CHAPTER- V

FUNDAMENTAL RIGHTS: HUMANISTIC APPROACH OF JUSTICE
P.N.BHAGWATI IN PROTECTION OF BONDEDLABOURERS AND
HIS JUDGMENTS ON ARREST AND DETENTION
5.1. General

Natural Justice is a great humanising principle intended to invest law with fairness and to secure Justice. Fair procedure is the natural Justice. Procedure which is prescribed by the law for the purpose of depriving any person of his right of personal liberty must be reasonable, fair and Just. Fairness in action therefore requires reasonable opportunity to be defended by a lawyer.

As an adjunct to the guarantee of personal liberty and the prohibition against discrimination, the constitution of India lays down certain provisions to prevent exploitation of the weaker sections of the society by unscrupulous individuals or even by the state. The general term exploitation are no less a serious challenge to human freedoms and civilization. The more comprehensive expression of ‘traffic in human beings’ includes a prohibition not only of slavery but also of traffic in women or children or the crippled, for immoral or other purpose.¹

One of the miseries and social evils in India is the practice of bonded or forced labour or begar or unlawful compulsory labour existing in large parts of the society. According to J. Breman, (Patronage and Exploitation, p., 9, 1974) in the beginning of the twentieth century, the system combined the elements of exploitation, patronage and protection at

least in some regions. But with increasing trend towards the money economy and changes in the types of use to which agricultural land is part, the element of patronage disappeared and that of exploitation persisted\(^1\). In the rural areas as well as urban areas mostly boy children are found to be kept in bonded labour by their parents owing to their indebtedness to the rich by the poor merely because of poverty.

5.2. Right against Exploitation and Personal Liberty

Articles, 23 and 24 of the Constitution provides protection to the women and children against these evil practices as fundamental rights. Art.23 prohibits traffic in human beings and beggar and other similar forms of forced labour .... And any contravention of this provision shall be an offence punishable in accordance with law. Art.24 prohibits the employment of children below the age of 14 years in factories, mines and other hazardous occupations.

Articles 23 and 24 have been put together as Right against Exploitation. Exploitation which means the utilization of persons for one's own ends, is opposed to the dignity of the individual to which the preamble to our Constitution refers\(^2\).

In the case of *Dubar Goala v. Union of India*\(^3\), it was held by the Court that 'when there is an agreement for extra work and the worker is paid for that then it is not forced labour but when the worker is not paid for extra work then that amounts to bonded labour. In *Raj Bahadoor v. Legal Remembrancer*\(^4\), the court held that through slavery is not

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\(^1\) Upendra Baxi: Law and Poverty - Critical Essays ; N.M. Tripathi Private Limited, Bombay, 1988,p.237
\(^3\) AIR 1952 Cal. 496
\(^4\) AIR 1953 Cal. 522,
expressively mentioned in Art 23, it is included in the expression ‘traffic in human being’.

Art. 23 prohibits the system of bonded labour, the protection of this article is available to both citizens as well as non-citizens, not only against the state but also private citizens. It imposes a positive obligation on the state to take steps to abolish evils of ‘traffic in human beings and beggar and other similar forms of forced labour wherever they are found, and Article 24 prohibits the employment of children below 14 years of age in factories and hazardous employment. This provision is certainly in the interest of the children as they are the assets of a Nation, they should be grown and develop in a healthy manner without subjecting to any oppressions and percussions. That is why Article 39 of the constitution under decretive principles imposed upon the state an obligation to ensure men, women and tender age of the children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

5.2.1. Contribution of Justice Bhagwati in interpreting Articles 23 & 24 to eradicate the evil practice of Bonded Labour system.

The system of bonded labour based on exploitation by a few socially and economically powerful persons trading on the misery and suffering of large numbers of men and holding them in bondage is a relic of a feudal hierarchical society which hypocritically proclaims the divinity of man but treats large masses of people belonging to the lower rungs of the social ladder or economically impoverished segments of society as dirt and chattel. This system... is totally incompatible with the new egalitarian socio-economic order which the people of India have promised in the

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1 Pandey, J.N.: Constitutional Law of India; Central Law Agency ; Allahabad, 42nd Ed.2605, P.287.
Constitution to build and it is not only an affront to basic human dignity but also constitutes gross and revolting violation of constitutional values.

A spate of important issues relating to bonded labour vis-à-vis various labour laws meant to protect labour came up for adjudication before the Supreme Court during the tenure of Justice Bhagwati as a judge of Supreme Court. One can find the observations made by him about this whole evil system in his own inimitable style in the following study.

Yet another case during his tenure as a judge in the highest court of India which raised several important questions and bringing along with it an opportunity to establish a new wave of the third world jurisprudence came in the form of Peoples Union for Democratic Rights. V. Union of India. This writ petition is filed by a non governmental organisation with an object to ensure that in future the labour laws are implemented and the rights of the workers under the labour laws are not violated. In this context Justice Bhagwati explained elaborately and extensively the scope and ambit of Article 23 and the object of the framers to provide living wages under the directive principles, Article 4 of the Universal declaration of Human Rights, Provisions of Inter State Migrant Workmen (Regulation of Employment and conditions of service) Act, 1979, Meaning of words forced labour and Begar and its origination, International Labour Organisations Convention No.29 & 105. Art. 4 of the European Convention of Human Rights, Article 8 of the International Covenant on Civil and Political Rights, 13th Amendment to the United States Constitution, the Equal Remuneration Act, 1976, the Contract Labour (Regulation and Abolition) Act, 1970, Minimum Wages Act, 1948, Article 24 and the Employment of Children Act, 1938, ILO's Convention No.59 and the Concept of PIL & Locus Standi principle.

1. AIR 1982 SC 1943 (also known as Asiad Projects Case).
2. The Constitution under Art.43 provides that the state shall secure...Living wage for workers.
Justice Bhagwati pointed out that "the system was totally incompatible with the principles underlying the constitution. Article 23 prohibited traffic in human beings and beggar and other similar forms of forced labour. So the system or bonded labour, which was clearly forced labour, stoop prohibited by Article 23. He emphasized that 'although the constitution had been the spirit of all laws since its coming into force in 26th January, 1950, no attempt had been made to tackle the problem of bonded labour."

In the present case\(^2\), the Asian Games due to be held in India in 1981 the Government had to embark up on various construction projects according to international standards including flyovers, stadia.... Asian Games Village complex. This construction work was formed out by the Government of India amongst various authorities such as Delhi Development Authority and the New Delhi Municipal Committee. The project work was entrusted to the constructors and they were registered as principal employers under Sec. 7 of the Contract Labour (Regulation and Abolition) Act, 1970.

The Constructors started the construction work by engaging workers through Jamadars. These Jamadars brought the workers from different parts of India. The workers were entitled the Minimum Wage of Rs. 9.25 per day that being the minimum wage fixed for workers employed on construction of roads and building operations. But in this case according to petitioners the workers were not paid this minimum wage and they were exploited by the contractors and Jamadars. The Secretary of Ministry of Labour (the Union of India) in the affidavit reply frankly admitted that the workers are paid only Rs. 8.25 by way of wage per day remaining one rupee in the commission of Jamadars. And also the

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\(^1\) Poornima Advani: Constitutional Law of India – Central Law Agency ; Allahabad, 42\(^{nd}\) Ed.2005, p-26.

\(^2\) Peoples Union for Democratic Rights. V. Union of India, AIR 1982 SC 1943
provision of Equal Remuneration Act, 1976 were also violated and women workers were paid only Rs. 7 per day. In summing up the case, the allegations of the petitioners are,

- The workers were paid only Rs.8.25 per day by wage;
- The women workers are receiving only Rs.7 per day instead equal remuneration along with male workers;
- The children below the age of 14 years are engaged in the construction work by violating Art. 24 of the Construction and the Employment of Children Act, 1938,
- The workers were denied proper living condition and medical and other facilities which they are entitled under the provisions of the Contract Labour (Regulation and Abolition) Act, 1970.

So far as to the above mentioned points Justice Bhagwati held that, for point number one, “The Union of India was clearly admitted in its affidavit that workers were paid Rs.8.25 by way of wages and there was violation of the provisions of the Minimum Wages Act, 1948”. So far as the violation of the Employment of Children Act, 1938 is concerned, the Union of India, the Delhi Administration and the Delhi Development Authority was stated that, no complaint in regard to the violation of the provisions of the Act, at any time received by them and they disputed that there was no violation of these provisions by the contractors. It was also contended that, the Employment of Children Act, 1938 was not applicable in the case of employment of children in the construction work of these projects, since construction industry is not a part specified in the schedule and is therefore not with in the provisions of sub-sec (3) of Section 3 of that Act.
In the above context Justice Bhagwati observed that: "It is a sad and deplorable omission which, we think, must be immediately set right by every state government by amending the schedule so as to include construction industry in it. Every state government will take the necessary steps in this behalf with out any undue delay, because construction work is clearly a hazardous occupation and it is absolutely essential that the employment of children under the age of 14 years must be prohibited in every type of construction work. That would be in consonance with convention no.59 adopted by the ILO and ratified by India. But apart....We have Article 24 of the Constitution which provides that no child below the age of 14 shall be employed to work in any factory or mine or engaged in any other hazardous employment. This is a constitutional prohibition which, even if not followed up by appropriate legislation, must operate 'proprio vigore' and construction work being plainly and undoubtedly a hazardous employment.... not with standing the absence of specification of Construction Act, 1938, no child below in age of 14 years can be employed in construction work, and the Union of India as also every state Government must ensure that this constitutional mandate is not violated in any part of the country."

