IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/LETTERS PATENT APPEAL NO. 537 of 2020
In
R/SPECIAL CIVIL APPLICATION NO. 9868 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MR. VIKRAM NATH Sd/-
and
HONOURABLE MR. JUSTICE J.B.PARDIWALA Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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HAIDARSHA ABDULSHA PIR THROUGH HIS SON NIZAMUDDIN HAIDARSHA PIR
Versus
STATE OF GUJARAT

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Appearance:
MS MITA S PANCHAL(530) for the Appellant(s) No. 1
for the Respondent(s) No. 2,3
MR. DHARMESH DEVNANI, ASST. GOVERNMENT PLEADER/PP(99) for the Respondent(s) No. 1

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CORAM: **HONOURABLE THE CHIEF JUSTICE MR. VIKRAM NATH**
and
HONOURABLE MR. JUSTICE J.B.PARDIWALA

Date : 18/09/2020

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. This Appeal under Clause 15 of the Letters Patent is at the instance of an unsuccessful writ-applicant (detenue) of a writ application and is directed against the judgment and order passed by a learned Single Judge of this Court dated 27th August 2020 in the Special Civil Application No.9868 of 2020, by which the learned Single Judge rejected the writ-application filed by the appellant herein, challenging the order of preventive detention passed under the Gujarat Prevention of Anti-Social Activities Act, 1985 (for short "the Act, 1985"), on the ground of alternative remedy.

2. *An order of preventive detention, though based on the subjective satisfaction of the detaining authority, is nonetheless a serious matter, affecting the life and liberty of the citizen Under Article 14,19,21 and 22 of the Constitution. The power being statutory in nature, its exercise has to be within the limitations of the statute, and must be exercised for the purpose the power is conferred. If the power is misused, or abused for collateral purposes, and is based on grounds beyond the statute, takes into consideration extraneous or irrelevant materials, it will stand vitiated as being in colourable exercise of power.*

3. We are tempted to preface our judgment with the aforequoted observations of the Supreme Court in the case of ***V.Shantha vs. State of Telangana & Ors.***, 2017 (14) SCC 577, because the State Government nor the detaining authorities are ready and willing to abide by or pay heed to the afore-quoted observations of the Supreme Court.

4. The facts giving rise to this Appeal may be summarized as under :

4.1 The appellant herein came to be preventively detained vide the detention order dated 29th July, 2020 passed by the respondent No.2 herein, i.e, the District Magistrate, Kachchh-Bhuj as a "dangerous person" by virtue of the powers conferred under the Act, 1985. The appellant came before this Court challenging the legality and validity of the order of detention by filing the Special Civil Application No.9868 of 2020.

4.2 It appears that the learned Single Judge declined to look into the legality and validity of the impugned order of detention on the ground that the appellant (Detenue) has already preferred a representation dated 6th August, 2020 addressed to the PASA Board and, in such circumstances, the appellant should wait for the outcome of his representation. In other words, the learned Single Judge declined to entertain the writ application on the ground that as the matter is under consideration before the Board, any order that may be passed by the High Court may come in conflict with the decision of the Advisory Board. It appears that the learned Single Judge also took the view that when an alternative efficacious remedy is available to the appellant, then the High Court should not entertain the writ application under Article 226 of the Constitution.

4.3 We quote the relevant observations made by the learned Single Judge in the impugned order.

> *"6. From the bare reading of the said provisions, it clearly transpires that in every case, where the detention order has been made under the Act the State Government within three weeks thereof has to place the same before the Advisory Board, the grounds on which the order has been made, and the representation, if any, made by the person affected by the order and where the order has been made by the Authorised Officer, also the report made by the officer, within three weeks from the date of order of detention. The*

procedure after the matter is referred to the Advisory Board has been prescribed in Section 12 of the said Act. The report that may be submitted by the PASA Board to the State Government within seven weeks from the date of detention is required to be kept confidential.

7. So far as the present case is concerned, the order impugned has been passed on 29.07.2020 and the petitioner has also made representation to the PASA Board on 06.08.2020. Hence, the same being under consideration before the Advisory Board, the Court is not inclined to entertain the present petition at this juncture. Even if the detenue does not make any representation the Advisory Board is obliged to consider the matter place before it along with the order of the detention, and to submit its report/opinion within seven weeks of the detention. Thus, by entertaining the petition at this stage when the matter is under consideration before the Board, may result into conflict of orders. Even otherwise, it is needless to say that when the alternative efficacious remedy, that too a statutory remedy is available to the petitioner, the Court would not exercise the extraordinary jurisdiction under Article 226 of the Constitution of India. As held by Supreme Court in case of Punjab National Bank vs O.C. Krishnan And Ors., reported (2001) 6 SCC 569, even though a provision under an Act may not expressly oust the jurisdiction of the High Court under Article 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said Constitutional Provisions.

8. In that view of the matter, the Court s not inclined to entertain the present petition at this juncture, and hence, the present petition is dismissed."

4.4 The appellant (detenue), being dissatisfied with the judgment and order passed by the learned Single Judge, has come up with this Appeal.

5. Before adverting to the rival submissions canvassed on either side, we would like to say something with regard to the order of

detention passed by the Detaining Authority. It appears that the appellant herein is a resident of Bhuj (Kachchh). Two first information reports, lodged against the appellant, have been taken into consideration by the Detaining Authority. The details are as under :

Sr. No.	Police Station	C.R.No./Date	Sections	Status of the case
1.	Bhuj City "B" Division	Part-A C.R. No.11205043201764	Under Sections 379 and 114 of the Indian Penal Code and Sections 4(1) and 4(1)A of the Mines & Minerals (Development of Regulation) Act, 1957.	Pending Investigation
2.	Bhuj City "B" Division	C.R. No.II-3115 of 2009	Under Sections 323, 504, 502(2) and 114 of the Indian Penal Code.	Pending Trial

6. It also appears that the Detaining Authority, over and above the two cases, referred to above, has taken into consideration one statement recorded in Camera of an individual whose identity has not been disclosed by exercising privilege in public interest by virtue of Section Section 9(2) of the Act, 1985.

