CASE NO.:
Appeal (crl.) 417 of 2008

PETITIONER:
STATE OF MAHARASHTRA & ORS

RESPONDENT:
BHAURAO PUNJABRAO GAWANDE

DATE OF JUDGMENT: 03/03/2008

BENCH:
C.K. THAKKER & ALTAMAS KABIR

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO 417 OF 2008
ARISING OUT OF
SPECIAL LEAVE PETITION (CRL) NO. 583 OF 2007

C.K. THAKKER, J.

1. Leave granted.
2. The present appeal is filed by the State of Maharashtra and others against the sole respondent (original petitioner) against the judgment and order passed by the High Court of Judicature at Bombay (Nagpur Bench) on October 17, 2006 in Writ Petition No. 372 of 2006. By the impugned order, the High Court (partly) allowed the petition filed by the detenu-writ petitioner and set aside the order of detention dated July 27, 2006 passed by the Commissioner of Police (Nagpur City) under the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980.

FACTUAL MATRIX
3. The case of the appellants is that one Bhaurao Punjabrao Gawande (detenu) was running a business of transportation of petroleum products and had fleet of tankers for carrying on the said occupation. He was indulging in illegal purchase and sale of blue kerosene oil in black market since last five to six years. Certain cases were also registered against the said Bhaurao under the Essential Commodities Act, 1955 (hereinafter referred to as '1955 Act'). In view of continuous activities of Bhaurao in black-marketing of essential commodity (Kerosene), the Commissioner of Police (appellant No.2 herein), in exercise of power conferred on him by sub-section (1) read with Clause (b) of sub-section (2) of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (hereinafter referred to as 'the Act') directed that the said Bhaurao be detained. Grounds of detention were sought to be served to the detenu on the same day.
4. According to the appellants, in accordance with sub-section (3) of Section 3 of

the Act, the order of detention passed by the Commissioner of Police was approved by the State Government. The detenu somehow came to know about the order of detention being passed again him and absconded himself. He, therefore, could not be detained, nor served with the order or grounds of detention in support of the order.

WRIT PETITION

5. The detenu, without submitting to the order of detention and surrendering, filed Writ Petition No. 372 of 2006 in the High Court of Bombay (Nagpur Bench) for an appropriate writ, direction or order quashing and setting aside the order of detention dated July 27, 2006 being illegal, unwarranted and vitiated by mala fide. Other reliefs were also sought.

COUNTER AFFIDAVIT

6. An affidavit in reply was filed by the Detaining Authority, inter alia, contending that the petition filed by the detenu was not maintainable at law. The detenu got the information about the order of detention, absconded himself and the order of detention could not be served upon him. The order was, therefore, affixed at a conspicuous place at the residence of the detenu on July 30, 2006 and a panchanama was drawn by the Police Inspector of Sakkardara Police Station, Nagpur. Since the detenu was not available, grounds of detention along with relevant documents also could not be served upon him. It was stated that the order of detention was approved by the State Government. Moreover, the entire proceedings of detention were submitted to the Advisory Board constituted under Section 10 of the Act as required by law. The Government decided the period of detention only after the opinion of the Advisory Board under Section 12 of the Act.

7. On merits, it was contended on behalf of the Detaining Authority that the detenu was indulging in black marketing of kerosene oil which was an 'essential commodity' and several cases had been registered against him. It was also stated that the detenu had executed a bond under the Code of Criminal Procedure, 1973 for good behaviour. In spite of all these steps, the detenu continued to indulge in black marketing activities of essential commodity and the Detaining Authority was satisfied that "with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies of essential commodities to the community", it was necessary to detain him and accordingly the order was passed. It was, therefore, submitted that the petition was liable to be dismissed, particularly when the detenu absconded and the order of detention along with grounds of detention and other documents could not be personally served and could not be executed.

HIGH COURT JUDGMENT

8. The High Court, by the impugned order, held that the detenu was not entitled to know the grounds on which the order of detention had been passed, unless he surrendered. The Court, however, proceeded to state that it perused the grounds of detention with a view to satisfy itself about the legality of the order of detention. The Court noted that the authorities made the record available to the Court and the Court had 'carefully' examined it. The Court then concluded;

"We find that the present petition can be entertained at pre-execution stage".

9. The High Court considered the relevant provisions of the Act as also the Maharashtra Kerosene Dealers' Licensing Order, 1966 and the Kerosene (Restriction on Use and Fixation of Ceiling Price) Order, 1993. It observed that if the cases instituted against the detenu were taken into consideration by the Detaining Authority, it could not be said that the Detaining Authority could not have reached 'subjective satisfaction' on that basis and as such the order could not be challenged. The High Court also conceded that normally, a Court would not interfere with the order of detention at pre-execution stage. It, however, held that the present case was covered by one of the exceptions laid down in Addl. Secretary to the Government of India & Ors. v. Smt. Alka Subhash Gadia & Anr., 1992 Supp (1) SCC 496 and hence the petition was maintainable and the detenu was entitled to relief. The High Court accordingly set aside the order of detention. The legality of said order is questioned by the Authorities in the present appeal.

PREVIOUS ORDERS

10. On February 12, 2007, when the matter was placed for admission hearing, notice was issued and was made returnable within three weeks. On August 13, 2007, four weeks time was sought by the detenu for filing counter affidavit. The Court, however, passed the following order;

"The matter relates to grant of relief by the High Court under Article 226 of the Constitution at pre-arrest stage. This Court had issued notice on February 12, 2007.