So far as the complaint in regard to non-observance of the provisions of the Inter-State Migrant workmen (Regulation of Employment and Conditions of Service) Act, 1979 was concerned, in the defence the Union of India stated that "the provisions of the Act could not be enforced because the Rules to be made under the Act had not been finalized until 4/06/1982". Deploring for this state of affairs, Justice Bhagwati pointed out that "a large number of migrant workman coming from different states were employed in the construction work of various Asiad Projects work and if the provisions of a Social Welfare Legislation

1. Peoples Union for Democratic Rights. V. Union of India, AIR 1982 SC 1943
like the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 were applied and the benefit of such provisions made available to these migrant workmen, it would have gone a long way towards ameliorating their conditions of work and ensuring them a decent living with basic human dignity.

So far as the rights and benefits conferred upon migrant workmen under the provisions of sections 13 to 16 of the Act are concerned, he stated that 'the responsibility for ensuring such rights and benefits rests not only on the contractors but also on the Union of India, the Delhi Administration or the Delhi Development Authority who is the principal employer in relation to the construction work entrusted by it to the contractors'.

About the Constitutional protection under Article 24 and the obligation on the part of state to protect the child, Justice held that, the fundamental right and which is plainly and undoubtedly enforceable against every one and by reason of its compulsive mandate no one can employ a child below the age of 14 years in a hazardous employment and since, as pointed out above construction work is a hazardous employment, no child below the age of 14 years can be employed in the construction work and therefore, not only are the contractors under a constitutional mandate not to employ any child below the age of 14 years, but it is also the duty of the Union of India, the Delhi Administration and the Delhi Development Authority to ensure that this constitutional obligation is obeyed by the contractors to whom they have entrusted the construction work of the various Asiad Projects¹.

For the violations of provision of Equal Pay for Equal Work concerned Justice Bhagwati reminded the obligation on the part of the

¹. Peoples Union for Democratic Rights. V. Union of India, AIR 1982 SC 1943
Union of India, and its executives in strong words that, it is the principle
of equality embodied in Art. 14 of the Constitution which finds expression
in the provisions of the Equal Remuneration Act, 1976 and if the Union of
India, the Delhi Administration or the Delhi Development Authority at
any time finds that the above said provisions have been violated by its
own contractors, it cannot ignore such violation and sit quiet by adopting a
non-interfering attitude and taking shelter under the executive saying that
the violation is being committed by the contractors and not by it.

Therefore it is the responsibility of the Government to ensure that
the minimum wage is paid to the workmen as provided under the
Minimum Wages Act, and does not breach the equality clause enacted in
Art. 14 and it is the obligation of the Government to make the contractor
to observe the provisions of the Equal Remuneration Act, 1976.

In the very same case, again, Justice Bhagwati expressed his view
with regard to the issues of violations of labour laws and punishments
imposing for that by Magistrates and Judges thus: “The magistrates are
imposing only small fines of Rs. 200 thereabouts. The Magistrates seem to
view the violations of labour laws with great indifference and unconcern
as if they are trifling offences undeserving of judicial severity contractors
would not mind paying because by violating the labour laws they would
be making profit which would for exceed the amount of the fine. If
violations of labour laws are going to be punished only by meagre fines, it
would be impossible to ensure observance of the labour laws and the
labour laws would be reduced to nullity”.

Again that violations of labour laws must be viewed with strictness
and wherever any violations of labour laws are established before the
magistrates and judges they should punish the errant employers by
imposing adequate punishment, other wise they would remain merely
paper tigers without any teeth and claws is the apt suggestion given by Justice Bhagwati to the magistrates and judges in the country through this judgment.

Then, two preliminary objections have been raised by the respondents on the maintainability of the writ petition. The first one was that the petitioners had no *locus standi*. For this objection *Justice* rejected their contention and held that, in view of socio-economic conditions prevailing in the country, the workmen whose rights are said to have been violated and to whom a life of basic human dignity has been denied are poor, ignorant, illiterate humans, who are unable to approach the courts for judicial redress and hence the petitioners have under the liberalized rule of *locus standi* to maintain the present writ petition espousing the cause of the workmen.

The second objection of the respondents was that the writ petition under Art 32 cannot be maintained unless it complains of a breach of some fundamental right or the other and their argument was that, since in the present writ petition what were alleged were merely violation of the labour laws enacted for the benefit of the workmen and was liable to be dismissed by rejecting their view. In the above state of affairs *Justice Bhagwati* replied as: “we agree with the contention that it is only for enforcement of a fundamental right a writ petition can be maintained in this court under Art 32, but there our augment ends. We cannot accept the plea of the respondents that the present writ petition does not complain of any breach of a Fundamental Right. The complaint of violation of Art 24 based on the averment that children below the age of 14 years are employed in the construction work of the Asiad Project is clearly a complaint of violation of a fundamental right. The non observance of the provisions of the Equal Remuneration Act, 1976, it is in effect and substance a complaint of breach of the principle of equality before the law.
enshrined in Art....the non observance of the provisions of the contract labour (Regulation and Abolition) Act, 1970.... and the Inter-state Migrant Workmen (Regulation of Employment and Condition of Service) Act, 1979, .in our opinion, also relating to violation of Art. 21.As the last two Acts are clearly intended to ensure basic human dignity to the workmen and if the workmen are deprived of any of these rights and benefits to which they are entitled under the provisions of these two pieces of social welfare legislation that would clearly be a violation of Art. 21 by the Union of India, the Delhi Administration and the Delhi Development Authority which, as principal employers, are made statutorily responsible for securing such rights and benefits to the workmen".¹

So far as the issue of the contract labour (Regulation and Abolition) Act 1970 is concerned Justice Bhagwati expressed that under section Sec. 20 if any amenity required to be provided u/Secs. 16, 17, 18 and 19 for the benefit of the workmen employed in an establishment is not provided by the contractor, the obligation to provide such amenity rests with the principal employer. The same position obtains in regard to the Inter-State Migrant Workmen (Regulation of Employment ad conditions of service) Act 1979.

There are certain fundamental rights conferred by the Constitution which are enforceable against the whole world and they are to be found inter alia in Articles 17, 23 and 24, and especially Article 23 is clearly designed to protect the individual not only against the state but also against other private citizens. In the present case the fundamental right enshrined in Art. 23 is violated by non-payment of minimum wages to the workmen.

¹ Peoples Union for Democratic Rights v. Union of India, AIR 1982 SC 1943
With regard to the application of Article 23 against the state, its protection against any one else and the necessity to include it under the fundamental right, Justice explained elaborately in the following words:

"The sweep of Article 23 is wide and unlimited and it strikes at 'traffic in human beings and begar and other similar forms of forced labour' wherever they are found. The reason for enacting this provision in the chapter on fundamental rights is to be found in the socio-economic conditions of the people at the time when the Constitution came to be enacted. The Constitution makers, when they set out to frame the Constitution, found that they had the enormous task before them of changing the socio-economic structure of the country and bringing about socio-economic regeneration with a view to reaching social and economic justice to the common man. The Constitution makers therefore, decided to give teeth to their resolve the obliterate and wipe out this evil practice by enacting constitutional prohibition against it in the chapter on fundamental rights, so that the abolition of such practice may become enforceable and effective as soon as the Constitution came into force. This is the reason why the provision enacted in Art, 23 was included in the chapter on fundamental rights. The prohibition against "traffic in human beings and begar and other similar forms of forced labour" is clearly intended to be a general prohibition, total in its effect and all pervasive in its range and it is enforceable not only against the State but also against any other person indulging in any such practice". ¹

The object of adding these words was clearly to expand the reach and content of Art. 23 including begar and other forms of forced labour within the prohibition of that Article. Every form of forced labour, ‘begar’ or otherwise, is within the inhibition of Art. 23 and it makes no

¹. Peoples Union for Democratic Rights V. Union of India, AIR 1982 SC 1943
difference whether the person who is forced to give his labour or service to another is remunerated or not. Even if remuneration is paid, labour supplied by a person would be hit by this Article if it is forced labour, that is, labour supplied not willingly but as a result of force or compulsion.

The next question arouse for consideration is whether there may take place any breach of Article 23 when a person provides labour or service to the State or to any other person and is paid less than the minimum wage for it. His reply was “The scope of Art. 23 is much wider than that of Article 4 of the Universal Declaration of Human Rights and this Article strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values. Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him, would be clearly ‘forced labour’ hence The word ‘force’ must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leaves no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage”.

1. Art. 39(e) of Directive Principles of State Policy requires the state to direct its policy towards securing to protect health and strength of workers and tender age of children and to ensure that they are not forced by economic necessity to enter avocations unsuited to their age or strength.
Further, he pointed out with all the emphasis and command—
‘whenever any fundamental right which is enforceable against private individuals such as, for example, a fundamental right enacted in Arts. 17 or 23, or 24 is being violated, it is the constitutional obligation of the state to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same’. “hereafter whenever any contracts are given by the government or any other governmental authority including a public sector corporation, it should be ensured by introducing a suitable provision in the contracts that wage shall be paid by the contractors to the workmen directly without the intervention of any jamadars or the thekedars and that the contractors shall ensure that no amount by way of commission or otherwise is deducted or recovered by the jamadars from wages of the workmen” was his strict suggestion to the mode of payments to be followed by the authorities in payments to the workers.

Similarly, in Sanjit Roy v. State of Rajasthan, the petitioner is the director of a social action group called Social work and Research Centre operating in and around Tilonia village in Ajmer district of the State of Rajasthan, engaged in the work of upliftment of Scheduled Castes and Scheduled Tribes in different areas and particularly in and around Tilonia village, filed a writ petition for the purpose of remedying gross violations of the Minimum Wages Act, 1948.

