, in order to prevent a smuggler from securing his release from detention, because whatever in the law laid down by the Courts in the case of a smuggler would be equally applicable in the case of preventive detention under any other law. This court would be laying down a dangerous precedent if it allows a hard case to make bad law. We must, therefore, interpret the provisions of the Constitution and the law in regard to preventive detention without being in any manner trammelled by the fact that this is a case where a possible smuggler is seeking his release from detention.

This constitutional protection for life and personal liberty is placed on such a high pedestal by Courts that it has always been insisted that whenever there is any deprivation of life or personal liberty, the authority responsible for such deprivation must satisfy the court that it has acted in accordance with the law. This is an area where the Court has been most strict and scrupulous in ensuring observance of the requirements of the law, and even where a requirement of the law is breached in the slightest measure, the Courts have not hesitated to strike down the order of detention or to direct the release of the detenu even though the detention may have been valid till the breach occurred. The Court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of the social cost involved in the release of a possible renegade."

26. The abovesaid observations also receive support from the decisions rendered in *Rattan Singh v. State of Punjab* AIR 1982 SC 1 ; *Kamla Kanyalal Khushalani Vs. State of Maharashtra* and another, *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* AIR 1981 SC 746 ; *A.K. Roy and Others Vs. Union of India (UOI) and Others*, *Prabhu Dayal Deorah Vs. The District Magistrate, Kamrup and Others*, *G. Sadanandan Vs. State of Kerala* and Another, *Narendra Purshotam Umrao Vs. B.B. Gujral and Others*, *Motilal Jain Vs. State of Bihar* and Others, *Kishori Mohan Bera Vs. The State of West Bengal*, *Shaik Hanif and Others Vs. State of W.B., and Daktar Mudi Vs. State of West Bengal*, .

27. In *The State of Bihar Vs. Rambalak Singh and Others*, the Supreme Court had occasion to consider the question of grant of bail in a habeas corpus petition filed after the party had been taken into custody by invoking R. 30, Defence of India Rules. The Supreme Court upheld the power of the High Court to grant such bail if it is satisfied that there is something patently illegal in the order of detention. In this connection, the Supreme Court held-

"....We are free to confess that we have not come across cases where bail has been granted in habeas corpus proceedings directed against orders of detention under R. 30 of the rules, and we apprehend that the reluctance of the Courts to pass orders of bail in such proceedings is obviously based on the fact that they are fully conscious of the difficulties - legal and Constitutional and of the other risks involved in making such orders. Attempts are always made by the Courts to deal with such applications expeditiously; and in actual practice it would be very difficult to come across a case where without a full enquiry and trial of the grounds on which the order of detention is challenged by the detenu, it would be reasonably possible or permissible to the Court to grant bail on prima facie conclusion reached by it at an earlier stage of the proceedings. However, the concept of individual liberty as enshrined in Art. 21 will have to be read in the light of scheme of Art. 22 and in the backdrop of the Constitutional scheme emerging from these relevant Articles and as reflected by the decision of the Supreme Court starting from *A.K. Gopalan Vs. The State of Madras*, . It would, therefore, be profitable to quickly glance through the relevant aspects of law

holding the field."

28. The legislation on preventive detention has been a permanent feature in our country. The jurisprudence as we have adopted and accepted permits the Parliament and the State Legislatures to enact laws regarding preventive detention for reasons connected with (i) defence, (ii) foreign affairs; (iii) security of India (entry 9 in list 1 of Sch. 7 of the Constitution), (iv) security of a State; (v) maintenance of public order; and (vi) maintenance of supplies and services essential to the community (entry 3 in list 3 of Sch. 7 of the Constitution). Thus the preventive detention of a person may be in connection with maintenance of public order or maintenance of supplies and services essential to the community, but it can also be with regard to the defence, foreign affairs and the security of the nation or that of a State.

