CHAPTER IV

JUDICIAL TRENDS REGARDING THE RIGHTS OF THE ACCUSED

“The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the deflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures.”

-Felix Frankfurter

4.1 INTRODUCTION

Judiciary in every country has an obligation and a Constitutional role to protect Human Rights of citizens. As per the mandate of the Constitution of India, this function is assigned to the superior judiciary namely the Supreme Court of India and High courts. The Supreme Court of India is perhaps one of the most active courts when it comes into the matter of protection of Human Rights. It has great reputation of independence and credibility. The preamble of the Constitution of India encapsulates the objectives of the Constitution-makers to build a new Socio-Economic order where there will be Social, Economic and Political Justice for everyone and equality of status and opportunity for all. This basic objective of the Constitution mandates every organ of the state, the executive, the legislature and the judiciary working harmoniously to strive to realize the objectives concretized in the Fundamental Rights and Directive Principles of State Policy. The judiciary must therefore adopt a creative and purposive approach in the interpretation of Fundamental Rights and Directive Principles of State Policy embodied in the Constitution with a view to advancing Human Rights jurisprudence. The promotion and protection of Human Rights is depends upon the strong and independent judiciary. The main study here would be given wide coverage to the functional aspect of the judiciary and see how far the Apex judiciary in India has achieved success in discharging the

heavy responsibility of safeguarding Human Rights in the light of our Constitutional mandate. The major contributions of the judiciary to the Human Rights jurisprudence have been fold: (1) the substantive expansion of the concept of Human Rights under Article 21 of the Constitution, and (2) the procedural innovation of Public Interest Litigation.

The most significant of the Human Rights is the exclusive right to Constitutional remedies under Articles 32 and 226 of the Constitution of India. Those persons whose rights have been violated have right to directly approach the High Courts and the Supreme Court for judicial rectification, redressal of grievances and enforcement of Fundamental Rights. In such a case the courts are empowered to issue appropriate directions, orders or writs including writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-warranto, and Certiorari. By virtue of Article 32, the Supreme Court of India has expanded the ambit of Judicial Review to include review of all those state measures, which either violate the Fundamental Rights or violative of the Basic Structure of the Constitution. The power of Judicial Review exercised by the Supreme Court is intended to keep every organ of the state within its limits laid down by the Constitution and the laws. It is in exercise of the power of Judicial Review that, the Supreme Court has developed the strategy of Public Interest Litigation. The right to move to the Supreme Court to enforce Fundamental Rights is itself a Fundamental Right under Article 32 of the Constitution of India. This remedial Fundamental Right has been described as “the Cornerstone of the Democratic Edifice” as the protector and guarantor of the Fundamentals Rights. It has been described as an integral part of the Basic Structure of the Constitution. Whenever, the legislative or the executive decision result in a breach of Fundamental Right, the jurisdiction of the Supreme Court can be invoked. Hence the validity of a law can be challenged under Article 32 if it involves a question of enforcement of any Fundamental Rights.\(^{138}\)

The Supreme Court of India has been very vigilant against encroachments upon the Human Rights of the prisoners. In this area an attempt is made to explain the some of the provisions of the rights of prisoners under the International and National arenas and also as interpreted by the Supreme Court of India by invoking the Fundamental Rights. Article 21 of the Constitution of India provides that “No person shall be deprived of his life and Personal Liberty except according to procedure established by law”. The rights to life and Personal Liberty are the back bone of the Human Rights in India. Through its positive approach and Activism, the Indian judiciary has served as an institution for providing effective remedy against the violations of Human Rights.

By giving a liberal and comprehensive meaning to “life and personal liberty,” the courts have formulated and have established plethora of rights. The court gave a very narrow and concrete meaning to the Fundamental Rights enshrined in Article 21. In A.K.Gopalan’s Case, the court had taken the view that each Article dealt with separate rights and there was no relation with each other i.e. they were mutually exclusive. But this view has been held to be wrong in Maneka Gandhi case and held that they are not mutually exclusive but form a single scheme in the Constitution, that they are all parts of an integrated scheme in the Constitution. In the instant case, the court stated that “the ambit of Personal Liberty by Article 21 of the Constitution is wide and comprehensive. It embraces both substantive rights to Personal Liberty and the procedure prescribed for their deprivation” and also opined that the procedures prescribed by law must be fair, just and reasonable.

139 PERRY, MICHAL J., The constitution, the courts and the human Rights, Willey, Eastman Ltd., New Delhi - 1982
4.2 JUDICIAL SYSTEM IN INDIA

The Indian Judicial System is one of the oldest legal systems in the world today. It is part of the inheritance India received from the British after more than 200 years of their Colonial rule, and the same is obvious from the many similarities the Indian legal system shares with the English Legal System. The framework of the current legal system has been laid down by the Indian Constitution and the judicial system derives its powers from it. The Constitution of India is the supreme law of the country, the fountain source of law in India. It came into effect on 26 January 1950 and is the world’s longest written constitution. It not only laid the framework of Indian judicial system, but has also laid out the powers, duties, procedures and structure of the various branches of the Government at the Union and State levels. Moreover, it also has defined the fundamental rights & duties of the people and the directive principles which are the duties of the State. India adopting the features of a federal system of government, the Constitution has provided for the setting up of a single integrated system of courts to administer both Union and State laws. The Supreme Court is the apex court of India, followed by the various High Courts at the state level which cater to one or more number of states. The High Court’s exist the subordinate courts comprising of the District Courts at the district level and other lower courts. An important feature of the Indian Judicial System, is that it’s a ‘common law system’. In a common law system, law is developed by the judges through their decisions, orders, or judgments. These are also referred to as precedents. Unlike the British legal system which is entirely based on the common law system, where it had originated from, the Indian system incorporates the common law system along with the statutory law and the regulatory law.\[140\]
Another important feature of the Indian Judicial system is that our system has been designed on the pattern of the adversarial system. This is to be expected since courts based on the common law system tend to follow the adversarial system of conducting proceedings instead of the inquisitorial system. In an adversarial system, there are two sides in every case and each side presents its arguments to a neutral judge who would then give an order or a judgment based upon the merits of the case. Indian judicial system has adopted features of other legal systems in such a way that they do not conflict with each other while benefitting the nation and the people. For example, the Supreme Court and the High Courts have the power of judicial review. This is a concept prevalent in the American legal system. According to the concept of judicial review, the legislative and executive actions are subject to the scrutiny of the judiciary and the judiciary can invalidate such actions if they are ultra vires of the Constitutional provisions. In other words, the laws made by the legislative and the rules made by the executive need to be in conformity with the Constitution of India.

The cases instituted by the state police and the Central Investigating Agency are adjudicated by the courts. We have a four-tier structure of courts in India. At the bottom level is the Court of Judicial Magistrates. It is competent to try offences punishable with imprisonment of three years or less. Above it is the Court of Chief Judicial Magistrates, which tries offences punishable with less than 7 years. At the district level, there is the Court of District and Sessions Judge, which tries offences punishable with imprisonment of more than 7 years. In fact, the Code specifically enumerates offences which are exclusively triable by the Court of Sessions. The highest court in a state is the High Court. It is an appellate court and hears appeals against the orders of conviction or acquittal passed by the lower courts, apart from having writ jurisdiction. It is also a court
of record. The law laid down by the High Court is binding on all the courts subordinate to it in a state. At the apex, there is the Supreme Court of India. It is the highest court in the country. All appeals against the orders of the High Courts in criminal, civil and other matters come to the Supreme Court. This Court, however, is selective in its approach in taking up cases. The law laid down by the Supreme Court is binding on all the courts in the country.\textsuperscript{141}

The most significant of the Human Rights is the exclusive right to Constitutional remedies under Articles 32 and 226 of the Constitution of India\textsuperscript{142}. Those persons whose rights have been violated have right to directly approach the High Courts and the Supreme Court for judicial rectification, redressal of grievances and enforcement of Fundamental Rights. In such a case the courts are empowered to issue appropriate directions, orders or writs including writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-warranto, and Certiorari. By virtue of Article 32, the Supreme Court of India has expanded the ambit of Judicial Review to include review of all those state measures, which either violate the Fundamental Rights or violative of the Basic Structure of the Constitution. The power of Judicial Review exercised by the Supreme Court is intended to keep every organ of the state within its limits laid down by the Constitution and the laws. It is in exercise of the power of Judicial Review that, the Supreme Court has developed.

In India the Supreme Court of India is the highest court. Judiciary plays an important role in adjudication as well as interpretation of laws made by legislators. Further in the countries with written Constitution judiciary has the important task to do i.e. to maintain the supremacy of the Constitution. In case of a federal state judiciary decides the controversies between the Union and state. Judiciary acts as an arbitrator between them and scrutinizes the laws. Indian

\textsuperscript{141} www.supremecourtofindia.in
\textsuperscript{142} Bakshi P.M. Constitution law of India, Asia Law House, 2010.
judiciary is very vigilant in safeguarding the rights of the people. Mainly it protects the Fundamental Rights of the citizens as well as non citizens. The Supreme Court is the guardian of Fundamental rights as well as Constitutional rights and also the highest court of appeal. Our courts have always invariably tried to protect the basic rights and liberties of individuals in various spheres which include the rights of arrested persons. Judicial Activism is a delicate exercise involving creativity. Great skill and dexterity is required for innovation. Judicial creativity is needed to fill the void occasioned by any gap in the law or inaction of any other functionary, and, thereby, to implement the Rule of Law. Diversion from the traditional course must be made only to the extent necessary to activate the concerned public authorities to discharge their duties under the law and to catalyze the process, but not to usurp their role; the credibility of the judicial process must not get eroded.\textsuperscript{143}

The Supreme Court of India in the recent past has been very vigilant against encroachments upon the Human Rights of the prisoners. In this area an attempt is made to explain the some of the provisions of the rights of prisoners under the International and National arenas and also as interpreted by the Supreme Court of India by invoking the Fundamental Rights. Article 21 of the Constitution of India provides that “No person shall be deprived of his life and Personal Liberty except according to procedure established by law”. The rights to life and Personal Liberty are the back bone of the Human Rights in India. Through its positive approach and Activism, the Indian judiciary has served as an institution for providing effective remedy against the violations of Human Rights.

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144 AIR 1979 SC 1360
to be administered by the respective states. The states have generally given low priority to prison administration. In fact, some of the decisions of the Supreme Court on prison administration have served as eye–openers for the administrators and directed the states to modernize prison administration146.

The Human Rights saviour Supreme Court has protected the prisoners from all types of torture. Judiciary has taken a lead to widen the ambit of Right to Life and personal liberty. The hosts of decisions of the Supreme Court on Article 21 of the Constitution after Maneka Gandhi’s case, through Public Interest Litigation have unfolded the true nature and scope of Article 21. In this thesis, an attempt is made to analyses the new dimensions given by the Supreme Court to Article 21 through Public Interest Litigation to safeguard the fundamental freedom of the individuals who are indigent, illiterate and ignorant. Public Interest Litigation became a focal point to set the judicial process in motion for the protection of the residuary rights of the prisoners. Judicial conscience recognized that Human Rights of the prisoners because of its reformist approach and belief that convicts are also human beings and that the purpose of imprisonment is to reform them rather than to make them hardened criminals.

Regarding the treatment of prisoners, Article 5 of the Universal Declaration of Human Rights, 1948 says “No one shall be subjected to torture or cruel treatment, in human or degrading treatment or punishment”. While Article 6 of the Universal Declaration of Human Rights, 1948 contemplates that “everyone has the right to recognition everywhere as a person before law”. Article 10(1) of the International Covenant on Civil and Political Rights lay down that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. The Supreme Court of India has developed Human Rights jurisprudence for the preservation and protection of

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prisoner’s Right to Human Dignity. The concern of the Apex judiciary is evident from the various cardinal judicial decisions.

The system of criminal justice, as a person is considered to be a criminal only if and when he is convicted by a court of law; the police should also presume that a person in custody may be innocent, till his guilt is proved. The principle of presumption of innocence is specifically provided in Article 11 (1) of the Universal Declaration of Human Rights, Article 14(2) of the International Covenant on Civil and Political Rights and Rule 84(2) of the Standard Minimum Rules. Since arrested persons are presumed innocent, police may impose only those conditions and restrictions on them as will ensure their appearance at trial, prevent their interference with evidence and further commission of offences. A police station is the most important base-line unit of the police organisation. It is at this cutting edge level of police administration, the people often get in close touch with the police. The lock-up is the first place of detention of arrested persons, regardless of whether they are later acquitted, convicted, fined or placed on probation. Right to speedy trial is a fundamental right of a prisoner implicit in article 21 of the constitution. It ensures "Just, fair and reasonable" procedure. The fact that a speedy trial is also in public interest or that it serves the societal interest also, does not make it any the less the right of the accused. But, this right is also violated in many cases. The shocking and dismaying picture of administration of justice was depicted by Hussainara Khatoon in which the writ petition filed before the Supreme Court disclosed that a large number of men and women, including children, were behind prisons for years awaiting trial in courts of law. The court found that continued detention of the under-trial prisoners could not be justified\textsuperscript{147}.