The immediate cause to file this writ petition is, where the State Government in the Public Works Department has engaged a large number of workers including women and children for construction of the Madanganj—Harmara road and they include women belong to Scheduled Castes fixing the minimum wages of Rs.7.00 per day does not specify any

1. Peoples Union for Democratic Rights. V. Union of India, AIR 1982 SC 1943
particular quantity of work to be turned out by the worker in order to be entitled to this minimum wage.

The workers employed in this construction work are divided into gangs of 2 persons and there is a separate muster roll for each such gang and the work done by it is measured every fortnight and payment is made by the Public Works Department to the mate who is the leader of the gang according to the work turned out by such gang during such fortnight.

The petitioner has also averred that even within the gang itself, differential payments are made to the workmen without any visible principle or norm and it is not uncommon that a worker who has put in full day's work throughout the period of the fortnight, may get less than the minimum wage of Rs.7.00 per day, while worker who has put in much less work may get payment more than the proportionate wage due to him. Therefore workmen belonging to most of the gangs receive a wage very much less than the minimum wage of Rs.7.00 per day. In hearing of the case, the State Government produced the Rajasthan Famine Relief Works Employees (Exemption from Labour Laws) Act, 1964 (hereinafter referred to as the Exemption Act). Section 3 of the Exemption Act proceeds to enact that "notwithstanding... any such law." Section 4 of the Exemption Act excludes the jurisdiction of Courts and provides that "no Court shall take cognizance of any matter in respect of an employee of famine relief works under any Labour Law", which includes the Minimum Wages Act, 1948.

The principal grounds on which the constitutionality of the exemption Act was challenged were based on Arts. 14 and 23 of the Constitution, the petition filed an amended writ petition in this court challenging the constitutionality of the Exemption Act. In this case the Court had an occasion to consider the true meaning and effect of article
23, and Justice applied his decision in the case of Peoples Union for Democratic Rights v. Union of India and held that "it is difficult to see how the constitutional validity of the exemption Act is so far as it excludes the applicability of the minimum Wages Act, 1948 to the workmen employed in famine relief works can be sustained. Article 23, mandates that no person shall be required or permitted to provide labour or service to another on payment of anything less than the minimum wage and if the Exemption Act, by excluding the applicability of the Minimum Wages may not be paid to a workman employed in any famine relief work, it would be clearly violative of Article 23. The State cannot be permitted to take advantage of the helpless condition of the affected persons and extract labour or service from them on payment of less than the minimum wage. No work of utility and value can be allowed to be constructed on the blood and sweat of persons who are reduced to a state of helplessness on account of drought and scarcity conditions. The state cannot under the guise of helping these affected persons extract work of utility and value from them without paying them the minimum wage". The State must pay, at the least minimum wage to such person on pain of violation of Article 23 and the Exemption Act ... must be held to be invalid as offending the provisions of Article 23 and could be said to be 'forced labour' on the ground that they received wage less than Rs.7.00 per day."

So the mere circumstance that a worker belongs to an area affected by drought and scarcity conditions can in no way influence the scope and sum of those rights. In comparison with a worker belonging to some other more fortunate area and doing the same kind of work and receiving less wage is also affects the equality clause. In conclusion, he held that: "In my judgment, the workers employed in the construction of the Madanganj

1 AIR 1982 SC 1473 :: (1983) SCC (1) 525.
2 Peoples Union for Democratic Rights v. Union of India, AIR 1982 SC 1473; (1983) SCC (1) 525
Harmara Road as a measure of relief in famine stricken area are entitled to a minimum wage of Rs7.00 per day, and that wage cannot be reduced by reference to the Rajasthan Famine Relief Works Employees (Exemption from Labour Laws) Act, because in so far as the provisions of Section 3 of that Act countenance a lesser wage they operate against Article 14 of the Constitution and are, therefore, void."

Thus, the object enshrined under Art. 39(e) of the Indian Constitution has been upheld and accomplished by the adjudication of Justice Bhagwati.

Time and again Justice Bhagwati had an occasion to deal with the case relating to payment of minimum wages to Labourers working on Salal hydro Project. In Salal HydroElectric Project v. State of Jammu and Kashmir the writ petition was filed by People's Union for Democratic Rights on the basis of a newspaper Report, which stated that a large number of migrant workmen from different States including the State of Orissa were working on the Salal Hydro Electric Project in difficult conditions and they were denied the benefits of various labour laws and were subjected to exploitation by the contractors to whom different portions of the work entrusted by the central Government.

In the above state of affairs, apart from issuing notices to the Central Government and some State governments also, the Supreme Court through Justice Bhagwati directed the Labour Commissioner, Jammu to visit the site of the Salal Hydro Electric Project and ascertain whether there are any bonded labourers employed on this project, to furnish their names, any migrant workers from other States, the conditions in which the

1. Peoples Union for Democratic Rights v. Union of India, AIR 1982 SC 1473 :: (1983) SCC (1) 525
workers are living, and the labour laws enacted for their benefit and its implementation.

Accordingly, the labour Commissioner visited the site in Jammu and submitted his report to the Apex Court. Based on this report, for the question whether the workmen employed on the project work are ensured the rights and benefits provided to them under various labour laws, the final report of Labour Commissioner (J & K) clearly shows that its provisions have not been implemented at all and the workmen are denied many of the benefits and advantages provided under it. So far as medical facilities are concerned, the report provided that adequate medical care is provided to the workmen employed on the project site and it is pointed out that some minors were found to have been employed on the project site but the explanation given was that “these minors accompany male members of their families on their own and insist on getting employed”.

The Labour Commissioner (J and K) in his final report pointed out that overtime wages earned by workmen are not received by them in their entirety and almost 50 per cent is taken away by khatedars but the muster sheets do not reflect the correct position and “are treated as mere formality. And no weekly off day is allowed to the workmen “except in case of labour directly employed by the National Hydro Electric Power Corporation or other contractors”. Which means that it is not the extra wages are not being paid to the workmen for the weekly off days but that weekly paid off days are not given to the workmen, the result is that the workmen are required to work even on their weekly paid off days.

Concluding his Judgment Justice held that ‘the Central Government must also strictly enforce the requirement that payment of wages... either directly or through khatedars or by the ‘piece wagers’ or subcontractors is made in the presence of an authorized representative appointed by the
National Hydro Electric Power Corporation or the Central Government and wages are paid directly to the workmen without the intervention of khateds and to carried out fairly, the Labour Commissioner (J&K) should be made visits at regular intervals to the work place.¹

Thus, Justice Bhagwati through this judgment made accountable the government to ensure minimum wages to labourers and used his judicial authority to eradicate forced labour with great commitment by showing humanity towards the poor labourers.

Further, Justice Bhagwati had an occasion to deal with the bonded labourers problem in Bandhua Mukti Morcha v. Union of India.² This case was brought before the Supreme Court by an organization dedicated to the cause of release of bonded labourers in the country. The petition filed alleging that a large number of labourers were languishing in Faridabad Stone Quarries near Delhi under object conditions of bondage for about ten years, by giving names of eleven bonded labourers (annexed a letter containing signatures and thumb impressions of the bonded labourers) prayed that writ be issued for proper implementation of these provisions of the constitution and statutes with a view to ending the misery, suffering and helplessness of these victims of most inhuman exploitation. Responding to this, the Supreme Court had appointed two Advocates as Commissioners to visit the quarries to interview each of the persons and to submit their report on the condition of labourers, accordingly the commissioners submitted their report. The report ended by observing that they wee found leading a most miserable life and perhaps beasts and animals could be leading more comfortable life.

². AIR 1984 SC 802
After receiving the report while speaking on the problems of bonded labourers Justice expressed his pain and deep hurt about the grievances suffering by these labourers in the following manner: "Not having any choice, they were driven by poverty and hunger in to a life of bondage, a dark bottom less pit from which, in a cruel exploitative society, they cannot hope to be rescued. This pernicious practice of bonded labour existed in many states and obviously with the ushering in of independence, if it could not be allowed to continue to blight the national life any longer and hence, when we framed our constitution, we enacted Art. 23.... which prohibits traffic in human beings and all forms of forced labour....We also find that in some cases the state governments in order to shirk their obligation take shelter under the plea that there may be forced labour in their states but that is not bonded labour. No serious effort was made to give effect to Art.23 and to stamp out the shocking practice of bonded labour on top of all these forms of exploitation is the totally illegal system of "thekedars", middle men who extract 30 per cent of the poor miner's wages as their ill gotten commission (Rs.20.00 out of Rs.60.00,) from wages per truck load of stone ballast. The trucks are invariably over sized, in some cases they double the prescribed size of 150 sq. feet but payment remains the same. What is needed is determination, dynamism and a sense of social commitment on the part of the administration to free bonded labourers and rehabilitate them and wipe out this ugly inhuman practice which is a blot on our national life."

Justice Bhagwati appointed Dr. Patwardhan\(^1\) of IIT to carryout a socio-legal investigation for the purpose of determining what are the conditions prevailing in the Faridabad District stone quarries and living conditions prevailed there. The investigation is carried out with a view to

\(^1\) Patwardhan submitted his report to the court with elaborate suggestions and recommendations. Modes of payment of wages, mode of rehabilitation of bonded labourers are some of the items in his report.
find out the correctness of the state of affairs exists which is contrary to
the provisions of law and basic human norms and to take steps for
remedying the situation

After directing for the socio-legal investigation the court also
directed that the workmen whose names were set out in the writ petition
and in the report submitted by Advocates committee would be free to go
wherever they liked and they should not be restrained from doing so by
any one and if they go to their respective villages the district magistrates
having jurisdiction over those villages shall take steps or measures to the
extent possible for rehabilitating them.