29. It may also be noticed that as per the provisions of Art. 359 of the constitution the President has power to suspend enforcement of rights conferred by Part III of the Constitution. This power of the President has been curtailed by the Constitution (44th Amendment Act, 1978) which came into force from June 20, 1979. This means that either during peace time or in war time, emergency or no emergency, the rights guaranteed under Arts. 20 and 21 cannot be suspended. Therefore the Constitutional provision regarding preventive detention that may be interpreted and the law that may be laid down by the Courts would also be applicable even during the times when the nation is at war with any foreign power or even when there is a grave internal situation endangering the very existence of the nation or a State. In our country, with regard to the personal liberty of individuals, law is the same either during war or peace time. Therefore, the width of right of personal liberty that may be enjoyed by a citizen of this nation or for that matter by any other person (including a foreigner, for the simple reason that Arts. 20, 21 and 22 apply not only to the citizens but to all persons) will have to be determined by keeping the aforesaid factors in mind.

30. Preventive detention law aims at combating certain evils and/or dangers. This is evident from subjects specified in respect of entries in Sch. 7 Hence the important question is what is the width of the right to, liberty guaranteed under the Constitution and to what extent it can be circumscribed in case of preventive detention. As stated by Fazi Ali, J. in *A.K. Gopalan Vs. The State of Madras*, "it is elementary that the rigour of a law should correspond to or fit the gravity of the evil or danger it aims at combating."

31. In *Gopalan's* case (supra) for the first time after the adoption of the Constitution the right to liberty as enshrined in Arts. 20, 21 and 22, in the context of prevention detention law, came up for consideration. The Supreme Court has elaborately discussed the fundamental rights guaranteed by the Constitution. Kania C.J., while discussing the right to freedom guaranteed under Art. 19 observed as follows:

".... Reading Art. 19 in that way as a whole the only concept appears to be that

the specified rights of a free citizen are thus controlled by what the framers of the Constitution thought were necessary restrictions in the interest of the rest of the citizen ."

In para. 11 of the judgment, after referring to both Arts. 19 and 21 of the Constitution, it is further observed as under :

"in respect of each of the rights specified in sub-clauses of Art. 19(1) specific limitations in respect of each is provided while the expression "personal liberty" in Art. 21 is generally controlled by the general expression "procedure established by law." The Constitution, in Art. 19, also in other Articles in part III, thus attempts to strike a balance between individual liberty and the general interest of the society. The restraints provided by the Constitution on the legislative powers or the executive authority of the State thus operate as guarantees of life and personal liberty of the individual."

32. Patanjali Sastri, J. in para 102 of the judgment, after referring to the definition of "liberty" given by J. S. Mill, observed as follows :

"Man, as a rational being, desires to do many things, but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals. Liberty has, therefore, to be limited in order to be effectively possessed."

In para 119 it is further observed:

"The outstanding fact to be borne in mind in this connexion is that preventive detention has been given a constitutional status"

".....This "feature is doubtless designed to prevent an abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant republic."

33. B. K. Mukherjea, J. in para 170 of the judgment, made the following observations:

"There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint; for that would lead to anarchy and disorder..What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control "

34. S. R. Das, J., in para 215 of the judgment, made the following observations :

"Personal liberties may be compendiously summed up as the right to do as one pleases within the law.... Putting restraint on the freedom of wrong doing of one person is really securing the liberty of the intended victims Therefore, restraints on liberty should be judged not only subjectively as applied to as few individuals who come wit in their operations but also objectively as securing the liberty of a far greater number of individuals. Social interest in individual liberty may well have to be subordinated to other greater social interests. If a law ensures and

protects the greater social interests then such law will be a wholesome and beneficent law although it may infringe the some individuals, for, it will ensure for the greater liberty of the rest of the members of the, society."

Thus while recognising the fact that there cannot be absolute freedom without restraints, the need for checks and/or restraint on the executive, legislative and judicial usurpation of power is stressed as follows :

"At the same time, our liberty has also to be guarded against executive, legislative as well as judicial usurpations of powers and prerogatives"....." It (the Constitution) has by providing for preventive detention, recognized that individual liberty may be subordinated to the larger social interests."