On the facts and in the circumstances of the case, in our opinion, we should not grant four weeks' time as prayed for. Two weeks' time is granted, as a last chance, for filing counter affidavit.

List thereafter".

11. Affidavit-in-reply was thereafter filed. On December 13, 2007, the Registry was directed to list the matter for final hearing

in the first week of February, 2008 on a non-miscellaneous day and that is how the matter is before us.

12. We have heard learned counsel for the parties.

APPELLANTS' SUBMISSIONS

13. The learned counsel for the appellants strenuously contended that the High Court was wholly in error in exercising jurisdiction under Article 226 of the Constitution against an order of detention at a pre-execution stage. It was submitted that the preliminary objection raised by the Detaining Authority was well founded that the High Court should not have entertained the writ petition and set aside the order of detention before the order could be executed against the detenu. It was also submitted that an important factor which ought to have been taken into consideration by the High Court that the order could not be served upon the detenu, was a material factor. The detenu absconded himself and successfully avoided service of order of detention, grounds of detention and relevant documents in support of the order. The authorities were, therefore, constrained to affix the order at a conspicuous place of residence of the detenu. The said factor was crucial and the High Court should have refused to exercise jurisdiction in favour of the detenu.

14. On merits, it was contended that several cases had been instituted against the detenu under the 1955 Act and consistent conduct of the detenu revealed that he continued to indulge in black marketing activities. If it is so, a preventive action under the Act was called for and such action could not have been interfered with by the High Court. It was also submitted that the High Court was not right in observing that the detenu was ill-treated when he was arrested in connection with Crime No. 3022 of 2006 at Police Station, Wadi (Nagpur) and there was 'custodial violence' by police authorities. But, even if it is assumed to be true, the detenu could have taken appropriate action in accordance with law. That, however, does not make order of detention vulnerable. The counsel also contended that the High Court was not right that no other steps had been considered by the authorities. In fact, the detenu was directed to execute a bond of good behaviour and such bond was also executed by him. It was, therefore, submitted that the order passed by the High Court deserves to be set aside by allowing the Detaining Authority to execute the order of detention against the detenu and by granting liberty to the detenu to challenge the order by taking appropriate action in accordance with law against such detention.

RESPONDENT'S SUBMISSION

15. Learned counsel for the respondent-detenu, on the other hand, supported the order of the High Court. He submitted that normally a High Court or this Court, in exercise of extraordinary powers under Article 226 or 32 of the Constitution does not interfere with an order of detention at pre-execution stage. But, there is no restriction, limitation or prohibition on the power of the Court in exercising constitutional powers. It is a self-imposed limitation by Courts themselves. In an appropriate case, however, if the Court is satisfied that the order is ex-facie illegal, void, without jurisdiction or actuated by mala fides, the Court has jurisdiction to grant relief to the detenu even if the order is not executed and the person is not served with such order. In the case on hand, the learned counsel submitted, the High Court was satisfied that one of the exceptions carved out by this Court in Alka Subhash Gadia had been made out and the Court exercised the power which cannot be said to be illegal or contrary to law. It was also submitted that when it was alleged by the detenu that there was 'custodial violence' by police authorities, such complaint and the requisite materials should have been placed before the Detaining Authority and the Detaining Authority was bound to consider them. If no such material was placed before the authority or was placed but not considered by the Detaining Authority, there was non-application of mind on the part of the authority and it can be concluded that the order was passed for a 'wrong purpose' and was liable to be set aside. Finally, it was submitted that the order of detention was set aside by the High Court on October 17, 2006 and no allegation had been made by the appellants that subsequent to the said order, the detenu has indulged in black-marketing activities. Hence, even if this Court is convinced that the High Court was not right in exercising jurisdiction at pre-execution stage, this Court may not interfere with the decision of the High Court.

WHETHER HIGH COURT WAS RIGHT IN QUASHING ORDER OF DETENTION?

16. Having heard learned counsel for the parties and having given anxious consideration to the facts and circumstances of the case, we are clearly of the view that the High Court exceeded its jurisdiction in entertaining the writ-petition and in quashing and setting aside the order of detention at pre-execution stage. It cannot be gainsaid that the order of detention has been made against the detenu in exercise of power under the Act since the Detaining Authority was satisfied that detention of the writ-petitioner was necessary "with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies of commodities to the community" i.e.

selling of kerosene in black market. True it is that such order must be 'preventive' and not 'punitive' in nature. But the Court must be conscious and mindful that the satisfaction of the Detaining Authority is 'subjective' in nature and the Court cannot substitute its 'objective' opinion for the subjective satisfaction of Detaining Authority for coming to the conclusion whether the activities of the detenu were or were not prejudicial to the maintenance of supplies of essential commodities to the society. It would, therefore, be appropriate if we consider the concept of and relevant principles governing 'preventive detention'.

PERSONAL LIBERTY : PRECIOUS RIGHT

17. There can be no doubt that 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 those 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 v. Union of India, (1982) 1 SCC 271; Attorney General for India v. Amritlal Pranjivandas, (1994) 5 SCC 54].

18. It has been observed in R. v. Home Secretary, (1999) 2 AC 38 : (1997) 1 WLR 503, "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".