One can witness the keen observations and commitments of Justice
in delivering judgments in the matters relating to socio economic
problems of the people and his thrust to do justice to the poor by
appointing like socio legal enquiries. Justice showed concern for the
problem of child labourers' engaged in construction work and made
direction to the Central Government to make changes and include to the
Employment of Children Act, 1938 the provision of prohibiting child
labour below the age of 14 years in the construction work. In the Salal
Hydro Project case also he reiterated the same. In pursuance to the above
directions the Child Labour (Prohibition and Regulation) Act, 1986 have
been enacted by the Government of India.

5.2.2. Justice Bhagwati's contribution in Releasing and the
Rehabilitation of Bonded Labourers

To abolish the bonded labour system to prevent the economic and
physical exploitation of the vulnerable sections of the society and to
ensure the social justice the state is bound to identify, release and
rehabilitate that bonded labourers. The bonded labour system (Abolition)
Act, 1976, under Section 14(b) and (c) provides for the economic and
social rehabilitation of the freed bonded labourers and to co-ordinate the function of rural banks and cooperative societies with a view to canalizing adequate credit to such people.¹ Now violation of these social welfare provisions would amount to violation of Art. 21.

In Rampal v. Maishi Lal Raj Kumar,² a writ petition filed before the Supreme Court alleging that in Saharampur, State of UP some persons are held as bonded labourers in a brick kiln. In this case Justice Bhagwati made an order directing the District Magistrate, Saharanpur to visit the brick kiln immediately. The magistrate proceeded to the brick kiln and recorded the statements of those persons and submitted to the Supreme Court. According to this report these persons want to leave the brick kiln premises but they do not wish to take any assistance from the government by way of rehabilitation or otherwise and they intended to go to some other place for employment. Therefore Justice Bhagwati apprehend that, Since they do not wish to be rehabilitated, we are helpless in the matter and all that we can do is to direct the respondents to allow these persons to leave the brick premises and the brick kiln – owner shall not restrain them from doing so by threat of force or otherwise. Further he directed the District Magistrate to inquire whether there are any other brick kilns in his district and where persons are held as bonded labourers.

In Neeraja Chaoudhary v. State of M.P³, while speaking on the aspect of rehabilitation of bonded labourers Justice Bhagwati aptly observed that: It is the plain requirement of Articles 21 and 23 of the constitution that bonded labourers must be identified and released and on release they must be suitably rehabilitated, without rehabilitation, they

³ AIR 1984 SC 1099
would be driven by poverty helplessness and despair into serfdom again. The Bonded Labour System (Abolition) act, 1976 has been enacted pursuant to the Directive Principles of State Policy with a view to ensure basic human dignity to the bonded labourers and any failure of action on the part of the State in implementing the provisions of this legislation would be the clearest violation of Art. 21 of the Constitution.

Further, in *Bhandhua Mukti Morcha*’s case while delivering judgment regarding the rehabilitation aspect of bonded labourers laid down four main features of the concept of rehabilitation:

- Psychological rehabilitation must go side by side with physical and economic rehabilitation.

- Physical and economic rehabilitation had 15 major components in which allotment of house sites and agricultural lands, animal husbandry, promoting traditional arts and crafts are some areas.

- An integration in various central and state sponsored schemes was necessary and very much desirable.

- The freed bonded labourers must necessarily be given the choice between the various alternatives for their rehabilitation.

With these perspectives the court directed the Haryana Government to draw up a scheme or programme for a better and more meaningful rehabilitation of the labourers forced from bondage.

The recent judicial trend shows that the suitable action had been taken by the court for freeing bonded labourers from the bondage. Moreover Indian Judiciary is giving a sense of emancipation to the states, sleeping wing of the society, making conscious to the unconscious souls, enlightened them with their constitutional rights through *Samata* (equality), i.e., equal justice.

\(^1\) AIR 1984 SC 802
5.3. **Personal Liberty and Arrest and Detention**

The Constitution of India provides under Art 21 that 'A person can be deprived of his life and personal liberty if two conditions are complied with first, there must be a law secondly there must be a procedure prescribed by that law provided that the procedure is just, fair and reasonable'.

According to Art 21 of the constitution a person can be deprived of his life or personal liberty in accordance with the procedure prescribed by law which means the purpose of depriving any person of his right of personal liberty must be reasonable, fair and just, and therefore no action of government should be unreasonable, unfair or unjust. Hence in a matter of preventive detention the administration must follow sedulously and strictly the procedural norms laid down in clause 4 to 7 of Art 22 and the laws regarding preventive detention. Even a slight deviation from the procedure to the discharge of the detenu, would render the detention invalid. It does not matter whether the irregularity is of form or substance.

Like Articles 21 and 22 of Indian constitution all over the world the democratic constitutions contain similar provisions regarding the rights of the arrested persons in their arrest and detention. In US, the sixth amendment of the constitution of America provides for the rights of the arrested persons.¹ In England, it is a Fundamental Principle of English Common Law that a citizen who prima-facie is entitled to personal freedom is also entitled to know why for the time being his freedom is interfered with.²

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¹ In all criminal prosecutions the accused shall enjoy the right to a speedy trial and public trial, and to be informed of the nature and cause of the accusation to be confronted with witness against him, to have compulsory process for obtaining witnesses in his favour, and to have the assistance of the counsel for his defence.
Apart from the above two constitutions the Universal Declaration of Human Rights provides\(^1\) under Art. 9 that “No one shall be subjected to arbitrary arrest and detention…” Art. 9(1) of the International Covenant on Human Rights, 1950 provides that “No one shall be subjected to arbitrary arrest or detention”. Article 9(3) of the same covenant further provides that “Any one who is arrested shall be informed promptly of the reasons for his arrest and of any charges against him.”

5.3.1. Meaning and Object of Preventive Detention

Preventive detention means detention of a person without trial. It is so called in order to distinguish it from punitive detention. The objective of punitive detention is to punish a person for what he has done and after he is tried in the courts for the illegal act committed by him. The object of preventive detention, on the other hand, is to prevent him from doing, something and the detention is this case takes place on the apprehension that he is going to do something wrong which comes with in any of the grounds specified by the constitution viz., acts prejudicial to the security of the state, public order, maintenance of supplies and services essential to the community, defence, foreign affairs or security of India.\(^2\)

5.3.2. Inter relationship between Articles 21 and 22 of the Constitution

It is clear that the personal liberty provided under Article 21 of the constitution and the protection against arbitrary arrest and detention provided under Art. 22 have nexus with one another. This can not be separated.

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After the interpretation of Maneka Gandhi’s case, a case coming under Art. 22 must also satisfy the requirements of both Arts. 22 and 21. The law of preventive detention has therefore now to pass the test not only of Art. 22, but also of Art. 21 as the former provides for fair procedure for detention while the latter provides for the procedure established by law which is reasonable, fair and just.

The correlation between these articles have been explained by Justice Bhagwati in Francis Coralie Mullin V. Administrator, Union Territory of Delhi, that the law of preventive detention now has to pass the test not only of Art. 22 but also of Art. 21 and if the constitutional validity of any such law is challenged, the court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just.

5.3.3. Constitutional Safeguards against arbitrary Arrest and Detention under Art. 22

The Constitutional Safeguards provided under Art 22 is two fold; the first one is Art. 22 clauses (1) and (2), which deal with the procedural safeguards provided for the arrested persons under ordinary laws and the second fold of Article 22, clause 4 to 7 deal with the preventive detention laws.

5.3.3.1. Procedural Safeguards of Art. 22 (1) and (2) for the arrested persons under ordinary laws.

The rights of the persons against arbitrary arrest and detention, provided for in clauses (1) and (2) of Art. 22, as procedural safeguards are:

(a) The right to be informed ‘as soon as may be’ of ground of arrest.

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2 AIR 1981 SC 746
(b) The right to consult and to be represented by a lawyer of his own choice.

(c) The right to be produced before a magistrate with in 24 hours.

(d) The freedom from detention beyond the said period except by the order of the magistrate.

These Fundamental Rights are available for both citizens as well as non-citizens but not to persons arrested and detained under any law providing for preventive detention.\(^1\) And also for a person who is an enemy alien\(^2\) but an enemy alien may seek protection under Art. 22(4) and (5) subject to the law passed by the parliament.

5.3.3.2. Preventive Detention Laws under Art. 22(4) to (7) of the Constitution.

The Constitution itself authorizes the Legislature to make laws providing for preventive detention for reasons connected with the security of a state, the maintenance of public order or the maintenance of supplies and services essential to the community,\(^3\) or for reasons connected with defence, Foreign Affairs or the Security of India.\(^4\)

So, it would enable the Legislature to enact that a person shall be detained or imprisoned without trial for any of the reasons above mentioned and against such laws the individual shall have no right to Personal Liberty.\(^5\) The Parliament has the power to prescribe by law, the

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\(^3\) List-III, Entry, 3 of VII Schedule of the Constitution.
\(^4\) List-I, entry-9 of VII Schedule of the Constitution.
maximum period for which a person may be detained under a law of preventive detention.

The Constitution, however, imposes certain safeguards against abuse of the power vested under Article 22(4) to (7). It is these safeguards which constitute Fundamental Rights against arbitrary detention and it is because of these safeguards that 'preventive detention' has found a place in Part III of our constitution.

5.3.3.3. Preventive Detention Laws and Constitutional Safeguards under Article 22

Clauses (4) to (7) of Art.22 provide the procedure which is to be followed if a person is arrested under the law of Preventive Detention. They are as follows: (a) Review by Advisory Board, (b) Communication of Grounds of Detention to Detenu. (c) Detenu's rights of representation: Now it is clear that the constitution has recognized the necessity of laws as to Preventive Detention, it has also provided safeguards to mitigate their harshness by placing fetters on legislative power conferred on the legislature. The word preventive is used in contradiction to the word punitive.