\textsuperscript{147} Justice K. N. Goyai - Human rights and Criminal Justice, Cr. LJ.p.278.
Human rights would become meaningless unless a person is provided with legal aid to enable him to have access to justice in case of violation of his human rights. This is formidable challenge in a country of India's size and heterogeneity where more than half of the population lives in far flung villages steeped in poverty, destitution and illiteracy. Legal aid is no longer a matter of chancy benevolence but is not one of the constitutional rights, and the legal machinery itself is expected to deal specifically with it. In fact legal aid offers a challenging opportunity to a society to redress grievances of the poor and thereby lay foundation of "Rule of law." To begin with article 22 (1) of the constitution provided a right to every arrested person to consult legal practitioner of his choice. In 1976, a new article 39- dealing with "equal justice and free legal aid" was added in the Constitution of India.

4.3 SUPREME COURT DECIDED CASES OF ACCUSED PERSON

Prem Shankar Sukla Vs. Delhi Administration\textsuperscript{148}

- The Hon’ble Supreme Court observed that using handcuffs and fetters (chains) on prisoners violates the guarantee of basic human dignity, which is part of our constitutional culture. This practice does not stand the test of articles 14 (Equality before law), 19 (Fundamental Freedoms) and 21 (Right to Life and Personal Liberty). In the said case, the following directives were given in respect of Handcuffing: involved in serious nonbailable offences, has been previously convicted of a crime: and /or is of desperate character violent, disorderly or obstructive: and /or is likely to commit suicide: and /or is likely to attempt escape. The reasons why handcuffs have been used must be clearly mentioned in the Daily Diary Report. They must also be shown to the court. Once an arrested person is produced before the court, the escorting officer must take the court’s permission before handcuffing her/him to and fro

\textsuperscript{148}1980 SCC 526
from the court to the place of custody. The magistrate before whom an arrested person is produced must inquire whether handcuffs or fetters have been used.

The Supreme Court added yet another projectile in its armoury to be used against the war for prison reform and prisoners rights. In the instant case the question raised was whether hand-cuffing is constitutionally valid or not? The Supreme Court discussed in depth the hand-cuffing jurisprudence. It is the case placed before the court by way of Public Interest Litigation urging the court to pronounce upon the Constitution validity of the “hand-cuffing culture” in the light of Article 21 of the Constitution. In the instant case, the court banned the routine hand-cuffing of a prisoners as a Constitutional mandate and declared the distinction between classes of prisoner as obsolete. The court also opined that “hand-cuffing is prima-facie inhuman and, therefore, unreasonable, is over harsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring to inflict “irons” is to resort to Zoological strategies repugnant to Article 21 of the Constitution”.

While deciding the Constitutional validity of hand-cuffing, the Supreme Court specifically referred to Article 5 of the Universal Declaration of Human Rights, 1948 and Article 10 of the International Covenant on Civil and Political Rights and held that hand-cuffing is impermissible torture and is violate of Article 21. In the instant case justice Krishna Iyer rightly emphasized hand-cuffs should not be used in routine and they were to be used in extreme circumstances only, when the prisoner is a security risk, desperate, rowdy or involved in non-bailable offences. But in even such circumstances, the escorting authority must record the reasons for doing so. Otherwise, the court pointed out, under Article 21 of the Constitution the procedure will be unfair and bad in law.
In spite of such clear ruling of the Supreme Court against hand cuffing, the high handedness of the police personnel came to the light in Delhi Judicial Service Association case, wherein the Supreme Court held that an extraordinary and the unusual behaviour of police was not proper and the court laid down detailed guidelines which should be followed in case of arrest and detention of judicial officer. The Supreme Court took a serious note of whole incident and it amounts to interference with the administration of justice, lowering of its judicial authority and it amounts to criminal contempt.

It is submitted that wherever any police official acts contrary to the clear directions against hand cuffing as laid down by the Supreme Court and thus violates the basic Human Right to human dignity, he should be made personally liable to pay the compensation and this fact is clearly established in state of Maharashtra vs. Ravikanth S.Patil (1991) 2 SCC 373. Apart from the above the Supreme Court had delivered many cases against hand cuffing and ruled that it is violative of Article 21 of the Constitution. In Citizen for Democracy vs. State of Assam, the Supreme Court said that it lays down as a rule that hand cuffs or other fetters shall not be forced on prisoner, convicted or under trail, while lodged in a jail anywhere in the country or while transporting or in transit from jail to another or from jail to court and back. The police and jail authorities, on their own, shall have no authority to direct transport from one jail to another or from jail to court and back”. The court declared that if it is absolutely necessary for the jail or police authorities to hand cuff, permission of Magistrate is to be obtained. The Magistrate may grant the permission to hand cuff the prisoner in rare cases. Violation of the directions given by the Supreme Court by the authorities shall be punishable under the contempt of court Act, 1971.

The Supreme Court directed the Union of India to frame rules or guidelines
regarding the circumstances in which hand cuffing of the accused should be resorted to, in conformity with the judgment of the court in Prem Shankar case; and to circulate them among all the Government of the states and Union Territories for strict observance. It is important to mention that so as to put an end to hand–cuffing it is suggested that the parliament may make a suitable amendment to the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973 where in, hand–cuffing should be made a cognizable offence so as to give effect to the ruling of the Apex Court of the land and also to preserve the right to live with Human Dignity, which is an important facet of personal liability of the individuals.

State of Haryana & Ors. Vs Dinesh Kumar

- This have been taken up for hearing and disposal together, inasmuch as, the issues to be decided in these appeals are common to both, but have been decided differently by two co-ordinate benches of the same High Court giving rise to a question of law which is of great public importance. In these appeals we are called upon to decide in relation to a criminal proceeding and the decision in respect thereof may have a bearing on the fate of the respondent in this appeal and that of the appellants in the other appeal in relation to their recruitment as Constable-Driver in the Haryana Police. The respondent in the first of these two appeals and the appellants in the other appeal applied for appointment as Constable-Driver under the Haryana Police and submitted their respective application forms, which contained two columns, namely, 13(A) and 14, two queries in the negative. Subsequently, during verification of the character and antecedents of the said respondent, it was reported that he had been

149 CASE NO.: Appeal (civil) 84 of 2008
arrested in connection with a case arising out of FIR No. 168 of 13th October, 1994, registered at Kalanaur Police Station under Sections 323/324/34 Indian Penal Code. He and his family members were ultimately acquitted of the charges framed against them on 6th January, 1998, by the Judicial Magistrate, 1st Class, Rohtak. Since, according to the appellants, the respondent had failed to disclose the aforesaid criminal case, which had been registered against all his family members, he was not offered any appointment. The appeal filed by the respondent was rejected by the Director General of Police, Haryana, by his order dated 18th November, 2005. Before the High Court, it was contended by the respondent that in connection with the aforesaid FIR No. 168 dated 13th October, 1994, he had been granted bail on 17th October, 1994 without having been arrested. It was, therefore, contended on his behalf that since he had not been actually arrested and the case against him having ended in acquittal, it must be deemed that no case had ever been filed against him and hence he had not suppressed any information by replying in the negative to the questions contained in columns 13(A) and 14. The rejection of the respondents claim for appointment as Constable-Driver on the above mentioned ground was challenged by him before the Punjab and Haryana High Court in Civil Writ Petition No. 18 of 2006. Taking the view that the appellant had not suppressed any material while filling up the said columns 13(A) and 14, the High Court quashed the order of rejection by the Director General of Police, Haryana on 18th November, 2005 and directed the appellants herein to take steps to issue an appointment letter to the respondent subject to fulfillment of other conditions by him. In order to arrive at the aforesaid conclusion, the High Court held that since the petitioner had been acquitted from the criminal case in question, he had quite truthfully answered the query in column 14
by stating that he had never been convicted by any Court for any offence. The High Court also held that even column 13(A) had been correctly answered because the High Court was of the view that the appellant had never been arrested, though he had obtained bail in connection with the said case. In the other writ petition filed by Lalit Kumar and Bhupinder, a co-ordinate Bench of the same High Court took a different view. In the said matter the appellants had been involved in a criminal case, being FIR No.212 dated 3rd November, 2000, registered at Police Station Sadar, Narwana, for offences punishable under Sections 148/149/307/325/323 of the Indian Penal Code, but they had been subsequently acquitted of the said charges on 10th September, 2001. On behalf of the State, the same stand was taken that the aforesaid piece of information had been withheld by the writ petitioners while filling column 14 of the application form. The High Court was of the view that since the writ petitioners had withheld important information it clearly disentitled them to appointment, as it revealed that they could not be trusted to perform their duties honestly. The High Court, accordingly, dismissed the writ petitions as being without merit. In the first of the two appeals, the respondent had not surrendered to the police but had appeared before the Magistrate with his lawyer of his own volition and was immediately granted bail. Admittedly, therefore, the respondent had not surrendered to the police but had voluntarily appeared before the Magistrate and had prayed for bail and was released on bail, so that as per the respondents understanding at no point of time was taken into custody or arrested. With regard to column 13(A), the appellants who had been implicated in FIR 108 dated 26th May 2002 under Sections 323/324/34 Indian Penal Code of Police Station Nangal Chaudhary, Mahendergarh, appeared before the Ilaka Magistrate on 7th June, 2002, and were released on their personal bonds without being
placed under arrest or being taken into custody. The information disclosed by them was held to be suppression of the fact that they had been involved in a criminal case though the tenor of the query was not to that effect and was confined to the question as to whether they had been arrested. One of the common questions which, therefore, need to be answered in both these appeals is whether the manner in which they had appeared before the Magistrate and had been released without being taken into formal custody, could amount for the purpose of the query in Column 13A. As mentioned hereinbefore, the same High Court took two different views of the matter. While, on the one hand, one bench of the High Court held that since the accused had neither surrendered nor had been taken into custody, it could not be said that he had actually been arrested, on the other hand, another bench of the same High Court dismissed similar writ petitions filed by Lalit Kumar and Bhupinder, without examining the question as to whether they had actually been arrested or not. The said bench decided the writ petitions against the writ petitioners upon holding that they had withheld important information regarding their prosecutions in a criminal case though ultimately they were acquitted. In order to resolve the controversy that has arisen because of the two divergent views, it will be necessary to examine the concept of a criminal case. We are concerned with sub-sections (1) and (2) of Section 46 of the Code from which this much is clear that in order to make an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be submission to the custody by word or action. has been the subject matter of decisions of different High Courts, which have been referred to and relied upon by Mr. Patwalia appearing for Dinesh Kumar, respondent in the first of the two appeals. This Court has also had occasion to consider the said question in a few cases, which we
will refer to shortly. The provisions of Section 439 of the Code would not have had application. Mr. Chaudhary also submitted that it did not matter as to whether the accused persons had been arrested and detained in custody by the police or not, the very fact that they voluntarily appeared before the Magistrate and prayed for bail amounted to arrest of their movements, since thereafter they were confined to the Court room and were no longer free to leave the court premises of their own choice. Mr. Chaudhary submitted that the ordinary dictionary meaning of arrest is to legally restrain a persons movements for the purpose of detaining a person in custody by authority of law. He submitted that in Dinesh Kumars writ petition the High Court had erred in coming to a finding that he had never been arrested since he had voluntarily appeared before the Magistrate and had been granted bail immediately. Opposing Mr. Chaudharys submission, Mr. Patwalia, relying on various decisions of different High Courts and in particular a Full Bench decision of the Madras High Court in the case of Roshan Beevi and Anr. Vs. Joint Secretary to the Govt. of Tamil Nadu and Ors. (1984 Criminal Law Journal 134) submitted that although technically the appearance of the accused before the Magistrate might amount to surrender to judicial custody, in actuality no attempt had been made by anyone to restrict the movements of the accused which may have led him to believe that he had never been arrested. It is on a laymans understanding of the principle of arrest and custody that prompted the respondent in the first of the two appeals and the appellants in the second appeal to mention in column 13(A) that they had never been arrested in connection with any criminal offence. Mr. Patwalia referred to certain decisions of the Allahabad High Court, the Punjab High Court and the Madras High Court which apparently supports his submissions. Of the said decisions, the one in which the meaning of the two expressions arrest
and custody have been considered in detail is that of the Full Bench of the Madras High Court.

Roshan Beevis case (supra). The said decision was, however, rendered in the context of Sections 107 and 108 of the Customs Act, 1962. Sections 107 and 108 of the Customs Act authorises a Customs Officer empowered in that behalf to require a person to attend before him and produce or deliver documents relevant to the enquiry or to summon such person whose attendance is considered necessary for giving evidence or production of a document in connection with any enquiry being undertaken by such officer under the Act. In such context the Full Bench of the Madras High Court returned a finding that custody and arrest are not synonymous terms and observed that it is true that in every arrest there is a custody but not vice-versa. A custody may amount to arrest in certain cases, but not in all cases. It is in the aforesaid circumstances that the Full Bench came to the conclusion that a person who is taken by the Customs Officer either for the purpose of enquiry or interrogation or investigation cannot be held to have come into the custody and detention of the Customs Officer and he cannot be deemed to have been arrested from the moment he was taken into custody. In coming to the aforesaid conclusion, the Full Bench had occasion to consider in detail the meaning of the expression arrest. Reference was made to the definition of arrest in various legal dictionaries and Halsbury’s Laws of England as also the Corpus Juris Secondum. The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority
empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested. With the decision of this Court in Niranjan Singh vs. Prabhakar (AIR 1980 SC 785) the Full Bench distinguished the same on an observation made by this Court that equivocatory quibbling that the police have taken a man into informal custody but have not arrested him, have detained him in interrogation but have not taken him into formal custody, were unfair evasion of the straightforwardness of the law. This Court went on to observe further that there was no necessity of dilating on the shady facet as the Court was satisfied that the accused had physically submitted before the Sessions Judge giving rise to the jurisdiction to grant bail. The Full Bench observed that mere summoning of a person during an enquiry under the Customs Act did not amount to arrest so as to attract the provisions of Article 22(2) of the Constitution of India and the stand taken that the persons arrested under the Customs Act should be produced before a Magistrate without unnecessary delay from the moment the arrest is effected, had to fail. We are unable to appreciate the views of the Full Bench of the Madras High Court and reiterate the decision of this Court in Niranjan Singh case.