HABEAS CORPUS : FIRST SECURITY OF CIVIL LIBERTY

19. The celebrated writ of habeas corpus has been described as "a great constitutional privilege" or "the first security of civil liberty". The writ provides a prompt and effective remedy against illegal detention. By

this writ, the Court directs the person or authority who has detained another person to bring the body of the prisoner before the Court so as to enable the Court to decide the validity, jurisdiction or justification for such detention. The principal aim of the writ is to ensure swift judicial review of alleged unlawful detention on liberty or freedom of the prisoner or detenu.

20. In Cox v. Hakes, (1890) 15 AC 506 : 60 LJQB 89, Lord Halsbury propounded:

"For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might make a fresh application to every judge or every Court in turn, and each Court or Judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed."

21. In R v. Secretary of State for Home Affairs; ex parte O'Brien, (1923) 2 KB 361 : 1923 AC 603 : 92 LJKB 797, Scrutton, LJ observed: "The law in the country has been very zealous of any infringement of personal liberty. This case is not to be exercised less vigilantly, because the subject whose liberty is in question may not be particularly meritorious. It is indeed one test of belief in principles if you apply them to cases with which you have no sympathy at all. You really believe in freedom of speech, if you are willing to allow it to men whose opinion seem to you wrong and even dangerous; and the subject is entitled only to be deprived of his liberty by due process of law, although that due process if taken will probably send him to prison. A man undoubtedly guilty of murder must yet be released if due forms of law have not been followed in his conviction. It is quite possible, even probable, that the subject in this case is guilty of high treason; he is still entitled only to be deprived of his liberty by due process of law". (emphasis supplied)

22. As early as in 1627, the following memorable observations were made by Hyde, C.J. in Darnel, Re, (1927) 3 St Tr. 1:

"Whether the commitment be by the King or others, this Court is a place where the King doth sit in person, and we have power to examine it, and if it appears that any man hath injury or

wrong by his imprisonment, we have power to deliver and discharge him, if otherwise, he is to be remanded by us to prison".

23. In Halsbury's Laws of England, (4th Edn., Vol.11, para 1454, p.769), it is stated:
"In any matter involving the liberty of the subject the action of the Crown or its ministers or officials is subject to the supervision and control of the judges on habeas corpus. The judges owe a duty to safeguard the liberty of the subject not only to the subjects of the Crown, but also to all persons within the realm who are under the protection of the Crown and entitled to resort to the courts to secure any rights which they may have, and this whether they are alien friends or alien enemies. It is this fact which means the prerogative writ of the highest constitutional importance, it being a remedy available to the lowliest subject against the most powerful. The writ has frequently been used to test the validity of acts of the executive and, in particular, to test the legality of detention under emergency legislation. No peer or lord of Parliament has privilege of peerage or Parliament against being compelled to render obedience to a writ of habeas corpus directed to him".

24. In Greene v. Secretary of State for Home Affairs, (1941) 3 All ER 388 : 1942 AC 284, Lord Wright observed:
"The inestimable value of the proceedings is that it is the most efficient mode ever devised by any system of law to end unlawful detainments and to secure a speedy release where the circumstances and the law so required".

25. The underlying object of the writ of habeas corpus has been succinctly explained by Dua, J. in Sapmawia v. Deputy Commissioner, Aijal, (1971) 1 SCR 690, in the following words:
"The writ of habeas corpus is a prerogative writ by which, the causes and validity of detention of a person are investigated by summary procedure and if the authority having his custody does not satisfy the court that the deprivation of his personal liberty is according to the procedure established by law, the person is entitled to his liberty. The order of release in the case of a person suspected of or charged with the commission of an offence does not per

se amount to his acquittal or discharge and the authorities are not, by virtue of the release only on habeas corpus, deprived of the power to arrest and keep him in custody in accordance with law for this writ is not designed to interrupt the ordinary administration of criminal law".

PREVENTIVE DETENTION : MEANING AND CONCEPT

26. There is no authoritative definition of 'preventive detention' either in the Constitution or in any other statute. The expression, however, is used in contradistinction to the word 'punitive'. It is not a punitive or penal provision but is in the nature of preventive action or precautionary measure. The primary object of preventive detention is not to punish a person for having done something but to intercept him before he does it. To put it differently, it is not a penalty for past activities of an individual but is intended to pre-empt the person from indulging in future activities sought to be prohibited by a relevant law and with a view to preventing him from doing harm in future.

27. In Hardhan Saha v. State of W.B., (1975) 3 SCC 198, explaining the concept of preventive detention, the Constitution Bench of this Court, speaking through Ray, C.J. stated;

"The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. The basis of detention is the satisfaction of the executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. A criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence. There is no parallel between prosecution in a Court of law and a detention order under the Act. One is a punitive action and the other is a preventive act. In one case a person is punished to prove his guilt and the standard is proof beyond reasonable doubt whereas in preventive detention a man is prevented from doing something which it is necessary for reasons mentioned in Section 3 of the Act to prevent".