In Francis Coralie Mullin's\(^1\) case Justice Bhagwati has explained the meaning of preventive detention and cautioned the courts to take care while exercising this power of preventive detention in the following way: "Despite these safeguards laid down by the Constitution and creatively evolved by the Courts, the power of preventive detention is a frightful and awesome power with drastic consequences affecting personal liberty, which is the most cherished and prized possession of man in a civilized society. It is a power to be exercised with the greatest care and caution and the courts have to be ever vigilant to see that this power is not abused or

\(^1\) Francis Coralie Mullin V. Administrator, Union Territory of Delhi: AIR 1981 SC 746.
recognize the existence of their power, but it hedged in by various safeguards set out in Article 21 and 22".

The economic offenders are a menace to the community and it is necessary in the interest of the economic well-being of the society to mercilessly stamp out such pernicious, anti-social and highly reprehensible activities as hoarding, black-marketing and profiteering which are causing havoc to the economy of the country and inflicting untold hardships on the common man and to carry on a relentless war against such economic offenders with a view to putting them out of action. The case of Dwarika Prasad Sahu v. State of Bihar is of such with great import regarding the economic offences in the country came before the Supreme Court for consideration. In the instant case the petition was directed against the validity of an order of detention made by the District Magistrate, Ranchi under Section 3(2) (iii) of the M.I.S.A., 1971.

In the above context Justice Bhagwati held that "If the District Magistrate had applied his mind properly and carefully and acted with a greater sense of responsibility, the infirmity vitiating the order of detention could have been easily avoided. The attempt to curb this social menace has been frustrated and set at naught by want of due care and application on the part of the District Magistrate. We hope and trust that, in future, in view of the social objectives intended to be achieved by the use of the Act against economic offenders, the District Magistrate will show greater care and attention in exercising the vast powers conferred upon them under the Act, both in the interest of personal liberty which is one of our cherished freedoms as also in the interest of firm and effective action against those who are undermining the foundations of our social and economic structure".

1. AIR 1975 SC134 :: 1975-SCC-3-722
misused. It must always be remembered that preventive detention is qualitatively different from punitive detention and their purposes are different. In case of punitive detention, the person concerned is detained by way of punishment after he is found guilty of wrong doing as a result of a trial where he has the fullest opportunity to defend himself, while in case of preventive detention he is detained merely on suspicion with a view to preventing him from doing harm in future and the opportunity that he has for contesting the action of the Executive is very limited”.

Having regard to this distinctive character of preventive detention, Justice view was that, the preventive detention aims not at punishing an individual for a wrong done by him but at curtailing his liberty with a view to preventing his injurious activities in future.

5.3.4. Justice Bhagwati’s Contribution in Interpreting Article 22

Though no country in the world has made these laws integral part of the constitution as has been done in India, until the beginning of new millennium. This has been happened and designed in India because of the great farsightedness of the framers of the Constitution with a view to prevent the abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant republic.

The above objective was very well explained by the Indian judiciary especially Justice Bhagwati. He explained that: “the power of preventive detention has been recognized as a necessary evil and is tolerated in a free society in the larger interest of security of the state and maintenance of public order. It is a drastic power to detain a person without trial and there are many countries where it is not allowed to be exercised except in times of war or aggression. Our constitution does

1. After considerable increase in terrorist activities all over the world the western countries have now been enacted most draconian laws entrusting powers to the heads of state.
5.3.4.1. The Right to be informed of Grounds of Arrest

Under Art. 22(1) the words 'as soon as may be' mean as early as reasonable in the circumstances of a particular case. If the information of grounds of arrest is delayed it must be justified by reasonable circumstances. According to Art. 22(1) persons arrested under ordinary laws and under Art 22 (5) persons arrested under preventive detention laws has been ensured similar rights that the right to be informed of grounds of their arrest.

Justice Bhagwati had an occasion for the first time as a judge of the Supreme Court to deal with the provisions provided in Art. 22(5) in the case of Debu Mahto v. State of West Bengal. In this case the petitioner's contention was that he has been informed only one ground for his detention. The facts of this case were that, the District Magistrate of 24 Paraganas, in exercise of the power conferred upon him under sec. 3 of the Maintenance of Internal Security Act, 1971 passed an order dated 28.8.1972, directing that the petitioner be detained as it was necessary to do so with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies and services essential to the community.

Pursuant to the order of detention, the petitioner was arrested on 30th August 1972 and immediately on his arrest the grounds on which the order of detention was made were served on him by a communication dated 28.8.1972 which was made under sec 8, sub-section (1) of the Act, 1971.

The petitioner contended that there was only one ground communicated to him u/sec. 8 sub-section (1) as forming the basis of the order of detention and it was that on the night of 11.8.1972 the petitioner with his associates was found removing from the bales of empty jute bags

1. AIR 1974 SC 816.
after breaking a railway wagon in Naihati Railway Yard and when challenged by the local Railway Protection Force, the petitioner and his associates fled away leaving the body of their associate. This ground, said the petitioner, was a single solitary ground which could hardly sustain the inference that the petitioner was acting in a manner prejudicial to the maintenance of supplies and services essential in the community and with a view to preventing him from so acting it was to detain him and the satisfaction of the District Magistrate in this behalf was no satisfaction at all and could not support the making of the order of detention.

According to the petitioner's allegation, apart from the above mentioned ground for the detention of the petitioner, there is another ground which was not furnished to the petitioner in making an order of detention by the District Magistrate is that the petitioner was "one of the notorious wagon breakers and was engaged in systematic breaking of railway wagons and committing theft of rice and wheat "from railway wagons."

The petitioner's contention is that, hence this ground was not communicated to him; he was not given an opportunity of making a representation against it. On this point, the validity of the order of detention was challenged on behalf of the petitioner.

In the above context Justice Bhagwati observed that 'this was clearly in breach of the requirement of subsection (1) of section 8 of the Act and it also constituted violation of the constitutional guarantee embodied in Article 22, clause (5), the order of detention was thus, vitiated by a serious infirmity and it must be held to be invalid'.
Similar view was expressed by Justice Bhagwati in *Dharman Raj Barshi V. State of West Bengal*\(^1\). And some other cases dealt by Justice Bhagwati on similar issues are *Samar Ali Miyan v State of West Bengal*\(^2\), *Madhab Roy Alis Madha Roy V. State of West Bengal*\(^3\), and *Haru Sarkar v. State of West Bengal*\(^4\).

But there is another case in which Justice has explained the type of grounds should be communicated to the detenu 'as soon as' may be, after the detention and its constitutional mandate to inform was crop up in the case of *Khudiram Das v. State of West Bengal*\(^5\). In which he stated that, this Art 22 provides various safeguards calculated to protect personal liberty against arbitrary restraint without trial. These safeguards cannot be considered as substantial. They are essentially procedural in character and their efficiency depends on the care and caution and the sense of responsibility with which they are regarded by the detaining authority. Two of these safeguards which relate to the observance of the principles of natural justice and which a fortiori are intended to act as a check on arbitrary exercise of power are to be found in Art 22 (5)' of the constitution.

Speaking on the interrelation between the requirements of the first and the second safeguards and why the grounds are required to be communicated to the detenu 'as soon as may be' after detention and the barest minimum safeguards which must be observed before an executive authority can be permitted to preventively detain a person Justice explained that: "Obviously the reason is two fold. In the first place, the requirement of communication of grounds of detention acts as a check

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1. AIR 1974 SC 897 :: 1974 SCC (4) 133.
2. AIR 1975 SC 1631
3. AIR 1975 SC 255
4. AIR 1974 SC 2240
5. AIR 1975 SC 550
against arbitrary and capricious exercise of power. The detaining authority can not whisk away person and put him behind bars at its sweet will. It must have grounds for doing so and those grounds must be communicated to the detenu so that, not only the detenu may know what are the facts and materials before the detaining authority on the basis of which he is being deprived of his personal liberty and freedom but he can also invoke the power of judicial review, how so ever limited and peripheral it may be. But if the grounds of detention are not communicated to him, the opportunity of making a representation would be rendered illusory. The communication of the grounds of detention also intended to sub serve the purpose of enabling the detenu to make an effective representation. It is obvious that the 'grounds' mean all the basic facts and materials which have been taken in to accountable the detaining authority in making the order of detention and on which, therefore, the order of detention is based. That is the plain requirement of the first safeguard in Art 22 (5).

The second safeguard in Art 22 (5) requires that the detenu shall be afforded the earliest opportunity of making a representation against the order of detention. There are the legal bulwarks enacted by the constitution makers against arbitrary or improper exercise of the vast powers of preventive detention which may be vested in the executive by a law of preventive detention such as the maintenance of Internal Security Act, 1971....the Communication of grounds of detention is not only the right of the court but also its duty as well to examine what are the basic facts and materials which actually and in fact weighed with the detaining authority in reaching the requisite satisfaction. The court can certainly require the detaining authority to produce and make available to the court the entire record of the case which was before it".
In *Icchu Devi Choraria v. Union of India*¹, the contention of the petitioner was that the grounds of detention were not duly served on the detenu as required by sub-section (3) of Section 3 of the COFEPOSA Act, and clause (5) of Article 22 of the constitution.

Speaking through *Justice Bhagwati* the Supreme Court on the grounds of information to the detenu held that ‘these detaining authority was guilty of unreasonable delay in considering the two representations of the detenu and the delay on part of the detaining authority in supplying to the detenu the copies of the doctments, statements and other materials relied upon in the grounds of detention and the continued detention of the detenu was accordingly illegal and void.