Niranjan Singh the relevant portion of person is in custody, within the meaning of S. 439 Cr. P.C. When he is, in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court jurisdiction and submitted to its orders by
physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of S.439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasion of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose. Custody, in the context of S.439, is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and order of the court. He can be in custody not merely when the police arrest him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions. Sections 107 and 108 of the Customs Act do not contemplate immediate arrest of a person being summoned in connection with an enquiry, but only contemplates surrendering to the custody of the Customs Officer which could subsequently lead to arrest and detention. We also agree with Mr. Anoop Chaudhary submission that unless a person accused of an offence is in custody, he cannot move the Court for bail under Section 439 of the Code, which provides for release on bail of any person accused of an offence and in custody (Emphasis supplied). The pre-condition, therefore, to applying the provisions of Section 439 of the Code is that a person who is an accused must be in custody and his movements must have been restricted before he can move for bail. This aspect of the matter was
considered in Niranjan Sing case where it was held that a person can be stated to be in judicial custody when he surrenders before the Court and submits to its directions.

It is no doubt true that in the instant case the accused persons had appeared before the concerned Magistrates with their learned advocates and on applying for bail were granted bail without being taken into formal custody, which appears to have swayed one of the benches of the Punjab and Haryana High Court to take a liberal view and to hold that no arrest had actually been effected. The said view, in our opinion, is incorrect as it goes against the very grain of Sections 46 and 439 of the Code. The interpretation of rendered by the Full Bench in Roshan Beevi case may be relevant in the context of Sections 107 and 108 of the Customs Act where summons in respect of an enquiry may amount could subsequently materialize into arrest. The position is different as far as proceedings in the court are concerned in relation to enquiry into offences under the Indian Penal Code and other criminal enactments. In the latter set of cases, in order to obtain the benefit of bail an accused has to surrender to the custody of the Court or the police authorities before he can be granted the benefit there under. The aforesaid definition is similar in spirit to what is incorporated in Section 46 of the Code of Criminal Procedure. The concept was expanded by this Court in State of Uttar Pradesh vs. Deomen (AIR 1960 SC 1125). Section 46, Cr.P.C. does not contemplate any formality before a person can be said to be taken in custody. Submission to the custody by words of mouth or action by a person is sufficient. A person directly giving a police officer by word of mouth information which may be used as evidence against him may be deemed to have submitted himself to the custody of the Police
Officer. The sequatur of the above is that when a person, who is not in custody, approaches the police officer and provides information, which leads to the discovery of a fact, which could be used against him, it would be deemed that he had surrendered to the authority of the investigating agency. It must, therefore, be held that the views expressed by the High Court in Dinesh Kumar writ petition regarding arrest were incorrect, while the views expressed in the writ petitions filed by Lalit Kumar and Bhupinder correctly interpreted the meaning of the expressions the same would apply in the ultimate analysis relating to the filling up of column 13(A) is another matter altogether. the reasoning given in Dinesh Kumar case in that context is a possible view and does not call for interference under Article 136 of the Constitution. Conversely, the decision rendered in the writ petitions filed by Lalit Kumar and Bhupinder has to be reversed to be in line with the decision in Dinesh Kumar case. When the question as to what constitute has for long engaged the attention of different High Courts as also this Court, it may not be altogether unreasonable to expect a layman to construe that he had never been arrested on his appearing before the Court and being granted bail immediately. The position would have been different, had the person concerned not been released on bail. We would, in the facts of these cases, give the benefit of a mistaken impression, rather than that of deliberate and willful misrepresentation and concealment of facts, to the appellants in the second of the two appeals as well, while affirming the view taken by the High Court in Dinesh Kumar case. Accordingly, although, we are of the view that the legal position as to what constitutes arrest was correctly stated in the writ petitions filed by Lalit Kumar and Bhupinder, we confirm the order passed in Dinesh Kumars case and extend the same benefit to Lalit Kumar and Bhupinder also. In the result, the Civil Appeal
arising out of SLP(C) No. 1840 of 2007 is dismissed, while the Civil Appeal arising out of SLP(C)No.14939 of 2007 is allowed. The Judgment of the High Court dated 22nd September, 2005, impugned in the said appeal, is set aside and the concerned respondents are directed to take steps to issue appointment letters to the appellants in the said appeals subject to fulfillment of other conditions by them. It is also made clear that the appellants will be deemed to have been appointed as Constable-Drivers with effect from the date, persons lower in merit to them were appointed. However, while they will be entitled to the notional benefits of such continuous appointment, they will be entitled to salary only from the date of this judgment on the basis of such notional benefits.

Bavisetti Kameswara Rao @ Babai Versus State of A.P.Rep. by its Public
Prosecutor High Court of A.P., Hyderabad

- The appellant, Bavisetti Kameswara Rao original accused no. 1 (A- 1) has approached this Court challenging the judgment of the Andhra Pradesh High Court, confirming his conviction (accused no. 1) for an offence under Section 302 IPC.. Initially, as many as eight persons were tried by the Additional Sessions Judge (Fast Track Court) for various offences under Sections 147, 148 and 302 read with Section 149 etc. The allegation is that all the accused persons alongwith some others formed themselves into an unlawful assembly and in pursuance of the common object of that assembly, they committed murder of one Samudrala Pandu Rangarao @ Rayalam Rangadu. According to the prosecution, on 28th July 2007, at about 11 P.M., the deceased alongwith his friend Tamarapalli Subba Rao had visited mini lorry supply office of the first accused and he wanted to consume alcohol there. The first accused refused to let him have the

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alcohol there and on this, there was a wordy altercation in between the first accused and the deceased, and they also had the physical altercation with each other and in this melee, the first accused has sustained a wound on his hand. They were pacified by the people gathered there and at that juncture, both the first accused as well as the deceased sworn towards each others life. The prosecution alleged that in pursuance of this, the first accused had a discussion with the second accused and with the other seven accused persons and hatched up a plan to do away the deceased and were waiting for an opportunity. On 30th July 2000, all the accused formed into an unlawful assembly in the mini lorry office of the first accused at about 10 P.M. in pursuance of their pre-plan. The first accused was armed with the screw driver and the second accused had a pen knife. At around 10.30 P.M. on that day, the deceased came there on his Yamaha Motor cycle bearing registration no. AP-37 A-7569 and on seeing the deceased, A-1 and A-2 abused him filthily. When the deceased questioned their behaviour, A-1 and A-2 in pursuance of their intention, attacked the deceased with their weapons, wherein, the first accused stabbed the deceased below the left side chest with screw driver causing him a deep bleeding injury. A-2 also attacked the deceased with his pen knife, but the deceased tried to protect himself. However, the deceased suffered two incised wounds on his palm. It was the further case of the prosecution that the other accused persons also attacked the deceased and assaulted him with hands. The deceased somehow or the other, escaped when he was given a hot chase by all the accused. The deceased straightaway went to Bhimavaram II Town Police Station and reported the matter to the sub-inspector of police on duty, Sh. K.V.N. Vara Prasad, LW.23. Since the deceased required immediate medical help, he was tried to be taken to Government Hospital, Bhimavaram. However, in the way itself, the deceased breathed his last. Accordingly, an offence under Section 302
read with Section 34 was recorded vide Cr. No. 97/2000 by the LW.23. The investigations started and the accused came to be rounded up and on completion of the investigations, a charge sheet was filed against as many as eight accused persons, who were tried before the Additional Sessions Judge (Fast Track Court), Bhimavaram. The Additional Sessions Judge at Bhimavaram, however, convicted only A-1 and A-2 and convicted both of them for the offence under Section 302 while acquitting the rest of the accused persons. Both of them were sentenced to suffer rigorous imprisonment of life and also to pay fine of Rs.4,000/- in default, to suffer a further imprisonment for one year. On appeal, however, the conviction of appellant (herein) was confirmed for an offence under Section 302 but A-2 was acquitted of that offence and was convicted for an offence under Section 324 and his sentence was brought down to the rigorous imprisonment for two years. It is this appellate judgment, which has been challenged before us. This Court, however, on 15th January 2008 issued a notice confined to the question of sentence. As the appeal was delayed, a notice was also sent on delay. Considering the circumstances under which the appeal was filed, we condone the delay. Insofar as the first accused-appellant Bavisetti Kameswara Rao is concerned, the learned counsel urged before us that this was a case of single injury that too, the weapon used was a screw driver which was in the regular use of the accused as a tool, the accused-appellant being a motor mechanic. It was but natural that he would use the said screw driver in the regular course of his occupation and since he had not used any other weapon, it could not be said that his intention was to cause death of the deceased or also to cause such bodily injury as would be sufficient to cause death of the deceased. The learned counsel for the accused submitted that it was only a single injury and, therefore, even if in the knowledge of the accused that such injury was likely to cause the death of the deceased, the offence at
the most would be under Section 304 Part II of the IPC. As an alternative argument, the learned counsel contended that at the most that this was a sudden quarrel and the altercation took without a pre-plan, as such, the offence at the most could have been under Section 304 Part I and, therefore, the High Court and the trial Court were not justified in convicting the accused for an offence under Section 302 and sentencing him to suffer rigorous imprisonment for life. We have given very deep consideration to the contentions raised. It is found from the medical evidence that the deceased suffered the following injuries at the hand of the accused. The injuries have been proved by PW.15 D. Varahalaraju, who was himself a Civil Surgeon. He had conducted the post-mortem and examination on the dead body of the deceased and found the following injuries: An inside wound on lateral aspect of left palm 2cm x =cm x 2 cm, black in colour. An inside wound above wound no. 1 on lateral aspect of left palm, 2cm x =cm x 2 cm, black in colour. An incised wound on epigastria region of abdomen just below xiphi sternum 2cm x 1cm x 12cm (length, breadth, depth respectively). An abrasion on from of right upper arm above elbow joint 5 x4cm, black in colour. An abrasion on medical aspect of left leg, 2cm x =cm, black in colour. Another abrasion on front of left leg, 1cm x =cm, black in colour. Internal Examination: Head: Brain pale, neck, hyoid bone intact, thyroid cartilage-NAD. Thorax: Lungs-both jungs pale. Hert: chambers empty, palce. Abdomen: liver- an incised wound on left lobe of liver 3cm x 2cm x 3 cm pale. Spleen: an incised wound on medial aspect of spleen, 3cm x 2cm x2cm pale. Kidneys: both kidneys pale. Stomach: empty. Bladder: above 200 ml of urine present in bladder, above 900 ml of fluid blood present in abdominal cavity.

According to the Doctor, the post-mortem was done on 31st July 2000 and was completed on that day at 3.15 P.M. He gave opinion that the deceased
had died of hemorrhagic shock due to injuries to liver and spleen. A glance at these injuries would suggest that it was injury no. 3 which was fatal injury and it was in the region of abdomen which was a vital part of the body of the deceased. The injury was 1cm x 1cm x 12cm (length, breadth and depth respectively). In the internal examination, it was found that there was an incised wound on liver as well as spleen. The incised wound on liver was 3cm x 2cm x 3cm in measurement, while on the spleen, the measure of the injury was 3cm x 2cm x 2cm. There is hardly any cross-examination of this Doctor excepting that injuries no. 5 and 6 could be possible by a fall, however, the seriousness of injury no. 3 was not and could not be questioned in the cross-examination. We have, therefore, no doubt that this injury with depth of 12 cm which was sufficient to cause the death. We also cannot ignore that the screw driver used had the sharp end and the sufficient length to cause the injury having the depth of 12cm. It was, therefore, clear that the eye-witnesses have attributed this injury to the first accused-appellant and there could be no other intention, excepting to cause death.