28. In another leading decision in Khudiram Das v. State of W.B., (1975) 2 SCR 832, this Court stated;

"The power of detention is clearly a preventive measure. It does not partake in any manner of the nature of punishment. It is taken by way of

precaution to prevent mischief to the community. Since every preventive measure is based on the principle that a person should be prevented from doing something which, if left free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof. Hatanjali Sastri, C.J., pointed out in State of Madras v. V.G. Row A.I.R. 1952 SC 196 : 1952 SCR 597 that preventive detention is "largely precautionary and based on suspicion" and to these observations may be added the following words uttered by the learned Chief Justice in that case with reference to the observations of Lord Finlay in Rex v. Halliday, 1917 AC 260 namely, that "the court was the least appropriate tribunal to investigate into circumstances of suspicion on which such anticipatory action must be largely based". This being the nature of the proceeding, it is impossible to conceive how it can possibly be regarded as capable of objective assessment. The matters which have to be considered by the detaining authority are whether the person concerned, haying regard to his past conduct judged in the light of the surrounding circumstances and other relevant material, would be likely to act in a prejudicial manner as contemplated in any of sub-clauses (i), (ii) and (iii) of Clause (1) of Sub-section (1) of Section 3, and if so, whether it is necessary to detain him with a view to preventing him from so acting. These are not matters susceptible of objective determination and they could not be intended to be judged by objective standards. They are essentially matters which have to be administratively determined for the purpose of taking administrative action. Their determination is, therefore, deliberately and advisedly left by the legislature to the subjective satisfaction of the detaining authority which by reason of its special position, experience and expertise would be best fitted to decide them. It must in the circumstances be held that the subjective satisfaction of the detaining authority as regards these matters constitutes the foundation for the exercise of the power of detention and the Court cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction of the detaining

authority is based. The Court cannot, on a review of the grounds, substitute its own opinion for that of the authority, for what is made condition precedent to the exercise of the power of detention is not an objective determination of the necessity of detention for a specified purpose but the subjective opinion of the detaining authority, and if a subjective opinion is formed by the detaining authority as regards the necessity of detention for a specified purpose, the condition of exercise of the power of detention would be fulfilled. This would clearly show that the power of detention is not a quasi-judicial power".

(emphasis supplied)

29. Recently, in Naresh Kumar Goyal v. Union of India, (2005) 8 SCC 276, the Court said;

"It is trite law that an order of detention is not a curative or reformative or punitive action, but a preventive action, avowed object of which being to prevent the anti-social and subversive elements from imperiling the welfare of the country or the security of the nation or from disturbing the public tranquility or from indulging in smuggling activities or from engaging in illicit traffic in narcotic drugs and psychotropic substances etc. Preventive detention is devised to afford protection to society. The authorities on the subject have consistently taken the view that preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it, and to prevent him from doing so. It, therefore, becomes imperative on the part of the detaining authority as well as the executing authority to be very vigilant and keep their eyes skinned but not to turn a blind eye in securing the detenue and executing the detention order because any indifferent attitude on the part of the detaining authority or executing authority will defeat the very purpose of preventive action and turn the detention order as a dead letter and frustrate the entire proceedings. Inordinate delay, for which no

adequate explanation is furnished, led to the assumption that the live and proximate link between the grounds of detention and the purpose of detention is snapped". [See : P.U. Iqbal v. Union of India and Ors., (1992) 1 SCC 434; Ashok Kumar v. Delhi Administration, (1982) 2 SCC 403 and Bhawarlal Ganeshmalji v. State of Tamilnadu, (1979) 1 SCC 465].

PREVENTIVE DETENTION : NECESSARY EVIL

30. Liberty of an individual has to be subordinated, within reasonable bounds, to the good of the people. The framers of the Constitution were conscious of the practical need of preventive detention with a view to striking a just and delicate balance between need and necessity to preserve individual liberty and personal freedom on the one hand and security and safety of the country and interest of the society on the other hand. Security of State, maintenance of public order and services essential to the community, prevention of smuggling and black marketing activities, etc. demand effective safeguards in the larger interests of sustenance of a peaceful democratic way of life. In considering and interpreting preventive detention laws, courts ought to show greatest concern and solitude in upholding and safeguarding the Fundamental Right of liberty of the citizen, however, without forgetting the historical background in which the necessity\027an unhappy necessity\027was felt by the makers of the Constitution in incorporating provisions of preventive detention in the Constitution itself. While no doubt it is the duty of the court to safeguard against any encroachment on the life and liberty of individuals, at the same time the authorities who have the responsibility to discharge the functions vested in them under the law of the country should not be impeded or interfered with without justification [vide A.K. Roy v. Union of India; Bhut Nath v. State of West Bengal, (1974) 3 SCR 315; State of W.B. v. Ashok Dey, (1972) 2 SCR 434; ADM Jabalpur v. Shirakant Shukla, 1976 Supp SCR 132].

SUBJECTIVE SATISFACTION : SCOPE OF JUDICIAL REVIEW

31. Subjective satisfaction being a condition precedent for the exercise of the power of preventive detention conferred on the executive, the Court can always examine whether the requisite satisfaction is arrived at by the authority; if it is not, the condition precedent to the exercise of the power would not be fulfilled and the exercise of the power would be bad.

32. A Court cannot go into correctness or

otherwise of the facts stated or allegations levelled in the grounds in support of detention. A Court of Law is 'the last appropriate tribunal to investigate into circumstances of suspicion on which such anticipatory action must be largely based.'

33. That, however, does not mean that the subjective satisfaction of Detaining Authority is wholly immune from judicial reviewability. By judicial decisions, courts have carved out areas, though limited, within which the validity of subjective satisfaction can be tested judicially.