5.3.4.2. Right to be produced Before a Magistrate

According to Article 22 (5) in addition to furnishing of the grounds of arrest the arrested person must be produced before the Magistrate with in 24 hours of his arrest.² It affords an opportunity for immediate release in case the arrest is not justified.

Justice Bhagwati had an occasion to deal with the above mentioned right in *Rajinder Prasad Aggarwal V. Chief Metropolitan Magistrate case.*³ This case was brought before the Supreme Court through a writ of habeas corpus for production and release of one Anand Kumar Aggarwal. To understand the case some facts are necessary and they are as following.

Anand Kumar Aggarwal was arrested and along with Viswanath from the residence of his father in Benachithy at 8 pm on June 9ᵗʰ, 1981. The arrest was made by Sub Inspector Chauhan of Gujarat police with the assistance of the police from Durgapur police station. Anand Kumar

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² Art. 22 (5)
³ 1985-SCC( 1) 607; SCJ – 1985 (1) 123.
Aggarwal though arrested at Benachithy and taken to the Durgapur police station, was not produced before the Sub-Divisional Judicial Magistrate, Durgapur, who, according to the petitioner, was the nearest Magistrate having Jurisdiction to take cognizance of the offence charged Anand Kumar Aggarwal (here in after A.K. Aggarwal).

A.K. Aggarwal was taken by Su-Inspector Chouhan from Benachithy to Calcutta in the morning of 10th June 1981 and he was thereafter produced before the Chief Metropolitan Magistrate who on the application of the police remanded A.K. Aggarwal to police custody for a period of 14 days. The petitioner who is the cousin of A.K. Aggarwal thereupon filed the present writ petition in the Supreme Court for production and release of A.K. Aggarwal on the ground that A.K. Aggarwal was not produced before the nearest Magistrate with in the period of 24 hours of his arrest as required by clause 2 of Article 22 of the constitution and his detention in police custody was therefore unconstitutional. It is no doubt and it is true that A.K. Aggarwal was produced before the Chief Metropolitan Magistrate with in a period of 24 hours from his arrest but, contention of the petitioner is that, this was not sufficient compliance with the requirement of clause 2 of Art 22, since what that Article enjoins is the production of the arrested person before the Magistrate nearest to the place of arrest and not the nearest Magistrate at the place where the arrested person might be when the police choose to produce him before.

In the above context Justice Bhagwati stated that 'this question would be purely academic but even so we decided to here the arguments, but this is not proper case to decide this question because A.K. Aggarwal was already been released. Thus the writ petition for production and release of A.K. Aggarwal accordingly become infructuous.
5.3.4.3. Right to consult and to be defended by a Lawyer of his own choice.

In US if a person is arrested he must be afforded opportunity to consult a lawyer of his own choice and if he is unable to employ a counsel it is the duty of court to employ a lawyer for him. In India, prior to the Maneka Gandhi’s decision the view of the court was that it was not bound to provide the help of a lawyer unless a request was made by him. But as a result of the ruling of the Supreme Court in Maneka Gandhi’s case and a series of cases following that case; it is clear that the courts will be bound to provide the assistance of a legal representation to a person arrested under an ordinary law also.

When Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure by which a person may be deprived of his life or liberty should be reasonable, just and fair. Fairness in action, therefore, demands that an opportunity of legal representation. A procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance can not possibly be regarded as reasonable, fair and justice procedure to a prisoner who is to seek his legal services available to him. Now this right to legal representation (Free Legal aid) is a fundamental right under Article 21 and Article 39A also emphasizes the same, providing legal representation is the duty of state.

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In the case of *Hussainara Khatoon v Secretary, State of Bihar* broadly speaking on the free legal aid services to the poor and indigent persons Justice Bhagwati referred 39A as an inalienable element of reasonable, fair and just procedure, with out it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice, because it is the constitutional right of every accused. The right to free legal services is, therefore, clearly an essential ingredient of reasonable, fair adjust procedure for a person accused of an offence and it must be held implicit the guarantee of Art. 21. If free legal services are not provided the trial itself may be vitiated as contravening Art. 21.

Again in *Francis Coralie Mullin V. Administration, Union Territory of Delhi*, Justice Bhagwati had an opportunity to further elaborate this right. In this case the petitioner, a British National, was arrested and detained in the Central Jail, Tihar under Section 3 of the COFEPOSA Act, (Conservation of Foreign Exchange and Prevention of Smuggling Activities Act) by an order dated 23rd Nov.1979. In this case the question rose in regard to the right of the detenu under the COFEPOSA Act to have interview with a lawyer and the members of her family. She filed a petition in the Supreme Court for a writ of habeas corpus challenging her detention but by a judgment delivered by this court on 27.2.1980 she continued to remain under detention in the Tihar Central Jail.

Art. 22 from clauses (4) to (7) deals specifically with safeguards against preventive detention and any law of preventive detention or action by way of preventive detention taken under such law must be in conformity with the restrictions laid down by those clauses on plain of

2. *AIR 1981 SC 746*
3. *Francis Coralie Mullin V. Administration, Union Territory of Delhi*: AIR 1981 SC 746
invalidation. But apart from Art 22, there is also Article 21 which lays down restrictions on the power of preventive detention. In *Maneka Gandhi's* case this court expanded the scope and ambit of the right of life and personal liberty enshrined in Art. 21 and showed the seed for future development of the law enlarging this most fundamental of fundamental rights. The law of preventive detention, therefore, now to pass the test not only of Article 22, but also of Article 21 and if the constitutional validity of any such law is challenged, the court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just.

In the above context, Justice Bhagwati held that, unhesitatingly the sub-clause (ii) of clause (3) (b) [of COFEPOSA Act] to be violative of Art. 14 and 21 in as far as it permits only one interview in a month to a detenu, when an under trial prisoner is granted the facility of interviews with relatives and friends twice in a week under rules 559a and a convicted prisoner is permitted to have interviews with his relatives and friends once in a week under rule 550, in the Manual for the Superintendence and Management of Jails in the Punjab. And sub-clause (i) of clause (3) (b) of COFEPOSA Act, regulating the right of a detenu to have interview with a legal Advisor of his choice is violative of Art 14 and 21 and must be held to be unconstitutional and void. However the jail official may, if thought necessary, watch the interview but not so as to be within hearing distance of the detenu and the legal advisor.

Again, Justice Bhagwati had an occasion to explain the object of making an order of preventive detention under Section, 3 of the COFEPOSA Act, 1974, in *Shri Shiv Ratan Makim v. Union of India* 2, wherein the petitioner was found in possession of the two pieces of

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2. *AIR 1986 SC 610*
foreign - marked gold valued at Rs.74,760/- on reaching Panitanki Land Customs station from across Nepal border in his written statement given to the customs officers on the same day had stated that on arriving at Kathmandu, as per prior arrangement, he contacted certain person on telephone and that person thereupon came to the lodge where he was staying along with the requisite quantity of gold and he took delivery of gold from that person and paid him the price.

Through this writ petition the detenu was challenged his detention on many grounds but the most important two grounds were that, with regard to the considerable time lapse between the date of the detenu was found to be carrying two pieces of foreign marked gold and the date of the order of detention, Justice Bhagwati held that there can he no hard and fast rule as to what is the length of time which should be regarded sufficient to snap the nexus between the incident and the order of detention, and the reasons has been sufficiently explained by the detaining authority for the said time lapse.

As far as concern to the second contention of the petitioner Justice Bhagwati opined that: “the object of making an order of detention is preventive while the object of a criminal prosecution is punitive. Even if a criminal prosecution fails and an order of detention is then made, it would not invalidate the order of detention because, the purpose of preventive detention being different from conviction, punishment and subjective satisfaction being necessary in the former while proof beyond reasonable doubt being necessary in the latter1, and the order of detention would be bad merely because the criminal prosecution has failed”.

Further speaking on the authority created by the Act and new jurisdiction concerned to make an order of detention and the object of

making the order of detention he observed that: If an order of detention is made only in order to bypass a criminal prosecution which may be irksome because of the inconvenience of proving guilt in a court of law, it would certainly be an abuse of the power of preventive detention and the order of detention would be bad. But if the object of making the order of detention is to prevent the commission in future of activities injurious to the community, it would be perfectly legitimate exercise of power to make the order of detention. The court would have to consider all the facts and circumstances of the case in order to determine on which side of the line the order of detention falls. Here the petitioner was caught in the act of smuggling gold and the circumstances in which the gold was being smuggled as also the facts set out in the written statement of the petitioner clearly indicate that the petitioner was engaged in the activity of smuggling gold and if that be so, it is not possible to say that the order of detention was passed by the second respondent with a view of subverting, supplanting or substituting the criminal law of the land.1

The order of detention was passed plainly and indubitably with a view to preventing the petitioner from continuing the activity of smuggling and it was therefore a perfectly valid order of detention.

5.3.4.4. Duty and Purposes of Advisory Boards

In Masuma v. State of Maharashtra's 2, on behalf of the petitioner the learned counsel argued that whenever any order of detention is made, whether the detention is to continue for a period of longer than three months or a period of 3 months or less or the detaining authority has not yet applied its mind and determined how long the detention shall be continued, the appropriate government is bound with in five weeks from the date of detention to make a reference to the advisory board according

2. AIR 1981 SC 1757
to clause (b) of sec. 8 of COFEPOSA Act, for the requirement of Art. 22(4), and if it fails to do so, the continuance of the detention after the expiration of the period of five weeks would be rendered invalid.