When the screw driver was plunged into the vital part of the body of the deceased, it cut his liver and spleen. Therefore, this was a case where the act was done with intention of causing bodily injury and the body injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, covered by Section 300 of Penal code. The act of the accused-appellant would, therefore, clearly come within the definition of murder under Section 300 of the Indian Penal Code. We cannot forget that when the deceased came up to the office of the accused, there was exchange of abuses and then, he was thrashed by the accused persons. There is hardly any cross-examination of the eyewitnesses to dispute the authorship of
this particular injury. We have scanned the evidence very closely only to find that the authorship of the injury could not be disputed and nor the manner in which the single injury was inflicted. Therefore, under the circumstances, even if there was a single injury caused, it was with such a force and on such vital part of the body that it caused almost instantaneous death. The deceased, after he was injured went up to the police station and before he could be reached to the hospital, breathed his last. It is seen that where in the murder case there is only a single injury, there is always a tendency to advance an argument that the offence would invariably be covered under Section 304 Part II IPC. The nature of offence where there is a single injury could not be decided merely on the basis of a single injury and thus in a mechanical fashion. The nature of the offence would certainly depend upon the other attendant circumstances which would help the court to find definitely about the intention on the part of the accused. Such attendant circumstances could be very many, they being (whether the act was pre-meditated; the nature of weapon used; the nature of assault on the accused. This is certainly not exhaustive list and every case has to necessarily depend upon the evidence available. As regards the user of screw driver, the learned counsel urged that it was only the accidental use at the spur of the moment and, therefore, there could be no intention to either cause death or cause such bodily injury as would be sufficient to cause death. Merely because the screw driver was a usual tool used by the accused in his business, it could not be as if its user would be innocuous. In State of Karnataka v. Vedanayagam [(1995) 1 SCC 326] this Court considered the usual argument of a single injury not being sufficient to invite a conviction under Section 302 IPC. In that case the injury was caused by a knife. The medical evidence supported the version of the prosecution that the injury was sufficient, in the ordinary course of
nature to cause death. The High Court had convicted the accused for the
offence under Section 304 Part II IPC relying on the fact that there is only
a single injury. However, after the detailed discussion regarding the nature
of injury, the part of the body chosen by the accused to inflict the same
and other attendant circumstances and after discussing clause Thirdly of
Section 300 IPC and further relying on the reported decision in Virsa
Singh v. State of Punjab [AIR 1958 SC 465], the court set aside the
acquittal under Section 302 IPC and convicted the accused for that
offence. The Court relied on the observation by Justice Bose in Virsa
Singhs case to suggest With due respect to the learned Judge he has linked
up the intent required with the seriousness of the injury, and that, as we
have shown is not what the section requires. The two matters are quite
separate and distinct though the evidence about them may sometimes
overlap.

The further observation in the above case were: The question is not
whether the prisoner intended to inflict a serious injury or a trivial one but
whether he intended to inflict the injury that is proved to be present. If he
can show that he did not, or if the totality of the circumstances justify such
an inference, then, of course the intent that the section requires is not
proved. But if there is nothing beyond the injury and the fact that the
appellant inflicted it, the only possible inference is that he intended to
inflict it. Whether he knew of its seriousness, or intended serious
consequences, is neither here nor there. The question so far as the
intention is concerned, is not whether he intended to kill, or to inflict an
injury of a particular degree of seriousness, but whether he intended to
inflict the injury in question, and once the existence of the injury is proved
the intention to cause it will be presumed unless the evidence or the
circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question. It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as in turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact. (emphasis supplied). Their Lordships then referred to the decision of this Court in Jagrup Singh v. State of Haryana [(1981) 3 SCC 616] There is no justification for the assertion that the giving of a solitary blow on a vital part of the body resulting the death must always necessarily reduce the offence to culpable homicide not amounting to murder punishable under Section 304 Part II of the Code. If a man deliberately strikes another on the head with a heavy log of wood or an iron rod or even a lathi so as to cause a fracture of the skull, he must, in the absence of any circumstances negativing the presumption, be deemed to have intended to cause the death of the victim or such bodily injury as is sufficient to cause death. The whole thing depends upon the intention to cause death, and the case may be covered by either clause 1stly or clause 3rdly. The nature of intention must be gathered from the kind of weapon used, the part of the body hit, the amount of force employed and the circumstances attendant
upon the death. (Emphasis supplied). Their Lordships also referred the case of Tolan v. State of T.N. [(1984) 2 SCC 133]. In the present case we do not have any reason to take any different view of the matter. Here was the case where a long screw driver having a sharp end was plunged into the abdomen of the deceased with such savage force that it caused injury which was 12 cm. deep cutting liver and spleen. This is apart from the fact that the deceased also suffered other injuries. The deceased was unarmed and there was a heated exchange of words before the incident. After the incident also the deceased was chased. Therefore, we find that this is not the case where conviction could be for the offence committed under Section 304 Part II IPC.

We also do not accept the contention of the learned counsel for the defence which was raised only by way of a desperate argument that the incident was sudden and it was without any pre-meditation, thereby the learned counsel wanted to bring the evidence under Section 304 Part I. In short the counsel aimed at Exception I of Section 300 IPC. Exception was also brought to be relied upon. We do not think the evidence available would warrant the offence covered by Exception I as there was no such grave and sudden provocation on the part of the deceased. Similarly it was not a case of sudden fight in the heat of passion nor was it a case of sudden quarrel when the offender having taken undue advantage or acted in a cruel or unusual manner. There is evidence on record to suggest that there was a previous altercation and the accused persons were seething in anger to take the revenge of the incident which had taken place on 27th of the same month. Further it was only after the deceased came in front of the shop of the accused on his motorbike, first there was an exchange of abuses and it was then that the incident took place where not only the
accused but even the second accused is proved to have attacked the deceased. This could not, therefore, be a case of a sudden fight. Therefore, the question of application of Section 304 Part I is also ruled out. Under the circumstances, we would be constrained to hold that the Courts below were right in convicting this accused-appellant for an offence under Section 302. We, therefore, find no reason to take any different view and confirm the conviction and sentence of this accused also. In the result, the appeal has no merits, and it is dismissed.

Dharmendra Kirthal Versus State of U.P. and another

- In this writ petition preferred under Article 32 of the Constitution of India, the petitioner who is undergoing trial before the learned Special Judge, District Baghpat, U.P., has called in question the constitutional validity of number of provisions of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 (Act 7 of 1986) (for short “the Act”) being violative of Articles 14, 21, 22(4) and 300A of the Constitution of India and further prayed for issue of a writ of certiorari for quashment of the First Information Report dated 2.5.2010 giving rise to Crime No. 100 of 2010 registered at Police Station Ramala, District Baghpat. At the very outset, it is imperative to state that this Court, on 20th September, 2010, while issuing notice, had passed “Issue notice in regard to the validity of Section 12 of the U.P. Gangster & Anti-Social Activities (Prevention) Act, 1986.” Regard being had to the aforesaid, we shall only dwell upon and delve into the constitutional validity of the section 12 of the Act. It is necessary to state here that the validity of the Act was called in question before the High Court of Judicature at Allahabad and a Full Bench of the High Court in Ashok Kumar Dixit v. State of U.P. and another upheld

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the constitutional validity and dismissed the writ petition. The assail to the constitutional validity travelled to this Court in Subhash Yadav v. State of U.P. and another2 and a two-Judge Bench of this Court referred the matter to the Constitution Bench by stating thus 1 AIR 1987 All 235 Writ Petition (Crl.) No. 317 of 1987 dt. 9.12.1987 Heard learned counsel for the parties at some length. We are informed that the question of vires of the Terrorist Affected Areas (Special Courts Act) 1984, is pending before a Constitution Bench. In the light of this, in our opinion, it would be proper that these matters wherein the constitutional validity of U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986, is challenged, should also be heard by the Constitution Bench.” When the matter was listed before the Constitution Bench along with connected matters, the larger Bench in Kartar Singh v. State of Punjab “Though originally, a number of other matters falling under various Acts such as the U.P. Gangsters and Anti-social Activities (Prevention) Act, 1986 (U.P. Act 7 of 1986), the Prevention of Illicit Traffic of Narcotics Drugs and Psychotropic Substances Act, 1988 and some provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA), were listed for hearing, we have fully and conclusively heard only the matters pertaining to the Act of 1984, Act of 1985 and Act of 1987 and U.P. Act 16 of 1976.” Thus, the constitutional validity of the Act was not decided by the said Constitution Bench. Thereafter, the matters relating to this Act were placed before another Constitution Bench. The Court, in Subhash 3 (1994) 3 SCC 569 Yadav v. State of U.P. and another4, took note of the challenge and the decision rendered in Ashok Kumar Dixit (supra) We had started hearing arguments in the writ petitions when the matters remained partheard. We have now been informed that Subhash Yadav, petitioner in Writ Petition
(Crl.) No. 317 of 1987 was discharged by the trial court as early as on 3-4-1990 while Amar Mani Tripathi, petitioner in Writ Petition (Crl.) No. 407 of 1987 was acquitted by the trial court on 20-5-1992. Learned counsel for Jitender, petitioner in Writ Petition (Crl.) No. 562 of 1987 submits that despite numerous attempts made to contact the petitioner and find out about the position of the criminal case against him, there is no response. Learned counsel has, therefore, reported no instructions to pursue the writ petition any further. In view of the developments which have taken place by the discharge of petitioner Subhash Yadav and acquittal of petitioner Amar Mani Tripathi and no instructions having been reported on behalf of petitioner Jitender, nothing survives for consideration in these writ petitions, as the exercise to determine the constitutional validity of the Act, would now be only of an academic interest insofar as these cases are concerned. Writ Petitions (Crl.) Nos. 317 and 407 of 1987 are, therefore, dismissed as infructuous while Writ Petition (Crl.) No. 562 of 1987 is dismissed for non-prosecution.” In view of the aforesaid position, the constitutional validity of the Act is still alive, but as a restricted notice was issued pertaining only to the validity of 4 (2000) 10 SCC 145 Section 12 of the Act and the learned counsel for the parties confined their submissions in that regard, we would, as stated earlier, address ourselves singularly on that point. Be it noted, Section 12 of the Act provides that the trial under the Act of any offence by special court shall have precedence over the trial of any other case against the accused in any other court and shall be concluded in preference to the trial of such other case and accordingly trial of such other case shall remain in abeyance.

We have heard Mr. D.K. Garg, learned counsel for the petitioner, and Mr. Irshad Ahmad, learned Additional Advocate General for the State of U.P.
Assailing the validity of the said provision, Mr. Garg, learned counsel for the petitioner, has raised the provision frustrates the basic tenet of Article 21 of the Constitution as has been interpreted by this Court to encapsulate in a sacrosanct manner the concept of speedy and fair trial, for the trial before the other courts are kept in abeyance and precedence is given to the trial before the special courts under this Act as a consequence of which the trial in other Court does not take place. The precedence conferred on the cases before the special courts tantamounts to illegal detention of an accused as he is deprived of his liberty as the trial in other cases are not allowed to proceed and the accused is compelled to languish in custody. The detention which is virtually in the nature of a preventive detention violates Article 22(4) of the Constitution. The accused, who is tried by the special courts under this Act, is treated differently because trial in other courts are kept in abeyance whereas the accused tried by other courts gets the benefit of speedy trial. There is no justification to treat the accused under this Act in such a manner as it violates the equal treatment before the law as envisaged under Article 14 of the Constitution. Mr. Irshad Ahmad, learned Additional Advocate General for the State of U.P., resisting the aforesaid proponements, contended The submission that the fundamental concept of speedy trial is throttled and stifled is neither correct nor sustainable as, on the contrary, the purpose of the legislature is to guarantee speedy trial by providing the precedence of the trial under this Act over other cases and keeping other cases before other courts in abeyance. From the scanning of the scheme of the Act, the emphasis on speedy trial is luminous and, hence, the ground urged on this score deserves to be repelled. The liberty of the accused is not jeopardized but schematic canvas and conceptual interpretation would reveal that the command of the legislature is for speedy trial and further there are
provisions for grant of bail. The contention that it is in the nature of preventive detention has no legs to stand upon as preventive detention and detention in connection with the crime under the Act have different connotations altogether. The accused in other cases, who is not tried under this Act, stands on a different footing altogether and such a classification is permissible in the constitutional backdrop and, therefore, it does not invite the frown of Article 14 of the Constitution. To appreciate the rival submissions raised at the Bar in their proper perspective, we think it seemly to refer to the Statement of Objects and reasons of the Act “Gangsterism and anti-social activities were on the increase in the State posing threat to lives and properties of the citizens. The existing measures were not found effective enough to cope with this new menace. With a view to break the gangs by punishing the gangsters and to nip in the bud their conspiratorial designs it was considered necessary to make special provisions for the prevention of, and for coping with gangsters and anti-social activities in the State. Since the State Legislature was not in session and immediate legislative action in the matter was necessary, the Uttar Pradesh Gangsters and Anti-social Activities (Prevention) Ordinance 1986 (U.P. Ordinance No. 4 of 1986) was promulgated by the Governor on January 15, 1986, after obtaining prior instructions of the President. The Uttar Pradesh Gangsters and Antisocial Activities (Prevention) Bill, 1986 is accordingly introduced with certain necessary modifications to replace the aforesaid Ordinance.” The Preamble of the Act “An Act to make special provisions for the prevention of, and for coping with gangsters and anti-social activities and for matters connected therewith or incidental thereto.” Reference to the Statement of Objects and Reasons and the Preamble of the Act is meant to appreciate the background and purpose of the legislation. In this context
we may refer with profit to the dictum in Gujarat University and another v. Shri Krishna Ranganath Mudholkar and others5, where the majority “Statements of Objects and Reasons of a Statute may and do often furnish valuable historical material in ascertaining the reasons which induced the Legislature to enact a Statute, but in interpreting the Statute they must be ignored.” In Shashikant Laxman Kale and another v. Union of India and another6, a three-Judge Bench of this Court has expressed:AIR 1963 SC 703 AIR 1990 SC 2114

For determining the purpose or object of the legislation, it is permissible to look into the circumstances which prevailed at the time when the law was passed and which necessitated the passing of that law. For the limited purpose of appreciating the background and the antecedent factual matrix leading to the legislation, it is permissible to look into the Statement of Objects and Reasons of the Bill which actuated the step to provide a remedy for the then existing malady.” In New India Assurance Co. Ltd. v. Asha Rani and others7, the Court referred to the Statement of Objects and Reasons of the Motor Vehicles Amendment Act, 1994 to understand the purpose behind the legislation. The Statement of Objects and Reasons and Preamble make it quite clear that the Legislature felt the compulsion to make special provisions against gangsterism and anti-social activities. While speaking about terrorism, the majority in Kartar Singh (supra) opined that it is much more rather a grave emergent situation created either by external forces particularly at the frontiers of this country or by anti-nationals throwing a challenge to the very existence and sovereignty of the country in its 7 (2003) 2 SCC 223 democratic polity. The learned Judges put it on a higher plane than public order disturbing the “even tempo of the life of community of any specified locality” as has been
stated by Hidayatullah, C.J., in Arun Ghosh v. State of West Bengal8. The present Act deals with gangs and gangsters to prevent organized crime. Section 2 of the Act is the dictionary clause. Section 2(b) defines the term “gang” and we think it apt to quote the relevant part ““Gang” means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities” After so defining, the legislature has stipulated the offences which are punishable under the Act, but they need not be referred to. The term “gangster” has been defined under Section 2(c) 8 (1970) 1 SCC 98 gangster” means a member or leader or organizer of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities.” Section 3 of the Act deals with penalty. It is apt to reproduce Penalty. – (1) A gangster, shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to ten years and also with fine which shall not be less than five thousand rupees: Provided that a gangster who commits an offence against the person of a public servant or the person of a member of the family of a public servant shall be punished with imprisonment of either description for a term which shall not be less than three years and also with fine which shall not be less than five thousand rupees.