7. We shall now proceed to record the submissions of the learned counsel appearing for the parties.

Submissions on behalf of the appellant:-

8. Ms. Mita Panchal, the learned counsel appearing for the appellant vehemently submitted that the learned Single Judge committed a serious error in passing the impugned order inasmuch as the learned Single Judge ought not to have declined to entertain the writ application on the premise that the matter is being looked into by the Advisory Board of the PASA. Ms. Panchal would submit that ordinarily when

there is an alternative efficacious remedy available, the High Court may decline to entertain a writ application under Article 226 of the Constitution of India, but such proposition of law cannot be made applicable in a case wherein the subject matter of challenge is an order of preventive detention. Ms. Panchal would submit that if the detention of any individual is illegal or unlawful, then it is expected of the High Court to immediately pass appropriate orders for release of the person unlawfully detained keeping in mind Articles 21 and 22 (5) of the Constitution of India. Ms. Panchal submitted that before the Gujarat High Court Rules came to be amended sometime in the year 1993-94, the detention matters used to be heard by a Division Bench as those matters were treated as Habeas Corpus petitions. Ms. Panchal pointed out that even as on date, if a writ of habeas corpus is prayed for, the matter is taken up for hearing by a Division Bench and not by a learned Single Judge. Ms. Panchal pointed out that after the amendment in the Rules, the petitions, challenging the legality and validity of the detention orders are now being titled as the Special Civil Application praying for a writ of mandamus and not for a writ of Habeas Corpus. She would argue that although a writ of mandamus is being prayed for as on date in all the detention matters, yet, in substance, when a petition is filed questioning the legality and validity of a preventive detention order, then it is, in substance, a petition for a writ of habeas corpus. She would argue that even the unlawful detention of any citizen even for a minute would amount to infringement of his personal liberty as enshrined under Articles 21 and 22 respectively of the Constitution of India. In such circumstances, Ms. Panchal would submit that there is no question of asking a detenue, preventively detained under the PASA, to wait till the outcome of his representation at the end of the Advisory Board or to ask him to file a representation if not filed before coming to this Court.

9. Ms. Panchal submitted that even otherwise the order of

preventive detention passed by the Detaining Authority against the appellant branding him as a “dangerous person” is not tenable in law as merely on the basis of registration of two cases and one statement recorded in Camera, it cannot be said that the appellant is a “dangerous person” as defined under Section 2(c) of the Act, 1985.

10. In such circumstances, referred to above, Ms. Panchal prays that there being merit in her appeal, the same may be allowed and the impugned judgment and order passed by the learned Single Judge be set aside. Ms. Panchal made a fervent request that instead of remitting the matter to the learned Single Judge, this Court may itself look into the legality and validity of the detention order and dispose of the writ application accordingly.

Submissions on behalf of the State:-

11. Mr. Dharmesh Devnani, the learned AGP appearing for the State has vehemently opposed this appeal. Mr. Devnani would submit that no error, not to speak of any error of law, could be said to have been committed by the learned Single Judge in passing the impugned judgment and order.

12. Mr. Devnani would submit that even otherwise on merits, the appellant has no case. It is argued that the appellant is a habitual offender. There are two prosecutions pending, as on date, against the appellant. Mr. Devnani would submit that the Detaining Authority has also considered one statement of a local resident recorded in Camera and whose identity has not been disclosed in public interest in exercise of powers under Section 9(2) of the Act. In such circumstances, referred to above, Mr. Devnani prays that there being no merit in this appeal, the

same may be dismissed.

ANALYSIS

13. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration;

(I) Whether a writ application filed by a detenue, preventively detained, can be rejected at the threshold on the ground that the detenue should wait for the outcome of his representation addressed to the PASA Board?. In other words, whether a writ application, questioning the legality and validity of an order of preventive detention can be declined to be entertained on the ground of alternative remedy available to the detenue of filing a representation to the PASA Advisory Board or to any other authority concerned?.

(ii) Whether the order of detention passed by the District Magistrate, Kachchh-Bhuj, in exercise of his power under the provisions of the Act, 1985 is, otherwise, sustainable in law?

14. Our Constitution has given the 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. (Vedprakash vs. State of Gujarat, Special Civil Application No.427 of 1986 dated 25.04.1986)

15. **In Ichudevi Choraria v. Union of India** *AIR 1980 SC 1983*, 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 detenue 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 trammeled 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 detenue 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."

16. The above quoted observations also receive support from the decisions rendered in Rattan Singh v. State of Punjab, AIR 1982 SC 1; Kamla Khushalani v. State of Maharashtra, AIR 1981 SC 814; Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, AIR 1981 SC 746; A. K. Roy v. Union of India, AIR 1982 SC 710; Prabhudayal v. Dist Magistrate, Kamrup, AIR 1974 SC 183; G. Sadanandan's case AIR 1966 SC 1925; Narendra Purshottam Umrao's case AIR 1979 SC 420; Motilal v. State of Bihar, AIR 1968 SC 1509; Mohammed Alam v. State of W.B., AIR 1972 SC 1749 (Sic); Shaikh Haneef v. State of W.B., AIR 1974 SC 679 and Dakar Mudi v. State of W.B., AIR 1974 SC 2086.

17. ***In State of Bihar v. Rambalak Singh***, *AIR 1966 SC 1441* the Supreme Court had the 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 AIR 1950 SC 27. It would, therefore, be profitable to quickly glance through the relevant aspects of law holding the field."

18. In ***A.K. Gopalan vs. State of Madras***, AIR 1950 SC 27, for the first time after the adoption of the Constitution the right to liberty as enshrined in Arts. 20, 21 and 22 respectively in the context of preventive 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 ."

19. 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."

20. 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."

21. 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."

22. 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 "

23. 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 beneficient 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."

24. 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."

25. 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 Gopalan's case, AIR 1950 SC 27. 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. .

26. In ***Maganbhai v. Union of India,*** *AIR 1969 SC 783*, 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.

27. In fact, the question No.1 posed by us could be said to be no longer res integra, and we wonder whether the position of law as explained by the Supreme Court in the case of **P*iyush Kantilal Mehta vs. Commissioner of Police, Ahmedabad City & Ors.***, *AIR 1989 SC 491* was pointed out or not to the learned Single Judge. We quote the relevant observations of the Supreme Court as contained in Paras-6 and 7;

> *"6. At this stage it may be stated that the representation of the petitioner is pending before the Advisory Board. The question that has been raised on behalf of the respondents is whether in view of the pendency of the representation before the Advisory Board, the writ petition is maintainable under Article 32 of the Constitution. The question need not detain us long, for it has already been decided by this Court in Prabhu Dayal Deorah v. The District Magistrate, Kamrup, [1974] 1 SCC 103. In paragraph 16 of the Report Mathew, J., speaking for himself and Mukherjee, J., observed inter alia as follows:*
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> *"We think that the fact that the Advisory Board would have to consider the representations of the petitioners where they have*

also raised the contention that the grounds are vague would not in any way prevent this Court from exercising its jurisdiction under Article 32 of the Constitution. The detenu has a right under Article 22(5) of the Constitution to be afforded the earliest opportunity of making a representation against the order of detention. That constitutional right includes within its compass the right to be furnished with adequate particulars of the grounds of the detention order. And, if their constitutional right is violated, they have every right to come to this Court under PG NO 1086 Article 32 complaining that their detention is bad as violating their fundamental right. As to what the Advisory Board might do in the exercise of its jurisdiction is not the concern of this Court."

7. In the above observation, this Court has specifically laid down that even though a representation is pending before the Advisory Board, the writ petition under Article 32 of the Constitution is maintainable before this Court. In the Circumstances, we may proceed to dispose of the writ petition on merits."