By refuting the above argument Justice Bhagwati held that "this is a safeguard provided by the COFEPOSA Act, which is applicable in all cases of detention, whether the detention is to be continued beyond a period of three months or not and his view was that "it is not at all necessary for the detaining authority to apply its mind and consider at the time of passing the order of detention or before making a reference to the Advisory Board, as to what shall be the period of detention and whether the detention is to be continued beyond a period of three months or not. The only inhibition on the detaining authority is that it cannot lawfully continue to detention for a period longer than 3 months unless the Advisory board has, before the expiration of the period of 3 months, reported that there is in its opinion sufficient cause for such detention."

Thus, Justice held that the state government did not commit any breach of its constitutional or legal obligation in making a reference to the Advisory Board without first determining the period for which the detenu was to be detained.

5.3.4.5. Detenu’s Right of Representation and the Representation to be considered by the State.

Art. 22 (5) is a two fold the first part provides for grounds of the detention to be communicated to the detenu ‘as soon as possible’ whereas the second part consists to give the detenu “the earliest opportunity” of making a representation against the order or detention. The true meaning and import of this clause explained by the Supreme Court through Justice
Bhagwati in Khudiram Das's case¹ is that, if the grounds of detention are not communicated to the detenu he cannot make an effective representation and the opportunity of making a representation would be rendered illusory. The communication of the grounds of detention is, therefore, also intended to sub-serve the purpose of enabling the detenu to make an effective representation. In regard to the second safeguard in Article 22(5) which requires that the detenu shall be afforded the earliest opportunity of making a representation against the order of detention. No avoidable delay, no short fall in the materials communicated shall stand in the way of the detenu in making an early, yet comprehensive and effective representation in regard to all basic facts and materials which may have influenced the detaining authority in making the order of detention depriving him of his freedom.

In Dharman Raj Banshi v. State of West Bengal,² Justice Bhagwati held that, the incidents of wagon breaking and stealing on the basis of the petitioner was found as a notorious anti social element of Barrackpore–Naihati Area and which contributed is no small measure to the making of the order of detention, were, however, not communicated to the petitioner. Therefore, he was not given an opportunity of making his representation in regard to them was clearly breach of the requirement of subsection (1) of the Maintenance of Internal Security Act, 1971 and it also constituted violation of the constitutional guarantee embodied in Art 22 (5) of the constitution.

The importance of the information of grounds of detention communicated to the detenu is an opportunity of making a representation against his detention is a matter of prime intendment stressed by Justice time and again, where it is a constitutional safeguard, under Article 22(5)

and requirement under section 8(1) of the Maintenance of Internal Security Act, 1971. In Debu Mahato’s Case¹ he pronounced, that the right of representation where one of the grounds on which the order of detention was really made was that the detenu was a notorious wagon breaker who was systematically engaged in breaking railway wagons and committing theft of rice and wheat but that ground was not communicated to the detenu and he was not given an opportunity of making a representation this amounts to clear breach of sec.8 (1) of M.I. Security Act and also violation of Art. 22(5) of the Constitution. The same view has been expressed by Justice Bhagwati in the case of Golam Hossain Mondal V. State of West Bengal².

But in the case of Madhab Roy alias Madha Roy V. State of West Bengal³ his view was different because of the nature of the case, incidents and circumstance which was based on grave proportions and clear implications. In this case the petitioner detenu filed a writ of habeas corpus from jail contending that, in arriving at his subjective satisfaction it was necessary to detain the petitioner with a view to preventing him from carrying on prejudicial activities, Further, the District Magistrate took in to account not only the ground intimated to the petitioner but also the fact that the petitioner was one of the notorious anti-social element of Shyam Nagar police station. This additional circumstance, which went in to the formation of the satisfaction of the District Magistrate was not communicated to the petitioner. Hence, the petitioner had no opportunity of making his representation against it.

In this context, Justice observed that “the petitioner was one of the notorious antisocial elements indulging in committing theft of copper feeder wires from railway tractions is, therefore really nothing but an

² AIR 1974 SC 895 :: 1974- SCC – 4- 139
³ AIR 1975 SC 255; 1974 – SCC – 4- 548
elaboration of what is already implied in the apparently single solitary incident communicated to the petitioner", since there is no substance in it the petition fails and dismissed.¹

Similarly in Daroga Roy v. State of West Bengal,² the petitioner contended that the grounds of detention supplied to him were vague in as much as they did not state the names of the associates who participated with the petitioner in the incident set out in the grounds of detention. For this contention Justice Bhagwati viewed that 'it is not necessary for the petitioner to make an effective representation to specify all his associates because they may not have been known. The petitioner is being detained in respect of his acts and.... he has acted in a manner prejudicial to the maintenance of the public order, his detention can not be said to be illegal'.

It has been the consistent view of the Supreme Court that the representation of the detenu must be considered by the state government. The same was elaborately explained by Justice Bhagwati in the case of Sekawat v. State of West Bengal³. In this case the petition was directed against the validity of an order of detention dated 26-07-1972 made by the District Magistrate, Midnapur under section 3 of the MIS Act, 1971. The petitioner contended on several grounds before the court but only one ground which has great force and it must result in the detention of the petitioner being set aside has taken the court for consideration.

The petitioner, in this case, contended that the order confirming the detention of the petitioner having been passed by the State government without considering the representation of the petitioner, hence, the

¹ This case has been discussed in detail along with facts by the researcher under the 'subjective satisfaction'.
detention of the petitioner was unlawful as being in violation of Article 22(5) of the Constitution and Section 7 of the Maintenance of Internal Security Act, 1971.

In the above context the apex court through Justice Bhagwati held that, the peremptory language of Article 22(5) of the Constitution and section 7 of the Act makes it obligatory that the State Government should consider the representation of the detenu “as soon as it is received by it”. The requirement of Article 22(5) of the Constitution states that the authority making the order of detention should afford the detenu of the earliest opportunity of making a representation against the order of detention would become illusory if there were no corresponding obligations on the State Government to consider the representation of the detenu as early as possible.

Further he said that: “It is not enough of the state government to forward the representation to the Advisory Board while seeking its opinion as to whether there is sufficient cause for the detention of the detenu. The state Government must itself consider the representation of the detenu and come to its own conclusion whether it is necessary to detain the detenu. If the state government takes the view, on considering the representation of the detenu and come to its own conclusion whether it is necessary to detain the detenu”. If the state government takes the view, on considering the representation of the detenu, that it is not necessary to detain him, it would be wholly unnecessary for it to place the case of the detenu before the Advisory Board. The requirement of obtaining the opinion of the Advisory Board is an additional safeguard for the detenu over and above the safeguard afforded to him of making a representation against the order of detention. The opinion of the Advisory Board, on a consideration of the representation, is no substitute for the consideration of the representation by the State Government.
He added, "where the Advisory Board reports that there is in its opinion sufficient cause for the detention of the detenu, the State Government is not bound to confirm the order of detention. The state government has to apply its mind, keeping in view all the facts and circumstances relating to the case of the detenu including the opinion of the Advisory Board and come to its own decision whether or not to confirm the order of detention. If, therefore, the State Government has before it at that time the representation of the detenu the state government must consider it and take it into account for the purpose of deciding whether to confirm and continue the detention".

After the Advisory Board's opinion is received the State Government is bound under Section 11 to consider whether it should confirm the detention order and continue the detention of the person concerned. Since the government had not considered the representation as soon as it was received nor even at the time of the confirmation and continuation of the detention, the government had failed in one of its obligatory duties with regard to the detention of the prisoners and, therefore, for that reason also the detention becomes illegal. Here in the present case1 the representation of the petitioner was received by the State Government before it confirmed the order of detention, but it did not considered the representation and thus "failed in one of its obligatory duties with regard to the detention" of the petitioner. The subsequent consideration and rejection of the representation of the petitioner could not cure the invalidity of the order of confirmation. The detention of the petitioner must, therefore, be held to be illegal and void".

The next case came before the Supreme Court for consideration is the case of Gora v. State of West Bengal.2 In this case the petitioner

1. Sekarat v. State of West Bengal; AIR 1975 SC 64 :: 1975 - SCC - 3 - 249
2. AIR 1975 SC 473
contended that through the order of detention made by the District Magistrate had not reported the fact of making of the order of detention to the State Government for five days. Thus a delay of about five days which constituted a violation of the statutory requirement of subsection (3) of Section 3, and the fact of the making of the order of detention must be reported forthwith to the State Government.

This contention raised the question before the Supreme Court regarding the true meaning and connotation of the word 'forthwith' as used in sub-section 3 of Section 3 of the Act. In this case the District Magistrate has made an affidavit explaining the reason for the delay in sending the report to the State Government. In the report he has pointed out that 29/12/1973, which was the date when the order of detention was made, was a Saturday and on that day he had passed eight other orders of detention and the materials in connection with all these nine cases had to be typed out by the typist which could not possibly be completed in one single day 30/12/1973 was a Sunday and, therefore, the earliest when the report could be submitted to the State Government was 31.12.1973. But the District Magistrate could not sent the report on that day as he was very busy in connection with food procurement work in the district and the next day, namely, 1.01.1974 being a public holiday, he could send the report only on 2.01.1974.

Whilst taking this view relying on facts, Justice Bhagwati held that “the facts stated by the District Magistrate in his affidavit show that he acted with prompt dispatch and was not guilty of any avoidable delay. The District Magistrate must, therefore, be held to have sent the report ‘forthwith’ as required by Section 3, subsection (3)’. 
Similarly in the case of John Martin v. State of West Bengal the petitioner seeks a writ of habeas corpus challenging the validity of his detention under an order made by the District Magistrate, Burdwan under sub-section (1) read with sub-section (2) of S. 3 of the MISA Act, 1971. The contention urged by the petitioner was that the representation of the petitioner ought to have been considered by an impartial tribunal constituted by the State Government and it was not sufficient compliance with the requirement of Article 22, clause (5) under which the representation has been considered only by the State Government.