35. Thus the inherent need to curtail the, right to freedom in certain circumstances has been recognised as emerging from the, Constitutional scheme itself. By providing for preventive detention the framers of the Constitution have recognised certain, restraints on the right to individual liberty and in certain cases the individual liberty is required to be subordinated to the larger social interest. The balance which has been struck by the framers of the Constitution between the conflicting interests of individuals on the hand, and the interests of the nation and the society on the other hand, has been clearly brought out and elaborately discussed all the judgments, delivered separately by all the five Judges of the Supreme Court constituting the bench which heard A.K. Gopalan Vs. The State of Madras, . Thereafter the law laid down in Gopalan's case is to some extent modified as far as the procedural aspect is concerned. However, the basic scheme of the Constitution with regard to the balance having been struck between the conflicting interest of an individual and that of the national and social interests, is not in any way questioned or disturbed. .

36. In the aforesaid background the question raised and referred to the Full Bench are required to be examined. Be it noted that in the very nature of things no one can claim a right of being heard before an order of detention is passed against him. Therefore, the question arises: Can any one claim a right of being heard (or any such thing which would in substance be some thing more than a right of being heard) before a detention order is executed upon him? If a petition is entertained before the detention order is served, and if it is held that such a petition, without any limitation whatsoever, can be entertained, the proposed detenu would not only get a right of being heard but he would, also get a right of judicial review of the proposed detention order before the order is executed.

37. In A.K. Gopalan Vs. The State of Madras, before the Supreme Court, it was "conceded that no notice before detention can be claimed by the very nature of such detention " (Kania, C.J., in Gopalan's case para 37). The Supreme Court accepted the concession and for valid reasons. Therefore, by necessary implication it can be said that the Supreme Court has recognised that no such right of being heard can be claimed before the detention order is executed.

38. In this context the nature, scope and function of judicial review of

administrative action is required to be properly understood. In *Judicial Review of Administrative Action*" by De Smith, 4th Edition (1980) (page 1) it is, stated as follows :

"Judicial review of administrative action is inevitably sporadic and peripheral. The administrative process is not, and cannot be, a succession of justiciable controversies. Public authorities are set up to govern and administer, and if their every act or decision were to be reviewable on unrestricted grounds by an independent judicial body the business of administration could be brought to a standstill. The prospect to judicial relief cannot be held out to every person whose interests may be adversely affected by administrative action."

39. In above view of the matter if the Court holds that the petition challenging the order of detention before the same is executed and served upon the detenu is maintainable it would be necessary to hold that such" maintainability is also subject to certain limitation. From the Constitutional scheme itself and in the very nature of things, there are certain inherent limitation which the Court must recognise. If these limitations are not recognised, some disastrous consequences may follow. While entertaining a petition under Art. 226 for mandamus against the order of detention which is not even executed, the Court cannot forget that the preventive detention laws also operate in the spheres of defence, foreign affairs, security of the nation and security of a State. If a detention order is passed against a person suspected to have been engaged in espionage and/or spying activities or against a person who is suspected to have been involved in disruptive and terrorist activities, and such an order of detention is challenged, by way of a petition under Art. 226, before it is executed, and if the Courts were to grant stay order in such petitions, would it not be that in a given case, the very existence of the nation may be put into danger ? If that be so, would it not be reasonable to say that in matters where detention order is challenged before it is executed, stay orders are not granted by the Court even when the court feels that the petition may be entertained and notice be issued against the executive authority ? By recognising this limitation the Court is merely striking a balance between two conflicting, interests which is basic to the constitutional scheme. The Court cannot also lose sight of the fact that the law laid down in this respect can as well be availed of by a proposed detenu filing a suit before the Court of a Civil Judge (S. D.) also. Obviously in such a suit the plaintiff would not pray for any relief in the nature of "Habeas Corpus". He may seek mere declaration regarding illegality and/or validity of detention order and pray for ex parte interim order. If this becomes the law, will it be prudent and reasonable that the matters of grave concern which may endanger the safety and very existence of the nation be left to be considered at leisure while keeping a person suspected to be "potentially dangerous" untouched by the executive ? If this is permitted it may well be said that Court is exceeding its limits. Therefore, a restrained and cautious approach is absolutely necessary.