28. We also have a very lucid and erudite judgment to our advantage delivered by a Division Bench of the Jammu & Kashmir High Court in the case of ***Mian Ab. Qayoom vs. State of J &K & Ors***., reported in *(2010) 4 JKJ 922*. We quote the relevant observations as under;

"7. Learned Advocate General vehemently argued that in view of the scheme of the Act of 1978, more particularly, the mandate contained in Sections 16 and 17, an efficacious alternative remedy being available to the detenu, petition is not maintainable and merits rejection. Learned Advocate General while placing whole hog reliance on Section 16(3) and Section 17(2) of the Act of 1978 submitted that the conjoint reading of these provisions of law would show that in case the Advisory Board report that there is no sufficient cause for detaining the detenu, Government is duty bound to revoke the detention order and release the detenu forthwith. Learned Advocate General in his wisdom accordingly submitted that the above referred provisions of laws provided an efficacious alternative remedy to the detenu and in these circumstances, this petition is not maintainable and merits rejection. Learned counsel also submitted that exercise of jurisdiction by this Court is discretionary and in the submission of learned Advocate General discretion cannot be exercised at this stage in the case for the reasons cited at the bar by him. Learned counsel also submitted that in terms of Section 17 of Act of 1978,

Government has yet to take decision as to whether the order of detention is to be confirmed and for which period detenu is to be detained. Learned Advocate General on the basis of these submissions stated that petition being premature is not maintainable and merits dismissal.

8. While responding to the arguments of learned Advocate General, Mr. Z.A. Shah, learned senior Advocate for the detenu submitted that safeguards provided to the detenu under Article 22 of the Constitution of India and provisions of Act of 1978 are procedural safeguards made available to the detenu and on these basis it cannot be said that the petition is premature. Learned counsel vehemently argued the concept of efficacious alternative remedy as propounded by the learned Advocate General is not attracted to the case of a person who is detained under the preventive detention laws. Learned counsel invited the attention of the Court to Article 22 of the Constitution of India and submitted that when a person is detained under preventive detention laws he is not entitled for being brought before Magistrate and is also not entitled to consult legal practitioner. Learned counsel accordingly submitted that denial of these rights to the detenu has obligated upon the State to adopt measures to safeguard the Constitutional and legal rights of the detenu. Learned counsel submitted that right to lead a free life is a basic human right and a person cannot be deprived of his personal liberty except in accordance with the procedure established by law. Learned counsel submitted that the arguments of the learned Advocate General that the petition is not maintainable, being premature on the reasons of safeguards made available to detenu, cannot be countenanced in law. Learned counsel also referred to and relied upon the judgments of the Hon'ble Supreme Court reported in Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, , Abdul Latif Abdul Wahab Sheikh Vs. B.K. Jha and another, and Union of India (UOI) and Others Vs. Vidya Bagaria, .

9. In order to appreciate the issue raised, Section 16 and 17 of the Act of 1978 and Article 21 and 22 of the Constitution of India are reproduced as under:

16. Procedure of Advisory Board

(1) The Advisory Board shall, after considering the material placed before it and, after calling for such further information as it may deem necessary from the Government or from the person called for the purpose through the Government or from the

person concerned and if in any particular case it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submit its report to the Government within eight weeks from the date of detention.

(2) Notwithstanding anything contained in sub-section (1), the Board may, if the person detained so demands, at any time before submitting its report, after affording an opportunity to the person detained and the Government or the officer, as the case may be, of being heard, determine whether the disclosure of facts, not disclosed under sub-section (2) of Section 13 to the person detained, is or is not against public interest. Such finding of the Board shall be binding on the Government.

(3) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.

(4) When there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(5) Nothing in this section shall entitle any person against whom a detention order has been made to appeared by any legal practitioner in any matter connected with the reference to the Advisory board and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

17. Action upon report of Advisory Board

(1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the Government may confirm the detention order and continue the detention of the person concerned for such as it thinks fit.

(2) In any case where the Advisory Board has reported that there is, in its opinion, no sufficient cause for the detention of the person concerned, the Government shall revoke the detention order and cause the person to be released forthwith.

21. Protection of life and personal liberty.-

No person shall be deprived of his personal liberty except according to procedure established by law.

22. Protection against arrest and detention in certain cases.-

(1) No person who is arrested shall be detained in custody without being informed, as soon as may, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate
(3) Nothing in clauses (1) and (2) shall apply-

(a) to any person who for the time being is any enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention

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

(a) An advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention: Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed any law maybe Parliament under sub-clause (b) of clause (7); or

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

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

(6) Nothing in clause (5) shall require the authority making any

such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive, detention without obtaining the opinion of any Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory board in any inquiry under Sub- Clause (a) of clause (4).

10. "WE THE PEOPLE" have given to ourselves constitution, which document covers all the fields of life. The said document which is sacred for all, has crystallized basic human rights by christening them as fundamental rights. Ours is a parliamentary democracy and it is the people who are "sovereign" and in whom lies the ultimate authority. It is this sovereign authority viz. the people, who have given to themselves the Constitution. The State on the one hand is duty bound to faithfully and obediently follow the mandate of the Constitution and on the other hand citizens are also duty bound to follow and respect the mandate contained in the Constitution and other laws. The people in terms of Constitution have created state for having orderly society based on principles of fairness, ethics, morality. For preserving and protecting both the state as also individual rights, different institutions have been created. State is duty bound to protect the life, liberty and property of its citizens and citizens in turn are duty bound to lead an orderly life in accordance with the mandate of Constitution and other laws made. An individual can survive only when state survives. The existence of a state when threatened will in turn jeopardise the very existence of the individual who constitutes a part of the whole of the State. The duties and responsibilities are thus to the honoured and shared by the State and the individual. For maintaining the security of the State and public order, preventive detention laws are made. The laws though apparently impinge upon the individual liberty guaranteed by the Constitution, have to prevail to protect the society from being endangered by an individual. It is always appropriate to

prevent the individual from indulging in such hazardous activities which would threaten the very existence of the State and/or public order, by detaining him under preventive detention law.

11. The individual liberty is most valuable and cherished right and is recognised not only by the Constitution but by the international Covenants as well. The Article 21 of the Constitution of India provides that no person shall be deprived of his personal liberty except according to the procedure established by law. Article 21 thus recognises an important right which inheres in an individual. The right to personal liberty is thus not only to be protected but respected by the State. The right to personal liberty however can be interfered with in accordance with the procedure established by law. For achieving a bigger cause, the preventive detention laws provide a mode of depriving an individual of his personal liberty.

12. Article 22 of the Constitution of India, on which reliance has been placed by Mr. Shah, learned senior Advocate appearing for the detenu, mandates that no law providing preventive detention shall authorize detention of a person for a longer period than three months, unless Advisory Board in its opinion has reported before the period of said three months that there is sufficient cause for such detention.