Whoever being a public servant renders any illegal help or support in any manner to a gangster, whether before or after the commission of any
offence by the gangster (whether by himself or through others) or abstains from taking lawful measures or intentionally avoids to carry out the directions of any Court or of his superior officers, in this respect, shall be punished with imprisonment of either description for a term which may extend to ten years but shall not be less than three years and also with fine.” Section 5 of the Act deals with Special Courts and Section 5(1) provides that for the interest of speedy trial of offences under this Act, the State Government may, if it considers necessary, constitute one or more special courts. Section 7 deals with the jurisdiction of the Special Courts. Section 7(1) provides that notwithstanding anything contained in the Code, where a Special Court has been constituted for any local area, every offence punishable under any provision of this Act or any rule made there under shall be triable only by the Special Court within whose local jurisdiction it was committed, whether before or after the constitution of such Special Court. Sub-section (2) of Section 7 lays the postulate that all cases triable by a Special Court, which immediately before the constitution of such Special Court were pending before any court, shall on creation of such Special Court having jurisdiction over such cases, stand transferred to it. Section 8 deals with the power of Special Courts with respect to other offences. – (1) When trying any offence punishable under this Act a Special Court may also try any other offence with which the accused may, under any other law for the time being in force, be charged at the same trial. If in the course of any trial under this Act of any offence, it is found that the accused has committed any other offence under this Act or any rule thereunder or under any other law, the Special Court may convict such person of such other offence and pass any sentence authorized by this Act or such rule or, as the case may be, such other law, for the
punishment thereof.” Section 10 provides the procedure and powers of Special Courts and Section 11 provides for protection of witnesses. Section 12, the validity of which is under attack, Trial by Special Courts to have precedence. – The trial under this Act of any offence by Special Court shall have precedence over the trial of any other case against the accused in any other Court (not being a Special Court) and shall be concluded in preference to the trial of such other case and accordingly the trial of such other case shall remain in abeyance.” At this juncture, we may profitably recapitulate that it is the duty of the Court to uphold the constitutional validity of a statute and that there is always the presumption in favour of the constitutionality of an enactment. In this context, we may fruitfully refer to the decision in Charanjit Lal Chowdhury v. The Union of India and others wherein it has been accepted doctrine of American Courts, which I consider to be well founded on principle, that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.” In Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and others, this Court had ruled that there is always a presumption in favour of the constitutionality of an enactment and the burden is on him who challenges the same to show that there has been a clear transgression of the constitutional principles and it is the duty of the Court to sustain that there is a presumption of constitutionality and in doing so, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of the legislations. In State of Bihar and others v. Bihar Distillery Limited, the said principle was reiterated. In Burrakur Coal Co. Ltd. v. Union of India, Mudholkar, J., speaking for the
Constitution Bench, “Where the validity of a law made by a competent legislature is challenged in a court of law, that court is bound to presume in favour of its validity. Further, while considering the validity of the law the court will not consider itself restricted to the pleadings of the State and would be free to satisfy itself whether under any provision of the Constitution the law can be sustained. In Pathumma and others v. State of Kerala and others13, the seven-Judge Bench has opined “The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. It must take into consideration the changing trends of economic thought, the temper of the times and the living aspirations and feelings of the people. This Court while acting as a sentinel on the qui vive to protect fundamental rights guaranteed to the citizens of the country must try to strike a just balance between the fundamental rights and the larger and broader interests of society, so that when such a right clashes with the larger interest of the country it must yield to the latter.” Again in the said judgment, it has been obvious that the Legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution to bring about social reforms for the upliftment of the backward and the weaker sections of the society and for the improvement of the lot of poor people. The Court will, therefore, interfere in this process only when the statute is clearly violative of the right conferred on the citizen under Part III of the Constitution or when the Act is beyond the legislative competence of the legislature or such other grounds.” The said principles have been reiterated by the majority in another Constitution Bench in State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and others14. At this juncture, we think it condign to sit in a time machine and refer to the opinion expressed by Krishna Iyer, J., in R.S. Joshi, Sales Tax Officer, Gujarat and others v.
Ajit Mills Limited and another15: “A prefatory caveat. When examining a legislation from the angle of its vires, the Court has to be resilient, not rigid, forward-looking, not static, liberal, not verbal – in interpreting the organic law of the nation. We must also remember the constitutional proposition enunciated by the U.S. Supreme Court in Munn v. Illinois viz., ‘that courts do not substitute their social and economic beliefs for the judgment of legislative bodies’. Moreover, while trespasses will not be forgiven, a presumption of constitutionality must colour judicial construction.

These factors, recognized by our Court, are essential to the modus Vivendi between the judicial and legislative branches of the State, both working beneath the canopy of the Constitution.” We have referred to the aforesaid authorities for the sanguine reason that the submissions raised at the Bar are to be considered in the backdrop of the aforesaid “caveat”. The “Modus Vivendi” which needs a purposive and constructive ratiocination while engaged in the viceration of the provision, which draws its strength and stimulus in its variations from the Constitution, we have to see whether the provision trespasses the quintessential characteristics of the Organic Law and, therefore, should not be allowed to stand. Keeping the aforesaid enunciation in view, we shall presently proceed to deal with the stand and stance of both the sides. The first submission which pertains to the denial of speedy trial has been interpreted to Labor Board v. Jones & Laughlin, 391 US 1, 33-34-Corwin, Constitution of the USA, Introduction, p. XXXI) be a facet of Article 21 of the Constitution. In Kartar Singh (supra), the majority, speaking through Pandian, J., has expressed “The right to a speedy trial is not only an important safeguard to prevent undue and oppressive incarceration, to minimize anxiety and
concern accompanying the accusation and to limit the possibility of impairing the ability of an accused to defend himself but also there is a societal interest in providing a speedy trial. This right has been actuated in the recent past and the courts have laid down a series of decisions opening up new vistas of fundamental rights. In fact, lot of cases are coming before the courts for quashing of proceedings on the ground of inordinate and undue delay stating that the invocation of this right even need not await formal indictment or charge. The concept of speedy trial is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted. In this context, it may be noted that the constitutional guarantee of speedy trial is properly reflected in Section 309 of the Code of Criminal Procedure.”. The present provision is to be tested on the touchstone of the aforesaid constitutional principle. The provision clearly mandates that the trial under this Act of any offence by the Special Court shall have precedence and shall be concluded in preference to the trial of such other courts to achieve the said purpose. The legislature thought it appropriate to provide that the trial of such other case shall remain in abeyance. It is apt to note here that “any other case” against the accused in “any other court” does not include the Special Court. The emphasis is on speedy trial and not denial of it. The legislature has incorporated such a provision so that an accused does not face trial in two cases simultaneously and a case before the Special Court does not
linger owing to clash of dates in trial. It is also worthy to note that the Special Court has been conferred jurisdiction under sub-section (1) of Section 8 of the Act to try any other offences with which the accused may, under any other law for the time being in force, have been charged and proceeded at the same trial. As far as fair trial is concerned, needless to emphasise, it is an integral part of the very soul of Article 21 of the Constitution. Fair trial is the quit essentiality of apposite dispensation of criminal justice. In Zahira Habibulla H. Sheikh and another v. State of Gujarat and others, it has been held  The principle of fair trial now informs and energizes many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation peculiar at times and related to the nature of crime, persons involved—directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.” In the said case, emphasis was laid on the triangulation of the interest of the accused, the victim and the society and stress was further laid on the fact that it is the community that acts through the State and the prosecuting agencies and the interests of the society are not to be treated completely with disdain and as persona non grata.

In paragraphs 39 and 40 of the said judgment, Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it
may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.”

In Mohd. Hussain alias Julfikar Ali v. State (Government of NCT of Delhi)25, this Court observed that “speedy trial” and “fair trial” to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the right of the accused to fair trial. Unlike the right of the accused to fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. Same principle was reiterated in Niranjan Hemchandra Sashittal and another v. State of Maharashtra On a careful scrutiny of the provision, it is quite vivid that the trial is not hampered as the trial in other courts is to remain in abeyance by the legislative command. Thus, the question of procrastination of trial does not arise. As the trial under the Act would be in progress, the accused would have the fullest opportunity to defend himself and there cannot be denial of fair trial. Thus, in our considered opinion, the aforesaid provision does not frustrate the concept of fair and speedy trial which are the imperative facets of Article 21 of the Constitution. The next limb of attack pertains to scuttling of liberty of the person who is made an accused for an offence under the Act. There can never be any shadow of doubt that sans liberty, the human dignity is likely to be comatosed. The liberty of an individual cannot be allowed to live on the support of a ventilator. Long back in the glory of liberty, Henry Patrick, life Is so dear, or peace so sweet as to be purchased at the price of chains and slaver. Forbid it, Almighty God! – I
know not what course others may take, but, as for me, give me liberty or give me death. When the liberty of an individual is atrophied, there is a feeling of winter of discontent. Personal liberty has its own glory and is to be put on a pedestal in trial to try offenders, it is controlled by the concept of “rational liberty”. In essence, liberty of an individual HENRY, Patrick, Speech in the Virginia Revoluntionary Council, Richmond, 1175 in Henry, William Writ, Patrick Henry: Life Correspondence and Speeches (New York: Charles Scribner’s Sons, should not be allowed to be eroded but every individual has an obligation to see that he does not violate the laws of the land or affect others’ lawful liberty to lose his own. The cry of liberty is not to be confused with or misunderstood as unconcerned senile shout for freedom. It may be apt to add here that the protection of the collective is the bone marrow and that is why liberty in a civilized society cannot be absolute. It is the duty of the courts to uphold the dignity of personal liberty. It is also the duty of the court to see whether the individual crosses the “Lakshman Rekha” that is carved out by law is dealt with appropriately. In this context, we may profitably reproduce a passage from the judgment in Ash Mohammad v. Shiv Raj Singh alias Lalla Babu and another. We are absolutely conscious that liberty of a person should not be lightly dealt with, for deprivation of liberty of a person has immense impact on the mind of a person. Incarceration creates a concavity in the personality of an individual. Sometimes it causes a sense of vacuum. Needless to emphasise, the sacrosanctity of liberty is paramount in a civilised society. However, in a democratic body polity which is wedded to the rule of law an individual is expected to grow within the social restrictions sanctioned by law. The individual liberty is restricted by larger social interest and its deprivation must have due sanction of law.
In an orderly society an individual is expected to live with dignity having respect for law and also giving due respect to others’ rights. It is a well accepted principle that the concept of liberty is not in the realm of absolutism but is a restricted one. The cry of the collective for justice, its desire for peace and harmony and its necessity for security cannot be allowed to be trivialised. The life of an individual living in a society governed by the rule of law has to be regulated and such regulations which are the source in law subserve the social balance and function as a significant instrument for protection of human rights and security of the collective. It is because fundamentally laws are made for their obedience so that every member of the society lives peacefully in a society to achieve his individual as well as social interest. That is why Edmond Burke while discussing about liberty opined, “it is regulated freedom”.