GROUNDS OF CHALLENGE

34. An order of detention can be challenged on certain grounds, such as, the order is not passed by the competent authority, condition precedent for the exercise of power does not exist; subjective satisfaction arrived at by the Detaining Authority is irrational, the order is mala fide; there is non-application of mind on the part of the Detaining Authority in passing the order; the grounds are, or one of the grounds is, vague, indefinite, irrelevant, extraneous, non-existent or stale; the order is belated; the person against whom an order is passed is already in jail; the order is punitive in nature; the order is not approved by State/Central Government as required by law; failure to refer the case of the detenu to the Board constituted under the statute; the order was quashed/revoked and again a fresh order of detention was made without new facts, etc.

CHALLENGE TO DETENTION-ORDER PRIOR TO EXECUTION

35. A writ of habeas corpus may be prayed in case of actual detention or imprisonment of a person if it is illegal or unconstitutional. But if a person is not actually detained, obviously a writ of habeas corpus would not lie. A question, however, may arise whether in such an eventuality, no remedy at all is available to an aggrieved person against whom an order of detention has been made and such order is still to be executed. In other words, whether actual detention of a person against whom an order of detention is made is sine qua non or condition precedent for approaching a Court of Law.

36. On this question, our attention has been invited by the learned counsel for both the sides to several decisions of this Court. Having gone through those decisions, we are of the view that normally and as a general rule, an order of detention can be challenged by the detenu after such order as also the grounds of detention have been received by him and the order is executed. In exceptional cases, however, a High Court or this Court may exercise extraordinary powers to protect a person against an illegal invasion of his right to freedom by protecting him while still he is free by issuing an appropriate writ, direction or order including a writ in the nature of

mandamus questioning an order of detention and restraining the authorities from interfering with the right of liberty of an individual against whom such order is made.

37. A direct question arose before this Court in Kiran Pasha v. Government of A.P., (1990) 1 SCC 328. In that case, the petitioner filed a writ petition in the High Court of Andhra Pradesh under Article 226 of the Constitution restraining the respondents from making an order of detention against him. A Single Judge of the High Court granted interim relief against taking the petitioner in custody but the Division Bench held that the order of detention was already made even prior to filing of the petition, the petitioner was taken in custody and the petition had become infructuous. According to the Division Bench, the normal rule was that the petitioner should first surrender to custody and then to move for a writ of habeas corpus. The aggrieved petitioner approached this Court. An important question before this Court was whether a writ petition for protection of a Fundamental Right being threatened or in imminent danger was maintainable. Following K.K. Kochuni v. State of Madras, 1959 Supp (2) SCR 316 and approving observations of the High Court of Bombay in Jayantilal v. State of Maharashtra, (1981) 83 Bom LR 190 as also of the Full Bench of the High Court of Gujarat in Ved Prakash v. State of Gujarat, AIR 1987 Guj 253, this Court observed:

"When a right is so guaranteed, it has to be understood in relation to its orbit and its infringement. Conferring the right to life and liberty imposes a corresponding duty on the rest of the society, including the State, to observe that right, that is to say, not to act or do anything which would amount to infringement of that right, except in accordance with the procedure prescribed by law. In other words, conferring the right on a citizen involves the compulsion on the rest of the society, including the State, not to infringe that right. The question is at what stage the right can be enforced? Does a citizen have to wait till the right is infringed? Is there no way of enforcement of the right before it is actually infringed? Can the obligation or compulsion on the part of the State to observe the right be made effective only after the right is violated or in other words can there be enforcement of a right to life and personal liberty before it is actually infringed? What remedy will be left to a person when his right to life is violated? When a right is yet to be violated, but is threatened with violation can the citizen move the court for protection of the right? The

protection of the right is to be distinguished from its restoration or remedy after violation. When right to personal liberty is guaranteed and the rest of the society, including the State, is compelled or obligated not to violate that right, and if someone has threatened to violate it or its violation is imminent, and the person whose right is so threatened or its violation so imminent resorts to Article 226 of the Constitution, could not the court protect observance of his right by restraining those who threatened to violate it until the court examines the legality of the action? Resort to Article 226 after the right to personal liberty is already violated is different from the pre-violation protection. Post-violation resort to Article 226 is for remedy against violation and for restoration of the right, while pre-violation protection is by compelling observance of the obligation or compulsion under law not to infringe the right by all those who are so obligated or compelled. To surrender and apply for a writ of habeas corpus is a post-violation remedy for restoration of the right which is not the same as restraining potential violators in case of threatened violation of the right. The question may arise what precisely may amount to threat or imminence of violation. Law surely cannot take action for internal thoughts but can act only after overt acts. If overt acts towards violation have already been done and the same has come to the knowledge of the person threatened with that violation and he approaches the court under Article 226 giving sufficient particulars of proximate actions as would imminently lead to violation of right, should not the court call upon those alleged to have taken those steps to appear and show cause why they should not be restrained from violating that right? Instead of doing so would it be the proper course to be adopted to tell the petitioner that the court cannot take any action towards preventive justice until his right is actually violated whereafter alone he could petition for a writ of habeas corpus? In the instant case when the writ petition was pending in court and the appellant’s right to personal liberty happened to be violated by taking him into custody in preventive detention, though he was released after four days, but could be taken into custody again, would it be

proper for the court to reject the earlier writ petition and tell him that his petition has become infructuous and he had no alternative but to surrender and then petition for a writ of habeas corpus? The difference of the two situations, as we have seen, have different legal significance. If a threatened invasion of a right is removed by restraining the potential violator from taking any steps towards violation, the rights remain protected and the compulsion against its violation is enforced. If the right has already been violated, what is left is the remedy against such violation and for restoration of the right". (emphasis supplied)

38. Alka Subhash Gadia was indeed a leading decision of this Court on the point. This Court in that case stated that if in each and every case a detenu is permitted to challenge an order of detention and seek stay of the operation of the order before execution, "the very purpose of the order and of the law under which it is made will be frustrated since such orders are in operation only for a limited period".