40. Mr. Karmali also brought to our notice various decisions of the Division

Benches of High Court of Bombay which have entertained writ petitions under Art. 226 of the Constitution even before the surrender of the detenu concerned and quashed the same. In those decisions, the Government took up a preliminary objection regarding the maintainability of such petitions on the ground that the detenu had not yet surrendered as per the detention order. Repelling those objections, the Bombay High Court in Criminal Writ Petition No.622 of 1982 -vide Order dated 21-11-1983, presided over by Kurdukar and Khatri, JJ., has observed -

"Article 226 is couched in language wide enough to protect a person against an illegal invasion of his right to freedom by protecting him while still free (emphasis ours) and by regaining his freedom for him if he has already been wrongfully detained. It cannot be said that the High Courts are impotent to give relief against the prospect of illegal detention and must first require the intended detenu to surrender to the illegal detention. The High Courts may under the provisions of Art. 226 issue a direction, order and writ in the nature of mandamus and/or certiorari quashing an illegal order of detention and may by directions, order and writ in the nature of prohibition enjoin the person threatening the illegal detention from executing the threat."

The aforesaid observation made by the Bench followed various other Bench decisions of the Bombay High Court which laid down the very same principle enunciated above.

41. However, the aforesaid observations of the Division Bench of the Bombay High Court have got to be read subject to certain limitations which emerge from the Constitutional scheme and the necessity to strike the balance between the conflicting interest of individual liberty on the one hand and interests of nation and the society on the other. These aspects have been discussed in detail in the earlier part of this judgment. The limitations which we wish to read are being discussed hereafter. Under these circumstances, we should not be treated to have fully approved the ratio of the aforesaid Division Bench judgment of the Bombay High Court without limitations indicated in this judgment. Subject to these limitations we, of course, agree that a petition under Art. 226 praying for mandamus before the order of preventive detention is executed would be maintainable.

42. In Special Criminal Appln. No. 841 of 1985, a Division Bench of this Court on 11-10- 1985* had occasion to examine the question as to whether the High Court can entertain a petition before the order of detention is executed and the person concerned is put in detention. In that judgment, the Bench observed -

"In our opinion, whether the order is passed according to the provisions of the Act or whether it is passed by the detaining authority applying its mind would be required to be decided after taking into consideration the grounds of detention and the materials which are required to be supplied to the petitioner. But, at this stage, merely because the petitioner alleges that there are no grounds for

detaining him cannot be accepted. In any case, this question whether the detaining authority has applied its mind before passing the detention order can be decided only after verifying the grounds of detention and other materials which are required to be supplied to the petitioners. At this stage if the petitioner's contention is accepted and the prayer of the petitioner is granted, the purpose of the Act would be frustrated which essentially operates in suspicion jurisdiction."

The Bench has further observed-

"The very chapter of fundamental rights which guarantees and protects individual liberty has provided for the preventive detention also. Therefore, while giving utmost importance for safeguarding the individual liberty, the High Court cannot be oblivious of the fact that in certain cases executive is authorised to detain a person without trial, provided the constitutional safeguards mentioned in Art. 22 and in the relevant law providing for preventive detention are complied with.....In such cases it has got to be borne in mind by the High Court that preventive detention is not by way of punishment at all. It is intended to pre-empt or restrain a person from indulging in any conduct injurious to the society. In case of preventive detention a person is detained merely on suspicion with a view to preventing him from doing harm in future. Since the object of preventive detention is not to punish a person for having done something, but it is to intercept him before he does it and to prevent him from doing it, ordinarily, it would not be proper for High Court to entertain petition before the order of detention is executed and the person concerned is put under detention. If this is done, the very purpose and the object of preventive detention would be frustrated".