13. The detenu has been deprived of his personal liberty as guaranteed by Article 21 of the Constitution of India. The State claims to have deprived the detenu of his liberty in accordance with the procedure established by law viz. under the provisions of Act of 1978. When a person is detained under the preventive detention law, he is not to be brought before the Magistrate and is not entitled to consult legal practitioner, though a person who is arrested/detained for commission of alleged offences is to be produced before the Magistrate within 24 hours on such arrest and has to be afforded as opportunity for consulting a legal practitioner. When a person is arrested for alleged commission of offence, he can approach the Court of competent jurisdiction for seeking his release on bail or even for his discharge by showing that the material collected during the investigation does not inculpate him. A person who is detained under the preventive detention law has right to challenge the detention but said right is circumscribed by the procedure established by law. The State governed by rule of law, being repository of all basic and constitutional rights of the people, is duty bound to provide machinery and to take steps to find out whether detenu is to be deprived of his personal liberty for a period of time provided by

Statute. This is the basic and fundamental duty of the State. In a democratic society, the State has to discharge its obligations and duties. The constitution of the Advisory Board as mandated by the Article 22 of the Constitution of India thus finds a place in the Act of 1978 as well. The purpose of the constitution of the Advisory Board comprising of a Judge of a High Court or a retired judge of the High Court and two other members who have been, or, are qualified to be appointed as judges of the High Court is to find out whether or not there is sufficient cause for the detention of the person concerned. By constituting Advisory board the State has fulfilled its constitutional obligations for providing safeguard to the person who has been deprived of his personal liberty. without putting him on trial before the Court of law. The Advisory Board has thus power to find out as to whether there is sufficient cause or not for the detention of the detenu. The expression "sufficient cause" appearing in Sub-Section 3 of the Section 16 of the Act of 1978 confers power upon the Advisory Board to consider the entire material and take the conscious decision as to whether the material so available does constitute sufficient cause to effect the detention of the person. This is the constitutional safeguard provided to detenu who is detained under the preventive detention law. State by constitution of said Board has fulfilled its constitutional obligations to ensure that no person is detained under preventive detention law without there being any sufficient cause. This in law cannot be said to provide an efficacious alternative remedy to the detenu and on such basis, it cannot be held that unless Advisory Board gives its opinion the petition will be premature and not maintainable. The argument of the learned Advocate General in this behalf falls foul of Constitutional safeguards available to the detenu as it is State's responsibility to provide such mechanism for safeguarding the rights of an individual.

14. The moment a person is deprived of his personal liberty guaranteed by Article 21 of the Constitution of India, which inheres in him, he gets right to challenge such detention on the grounds available in law. The detenu can challenge his detention calling it to be illegal being violative of Constitutional guarantee as contained in Articles 21 and 22 of the Constitution of India. The person who is detained without being brought before the Magistrate immediately after his arrest, by no stretch of imagination can be said to wait until such time the Advisory. Board furnishes its opinion to the State Government. The duty imposed by the State upon itself to provide procedural safeguard to detenu detained under preventive detention law, cannot take away right of the detenu to challenge his detention before the

Constitutional Court. The right to challenge detention order is an independent right which accrues to a detained person and is not circumscribed by any statutory provision providing for a safeguard. The moment a person is detained, he gets an independent right, not circumscribed by the provisions by the Act of 1978, more particularly by Section 16 of the said Act to challenge same. The Article 21 of the Constitution of India to which Article 22 is interlinked confers right upon an individual to challenge the detention on the grounds available to him. The moment his personal liberty is taken away by the act of statutory authority, he gets right to challenge same. The right to challenge detention by a person cannot be abridged or curtailed by saying that until such time the Advisory Board gives its opinion, the challenge thereto has to await. As already stated it is the State's obligation to provide procedural safeguard and it cannot be said to be taking away the right of an individual to challenge his detention."

29. In view of the aforesaid discussion, we have no hesitation in holding that the learned Single Judge committed a serious error in declining to entertain the writ application on the ground that the detenue has an alternative remedy of filing a representation, and if already filed, must wait till his representation is decided by the Advisory Board. The concept of alternative remedy and the power of the High Court to entertain a writ application under Article 226 of the Constitution of India is foreign to cases wherein the challenge is to an order of preventive detention. When a citizen of this country complains of infringement of his right of personal freedom and liberty as embodied under Articles 21 and 22 of the Constitution respectively, then the High Court should not decline to entertain his challenge to such preventive detention on the ground that the detenue has an alternative remedy of filing a representation before the authority concerned.

30. Having taken the view that the writ application should not have been rejected only on the ground of alternative remedy, we would have ordinarily remitted the matter to the learned Single Judge for being looked into on merits. However, having regard to the nature of the order

of detention passed by the Detaining Authority, we are of the view that we should, ourselves, look into the legality and validity of the order of detention and pass an appropriate order and dispose of the writ application.

31. We have already given a fair idea as regards the materials relied upon by the Detaining Authority for the purpose of passing the order of detention against the appellant. On the face of it, the same is not sustainable in law. No doubt, the offences alleged to have been committed by the appellant are such as to attract the punishment under the Mines & Minerals (Development & Regulation) Act, 1957 as well as the Indian Penal Code, but that, in our view, has to be done under the said laws and taking recourse to the preventive detention laws would not be warranted. Preventive detention involves detaining of a person without trial in order to prevent him/her from committing certain types of offences. But, such detention cannot be made a substitute for the ordinary law and absolve the Investigating Authorities of their normal functions of investigating the crimes which the detenue might have committed. After all, the preventive detention, in most cases, is for a year only and cannot be used as an instrument to keep a person in perpetual custody without trial.

32. Very recently, this very Bench had an occasion to explain the law of preventive detention in details in the case of ***Vijay Alias Ballu Bharatbhai Ramanbhai Patni vs. State of Gujarat,*** *Letters Patent Appeal No.454 of 2020*, decided on 31.08.2020.

33. We quote the observations made by the Supreme Court in ***Rekha vs. State of Tamilnadu Through Secretary to Government & Ors***., reported in *(2011) 5 SCC 244* as under;

“10. It has been held in T.V. Sravanan alias S.A.R. Prasana Venkatachaariar Chaturvedi Vs. State through Secretary and Anr., (2006) 2 SCC 664; A. Shanthi (Smt.) Vs. Govt. of T.N. and Ors., (2006) 9 SCC 711; Rajesh Gulati Vs. Govt. of NCT of Delhi and Anr. (2002) 7 SCC 129, etc. that if no bail application was pending and the detenue was already, in fact, in jail in a criminal case, the detention order under the preventive detention law is illegal. These decisions appear to have followed the Constitution Bench decision in Haradhan Saha Vs. State of West Bengal, (1975) 3 SCC 198, wherein it has been observed (vide para 34):

"Where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or public order."

On the other hand, Mr. Altaf Ahmed, learned senior counsel appearing for the State of Tamil Nadu, has relied on the judgments of this Court in A. Geetha Vs. State of T.N. And Anr. (2006) 7 SCC 603; and Ibrahim Nazeer Vs. State of T.N. and Anr., (2006) 6 SCC 64, wherein it has been held that even if no bail application of the petitioner is pending but if in similar cases bail has been granted, then this is a good ground for the subjective satisfaction of the detaining authority to pass the detention order.