39. The Court, after considering several cases, observed that with a view to prevent possible abuse of 'draconian measure' of preventive detention, the Legislature had taken care to provide various salutary safeguards such as (i) obligation to furnish to the detenu the grounds of detention; (ii) right to make representation against such action; (iii) constitution of Advisory Board consisting of persons who are or have been qualified to be appointed as Judges of the High Court; (iv) reference of the case of the detenu to the Advisory Board; (v) hearing of the detenu by the Advisory Board in person; (vi) obligation of the Government to revoke detention order if the Advisory Board so opines; (vii) maximum period for which a person can be detained; (viii) revocation of detention order by the Government on the representation by the detenu, etc.

40. The Court then considered the point as to denial of a right to the proposed detenu to challenge the order of detention before the execution of order and observed:

"As regards his last contention, viz., that to deny a right to the proposed detenu to challenge the order of detention and the grounds on which it is made before he is taken in custody is to deny him the remedy of judicial review of the impugned order which right is a part of the basic structure of the Constitution, we find that this argument is also not well-merited based as it is on absolute assumptions. Firstly, as pointed out

by the authorities discussed above, there is a difference between the existence of power and its exercise. Neither the Constitution including the provisions of Article 22 thereof nor the Act in question places any restriction on the powers of the High Court and this Court to review judicially the order of detention. The powers under Articles 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive order resulting in civil on criminal consequences. However, the Courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the Courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary, extraordinary, and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which these extraordinary powers are used and are declined to be used by the courts. To accept Shri Jain’s present contention would mean that the courts should disregard all these time-honoured and well-tested judicial self-restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibbal for the appellants, as far as detention orders are concerned if in every case a detenu is permitted to challenge and seek the stay of the operation of the order before it is executed, the very purpose of the order and of the law under which it is made will be frustrated since such orders are in operation only for a limited period. Thirdly, and this is more important,

it is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre- execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary power of judicial review to interfere with the detention orders prior to their execution on any other grounds does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question".
(emphasis supplied)

41. The above principles have been reiterated in subsequent cases decided by this Court.

42. The learned counsel for the detenu urged that on the facts and in the circumstances of the case, the High Court was right in holding that exception (iii) in Alka Subhash Gadia got attracted inasmuch the order was passed for a 'wrong purpose'.

43. We must concede our inability to uphold the above contention. We have been taken to the judgment of the High Court impugned in the present appeal. So far as the authority of the Commissioner of Police is concerned, the High Court was satisfied that the order was passed by the authority competent to exercise the power. It was also clear that the order was passed 'under the Act' since the Detaining Authority was satisfied that the detention of the writ-petitioner was necessary 'with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies of essential commodities to the community' i.e. kerosene. The grounds, in our opinion, cannot be said to be vague, extraneous irrelevant or non-existent. (In fact, the detenu absconded and grounds could not be served). It is not even alleged that the order is sought to be executed against a wrong person.

44. According to the High Court, however, the order was passed for a 'wrong purpose'. It

was contended before the High Court on behalf of the detenu that certain offences had been registered against the detenu and they were under investigation. The report of the Chemical Analyzer was not received and yet the Detaining Authority took into account those cases. It was further submitted that offences were registered against the detenu in July, 2003, September, 2005 and May, 2006 and no preventive action was thought necessary to be taken by the authority at any stage. It was when the detenu was arrested in 2006 and a complaint was made against 'custodial violence' meted out to him by police authorities while he was in custody that with a view to save the skin of erring police officials that an illegal order of detention was passed. Thus, it was made for 'wrong purpose' and not with a view to preventing the writ petitioner from indulging in black marketing of kerosene. The High Court found 'considerable force' in the submission. The High Court, with respect, went wrong in observing that once a detenu had made allegations against the police atrocities and custodial violence, the Detaining Authority ought to have waited till the inquiry was conducted and report submitted.

45. The Court observed;

"We find considerable force in this submission. A careful perusal of the events that followed the registration of Crime No.3022/2006 at P.S. Wadi (Nagpur) indicates that the petitioner made allegations against Respondent No. 3 about custodial violence immediately on his release. The said complaint dated 20.7.2006 was addressed to Respondent No.2. This complaint was forwarded by Respondent No.2 to DCP-1 Nagpur on 26.7.2006 for necessary enquiry and action. A copy of the communication 26.7.2006 was also forwarded to the petitioner. Immediately on the next day i.e. on 27.7.2006 detention order was passed by Respondent No. 2 even before any enquiry could be made into complaint made by the petitioner against Respondent No. 3. The detaining authority should have at least waited till the enquiry into the complaint made by the petitioner was initiated and completed and the result thereof either in the positive or in the negative. Instead of waiting for that, the detaining authority immediately proceeded to pass order of detention against the petitioner which indicates that even without subjective satisfaction of the detaining authority hastily passed the order of detention for wrong purpose. This clearly shows that the detention order against the

petitioner was passed for a wrong purpose and on this count the same deserves to be quashed and set aside".