From the aforesaid, it is quite clear that no individual has any right to hazard others’ liberty. The body polity governed by Rule of law does not permit anti-social acts that lead to a disorderly society. Keeping the aforesaid perspective in view, the submission of the learned counsel for the petitioner and the argument advanced in oppugnation by the learned counsel for the respondent are to be appreciated. It is urged that an accused tried under this Act suffers detention as the trial in other cases are not allowed to proceed. As far as other cases are concerned, there is no prohibition to move an application taking recourse to the appropriate provision under the Code of Criminal Procedure for grant of bail. What is stipulated under Section 12 of the Act is that the trial in other case is to be kept in abeyance. Special courts have been conferred with the power to try any other offence with which the accused under the Act is charged at the same trial. Quite apart from the above, the Act empowers the special
courts to grant bail to an accused under the Act though the provision is rigorous. Sections 19(4) and 19(5) deal with the same. Modified application of certain provisions of the Code Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made there under shall, if in custody, be released on bail or on his own bond unless: the Public Prosecutor has been given an opportunity to oppose the application for such release, and where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code.” The said provisions are akin to the provisions contained in Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The provision under Section 37 of the NDPS Act, though lays conditions precedent and they are in addition to what has been stipulated in the Code of Criminal Procedure, yet there is no deprivation of liberty. Be it noted, a more stringent provision is contained in MCOCA under Section 21 (5). It reads as under:- Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the court that he was on bail in an offence under this Act, or under any other Act, on the date of the offence in question.” A three-Judge Bench in State of Maharashtra v. Bharat Shanti Lal Shah and Other dealing with said facet has opined As discussed above the object of MCOCA is to prevent the organized crime and, therefore, there could be reason to deny consideration of grant of bail if one has committed a similar offence once again after being released on bail but the same consideration cannot be extended to a person who commits an offence under some other Act, for commission of an offence
under some other Act would not be in any case in consonance with the object of the Act which is enacted in order to prevent only organized crime.” Thereafter, the learned judges observed that the expression “or under any other Act” in the provision being discriminatory was violative of Articles 14 and 21 of the Constitution. Such a provision is absent in Section 19 of the Act. Thus, there being a provision for grant of bail, though restricted, we are disposed to think that the contention that the accused is compelled to languish in custody because of detention under the Act does not deserve acceptation and is, accordingly, negatived.

The next submission of the learned counsel is that it is in the nature of preventive detention as is understood under Article 22(4) of the Constitution of India. The said contention is to be taken note of only to be rejected, for the concept of preventive detention is not even remotely attracted to the arrest and detention for an offence under the Act. The next proponent, as noted, pertains to the violation of the equality clause as enshrined under Article 14 of the Constitution. Mr. Garg has endeavoured to impress upon us that the accused who is only tried by other courts gets the benefit of speedy trial whereas the accused tried under this Act has to suffer because trial in other courts are kept in abeyance. We have already expressed our view that the concept of speedy and fair trial is neither smothered nor scuttled when the trial in other courts are kept in abeyance. As far as Article 14 is concerned, we do not perceive that the procedure provided in the Act tantamounts to denial of fundamental fairness in trial. It does not really shock the judicial conscience and by no stretch of imagination, it can be said to be an anathema to the sense of justice. It is neither unfair nor arbitrary. It is apposite to note here that there is a distinction between an accused who faces trial in other courts and the
accused in the special courts because the accused herein is tried by the Special Court as he is a gangster as defined under Section 2(c) of the Act and is involved in anti-social activities with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person. It is a crime of a different nature. Apart from normal criminality, the accused is also involved in organized crime for a different purpose and motive. The accused persons under the Act belong to altogether a different category. The legislature has felt that they are to be dealt with in a different manner and, accordingly, the trial is mandated to be held by the special courts in an expeditious manner. The intention of the legislature is to curb such kind of organized crimes which have become epidemic in the society. In Kartar Singh (supra), the majority has said, “Legislation begins where Evil begins”. The legislature, as it seems to us, being guided by its sacrosanct duty to protect the individual members of society to enjoy their rights without fear and see that some people do not become a menace to the society in a singular or collective manner, has enacted such a provision. In this context, we may refer with profit to the authority in The Works Manager, Central Railway Workshop, Jhansi v. Vishwanath and others30, wherein a three-Judge Bench, though in a different context, has observed that certain types of enactments are more responsive to some urgent social demands and also have more immediate and visible impact on social vices by operating more directly to achieve social reforms. We have referred to the said observations only to highlight how the legislature in a welfare State immediately steps in for social reforms to eradicate social vices. Similarly, sometimes it is compelled to take steps to control the frenzied criminal action of some anti-social people. In the case at hand it can be stated with certitude that the legislature has felt that there should be curtailment of the
activities of the gangsters and, accordingly, provided for stern delineation with such activities to establish stability in society where citizens can live in peace and enjoy a secured life. It has to be kept uppermost in mind that control of crime by making appropriate legislation is the most important duty of the legislature in a democratic polity, for it is necessary to scuttle serious threats to the safety of the citizens. Therefore, the legislature has, in actuality, responded to the actual feelings and requirements of the collective. Thus, the accused under the Act is in a distinct category and the differentiation between the two, namely, a person arrayed as an accused in respect of offences under other Acts and an accused under the Act is a rational one. It cannot be said to be arbitrary. It does not defeat the concept of permissible classification. The majority in Kartar Singh (supra) has expressed “The principle of legislative classification is an accepted principle whereunder persons may be classified into groups and such groups may differently be treated if there is a reasonable basis for such difference or distinction.

The rule of differentiation is that in enacting laws differentiating between different persons or things in different circumstances which govern one set of persons or objects such laws may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different set of circumstances.” Tested on the touchstone of the above stated principles, the irresistible conclusion is that the classification is in the permissible realm of Article 14 of the Constitution. Therefore, the submission that Section 12 invites the wrath of Article 14 of the Constitution is sans substratum and, accordingly, we have no hesitation in repelling the same and we so do. In view of the
aforesaid analysis, we uphold the constitutional validity of Section 12 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 as it does not infringe any of the facets of Articles 14 and 21 of the Constitution of India. Ex-consequenti, the writ petition, being devoid of merit, stands dismissed.

Dipak Shubhashchandra Mehta Versus C.B.I. & Anr\textsuperscript{152}

- This appeal is directed against the judgment and order dated 20.10.2011 passed by the High Court of Gujarat at Ahmedabad in Criminal Misc. Application No. 14224 of 2011 whereby the High Court rejected the application for regular bail filed by the appellant herein. The appellant herein is the Joint Managing Director of Vishal Exports Overseas Ltd., a Public Limited Company (hereinafter referred to as “the Company”) incorporated in the year 1988 as a partnership firm which was converted into a Public Limited Company in 1995 under the provisions of Chapter IX of the Companies Act, 1956. The Company is engaged in the business of import and export of diverse commodities including agricultural products and diamonds. According to the appellant, the Company was a Government of India recognized Four Star Trading House with a turnover of about Rs.3935 crores in the year 2005-2006. It is also his claim that the Company has been accredited with many awards and was ranked 1st in India under the merchant exporter category in the years 2003-04 and 2005-06. Due to non-payment of advances from various banks, complaints were filed against the Company as well as the promoters and Directors. In the year 2008, Punjab National Bank lodged an FIR with CBI bearing No. RC-I(E)/2008/BSFC, Mumbai. In the said case, only Pradip Shubhashchandra Mehta (A-3) was arrested. Remand was not

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granted by the Special CBI Court at Ahmedabad and bail was granted within a span of one day. The appellant herein was not arrested in this case and formal bail was granted to him on filing charge sheet. In the year 2009, UCO Bank lodged an FIR with the CBI bearing No. RC 12(E)/2009 in which charge sheet was submitted on 15.11.2010 and the appellant was arrested on 1.11.2010 and was released on temporary bail for various durations. Vijaya Bank had also lodged an FIR with the CBI bearing No. RC11(E)/2008 and submitted charge sheet on 26.06.2010 in which the appellant herein was arrested after filing of the charge sheet, he was also granted bail. State Bank of Hyderabad has also lodged an FIR and the same is under investigation. No charge sheet has been submitted so far. State Bank of India and 17 other banks filed O.A. No. 11 of 2008 before the Debts Recovery Tribunal (DRT), Ahmedabad seeking recovery of amount given by way of credit facilities under consortium arrangement to the Company. Ad-interim orders have been passed on 28.02.2008 to secure the interest of the banks and to ensure that the litigation does not become meaningless by the time final order is passed. On 19.01.2010, the appellant herein filed Civil Suit No. 145 of 2010 seeking damages to the tune of Rs.786 crores against the informant Andhra Bank and other banks before the Ahmedabad City Civil Court. The Andhra Bank, Zonal Office, Mumbai also lodged an FIR on 19.01.2010 which was registered by the CBI BS & FC/MUM bearing No. 1(E)/2010 for commission of offences punishable under Sections 406, 420, 467, 468, 471 read with Section 120B of the Indian Penal Code, 1860 (in short ‘IPC’). In connection with the said FIR, the appellant herein was arrested on 31.03.2010 and remanded to police custody till 03.04.2010 and thereafter in the judicial custody. The appellant was granted temporary bail on three occasions on medical ground. After completing the investigation, the CBI submitted
charge sheet on 10.06.2010 in which the appellant was arrayed as accused No.4. On 31.08.2010, the appellant preferred an application for bail after charge sheet was filed before the Special Court vide Criminal Misc. Application No. 141 of 2010 but the same was dismissed. Being aggrieved by the said order, the appellant filed Criminal Misc. Application No. 11415 of 2010 before the High Court for regular bail in connection with the FIR lodged by Andhra Bank, Zonal Office Mumbai bearing No. 1(E)/2010 which was dismissed by the High Court on 19.10.2010. After investigation in RC.12(E)/2009 lodged by UCO Bank charge sheet was submitted on 15.11.2010 and the appellant was arrested on 01.11.2010 and he was released on temporary bail. Against the order dated 19.10.2010 passed by the High Court, the appellant filed S.L.P.(Crl.)No. 83 of 2011 before the Court and the same was disposed of on 29.04.2011 directing the special Court to take all endeavour for an early completion of the trial. As there was no progress in the trial, the CBI filed a supplementary charge sheet on 02.02.2011 which was served on all the accused including the appellant herein only on 02.08.2011. Since the trial did not come to an end, the appellant filed Criminal Misc. Application No. 195 of 2011 for regular bail before the Special Court. In the meanwhile, Additional Chief Judicial Magistrate, vide order dated 15.09.2011 in Misc. Application No. 17/2011 in Spl. Case No. 03/2010 granted temporary bail up to 20.10.2011 to the appellant herein on the ground of medical exigencies. Again on 19.10.2011, considering the health of the appellant, the Special Court extended the temporary bail till 30.11.2011. Vide order dated 27.09.2011, Special Court rejected the application for regular bail filed by the appellant herein. The appellant filed an application being Criminal Misc. Application No. 14224 of 2011 before the High Court for regular bail but the same was rejected. Again
the said application, the appellant has filed the above appeal by way of special leave before this Court. Heard Mr. Mukul Rohtagi, learned senior counsel for the appellant and Mr. P.P. Malhotra, learned Addl. Solicitor General for the CBI. The only point for consideration in this appeal is whether the appellant herein has made out a case for regular bail and whether the High Court is justified in dismissing his bail application. We are conscious of the fact that this Court should not ordinarily, save in exceptional cases, interfere with the orders granting/refusing bail by the High Court. We are also provided with the facts and figures about the appellant’s involvement in similar other proceedings. In the case on hand, out of four accused, A-1 is the Company and the appellant-A-4 is the Joint Managing Director of the Company. It is not in dispute that A-2 and A-3 were granted bail by the High Court on medical grounds. Mr. Rohtagi, learned senior counsel for the appellant apart from highlighting that the appellant-A-4 is entitled for regular bail and also submitted that he be considered on medical grounds because of his various ailments as certified by leading doctors including the Medical Officer, Central Jail Dispensary, Ahmedabad.