The Bench of our High Court after referring to the various decisions of the Supreme Court has observed-

"However, this does not mean that in proper cases the High Court has no jurisdiction to entertain such petition. But such petitions would be the rarest of the rare. By no stretch of reasoning it can be said that such type of petitions can be entertained because grounds of "mala fides" and that of "non-application" of mind are alleged in the petition. It is difficult to enumerate the cases in which the High Court may entertain such petitions even before a person is detained. There may be a case where no examination of fact be necessary. On the face of it without further examination of facts or law, it should appear that the action of detaining a person is illegal and mala fide. However even in such cases it would be wiser and proper for the courts not to issue ex parte interim order and direct the executive authority to refrain from implementing its order of detention. More appropriate and wiser course would be to hear such matters immediately, say, within a day or two or within a week's time and pass an appropriate order of release of the detenu."

43. Thus from the abovesaid decisions of the Supreme Court and also of our High

Court, it is clear that an illegal order of detention, which on the face it is ab initio void and which fact does not require any investigation, can be challenged in a court of law even before the detenu has surrendered and even before the order of detention has been actually served on him.

44. In *Maganbhai Ishwarbhai Patel etc. Vs. Union of India (UOI) and Another*, , Hidayatullah C.J., speaking for the Bench of the Supreme Court has made an observation to the effect that the courts may issue a writ of mandamus at the instance of a party whose fundamental rights are directly and substantially invaded or are in imminent danger of being so invaded. From this observation we can liberally interpret Art. 21 of the Constitution as conferring right upon an individual to invoke the jurisdiction of the court to safeguard his liberty even in cases where there is imminent danger to his liberty being invaded in future.

45. Mr. S. D. Shah and the learned Advocate General strenuously contended that the court should not exercise its extraordinary jurisdiction under Art. 226 of the Constitution before the detenu concerned exhausts the remedies provided under the Act promulgated by virtue of Art. 22 of the Constitution. When a procedure is set up by a validly enacted preventive detention law, the detenu concerned must go through the gamut of such procedure and cannot invoke Art. 226 to circumvent such procedure established by law. The executive should be permitted to exercise its statutory right to detain a person against whom an order of preventive detention is passed. It is a question of temporary curtailment of freedom of an individual in the interest of national security, public order, safety of the nation, etc. According to the learned Counsel, between the two conflicting claims, the court would permit the statutory authority to exercise its power and it is a question of striking the balance between these two. Continuing their arguments, the learned counsel submitted that the court should not entertain a petition at the stage when the detenu has not surrendered and even if such petitions are admitted, the court should direct the petitioner to surrender first and after that he can question the order of detention on grounds available to him. Alternatively the learned counsel submitted that even if such petitions are entertained, the court should not grant any stay of the operation of the detention order but direct such petitions to be posted immediately and decide the issue in question.

46. From the foregoing discussion, it is clear that a detenu cannot ordinarily seek a writ of mandamus in cases where he has not surrendered nor has been served with an order of detention and he cannot ordinarily invoke the jurisdiction of the High Court under Art. 226 of the Constitution. But in exceptional cases and in rarest of rare cases wherein the order of detention appears to be ab initio void, the detenu can invoke the jurisdiction of the High Court under Art. 226 of the Constitution even before he surrenders and even before the order of detention is served upon him, subject to the limitations indicated in this judgment.

47. Thus the question I referred to the Full Bench is answered in the above terms, subject to the limitations indicated in this judgment.