In our opinion, if details are given by the respondent authority about the alleged bail orders in similar cases mentioning the date of the orders, the bail application number, whether the bail order was passed in respect of co-accused in the same case, and whether the case of the co-accused was on the same footing as the case of the petitioner, then, of course, it could be argued that there is likelihood of the accused being released on bail, because it is the normal practice of most courts that if a co-accused has been granted bail and his case is on the same footing as that of the petitioner, then the petitioner is ordinarily granted bail. However, the respondent authority should have given details about the alleged bail order in similar cases, which has not been done in the present case. A mere ipse dixit statement in the grounds of detention cannot sustain the detention order and has to be ignored.

In our opinion, the detention order in question only contains ipse dixit regarding the alleged imminent possibility of the accused coming out on bail and there was no reliable material to this

effect. Hence, the detention order in question cannot be sustained.

Moreover, even if a bail application of the petitioner relating to the same case was pending in a criminal case the detention order can still be challenged on various grounds e.g. that the act in question related to law and order and not public order, that there was no relevant material on which the detention order was passed, that there was mala fides, that the order was not passed by a competent authority, that the condition precedent for exercise of the power did not exist, that the subjective satisfaction was irrational, that there was non-application of mind, that the grounds are vague, indefinite, irrelevant, extraneous, non-existent or stale, that there was delay in passing the detention order or delay in executing it or delay in deciding the representation of the detenu, that the order was not approved by the government, that there was failure to refer the case to the Advisory Board or that the reference was belated, etc.

In our opinion, Article 22(3)(b) of the Constitution of India which permits preventive detention is only an exception to Article 21 of the Constitution. An exception is an exception, and cannot ordinarily nullify the full force of the main rule, which is the right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting the civil liberties of the people, and not to put them in jail for a long period without recourse to a lawyer and without a trial. As observed in R Vs. Secy. Of State for the Home Dept., Ex Parte Stafford, (1998) 1 WLR 503 (CA) :-

"The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law."

Article 22, hence, cannot be read in isolation but must be read as an exception to Article 21. An exception can apply only in rare and exceptional cases, and it cannot override the main rule.

Article 21 is the most important of the fundamental rights guaranteed by the Constitution of India. Liberty of a citizen is a most important right won by our forefathers after long, historical, arduous struggles. Our Founding Fathers realised its value because they had seen during the freedom struggle civil liberties of our countrymen being trampled upon by foreigners, and that is why they were determined that the right to individual liberty would be placed on the highest pedestal along with the right to life as the basic right of the people of India.

Right to liberty guaranteed by Article 21 implies that before a person is imprisoned a trial must ordinarily be held giving him full

opportunity of hearing, and that too through a lawyer, because a layman would not be able to properly defend himself except through a lawyer.

The importance of a lawyer to enable a person to properly defend himself has been elaborately explained by this Court in A.S. Mohd. Rafi Vs. State of Tamilnadu, AIR 2011 SC 308, and in Md. Sukur Ali Vs. State of Assam, JT 2011 (2) SC 527. As observed by Mr Justice Sutherland of the U.S. Supreme Court in Powell Vs. Alabama, 287 U.S. 45 (1932) "Even the intelligent and educated layman has small and sometimes no skill in the science of law", and hence, without a lawyer he may be convicted though he is innocent.

Article 22(1) of the Constitution makes it a fundamental right of a person detained to consult and be defended by a lawyer of his choice. But Article 22(3) specifically excludes the applicability of clause (1) of Article 22 to cases of preventive detention. Therefore, we must confine the power of preventive detention to very narrow limits, otherwise the great right to liberty won by our Founding Fathers, who were also freedom fighters, after long, arduous, historical struggles, will become nugatory.

In State of of Maharashtra & Ors. Vs. Bhaurao Punjabrao Gawande, (2008) 3 SCC 613 (para 23) this Court observed :

"...Personal liberty is a precious right. So did the Founding Fathers believe because, while their first object was to give unto the people a Constitution whereby a government was established, their second object, equally important, was to protect the people against the government. That is why, while conferring extensive powers on the government like the power to declare an emergency, the power to suspend the enforcement of fundamental rights or the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against executive and legislative despotism those human rights which they regarded as fundamental. The imperative necessity to protect these rights is a lesson taught by all history and all human experience. Our Constitution makers had lived through bitter years and seen an alien Government trample upon human rights which the country had fought hard to preserve. They believed like Jefferson that "an elective despotism was not the Government we fought for". And, therefore, while arming the Government with large powers to prevent anarchy from within and conquest from without, they took care to ensure that those powers were not abused to mutilate the liberties of the people. (vide A.K. Roy Vs. Union of India (1982) 1 SCC 271, and Attorney General for India Vs. Amratlal

Prajivandas, (1994) 5 SCC 54." [emphasis supplied]

In the Constitution Bench decision of this Court in M. Nagaraj & Ors. Vs. Union of India & Ors. (2006) 8 SCC 212, (para 20) this Court observed :

"It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race."

In the 9 Judge Constitution Bench decision of this Court in I.R. Coelho (dead) By LRs. Vs. State of T.N., (2007) 2 SCC 1 (vide paragraphs 109 and 49), this Court observed :

"It is necessary to always bear in mind that fundamental rights have been considered to be the heart and soul of the Constitution.....Fundamental rights occupy a unique place in the lives of civilized societies and have been described in judgments as "transcendental", "inalienable", and primordial".

In our opinion, Article 22(3)(b) cannot be read in isolation, but must be read along with Articles 19 and 21, vide Constitution Bench decision of this Court in A.K. Roy Vs. Union of India (1982) 1 SCC 271 (para 70).

It is all very well to say that preventive detention is preventive not punitive. The truth of the matter, though, is that in substance a detention order of one year (or any other period) is a punishment of one year's imprisonment. What difference is it to the detenu whether his imprisonment is called preventive or punitive?

Mr. Altaf Ahmed, learned senior counsel for the respondents, submitted that there are very serious allegations against the detenu of selling expired drugs after removing the original labels and printing fresh labels to make them appear as though they are not expired drugs.

In this connection, criminal cases are already going on against the detenu under various provisions of the Indian Penal Code as well as under the Drugs and Cosmetics Act, 1940 and if he is found guilty, he will be convicted and given appropriate sentence. In our opinion, the ordinary law of the land was sufficient to deal with this situation, and hence, recourse to the preventive detention law was illegal.

Mr. Altaf Ahmed, learned senior counsel, further submitted that the impugned detention order was passed on 08.04.2010, and the bail application of the detenu was also dismissed on the same date. Hence, he submitted that it cannot be said that no bail application was pending when the detention order in question

was passed.