46. The High Court again went wrong in holding that two parallel and simultaneous proceedings were not permissible in law. The High Court, relying on Biram Chand v. State of U.P. & Ors., (1974) 4 SCC 573, stated;

"A perusal of the grounds of detention shows that Crime NO. 76/2006 of P.S. Mouda, District Nagpur was taken into consideration by the detaining authority for its subjective satisfaction. Now, in case the petitioner wants to make representation to the detaining authority against the order of detention he is required to disclose his defence which may cause prejudice to the petitioner in defending the criminal prosecution. In Biram Chand v. State of Uttar Pradesh & Ors., AIR 1974 SC 1161, it has been held that if the authority concerned makes an order of detention under the Act and also prosecutes him in criminal case on self-same facts, the detaining authority cannot take recourse to two parallel and simultaneous proceedings nor can take re-course to a ground which is the subject matter of a criminal trial. Thus on this ground also the impugned order of detention cannot be sustained".

47. Unfortunately, the attention of the High Court was not invited to Hardhan Saha, wherein the Constitution Bench did not approve the law laid down by this Court in Biram Chand. Referring to larger Bench decisions, the Court stated;

"Article 14 is inapplicable because preventive detention and prosecution are not synonymous. The purposes are different. The authorities are different. The nature of proceedings is different. In a prosecution an accused is sought to be punished for a past act. In preventive detention, the past act is merely the material for inference about the future course of probable conduct on the part of the detenu.

The recent decisions of this Court on this subject are many. The decisions in Borjahan Gorey v. The State of West Bengal reported in (1972) 2 SCC 550, Ashim Kumar Ray v. State of West Bengal reported in (1973) 4 SCC 76, Abdul Aziz v. The Distt. Magistrate, Burdwan and Ors.

reported in (1973) 1 SCC 301 and Debu Mahto v. The State of West Bengal reported in (1974) 4 SCC 135 correctly lay down the principles to be followed as to whether a detention order is valid or not. The decision in Biram Chand v. State of Uttar Pradesh and Ors. reported in (1974) 4 SCC 573 which is a Division Bench decision of two learned Judges is contrary to the other Bench decisions consisting in each case of three learned Judges. The principles which can be broadly stated are these. First merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the CrPC would not by itself debar the Government from taking action for his detention under the Act. Second, the fact that the Police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the CrPC and even lodges a first information report may be no bar against the District Magistrate issuing an order under the preventive detention. Third, 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 the public order. Fourth, the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the order. Fifth, the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behavior of a person based on his past conduct in the light of the surrounding circumstances".

(emphasis supplied)

48. Considering the facts on record in their entirety, it is clear that many cases had been filed against the detenu under the 1955 Act. It was alleged that the writ petitioner was indulging in illegal activities of black marketing of kerosene which was an essential commodity. Those cases had been registered in 2002, 2003, 2005 and 2006. Thus, the action was taken on the basis of past conduct of the detenu having reasonable prognosis of future

behaviour and there was 'live link' between the activities of the detenu and the action of preventive detention to reach subjective satisfaction by the Detaining Authority. It has come on record that the detenu was called upon to execute a bond for good behaviour under Sections 110 and 111 of the Code of Criminal Procedure, 1973. It is, therefore, clear that the authorities had taken steps under the relevant law. But even otherwise, in our opinion, such questions may become relevant and can be considered after the order of detention is executed.

49. Similarly, if the detenu was ill-treated when he was in custody in connection with any case registered against him under the 1955 Act, or there was custodial violence, it would not affect detention of the writ-petitioner. Whether there was such custodial violence and whether police officers had abused their position can indeed be gone into by a competent authority or by a Court of law. That circumstance, however, will not make the order of detention invalid or for a 'wrong purpose'. Externment proceedings initiated against the detenu under Section 59 of the Bombay Police Act, 1951 also would not make the action assailable. In our considered opinion, therefore, this was not a case in which interference was warranted at pre-execution stage.

50. In this connection, it may be profitable if we refer to a decision of this Court in Subhash Muljimal Gandhi v. L. Himingliana & Anr., (1994) 6 SCC 14. There, an order of detention was challenged by the detenu at pre-execution stage. It was contended by the detenu tht the contingencies noted in Alka Subhash Gadia were illustrative and not exhaustive. It was submitted that there might well be other contingencies where such order could be questioned at pre-execution stage. In that case also, it was alleged that the detenu was harassed, humiliated and beaten by authorities and the case called for grant of relief before execution of order of detention.