48. The question 2 referred to the Full Bench cannot assume any importance in view of our finding on question 1. If the detention order is not complied with and the detenu is absconding and a declaration to that effect is issued under the relevant provisions of the Act, it can be said that detenu gets authenticated information about passing of such an order. The prospective detenu in such cases cannot have the knowledge about the contents of the detention order. Issuance of notification under S. 7 (1)(b) would, therefore, not make any difference so far as 1 aspect I of maintainability is concerned issuance of such notification cannot be equated with service of the order to the detenu. Service of the order would mean physical service of the order on the detenu and he being taken in detention on such service. Thus question 2 should be answered in the negative, subject to the clarification that issuance of the notification cannot be equated with the service of the order on the detenu.

49. Since we have answered question 1 partly in the affirmative, we have to deal with question 3 referred to the Full Bench.

50. Article 22(5) of the Constitution makes it clear that when any person is detained in pursuance of an order made as per the provisions of the preventive detention Act, the authority making such an order shall communicate such person the grounds on which the order has been made and shall, afford him an earliest opportunity of making a representation against the order. The provisions of COFEPOSA and the Prevention of Blackmarketing and Maintenance of Supply of Essential Commodities Act, 1980 make it clear as to how and when the grounds can be served on the detenu concerned. We have already extracted the relevant provisions in paragraphs supra. When such detention laws have been validly made and that they are in consonance with the provisions of Arts. 21 and 22 of the Constitution, the detenu concerned cannot be allowed to circumvent such procedure by invoking the jurisdiction of the High Court under Art. 226 of the Constitution. Such insistence would result in, violation of Art. 22(5). The obligation of the authority to communicate the grounds to detenu would arise only on the service of the detention order on the detenu. If prior to such service the grounds are directed to be produced before the Court, and if they are to, be relied on by the court against the detenu, those grounds will have to be shown to the detenu otherwise basic principles of natural justice will be violated. Thus in such cases the court will have to make available the grounds to the detenu before the order of detention is served on him. That would fly in the face of Art. 22(5) and the court would be doing something indirectly which is directly not permitted and contra-indicated by the Article. In such cases the detenu can successfully avoid a detention order by going underground and question such detention order even before submitting to the procedures validly established by law in accordance with the constitutional mandate provided under Arts. 21 and 22 of the Constitution. Such interference by the court: before the detenu concerned submitting himself to the lawful procedure established by law would indirectly assist the detenu who flouts the law of detention by going underground.

51. Thus in short if in a writ of mandamus, the court undertakes the very same exercise of scanning the grounds which it is called, upon to exercise in a writ of habeas corpus at the instance of the person who abides by law, and surrenders; then there would remain no incentive or impetus for any one to surrender rather than to abscond, if both of them are to be treated alike. Considering this anomaly, we have to read personal liberty enshrined under Art. 21 of the Constitution, along with Art. 22 and the procedure established by law for the purpose of preventive detentions. The provision to enact preventive detention laws is incorporated in the Chapter declaring the fundamental rights. Hence any procedure established by law has to be given effect to and the party should not be allowed to circumvent the same by invoking the jurisdiction of the Court. The detenu who absconds and fails to surrender in accordance with the procedure established by preventive detention Act should not be permitted to get the benefit of scanning of the grounds by the court prior to surrender. If such indulgence is given it will amount to the court aiding and encouraging those who flout the procedure established by law. There may be cases where the order of detention may be ab initio void and such void orders could be found out without getting into the grounds of detention or the mala fide intention of the executive concerned. Those are all cases in which the courts have to interfere and that does not mean the court will insist upon the supply of the grounds dehors the procedure set up by law validly enacted on the strength of Arts. 21 and 22 of the Constitution. When Preventive Detention Act is applicable and its vires are not challenged and once the respondents state that a valid order of detention is passed by the competent authority, the matter must end at that stage. At that stage, there cannot be any detailed inquiry regarding the genuineness, legality, scope and ambit of the grounds supporting the detention order. All that the court has to see is whether the order passed is ab initio void, without going into the grounds of such a detention order.