In this connection, it may be noted that there is nothing on the record to indicate whether the detaining authority was aware of the fact that the bail application of the accused was pending on the date when the detention order was passed on 08.04.2010. On the other hand, in para 4 of the grounds of detention it is mentioned that "Thiru. Ramakrishnan is in remand in crime No. 132/2010 and he has not moved any bail application so far". Thus, the detaining authority was not even aware whether a bail application of the accused was pending when he passed the detention order, rather the detaining authority passed the detention order under the impression that no bail application of the accused was pending but in similar cases bail had been granted by the courts. We have already stated above that no details of the alleged similar cases has been given. Hence, the detention order in question cannot be sustained.

It was held in Union of India Vs. Paul Manickam and another, (2003) 8 SCC 342, that if the detaining authority is aware of the fact that the detenu is in custody and the detaining authority is reasonably satisfied with cogent material that there is likelihood of his release and in view of his antecedent activities he must be detained to prevent him from indulging in such prejudicial activities, the detention order can validly be made.

In our opinion, there is a real possibility of release of a person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed.

Mr. Altaf Ahmed, learned senior counsel, further submitted that we are taking an over technical view of the matter, and we should not interfere with the preventive detention orders passed in cases where serious crimes have been committed. We do not agree.

Prevention detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however,

Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous, historic struggles. It follows, therefore, that if the ordinary law of the land (Indian Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is : Was the ordinary law of the land sufficient to deal with the situation ? If the answer is in the affirmative, the detention order will be illegal. In the present case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Indian Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation. Hence, in our opinion, for this reason also the detention order in question was illegal.

In this connection, it may be noted that it is true that the decision of the 2 Judge Bench of this Court in Biram Chand Vs. State of Uttar Pradesh & Anr, (1974) 4 SCC 573, was overruled by the Constitution Bench decision in Haradhan Saha's case (supra) (vide para 34). However, we should carefully analyse these decisions to correctly understand the legal position.

In Biram Chand's case (supra) this Court held that the authorities cannot take recourse to criminal proceedings as well as pass a preventive detention order on the same facts (vide para 15 of the said decision). It is this view which was reversed by the Constitution Bench decision in Haradhan Saha's case (supra).

This does not mean that the Constitution Bench laid down that in all cases the authorities can take recourse to both criminal proceedings as well as a preventive detention order even though in the view of the Court the former is sufficient to deal with the situation.

This point which we are emphasizing is of extreme importance, but seems to have been overlooked in the decisions of this Court.

No doubt it has been held in the Constitution Bench decision in Haradhan Saha's case (supra) that even if a person is liable to be tried in a criminal court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in Articles 21 and 22 of the Constitution (which we have already

explained). Articles 22(3)(b) is only an exception to Article 21 and it is not itself a fundamental right. It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him opportunity of placing his defence through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (Indian Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.

Hence, the observation in para 34 in Haradhan Saha's case (supra) cannot be regarded as an unqualified statement that in every case where a person is liable to be tried, or is actually being tried, for a crime in a criminal court a detention order can also be passed under a preventive detention law.

It must be remembered that in cases of preventive detention no offence is proved and the justification of such detention is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as a 'jurisdiction of suspicion', (Vide State of Maharashtra Vs. Bhaurao Punjabrao Gawande, (supra) - para 63). The detaining authority passes the order of detention on subjective satisfaction. Since clause (3) of Article 22 specifically excludes the applicability of clauses (1) and (2), the detenu is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest.

To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however, technical, is, in our opinion, mandatory and vital.

It has been held that the history of liberty is the history of procedural safeguards. (See : Kamleshkumar Ishwardas Patel Vs. Union of India and others (1995) 4 SCC 51, vide para 49). These procedural safeguards are required to be zealously watched and enforced by the court and their rigour cannot be allowed to be diluted on the basis of the nature of the alleged activities of the detenu.

As observed in Rattan Singh Vs. State of Punjab, (1981) 4 SCC 1981 :-

"May be that the detenu is a smuggler whose tribe (and how their numbers increase!) deserves no sympathy since its activities have paralysed the Indian economy. But the laws of preventive detention afford only a modicum of safeguards to persons

detained under them, and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenus."

As observed in Abdul Latif Abdul Wahab Sheikh Vs. B.K. Jha and another (1987) 2 SCC 22, vide para 5, :

"...The procedural requirements are the only safeguards available to a detenu since the court is not expected to go behind the subjective satisfaction of the detaining authority. The procedural requirements are, therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard...."

As observed by Mr. Justice Douglas of the United States Supreme Court in Joint Anti-Fascist Refugee Committee Vs. McGrath, 341 US 123 at 179, "It is procedure that spells much of the difference between rule of law and rule of whim or caprice. Steadfast adherence to strict procedural safeguards are the main assurances that there will be equal justice under law."

Procedural rights are not based on sentimental concerns for the detenu. The procedural safeguards are not devised to coddle criminals or provide technical loopholes through which dangerous persons escape the consequences of their acts. They are basically society's assurances that the authorities will behave properly within rules distilled from long centuries of concrete experiences. "

34. Thus, the personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. In the case on hand, the detaining authority has miserably failed to show that the impugned order of detention passed by him accords far from being meticulously with the procedure established by law. The stringency and concern of judicial vigilance that is needed was aptly described in the following words in ***Thomas Pacham Dale's case***, (1881) 6 QBD 376, :

"Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and

that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue."

35. Our final conclusions may be drawn as under:

(i) The High Court should not reject the writ application, seeking to challenge the legality and validity of an order of preventive detention on the ground that the detenue has an alternative remedy of preferring a representation addressed to the Advisory Board constituted by the State Government, or if such representation is already preferred, then the detenue should wait till the outcome of such representation.

(ii) The individual liberty is most valuable and cherished right and is recognized not only by the Constitution but by the international Covenants as well. The Article 21 of the Constitution of India provides that no person shall be deprived of his personal liberty except according to the procedure established by law. Article 21, thus, recognizes an important right which inheres in an individual.

(iii) The right to personal liberty is thus not only to be protected but respected by the State.

(iv) When a person is detained under the preventive detention law, he is not to be brought before the Magistrate and is not entitled to consult a legal practitioner, though a person who is arrested/detained for the commission of alleged offences is to be produced before the Magistrate within 24 hours on such arrest and has to be afforded an opportunity for consulting a legal practitioner. When a person is arrested for alleged commission of offence, he can approach the Court of competent jurisdiction for seeking his release on bail or even for his discharge by showing that the material collected during the investigation does not inculpate him. A person who is detained under the preventive detention law has a right to challenge the detention but said right is circumscribed by the procedure established by law. The State governed by rule of law,

being the repository of all basic and constitutional rights of the people, is duty bound to provide machinery and to take steps to find out whether the detenue is to be deprived of his personal liberty for a period of time provided by Statute. This is the basic and fundamental duty of the State.