Insofar as the merits of the claim of the appellant is considered, it is useful to refer the recent decision of this Court in Sanjay Chandra vs. Central Bureau of Investigation, 2012 (1) SCC 40. Since in this decision, all the earlier decisions of this Court relating to grant of bail in a matter of this nature have been considered, we feel that no other earlier decisions need be referred to. Those appeals were directed against the common judgment and order of the learned Single Judge of the High Court of Delhi dated 23.05.2001 in Sanjay Chandra vs. CBI by which the learned Single Judge refused to grant bail to the appellant-accused therein. The allegations
against those accused appellants were that they entered into a criminal conspiracy for providing telecom services to otherwise ineligible companies and by their conduct, the Department of Telecommunications (DoT) suffered huge loss. The learned Special Judge, CBI, New Delhi rejected the bail applications filed by them by order dated 20.04.2011. The appellants therein moved applications before the High Court under Section 439 of the Code of Criminal Procedure, 1973. The same came to be rejected by the learned Single Judge by his order dated 23.05.2011. Aggrieved by the same, the appellants approached this Court by filing appeals. After considering the entire materials, arguments of the various senior counsel as well as the Addl. Solicitor General for the CBI and marshalling the earlier decisions of this Court and after finding that the trial may take considerable time and the appellants who are in jail have to remain in jail longer than the period of detention had they been convicted and also keeping in mind the fact that the accused are charged with economic offences of huge magnitude, ultimately this Court granted bail to all the appellants by imposing severe conditions. It is also relevant to refer the order passed by this Court on 29.04.2011 in SLP (Criminal) No. 83 of 2011 filed by the appellant herein earlier. This Court directed as under: “We have considered the rival contentions and also perused all the relevant documents. In view of the fact that the other two accused, namely, A-2 and A-3 were released mainly on the ground of illness and old age and of the assurance by the learned Additional Solicitor General that the trial will be completed within a period of three months, we are not inclined to accede to the request of the petitioner. However, we make it clear that for any reason if the trial continues beyond the period assured by the learned Additional Solicitor General, the petitioner is free to move bail application before the Special Court. In such event the Special Court
is permitted to consider it in accordance with law. We also direct the Special Court to take all endeavour for an early completion of the trial as suggested by the learned Additional Solicitor General. Though on the last date of hearing, learned Addl. Solicitor General assured this Court that the trial will be completed within a period of three months, in view of various reasons considering the magnitude of the issues involved, frequent absence of the accused at the hearing dates due to various reasons including health grounds, filing of petition for discharge and also the pressure of work on the Special Court hearing among other important matters, the fact remains that the trial could not be concluded. In fact, it is pointed out that though the prosecution has submitted charge sheet the charges have not been framed due to various reasons as mentioned above. We have already pointed out that insofar as the present case is concerned among the four accused A-1 is a Company, A-2 and A-3 were granted bail on medical grounds. According to the present appellant i.e A-4, he was arrested on 31.03.2010 by the CBI and was remanded to police custody for three days. Since 03.04.2010, he is in the judicial custody at Sabarmati Central Jail, Ahmedabad and on 15.09.2011, he was granted interim bail up to 20.10.2011 and again on 19.10.2011, considering his health conditions, the Special Court extended his interim bail till 30.11.2011. As stated earlier, the CBI has completed the investigation and submitted the charge sheet on 10.06.2010 and the offences alleged in the charge sheet are of the years 2006 and 2007. Mr. Rohtagi, learned senior counsel, after taking us through various proceedings by the Civil Court as well as DRT under SARFESI Act submitted that entire properties of the appellant and their companies/firms were attached by the orders of the Court/Tribunal. According to him, before entering into transaction with the banks, all those properties have been mortgaged and as on date, the appellant cannot
do anything with those properties without the permission of the Court/Tribunal. In such circumstances, he submitted that there will not be any difficulty in realising the money payable to the banks, if any. In addition to the above factual information, it was pointed out that after the order of this Court, on 29.04.2011 there is no progress in the trial. It is also pointed out that the trial has not even commenced inasmuch as a supplementary charge sheet has been served upon the appellant herein only on 02.08.2011. It is further pointed out that the charge has not been framed till this date. It is also brought to our notice that prosecution has relied upon 286 documents and listed 47 witnesses in the charge sheets filed by it. In addition to the above information, Mr. Rohtagi has also pointed out that at the time of arrest of the appellant on 31.03.2010, he was taken to the hospital and was diagnosed for hypertension and acidity. According to him, no other ailment was noted by the hospital in the discharge card. While so, when he was in custody since 31.03.2010, the appellant has suffered 40 per cent permanent partial disability in his left arm as a result of surgery for abnormal bone protrusion. It is also highlighted that on account of uncontrolled high blood pressure while in custody the appellant has suffered 30 per cent blindness in his right eye and has undergone a surgery for vitreous hemorrhage. It is further pointed out that the hemorrhage having re-occurred, the doctors have advised a second surgery to save his eyes. However, according to him, the said surgery could not be performed due to continuing uncontrolled high blood pressure and resultant recurring bleeding in the vessel even after first surgery. It is also pointed out that after passing of order by this Court on 29.04.2011, the appellant while in custody has contracted obstructive jaundice requiring long intensive treatment. As a result of such obstructive jaundice, the appellant is also unable to undergo other required surgeries.
Learned senior counsel has also pointed out that the appellant is now suffering from further disability of loss of hearing which can be corrected only through surgery. In support of the above claim, various certificates issued by doctors of private hospitals have been placed on record. In addition to the same, Mr. Rohtagi by drawing our attention to the certificate dated 07.08.2011 issued by the Central Prison Hospital, Sabarmati, Ahmedabad stated that even according to the Medical officer of the Central Jail Dispensary, the appellant is suffering from various ailments as mentioned in the certificate which reads as under: Apart from the above certificate, the very same Medical Officer, Central Jail Dispensary, Ahmedabad has issued another Certificate on 08.09.2011. After reiterating the very same complaints finally he concluded “he needs treatment from the Specialist, Super Specialist, Cardiologist and Gastroenterologist & Ophthalmologist for his multiple problems”.

Information by a Medical Officer of the Central Jail Dispensary, Ahmedabad supports the claim of the appellant about his health condition. No doubt, Mr. P.P. Malhotra, learned ASG by drawing our attention to various details from the counter affidavit filed on behalf of the CBI submitted that in view of magnitude of the financial involvement by the appellant with the nationalised banks, it is not advisable to enlarge him on bail. We have gone through all the details mentioned in the counter affidavit of the Senior Superintendent of Police, CBI, and Bank Securities and Fraud Cell, Mumbai. The appellant has also filed rejoinder affidavit repudiating those factual details. At this juncture, it is unnecessary to go into further details. In the earlier order, we have noted the assurance of the ASG for completion of the case within three months. Admittedly, the same was not fulfilled due to various reasons. It is also not in dispute that
though the charge sheet and additional charge sheet were submitted to the Court, the same have not been approved and framed. In the meanwhile, apart from absence of some of the accused on various dates, due to some reasons or other including medical grounds, the appellant herein has also filed a petition for ‘discharge’. Further, even in the counter affidavit filed by the CBI, it is stated that the accused persons moved applications under Section 239 of the Code of Criminal Procedure, 1973 for discharge and the same are pending for hearing and disposal and further the Madhao Merchantile Bank case is going on day-to-day basis before the Special CBI Court and in addition to the same, Sohrabuddin Fake Encounter case is also pending for trial before the same Court. It is clear that the said Special CBI Court is overburdened and in view of the voluminous materials the prosecution has collected, undoubtedly the trial may take a longer time. The Court has taken the view that when there is a delay in the trial, bail should be granted to the accused. Vide Babba vs. State of Maharashtra, (2005) 11 SCC 569, Vivek Kumar vs. State of U.P., (2000) 9 SCC 443.] But the same should not be applied to all cases mechanically. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted, particularly, where the accused is charged of having committed a serious offence. The Court granting bail has to consider, among other circumstances, the factors such as a) the nature of accusation and severity of punishment in case of conviction and the nature of supporting evidence; b) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant and; c) prima facie satisfaction
of the court in support of the charge. In addition to the same, the Court while considering a petition for grant of bail in a non-bailable offence apart from the seriousness of the offence, likelihood of the accused fleeing from justice and tampering with the prosecution witnesses, have to be noted. Considering the present scenario and there is no possibility of commencement of trial in the near future and also of the fact that the appellant is in custody from 31.03.2010, except the period of interim bail, i.e. from 15.09.2011 to 30.11.2011, we hold that it is not a fit case to fix any outer limit taking note of the materials collected by the prosecution. The Court has repeatedly held that when the undertrial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated. As posed in the Sanjay Chandra’s case (supra) we are also asking the same question i.e. whether the speedy trial is possible in the present case for the reasons mentioned above. As observed earlier, we are conscious of the fact that the present appellant along with the others are charged with economic offences of huge magnitude. At the same time, we cannot lose sight of the fact that though the Investigating Agency has completed the investigation and submitted the charge sheet including additional charge sheet, the fact remains that the necessary charges have not been framed, therefore, the presence of the appellant in custody may not be necessary for further investigation. In view of the same, considering the health condition as supported by the documents including the certificate of the Medical Officer, Central Jail Dispensary, we are of the view that the appellant is entitled to an order of bail pending trial on stringent conditions in order to safeguard the interest of the CBI. In the light of what is stated above, the appellant is ordered to be released on bail on executing a bond with two solvent sureties, each in a sum of Rs. 5 lakhs to the satisfaction of the Special Judge, CBI, the appellant
shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him to disclose such facts to the Court or to any other authority. The appellant shall remain present before the Court on the dates fixed for hearing of the case, for any reason due to unavoidable circumstances for remaining absent he has to give intimation to the Court and also to the concerned officer of CBI and make a proper application that he may be permitted to be present through counsel; the appellant shall surrender his passport, if any, if not already surrendered and in case if he is not a holder of the same, he shall file an affidavit; In case he has already surrendered the Passport before the Special Judge, CBI, that fact should be supported by an affidavit. Liberty is given to the CBI to make an appropriate application for modification/recalling the present order passed by us, if the appellant violates any of the conditions imposed by this Court.

**BEENU RAWAT & ORS VS. UNION OF INDIA & ORS.**

- The petitioners claim to be young volunteers of ‘Aam Aadmi Party’ (AAP) engaged in selfless work for the improvement of democratic institutions of this country and also fight for justice. They have approached this Court under Article 32 of the Constitution of India seeking the following reliefs: Issue a writ of mandamus or any other writ or direction to order an independent investigation by a Special Investigation Team into the abovementioned incident of police atrocities which took place on 19.06.2013 at Gokul Puri Police Station against the petitioners and if such allegations are found correct, pass further consequential and necessary directions, including initiation of criminal prosecution as well as disciplinary proceedings against the police officers.

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of the Delhi Police found involved and also against those senior police officers at whose behest this vindictive act of atrocity was done; issue a writ of mandamus or any other writ or direction to award monetary compensation to the petitioners for their illegal arrest and torture by the Delhi Police which has resulted in gross violation of their fundamental rights to live with dignity as guaranteed under Article 21 of the Constitution of India; pass such other and further orders as this Hon’ble Court may deem fit and proper on the facts and in the circumstances of the case.” The incident of 19.06.2013 at Gokal Puri Police Station in Delhi occurred in course of a protest by the volunteers of (AAP) at Gokal Puri Police Station since morning hours. The protestors wanted registration of an FIR in respect of an alleged occurrence of rape of a poor woman by two persons in Bhagirathi Vihar. Allegedly the police was reluctant to register the FIR and hence a number of volunteers including the petitioners joined the protest. The FIR was ultimately registered around 2.30 p.m. and the protestors were informed of the same. A demand was made for a copy of the FIR. According to respondents the copy could not be given to others because of the nature of the alleged crime which requires that name of the victim be not disclosed. According to petitioners the copy of the FIR was not given even to victim’s husband. It is the case of the petitioners that when they were planning to wind up the protest, they were suddenly rounded up by a large number of policemen and mercilessly beaten by them. The manner of chase and beating by lathi gave an impression to the petitioners that the police action was not to disperse the petitioners but to teach them a lesson. As per allegations, the police also used abusive language and told the protestors that they will be taught a lesson so that they do not indulge in such kind of protests in future. Initially, police arrested seventeen volunteers but three of them
were let off as they were minor girls. Subsequently, petitioner Nos. 2 and 10 were also taken into custody and allegedly beaten in police custody although they claimed that they had come to the police station later only to enquire about the incident. The nineteen petitioners claim to have sustained serious injuries on head, back, arm and legs. One of them has sustained fracture in lower ulna but he managed to run away. According to the case of the petitioners the police had indulged in unlawful use of force and inflicted injuries before arrest and also during custody, leading to injuries to the petitioners; the arrest was unlawful which is sought to be justified by fabricated evidence for rioting etc.; by breaking window glasses and tearing of some papers in the police station.