52. There may be cases where an order would have been passed by the authority who has no right to pass such an order. Cases may not be wanting where the purpose for which the detention is being ordered may be contrary to the purposes mentioned in the detention laws. There may also be cases where the order passed may relate to a person other than the detenu. These are all some of the instances we give and they are not exhaustive. We are also aware that the Court by interfering under Art. 226 of the Constitution, before the grounds of detention are served upon the detenu and before the detenu surrenders before the authority concerned should not frustrate the validly enacted law in accordance with Arts. 21 and 22 of the Constitution. Nevertheless the danger to the personal liberty has to be jealously guarded against by the judiciary which is the sentinel for the purpose of protecting the liberty of an individual. There may be cases where the order of detention is ex facie illegal and arbitrary. When especially a substantive provision of law in a valid piece of legislation can be questioned and may be quashed for the reasons germane to it is the Court helpless to protect the liberty of a person in rarest of rare cases even before the

said person exhausting the procedural machinery set up for getting redressal from such detention? The High Court cannot be a silent spectator when the fundamental right and liberty of a citizen are being eroded by an executive fiat. May it be under the cloak of preventive, detention or any other law or provision the High Court has ample power to entertain and save an individual who would otherwise be moulded by an arbitrary action. No doubt there are limitations in exercising the powers under, Art. 226 and such limitations are wider and limited according to the legislation under: which the executive has exercised its: authority. If a preventive detention order is found to be arbitrary and ex facie illegal, the High Court will not hesitate to interfere in such type of orders for the purpose of giving necessary relief to the affected. The Courts which have derived its power under the, Constitution cannot lie dormant as if its hands are fattered by promulgation of a detention order, when especially the intended detention order is ex facie illegal, arbitrary and shocks the moral conscience of the Court. In such rarest of rare cases it is the duty of the Court to interfere with ex facie illegal and arbitrary detention order in order to save and protect the liberty of the individual against the executive fiat. While doing so, it should not exceed the limit nor make a validly made law otiose. Hence, it is incumbent upon the, court when it entertains such a petition under, Art. 226 of the Constitution, in rarest of rare cases, to see that the procedure established by law is not circumvented by the detenu concerned. As far as the detention laws involved in these cases are concerned, there are procedures set up for the purpose of detaining a person and supplying the grounds and permitting him to avail the procedure for the purpose of vindicating his innocence. Even if a petition for writ of mandamus is moved for quashing the detention order prior to its service on the detenu in exceptional circumstances as discussed above, no question of interim stay of such order pending the petition would arise. We say so far the following obvious reasons :

53. In a society governed by rule of law the object behind administration of justice and the purpose for which the courts exist is to see that the people turn to the law and not turn away from the law. Therefore, the people must realise, and the people must be told even by the Courts, that it is better that in the interest of the society and the nation, one has to subordinate his individual liberty to the larger interest of the nation and the society. Such an approach would prevent the tendency to circumvent the provisions of law. It must be noted that in relation to preventive detention, constitutional safeguards have been mentioned in Arts. 22(4) to 22(7). As far as possible the court should not assist a person in circumventing law. If a petition as filed by the petitioner is entertained and interim relief granted as prayed for, the Court, by its order, would permit such a person to bypass the scheme of the Act and the Constitutional provisions. Moreover, if after retaining and after granting interim relief as prayed for, the contentions raised in the petition regarding the tenability of the grounds are examined, it would amount to frustrating the scheme of the Constitution and the Act. It is to be borne in mind that there is no constitutional or statutory obligation upon the executive authority to supply the grounds before the order of

detention is served upon the proposed detenu. In the absence of any constitutional or statutory duty cast upon the executive authority to supply copies of the grounds before actual detention, the executive authority can very well say that the court cannot ask it to do something which does not form part of its duty to do and which is otherwise within its right to refrain from doing. The executive authority will be within its rights to withhold the grounds till the order of detention is executed. It may be noted that, in a given case it may even be necessary for the security of the nation that the grounds be not disclosed to any one (even to the Court) till the order of detention is served. In matters of defence and foreign affairs or with regard to the security of the nation or a State, such a situation may arise at any time.