51. Negativing the contention and referring to Alka Subhash Gadia and N.K. Bapna v. Union of India, (1992) 3 SCC 512, the Court said;

"The above principles laid down in Alka Subhash Gadia have been quoted with approval by another three-Judge Bench in N.K. Bapna v. Union of India ((1992) 3 SCC 512. Bound as we are by the above judgments, we must hold that the other contingencies, if any, must be of the same species as of the five contingencies referred to therein. Coming now to Mr. Jethmalani's submission, that the detention order was passed 'for a wrong purpose', namely, to harass and humiliate the appellant by concocting a false case of smuggling, based

primarily on a confession obtained from him after subjecting to him to assault, illegal detention and extortion we find that the detaining authority has denied the allegations of assault and extortion. Needless to say these are disputed questions of fact, which we cannot entertain much less delve into or decide upon. In any case, the said fact, even if true cannot vitiate the order of detention". (emphasis supplied)

52. We may also refer to one more case of this Court in State of Bihar v. Ram Balak Singh, (1966) 3 SCR 344. The question which arose before this Court there related to grant of bail/parole in a petition filed by a detenu for a writ of habeas corpus. The Court observed that there is vital difference between 'preventive detention' and 'punitive detention'. Preventive detention is a precautionary measure and is intended to pre-empt a person from indulging in illegal or anti-social activities in order to safeguard the defence of India, public safety, maintenance of public order, maintenance of supplies and services essential to the life of the community, prevention of smuggling activities, etc. Therefore, the jurisdiction of the court to grant relief to the detenu in such proceedings is indeed narrow and very much limited. Bail cannot be granted as a matter of common practice on considerations generally applicable to cases of punitive detention. Therefore, whenever the Court is of the view that prima facie the allegations made in the writ petition disclose a serious defect in the order of detention, the wiser and the more sensible and reasonable course to adopt would invariably be to expedite the hearing of the writ petition and deal with the merits without any delay. (emphasis supplied)

53. The Court, however, held that it cannot be contended as a proposition of law that a writ Court has no jurisdiction to make an interim order giving the detenu the relief which the Court would be entitled to grant at the end of the proceedings. If the Court has jurisdiction to give the main relief to the detenu at the end of the proceedings, on principle and in theory, it is not easy to understand why the Court cannot give interim relief to the detenu pending the final disposal of his writ petition. The interim relief which can be granted in habeas corpus proceedings must no doubt be in aid of, and auxiliary to, the main relief. It cannot be urged that releasing a detenu on bail is not in aid of, or auxiliary to the main relief for which a claim is made on his behalf in the writ petition.

54. The Court then concluded:

"In dealing with writ petitions of this character, the Court has naturally to bear in mind the object which is intended to be served by the

orders of detention. It is no doubt true that a detenu is detained without a trial; and so, the courts would inevitably be anxious to protect the individual liberty of the citizen on grounds which are justiciable and within the limits of their jurisdiction. But in upholding the claim for individual liberty within the limits permitted by law, it would be unwise to ignore the object which the orders of detention are intended to serve. An unwise decision granting bail to a party may lead to consequences which are prejudicial to the interests of the community at large; and that is a factor which must be duly weighed by the High Court before it decides to grant bail to a detenu in such proceedings. 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."

(emphasis supplied)

55. The learned counsel for the respondent referred to Rajinder Arora v. Union of India & Ors., (2006) 4 SCC 796. On the facts of the case, the Court held that the case of the appellant was covered by exceptions (iii) and (iv) of Alka Subhash Gadia and the relief was granted.

56. Likewise, in K.S. Mangamuthu v. State of Tamil Nadu & Ors., (2006) 4 SCC 792, there was non-placement of relevant material before the Detaining Authority and it was held by this Court that the order of detention was vitiated.

57. The Counsel relied upon certain other decisions wherein the order was quashed and set aside. There, however, the order was executed and the detenu surrendered. As already held by us, at the second stage, i.e. after the order of detention is executed and the person is served with the grounds of detention, he can challenge such order and Court will decide the legality or otherwise of the action.

58. From the foregoing discussion, in our judgment, the law appears to be fairly well-settled and it is this. As a general rule, an order of detention passed by a Detaining Authority under the relevant 'preventive detention' law cannot be set aside by a Writ Court at the pre-execution or pre-arrest stage unless the Court is satisfied that there are exceptional circumstances specified in Alka Subhash Gadia. The Court must be conscious and

mindful of the fact that this is a 'suspicious jurisdiction' i.e. jurisdiction based on suspicion and an action is taken 'with a view to preventing' a person from acting in any manner prejudicial to certain activities enumerated in the relevant detention law. Interference by a Court of Law at that stage must be an exception rather than a rule and such an exercise can be undertaken by a Writ Court with extreme care, caution and circumspection. A detenu cannot ordinarily seek a writ of mandamus if he does not surrender and is not served with an order of detention and the grounds in support of such order.

59. The case on hand, in our considered opinion, does not fall within the category of exceptional cases and the High Court committed an error of law in setting aside the order of detention at the pre-execution and pre-arrest stage. The said order, therefore, deserves to be set aside and is hereby set aside. It is open to the authorities to execute the order of detention. It is equally open to the detenu to challenge the legality thereof on all available grounds.

60. Before parting with the matter, we may clarify that all observations made by us in this judgment are only for the purpose of deciding the legality of the order passed by the High Court and impugned in the present appeal. We may not be understood to have expressed any opinion one way or the other on the allegations and counter-allegations by the parties. It is also made clear that if after the execution of the order, the action is challenged by the detenu, the Court will decide the case strictly in accordance with law on its own merits without being inhibited by any observations made either in the decision of the High Court or in the present judgment.

61. The appeal is accordingly allowed.