(v) The moment a person is deprived of his personal liberty guaranteed by Article 21 of the Constitution of India which inheres in him, he gets the right to challenge such detention on the grounds available in law. The detenue can challenge his detention calling it to be illegal being violative of constitutional guarantee as contained in Articles 21 and 22 respectively of the Constitution.

(vi) The person who is detained without being brought before the Magistrate immediately after his arrest, by no stretch of imagination, can be said or told to wait until such time the Advisory Board furnishes its opinion to the State Government. The duty imposed by the State upon itself to provide procedural safeguard to the detenue detained under the preventive detention law, cannot take away the right of the detenue to challenge his detention before the Constitutional Court. The right to challenge the detention order is an independent right which accrues to a detained person and is not circumscribed by any statutory provision providing for safeguard.

(vii) The moment a person is detained, he gets an independent right, not circumscribed by the provisions by the Act of 1985, more particularly by Sections 11 and 12 of the said Act to challenge the same.

(viii) The right to challenge the detention by a person cannot be abridged or curtailed by saying that until such time the Advisory Board gives its opinion, the challenge thereto has to await.

(IX) The rhetorical incantation of the words “dangerous person” or “prejudicial to maintenance of public order” cannot be sufficient

justification to invoke the draconian powers of preventive detention. To classify the detenue as a dangerous person, effecting public order because of registration of two cases, referred to above, is a gross abuse of the constitutional power of preventive detention. The grounds of detention in the case on hand are ex-facie extraneous to the Act.

36. In such circumstances, referred to above, we hold that the impugned order of detention passed by the Detaining Authority is not sustainable in law and deserves to be quashed and set aside.

37. In the result, this appeal as well as the Special Civil Application No.9868 of 2020 succeed and are hereby allowed. The impugned order passed by the learned Single Judge dated 27th August, 2020 is hereby set aside. The Special Civil Application No.9868 of 2020 is allowed and the impugned order passed by the Detaining Authority dated 29th July, 2020 is hereby quashed and set aside. The detenue is ordered to be released forthwith, if not required in any other case.

38. Before we close this matter, we would like to say something as regards the Gujarat High Court Rules, governing the filing of the writ applications questioning the legality and validity of the orders of preventive detention under various enactments like Pasa, COFEPOSA, PBM etc.

39. We called for certain information in this regard from the concerned Branch of the Registry. It appears that an amendment was proposed to be made in Rule 2 of the Gujarat High Court Rules, 1993 so as to make the habeas corpus petitions triable by a learned Single Judge. It also appears that in view of the provisions of Rule 2 (10)(1) read with Rule 1, the Habeas Corpus Petitions filed under Article 226 of the Constitution of India were earlier being placed for hearing before a Division Bench. Under the Bombay High Court Appellate Side Rules,

1960, the Habeas Corpus Petitions were triable by a Division Bench. On the establishment of the High Court of Gujarat, it followed the Bombay High Court Appellate Side Rules, 1960 in this respect. Before the amendments in the Rules, Rule 2(10) (2) read as under;

> *"Save as otherwise expressly provided by any law in force or by these rules, a Single Judge may dispose of the following matters;*
>
> *applications under Articles 226 of the Constitution of India except:-*
>
> *those for issue of writs of Habeas Corpus and also those for issue of appropriate directions, orders or writs in respect of orders of deportation."*

40. The Bombay High Court Appellate Side Rules, 1960 which were followed by our High Court till the Gujarat High Court Rules, 1993 came into force, read as under;

> "*Provided however that applications for issue of Writs of Habeas Corpus and also those for issue of appropriate directions, orders or writs in respect of orders of externment and deportation shall be heard by a Division Bench."*

41. It appears that the matter was placed before the Full Court of the High Court to consider the feasibility of making suitable amendments in the relevant Rules so as to make the Habeas Corpus Petitions and other detention matters except the matter under the COFEPOSA triable by a Single Judge. In view of the decision taken in the Chamber Meeting, a Special Committee of three Hon'ble Judges was constituted to prepare the Draft Gujarat High Court Rules. The report of the Special Committee was placed before the Full Court in its Chamber Meeting and the same was approved by the Full Court in its Chamber Meeting dated 18th March, 1993. Ultimately, the following notification came to be issued dated 5th April 1995.

"NOTIFICATION BY THE HIGH COURT OF GUJARAT AT AHMEDABAD.

(For insertion in the Gujarat Government Gazette, Part-IV-C, Central Section)

No.C-2002/93

The Honourable the Chief Justice and the Honourable Judges have been pleased to direct that the following amendments be made in the Gujarat High Court Rules,1993, so as to come into force with effect from 10th April, 1995.

I

(1) Substitute the following as Sub-clause (11) in Rule 2, Part-I, "CIVIL":-

(2) Add the following as Sub-clause 17 in Rule,2, Part-I (II Criminal):-

"(17) Parol, furlough, jail petitions and Externment matters."

High Court of Gujarat

Ahmedabad-380 009. *Sd/-*

Date: April 5, 1995. *Officer on Special Duty."*

42. Thus, it appears that from 1995 onwards, the preventive detention matters are treated as matters of civil jurisdiction and are being taken up by the Single Judge of the High Court.

43. We are of the view that the amendment, referred to above, needs to be re-looked as we would suggest that the preventive detention matters should be treated as the Habeas Corpus Petitions and a Habeas Corpus Petition, questioning the legality and validity of an order of preventive detention should be heard by a Division Bench of this Court and not by a Single Judge.

44. We may draw the attention of the High Court on its administrative side to a Division Bench decision of the Bombay High Court in the case of ***Shivshankarlal Gupta & Anr. vs. C.T.A Pillai & Ors***., reported in AIR 1976 Bom. 165. We may quote the relevant observations:

> *"65. Considered from all points of view the interpretation suggested by the learned Counsel for the petitioners leads us to anomalous results. Considered from the point of view which we have accepted the Rules deal with a uniform and homogeneous procedure and make a Court available for every cause of action whether it arose. Whenever two interpretations are possible, one leading to anomalous result and the other to rational result, it need not be emphasised that the second must be accepted and the first must be rejected. In our view, therefore, Rule 1 of Chapter XXVIII must be read with the amendment we have suggested above for the purpose of understanding the real meaning and the purpose of placing this Rule in Chapter XXVIII. It is, therefore, clear that all the applications where the writ of habeas corpus is being claimed must be presented under Chapter XXVIII of the Appellate Side Rules and before a Division Court taking criminal business of the Appellate Side.*
>
> *66. We may incidentally add why this appeals to us as a better approach. Historically so far as this country is concerned ever since provisions for writs under habeas corpus were included in the Procedure Code, it is the Division Bench taking criminal business that has always dealt with these matters. We are at the moment considering the writs of detention where the procedure for enforcement of the detention order are mostly the procedures laid down by the Code of Criminal P. C. If a person against whom a detention order is passed is not available, the detention laws provide for approaching a Magistrate for the purpose of attachment and sale of property which are the processes of the Code of Criminal Procedure. It has been observed by the Supreme Court that even under the petitions for habeas corpus interim bail was possible and in appropriate cases bail was granted. It is entirely different that the amended laws now take away the right to grant or obtain bail. The procedure for the enforcement of the preventive detention appears to be essentially the procedure*

provided by the Code of Criminal Procedure. In addition we may indicate that the two laws dealing with preventive detention at present and under which we are receiving applications are either the Maintenance of Internal Security Act or Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974. Both these laws are undoubtedly related to preventive detention but if the contents of both the laws are seen it would appear that they are mostly for preventing commission of an act which if committed would be criminal offences under some laws of this country. When we say that they mostly refer to act which might become offence if committed, we are not deciding whether the contents of the dispute are really civil or criminal in nature.