54. The argument that such a petition under Art. 226 be entertained, if necessary, by putting the petitioner or the proposed detenu to certain terms, again amounts to begging the question. When the court puts the petitioner or the detenu to terms say, asks the petitioner/detenu to submit to the jurisdiction of the Court - is the Court not restricting his liberty ? If that is so, in the larger interest of the nation and when it is consistent with the basic scheme of the Constitution, should the executive authority be not permitted to take its own course and, if necessary, execute the order of detention without in any way being restricted by the Court ? The necessary check on the powers of the executive can be exercised by the Courts from the next moment of the execution of the order of detention. Such a balance has got to be struck in view of the basic scheme of the Constitution, the potential dangers and likelihood of disastrous consequences to follow and all other matters discussed hereinabove. In such cases, the court may fix up the final hearing of the petition at the earliest and call for immediate return from the respondents. If in the return, the respondents accept the case of the petitioner or cannot successfully challenge it, then, of course, the Court will set aside the order of detention though not served on the detenu. If on the other hand, the return indicates and avers that contentions of the petitioner are not correct, the matter at the preliminary stage must end, and the petition will be dismissed leaving the detenu to contest the detention order in a full-fledged manner after he is actually detained and supplied with the grounds. Thus in no case, question of interim stay of the execution of the proposed detention order will survive pending the hearing of the petition for mandamus for quashing the unserved detention order. If such stay is granted, it would amount to circumventing the procedure established by law of preventive detention as contemplated and countenanced by Arts. 21 and 22 of the Constitution. It would also result in restraining the executive from acting as per valid preventive detention law even before the Court examines whether their proposed action is justified or not. That would blunt the very preventive detention law procedure and will make it otiose and redundant. Consequently, on the very same reasons on which grounds cannot be called for from the respondents pending the writ petition for mandamus for quashing the unserved detention order, interim stay of such order also cannot be granted pending the final hearing of such petition.

55. Let us now take stock of the situation emerging from the above discussion.

(1) In a writ of mandamus for quashing an unserved detention order, a detenu cannot be granted any stay of detention pending the petition filed by him; (2) pending such petition, the Court also cannot call for the grounds of detention and review the same since it will go against the procedure established by law; (3) the Court cannot also investigate the facts of the case nor look into the grounds at this preliminary stage when the detenu approaches the Court even before he receives the order of detention and surrenders in view of such detention order; and (4) a petition of this nature must come to an end once the respondent states on oath that the order of detention is validly passed against the person concerned, Subject to the abovesaid limitations, we are of the view that a writ of mandamus is maintainable even at the preliminary stage of the detention order, before it is served on the proposed detenu.

56. In view of the foregoing reasons, question 1 referred to the Full Bench is answered in the negative so far as the maintainability of Habeas corpus petition is concerned and, in the affirmative, in so far as the maintainability of a writ of Mandamus is concerned, subject to the limitations we have mentioned in the paragraphs supra, and question 2 is answered in the negative by stating that the issuance of the notification cannot be equated with the service of the order on the detenu and it will not make any difference so far as the aspect of the maintainability of such petition is concerned. Question 3 is also answered in the negative.

57. At this stage, oral permission is asked for by Mr. S. V. Raju for the purpose of granting certificate to file an appeal to the Supreme Court. This Full Bench reference is by virtue of the order made by the Division Bench. We have answered all the questions referred to us in accordance with the principles laid down by the Supreme Court. Hence we find that this is not a fit case for grant of a certificate to file an appeal to the Supreme Court.

58. The request for stay of the operation of the order is also refused.

59. Both these petitions to be placed before the appropriate Court for proceeding further in accordance with law.

60. Answer accordingly.