According to the petitioners a serious case was attempted to be made out through subsequent statement of one ASI of police, Ms. Sushila. There is no such incident mentioned in the FIR bearing no. 251/2013 dated 19.06.2013 registered at P.S. Gokul Puri and even before the learned Metropolitan Magistrate she had alleged that only her scarf (dupatta) was pulled by protestors. The petitioners have claimed that the Commissioner of police, Delhi, has made an incorrect statement that Delhi police has videos of protestors vandalizing the police station. To decide the case it is not necessary for this Court to delve deep into allegations made by the petitioners or those against them by the police which has lodged a criminal case of rioting etc. as noted above. This is because there is no prayer made in this writ petition seeking any kind of intervention in the investigation of police case registered against the petitioners. Even the first prayer made by the petitioners is to order an independent investigation by a Special Investigation Team (SIT) into the incident of 19.06.2013 to find out the truthfulness of allegations of police atrocities
and if such allegations are found right then further consequential orders be passed for criminal prosecution as well as disciplinary action against the concerned police officers. Hence, the issue before the Court is a limited one requiring a careful appraisal of relevant facts and circumstances for coming to a conclusion as to whether the petitioners have made out a case for issuing a direction to order an independent investigation into the alleged incident of 19.06.2013 at Gokal Puri Police Station, Delhi or not. In this background a look at the counter affidavit on behalf of the respondents discloses that the version given by the police attempts to portray a picture that when the prosecutrix or the victim of alleged rape came to the police station along with her husband at about 9.00 a.m. on 19.06.2013, the S.H.O. immediately deputed a lady A.S.I., Ms. Sushila to investigate into the matter and a female counselor, Mrs. Dinesh Panchal from a local NGO was also called for the aid of prosecutrix. A Daily Diary entry to this effect bearing no.11-A was made at 9.10 a.m. and a statement of the victim was recorded by the lady A.S.I. in presence of counselor from the NGO. On that basis FIR No. 250/13 was registered under Section 376-D/506 of the Indian Penal Code at 10.05 a.m. and thereafter the victim was sent for medical examination to Guru Teg Bahadur Hospital, New Delhi. The fact of lodging of the FIR was conveyed to the protestors but still by 12.00 noon their number increased to 100-125 which included 20-25 women. A lady ASI was deputed to control the female protestors. Demand for getting a copy of FIR was declined by the S.H.O. with a view not to reveal the identity of the victim. It is found that the counter version does not deny or even refer to the presence of husband of the victim and there is no disclosure of any reason as to why copy of the FIR was not supplied to the victim or her husband. Had that been done, the bone of contention between the rivals could have
been totally taken care of. According to the counter affidavit the protestors were all around the compound of the police station and had also entered the corridor thus blocking the entry and exit of the officials and obstructing them in performing their official duties. The protestors climbed the compound walls and shouted slogans. They abused the police officials and some of them pelted stones causing damage to building windows and vehicles. The police staff was trapped inside the police station being out-numbered by the large number of protestors. The violent acts of the crowd allegedly caused injuries to five police personnels. Their injury reports have been annexed as Annexure R.1 (colly). The lady A.S.I. engaged in controlling the women protestors was manhandled by the crowd and sustained injuries. To support the claim that protestors had entered the premises, blocked entry to the police station, pelted stones and damaged public property, some photographs have been brought on record as Annexure R.2 (colly). The counter affidavit is crucial as it relates to the most significant part of the incident in which injuries were caused to some of the petitioners leading to their arrest. As the crowd had become uncontrollable, the SHO, PS Gokul Puri reported the situation to the senior officers and asked for the deployment of additional police force from adjoining Police Stations, PS Jyoti Nagar and PS Bhajan Pura, to control the crowd. With the help of the additional force, efforts were made to disperse the crowd and help the officials trapped inside the Police Station Gokul Puri. Arrival of the additional force from the adjoining police stations created panic amongst the protestors and they started dispersing in various directions. Some of the protestors who had climbed the walls of the Police Station fell down on the vehicles parked by the wall and sustained injuries on their own. There was no lathi charge or any act of beating of the protestors as wrongly alleged by the Petitioners.”
has also been disclosed in the counter affidavit that till 3.30 p.m. eighteen persons were apprehended on the spot which included three minor girls, four women and eleven men. FIR was registered against the protestors bearing no.251/13 at 5.35 p.m. The three minor girls were let off at about 7.00 p.m. when their parents arrived. The remaining fifteen were however arrested. They were sent for medical examination to Ram Manohar Lohiya Hospital and then produced before the Duty Magistrate at 2.20 a.m. in the morning and then sent to Tihar jail. Petitioner No. 10-Narender Rawat, brother of minor petitioner no.1 Beenu Rawat and also petitioner no.4-Pushpa is claimed to have been arrested in the morning of 20.06.2013 because he had escaped on the previous date. Petitioner No.17 along with four other persons had also allegedly escaped and they were arrested on 21.08.2013. In paragraph 8 of the counter affidavit a submission has been advanced that petitioners are trying to mislead this Court by making wrong allegations that police used excessive force against them. The defense in this paragraph is that the protestors had outnumbered and over run the police officers at police station Gokal Puri, obstructing them from performing their official duties and caused damage to public property on the pretext of helping a rape victim. According to respondents, there was no lapse on behalf of the police to help the prosecutrix and the police resorted to the minimal use of force only enough to disperse the large violent crowd and safeguard the police personnel trapped inside the police station. As indicated earlier, at the present stage when the criminal case is under investigation it will not be proper for this Court to finally decide any issue relating to that case. The pendency of investigation in that case notwithstanding, this Court has to decide the limited issue whether petitioners have made out a case that their fundamental right to live with human dignity guaranteed by Article
21 of the Constitution of India has been invaded, atleast prima facie, so as
to direct for an independent investigation/enquiry so that the perpetrators
may not get away scot free if petitioners’ case is found true. In part III of
the Constitution of India Article 21 enjoys special status. Right to life and
Right to liberty are of historical importance. Rise of modern democratic
state is attributable to a long drawn battle waged by ordinary people
against the sovereign power. The law is now well settled that the State or
its functionaries cannot deprive any person of his life which includes right
to live with human dignity except in accordance with law. The maximum
threat to such fundamental right is perceptible when any kind of protest
or agitation is directed against the police force for reasons which are self-
evident. Police is licensed to carry arms for protecting the people. This
itself creates a situation where the power of arms may be misused under
the mistaken belief in the absolutism of the police power or on account of
lack of sensitivity to the democratic rights of the people to register
peaceful protest, against wrongs, especially that of public functionaries.
The submissions on behalf of respondents that nobody can be permitted to
paralyse the functioning of police or other State institutions in a name of
public protest can not be rejected off hand because it is only a corollary of
the right to protest peacefully; proverbially the other side of the coin
which corroborates the well accepted principle that rights without duties
tend to degenerate into license for misuse of rights. In a given case, the
facts may lead to such conclusions. Hence facts and circumstances in such
cases need to be scrutinized carefully. In the present case also the relevant
facts require to be noticed in order to arrive at a conclusion whether the
petitioners’ prayers deserve to be allowed or not. The petitioners are
ordinary persons with clean antecedents. The injuries caused to the
petitioners in the incident have not been denied as they are supported by
medical reports. So far as injuries to some of the police officers are concerned, instead of forming our own opinion, we may only refer to the order dated 22.06.2013 While granting bail to 11 applicants, in learned Judge had noted that the MLCs of five police officials indicate that they have suffered from minor injuries which were in the form of scratches and abrasion only and the FIR does not indicate that the lady police officials were assaulted or any attempt to outrage their modesty was made by the accused persons. Since a claim was made that unlawful acts of the protestors had been recorded through videography which was available with the respondents, learned Additional Solicitor General Sidharth Luthra made arrangements for screening of the video tape for our perusal. The video footage shown to us revealed that none of the protestors were carrying any arms or even brickbats in course of the protest. The initial part of the incident discloses lack of any bitterness and almost a friendly atmosphere. Thereafter, when copy of the FIR was shown from a distance but not made available to anyone, the slogans increased and the tone could be perceived by some persons as irritating. Barring some protestors rest were pushed out of the gate of police station without any resistance or any untoward incident. The crowd outside the gate apparently did not disperse. The last part of the video footage fleetingly shows use of lathis by the police men upon the protestors. Thereafter, the recording was stopped and appears to have been resumed after lapse of sometime to show some broken glass panes, brickbats in very limited number and some broken spectacles lying on the ground, a grim reminder of use of force. Learned senior counsel for the petitioners Mr. Shanti Bhushan has relied upon some past incidents, specially one relating to unfortunate death of a police constable in the course of demonstration against the gang rape to a paramedical student “Damini” in December, 2012, followed by
another unfortunate case of a five years’ old victim “Gudiya” which led to protest by members of AAP and in course of the same petitioner no.1 was slapped by an Assistant Commissioner of Police of Delhi force which led to suspension of the said ACP. He also referred to some allegations against the erstwhile Delhi Police commissioner. On the basis of those incidents and allegation it was submitted that Delhi police cannot be relied for fair investigation in a case of present nature involving members of ‘AAP’ and therefore the Court should order for fair investigation by an independent agency. On the other hand, Mr. Luthra submitted that police itself acted fairly and did not submit charge-sheet against any of the accused persons arrested for causing death of constable Subhash Tomar.

He pointed out that the concerned ACP who had slapped petitioner No.1 was placed under suspension. According to him the allegations that the erstwhile Delhi Police Commissioner was close to a white collared criminal, has no substance and that matter cannot have any effect upon the investigation of the present incident. In our considered view it is not necessary to examine the effect of earlier incidents for the purpose of deciding the present writ petition. There is no dispute that petitioners have received injuries but according to counter affidavit, these were due to some of the protestors falling down on the vehicles parked along the walls of the compound and there was no lathi charge or any act of beating of the protestors. Such statement in paragraph 5 of the counter affidavit cannot be accepted in view of the last part of the video footage already noted earlier. A glimpse of action taken by the police is available of the counter affidavit wherein it is claimed that Police resorted to minimal use of force which was only enough to disperse a large violent crowd and safeguard the police personnel. No part of the video footage shows the
crowd to be very large or indulging in any physical violence. Even if this version in the counter affidavit is accepted in part, one is left to wonder why the petitioners who had injuries on their bodies had to be arrested instead of allowing them to disperse with the crowd which was allegedly large and violent. It is also intriguing as to why the FIR bearing No.251/13 for rioting etc. was registered at 5.35 p.m. after eighteen persons were apprehended at 3.30 p.m. and not before their arrest if they had vandalized the police station and caused damage to the public property. In the light of the aforesaid discussions and the fact that the video footage recorded at the instance of the police does not show acts of rioting or any arms or brickbats in the hands of the protestors and the recording was stopped as soon as police started using lathis upon the protestors, we are left with no option but to hold, at least prima facie, that in the incident in question, peaceful protestors were subjected to beatings by lathis etc. by the police force which included policemen from the concerned police station as well as force called from adjoining police station, P.S. Jyoti Nagar and P.S. Bhajanpura. The counter version of the respondents that the petitioners indulged in rioting and damaged public property is neither supported by photographs contained in Annexure R.2 (colly) nor by the video footage shows to this Court. In that view of the matter, the whole incident 19.06.2013 at Gokul Puri Police Station, District North-East, Delhi requires to be investigated/enquired by an independent agency or by a Special Investigation Team. Considering the possibility of our arriving at this opinion we had requested learned counsel for the rival parties to provide us proposals containing names of some persons who could be entrusted with conducting investigation in the said incident. On behalf of the petitioners two names have been proposed Sh. I.C.Dwivedi, IPS (RTD.), Former Director General of Police, Uttar
Pradesh, Address: 9/26, Vishal Khand, Gomati Nagar, Lucknow. 2. Sh. N.Dilip Kumar, IPS (Retired) Special Commissioner Delhi Police also worked as Joint Commissioner of police (Vigilance) Delhi Police Worked in CBI for seven years On the other hand, on behalf of the respondents only a letter addressed to Sh. Sidharth Luthra, leaned Additional Solicitor General along with copy of an order dated 31.10.2013 issued from the office of Commissioner of Police, Delhi, has been submitted to us to show that since during the course of hearing of this matter this Court had expressed the need for an impartial or fair investigation by some other competent setup, the Commissioner of Police Delhi has approved for formation of a Special Investigation Team headed by Sh. Bhisham Singh DCP/Crime to work under close supervision of Joint Commissioner of Police, Crime, Delhi. So far as investigation of the FIR No. 251/13 is concerned, in our considered view it has rightly been transferred from police station Gokal Puri to a Special Investigation Team. However that can not take care of the petitioners’ grievances that they have been subjected to excessive use of force and abuses etc. and that the force used was not at all justified and hence they have been deprived of their fundamental right to a life of dignity. In view of our prima facie findings noted above, we are of the view that the grievances of the petitioners require investigation by an authority having statutory jurisdiction in such matters. If the State had itself suggested names of the persons who could constitute Special Investigation Team for the purpose, the matter would have been different and we could have considered to direct for formation of such a team by the State by selecting persons from the names suggested by the parties. But in the absence of such option, we direct the National Human Rights Commission to enquire into the complaint of the petitioners regarding violation of their fundamental rights particularly one
under Article 21 of the Constitution of India. Such direction is granted in view of Section 12(A) of the Protection of Human Rights Act, 1993. Under that Act the definition of “Human Rights” is large enough to include rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution. In that view of the matter, the writ petition is disposed of with the Investigation of FIR No.251/13, as per order of the Commissioner of Police, Delhi, dated 31.10.2013 shall be carried out by Special Investigation Team and not by the police officials of P.S. Gokul Puri. The complaint of the petitioners as made before this Court regarding violation of their fundamental right to life and liberty shall be enquired into by the National Human Rights Commission expeditiously. For that purpose the Commission may use its statutory powers including those under Sections 13 and 14 of the Protection of Human Rights Act, 1993. The Commission shall take further required steps and action as per law after concluding the enquiry/investigation so that persons(s) found guilty may be subjected to required penalty according to law, without undue delay.

STATE OF MAHARASHTRA & ORS Versus BHAURAO PUNJABRAO GAWANDE

- 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. 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. 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. 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. 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. 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. 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 preexecution stage". 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. 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 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". 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 nonmiscellaneous day and that is how the matter is before us. We have heard learned counsel for the parties. 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. 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 council 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 behavior 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. 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. 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’. 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 "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". 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. 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.

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) 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". 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". 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 detentions and to secure a speedy release where the circumstances and the law so required". 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. 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. 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. "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". In another
leading decision in Khudiram Das v. State of W.B., (1975) 2 SCR 832,
the 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) 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". 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 an unhappy necessity was 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]. 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. 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.' 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. 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 nonapplication 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, nonexistent 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. 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. 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. 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, the 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. 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, 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. Postviolation resort
to Article 226 is for remedy against violation and for restoration of the
right, while previolation 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 where after 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) 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". 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, 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 or 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) The above principles have
been reiterated in subsequent cases decided by this Court. 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'. 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. It is not even alleged that the order is sought to be
executed against a wrong person. 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."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". 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". 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) 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. Similarly, if the detenu was illtreated 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 writpetitioner. 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'. Experiment 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. 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 that 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. 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) 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 preempt 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) 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. "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) 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. 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. 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. From the foregoing discussion, in our judgment, the law appears to be fairly wellsettled 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. 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. 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. The appeal is accordingly allowed.