67. The main anxiety exhibited by Mr. Bhabha, learned Counsel appearing for the petitioners, was that unless it was decided whether the matter under the preventive detention laws is civil or criminal in nature, it would affect the right of appeal of the parties. Until the recent amendment of Article 133 which came into force on 22nd February, 1973, the provisions of Article 133(1)(c) or 134(1)(c) were identical in their language. We are referring to these clauses only because neither clause (a) nor (b) of sub-article (1) of Article 133 nor clause (a) or (b) of sub-article (1) of Article 134 would be attracted when applications for preventive detention are being considered. The language of that clause in both these articles say that an appeal shall lie to the Supreme Court if the High Court certifies that the case is a fit one for appeal to the Supreme Court. However, Art. 133 is now amended and a person gets a right to appeal from any judgment, decree or final order in a civil proceeding of the High Court, if the High Court certifies that the case involves substantial question of law of general importance and that in the opinion of the High Court the said question needs to be decided by the High Court. Some argument was addressed to us on behalf of the respondents that the provisions of Art. 134(1)(c) as compared to the present provision of Art. 133(1) (a) and (b) are more liberal. If we call the proceeding a criminal one, the petitioners have a better right of appeal than if the matter is called as civil.

68. We will, however, point out that to mark a particular

matter as civil or criminal and to place it before a particular Bench for the purpose of hearing and disposal, is a matter of mere procedure and would not decide or affect the substantive right of appeal. Several judgments were cited before us of which some are already referred to above where in spite of marking the matter as the criminal application arguments were raised that the dispute was essentially of a civil character and therefore either costs be awarded or certain type of leave be granted. Even in these petitions, and such others when the question of appeal arises, it will always be open to the parties to satisfy the Bench about the real nature of the dispute and obtain leave.

69. However, looking to the history of the exercise of habeas corpus jurisdiction by the High Court in this country we think that the Rule requiring such petitions to be filed before a Division Court taking criminal business of the Appellate Side is in consonance with the historical background as also with the historical background as also with the nature of processes that are associated with the enforcement of preventive laws. For these additional reasons we think it would be appropriate and not all unlawful that the present manner of presenting these applications before a Division Court taking criminal business of the Appellate Side is continued. "

45. We may also draw the attention of the High Court, on its administrative side, to a Full Bench decision of the Allahabad High Court in the case of ***Basudeva vs. Rex,*** reported in AIR 1949 All 513. We quote the observations of his Lordship Justice Wanchoo:

"11. It has been urged, on behalf of the applicant, that in case the decision is in his favour, he is entitled to costs. The argument is that habeas corpus applications fall under two categories. If the matter with which they are concerned is a civil one, they are civil proceedings, while if the matter with which they are concerned is connected with a crime or likely permission of a crime, they are criminal proceedings. It is further urged that, in this case, the matter, namely, black-marketing is not connected with the commission of a crime or with the likely commission of a crime and, as such, these are civil

proceedings in which costs should, normally, be awarded in view of Section 35, Civil P.C. This argument is met on behalf of the Provincial Government on the ground that proceedings under Section 491, Criminal P.C., are criminal proceedings and as no provision as to costs has been made in that section, there can be no question of awarding any costs to any party in such proceedings.

12. The distinction between a civil and criminal habeas corpus application has been drawn on the basis of certain authorities in England. It is sufficient for present purposes to refer to only one of them, namely, ex parte, Amand E. v. Home Secretary and Minister of Defence of Royal Netherlands Government 1943 A.C. 147. At p. 160, Lord Wright observed as follows:

It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of habeas corpus deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for habeas corpus may or may not be in a criminal cause or matter.

The distinction may be illustrated by two examples. If a father makes an application for a writ of habeas corpus and wants that his son, who is in the custody of his maternal-uncle, may be set at liberty, the matter is of a civil nature, On the other hand, if a person, who is under orders of extradition to a foreign country in connection with some offence which he is alleged to have committed there, applies for a writ of habeas corpus, the matter is obviously criminal. Habeas corpus writ in England was a common law writ of a procedural nature. But the law in India on this subject is, in my opinion, somewhat different. There was, at one time, a controversy in this country whether the High Courts had the right to issue a common law writ of habeas corpus. That controversy has been set at rest by the decision of their Lordships of the Privy Council in Matthen and Ors. v. District Magistrate of Trivandrum A.I.R. (26) 1939 P.C. 213. Their Lordships agreed with the observations of the learned Chief Justice of the Madras High Court which were to this effect:

The High Courts Act of 1861 authorised the legislature if it thought fit to take away the powers which this Court

obtained as the successor of the Supreme Court, and Acts of the legislature lawfully passed in 1875 and subsequent years leave no doubt in my mind that the legislature has taken away the power to issue the prerogative writ of habeas corpus in matters contemplated by Section 491, Criminal P.C. of 1898.

In India, therefore, one must start with the premise that the power of issuing writs of habeas corpus is conferred under the Criminal Procedure Code. Prima facie, the provisions of the Code of Criminal Procedure are for Courts of criminal jurisdiction, unless there is anything in the context to suggest that they apply to Courts of civil jurisdiction also."

46. The attention is also drawn to the Supreme Court Rules, 2013 framed under Article 145 of the Constitution. Chapter-III thereof provides for the classification of cases. Clause 12 of Chapter-III reads thus:

"12. Writ Petition –

(i)petition under Article 32 of the Constitution relating to an infringement of a right in Part III of the Constitution in a civil case, other than habeas corpus, shall be registered as Writ Petition (Civil);

(ii) petition under Article 32 of the Constitution relating to a criminal matter, including habeas corpus, shall be registered as Writ Petition (Criminal);

(iii) petition under Article 32 of the Constitution of India relating

to public interest litigation shall be registered as Writ Petition(PIL). It may be either civil or criminal;

(iv) petition under Article 32 of the Constitution seeking transfer of a case relating to the State of Jammu and Kashmir and shall be registered as Writ Petition (Tr.). It may be either civil or criminal;"

47. The Registry shall prepare an appropriate submission in this regard and place it before the Hon'ble the Chief Justice or its

administrative side along with the copy of this judgment.

(VIKRAM NATH, CJ)

(J. B. PARDIWALA, J)

Vahid