In the above state of affairs the Supreme Court speaking through Justice Bhagwati held that ‘under Section 8(1) of the Act, it is the appropriate Government that is required to consider the representation of the detenu. This, however, does not mean that the appropriate Government can reject the representation of the detenu in a casual or mechanical manner. The appropriate Government must bring to bear on the consideration of the representation an unbiased mind. There should be a real and proper consideration of the representation by the appropriate Government. We cannot over-emphasise the need for the closed and most zealous scrutiny of the representation for the purpose of deciding whether the detention of the petitioner justified’.

In Satya Deo Prasad Gupta v. State of Bihar Justice Bhagwati had expressed his deep anguish and pain with regard to the inaction of the state government concerning the matter of representation made by the detenu.

In Vimal Chand v. Pradhan was the petition is directed against the validity of an order of detention dated 13-11-1978 made by the 1st

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2. AIR 1974 SC 1156
3. AIR 1979 SC 1501 & 1979-SCC-4-401
respondent who is the secretary to the government of Maharashtra, Home Department in exercise of the power conferred under Sub-Section (1) of Sec. 3 of the COFEPOSA Act, 1974. The petitioner has urged on several grounds but one ground which is in the opinion of the court sufficient to dispose of the petition. The petitioner's contention was that the order confirming the detention was passed by the 1st respondent without considering the representation of the petitioner and the detention of the petitioner was, therefore, unlawful as being in contravention of Article 22 (5) of the Constitution.

In this regard Justice Bhagwati maintained that, it is now settled law that the power to preventively detain a person cannot be exercised except in accordance with the constitutional safeguards provided in clauses (4) and (5) of Art. 22 and if any order of detention is made in violation of such safeguards, it would be liable to be struck down as invalid. It is immaterial whether these constitutional safeguards are incorporated in the law authorizing preventive detention, because even if they are not, they would be deemed to be part of the law as a superimposition of the Constitution which is the supreme law of the land and they must be obeyed on pain of invalidation of the order of detention. The 1st respondent was, therefore, bound to observe the constitutional safeguards provided inter alia in clauses (4) and (5) of Article 22 in detaining the petitioner.

He added, "it will, therefore, be seen that one of the basic requirements of clause (5) of Article 22 is that the authority making the order of detention must afford the detenu the earliest opportunity of making a representation against the order of detention. Now this requirement would become illusory unless there is a corresponding obligation on the detaining authority to consider the representation of the
detenu as early as possible. It could never have been the intention of the constitution makers that the detenu should be given the earliest opportunity of making a representation against the order of detention but the detaining authority should be free not to consider the representation before confirming the order of detention. That would render the safeguard enacted by the constitution-makers meaningless and futile. There can, therefore, be no doubt that the constitutional imperative enacted in clause (5) of Art. 22 requiring the earliest opportunity to be afforded to the detenu to make a representation carries with it by necessary implication, a constitutional obligation on the detaining authority to consider the representation as early as possible before making an order confirming the detention. The fact that Art.22 (5) enjoins upon the detaining authority to afford to the detenu the earliest opportunity to make a representation must implicitly mean that such representation, must, when made, be considered and disposed of as expeditiously, as possible, otherwise, it is obvious that the obligation to furnish the earliest opportunity to make a representation loses both its purpose and meaning”.

There are two distinct safeguards provided to a detenu under Art.22 (5); one is that the detenu’s case must be referred to an advisory board for its opinion if it is sought to detain him for a longer period than three months and the other is the detenu should be afforded the earliest opportunity of making a representation against the order of detention and such representation should be considered by the detaining authority as early as possible before any order is made confirming the detention. Therefore Justice Bhagwati held that: “Neither safeguard is dependent on the other and both have to be observed by the detaining authority. It is no answer for the detaining authority to say that the representation of the detenu was sent by it to the Advisory Board and the Advisory Board has considered the representation and then made a report stating that in its
opinion there is sufficient cause for the detention, the state government is
not bound by such opinion and it may still on considering the
representation of the detenu or otherwise, decline to confirm the order of
detention and release the detenu. The detaining authority is, therefore,
bound to consider the representation of the detenu on its own and keeping
in view all the facts and circumstances relating to the case come to its own
decision whether to confirm the order or to release the detenu.”

Thus, Justice Bhagwati reiterated the constitutional obligation on
the part of the authority making the order of detention, which must afford
the detenu the earliest opportunity of making a representation against the
order of detention and its obligations even after the advisory board has
considered the representation to make a report.

In Icchudevi’s\(^1\) case, while making an order to be set liberty
the detenu forthwith, Justice Bhagwati expressed his unhappiness
regarding the inordinate delay in supplying grounds of copies of the
statements, documents and tapes on which the order of detention has been
made were thus denied the earliest opportunity of making an effective
representation. The determining authority was guilty of unreasonable
delay in considering the 2 representations of the detenu.

In the above state of affairs Justice pointed out that “we are not at
all happy at the thought that our order may have resulted in setting free a
possible smuggler, we are mindful of the fact that the COFEPOSA Act has
been enacted for the purpose of eradicating the evil of smuggling which is
eating into the vitals of the nation like a cancerous growth and eroding the
economic stability of the country and when an order is made by the court
realizing a person detained under this Act, it is quite possible that the
effect of the order may be to let loose on the society a smuggler who

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\(^1\) Icchu Devi Choraria v. Union of India, AIR 1980 SC 1983.
might all probability, resume his notorious activities causing incalculable mischief and harm to the economy of the nation. But at the same time we cannot forget that the power of preventive detention is a draconian power justified only in the interest of public security and order and it is tolerated in a free society only as a necessary evil”. Then he ordered for the release.

5.3.4.6. Necessity of ‘Subjective Satisfaction’ of the detaining Authority according to Art. 22(5).

The language used in the preventive detention laws make it clear that the power of detention was to be exercised on the subjective satisfaction of the detaining authority.

In Malwa Shaw’s V State of West Bengal’s case, speaking on the satisfaction arrived by the District Magistrate in making the order of detention Justice Bhagwati held that the period of about 5 months which elapsed between the dates of alleged incidents, which are the issues to make an order of detention, and the making of the order of detention cannot be regarded as so unreasonably long as to warrant the inference that no satisfaction was arrived by the District Magistrate or that the satisfaction was colourable or no satisfaction at all as required by the statute.

The satisfaction which the Magistrate is required to reach in order to support the order of detention is that, ‘it is necessary to detain the petitioner with a view to preventing him from acting in a particular manner and that satisfaction can obviously be founded on a reasonably anticipated prognosis of future behaviour of the petitioner made on the basis of post incidents, and the order of detention must be held to be valid’.

Time and again Justice had reminded the duty of the detaining authority and courts towards the accomplishment of the Constitutional obligation, while dealing with *Khudiram Das's case*¹ that, constitutional requirements of Article 22(5) insists that all basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to the making of the order of detention must be communicated to the detenu, so that the detenu may have an opportunity of making an effective representation against the order of detention. It is, therefore, not only the right of the court, but also its duty as well to examine what are the basic facts and materials which actually and in fact weighed with the detaining authority in reaching the requisite satisfaction. The judicial scrutiny cannot be foreclosed by a mere statement of the detaining authority that it has taken into account only certain basic facts and materials and though other basic facts and materials were before it, it has not allowed them to influence its satisfaction. However, the subjective satisfaction of the detaining authority is not wholly immune from judicial scrutiny.

*Justice* had an occasion to deal with a case involving great potential relating to the distinction between law and order and public order, the object of detention and circumstances for a perfectly valid order of detention has been explicitly explained by Justice Bhagwati in *Shiv Ratan Makim's case*², where the detenu was caught in the act of smuggling gold that:

"the circumstances in which the gold was being smuggled and also the facts set out in the written statement of the detenu clearly indicated that the detenu was engaged in the activity of smuggling gold and if that be so, it could not be said that the order of detention was passed

¹ Khudiram Das v. State of West Bengal: AIR 1975 SC 550
² Shiv Ratan Makim V. Union of India, 1986 AIR SC 610.
by the authority with a view to subverting, supplanting or substituting the criminal law of the land. The object of making an order of detention is preventive while the object of a criminal prosecution is punitive. Even if a criminal prosecution fails and an order or detention is then made, it would not invalidate the order of detention, because “the purpose of preventive detention being different from conviction and punishment and subjective satisfaction being necessary in the latter, the order of detention would not be bad merely because the criminal prosecution has failed. If the failure of the criminal prosecution can be no bar to the making of an order of detention, a fortiori the mere fact that a criminal prosecution can be instituted cannot operate as a bar against the making of an order of detention. If an order of detention is made only in order to by-pass a criminal prosecution which may be irksome because of the inconvenience of proving guilt in a court of law, it would certainly be an abuse of the power of preventive detention and the order of detention would be bad. But if the object of making the order of detention is to prevent the commission in future of activities injurious to the community, it would be a perfectly legitimate exercise of power to make the order of detention”.

In Gora v. State of West Bengal, the first contention urged by the learned counsel appearing as amicus curiae on behalf of the petitioner, was that the solitary incident set out – in the grounds of detention was so remote from the date of order of detention – in fact there was a time lag of about six months – and the District Magistrate could not possibly have arrived at his subjective satisfaction on the basis of that incident. Hence the requirement of proximity was not satisfied and the subjective satisfaction said to have been reached by the District Magistrate could not be regarded as real or genuine.

1 AIR 1975 SC 473 :: 1975 SCC (2) 14.
In the above state of affairs Justice Bhagwati explaining the reasons for arriving subjective satisfaction by the Magistrate observed in the following way: “the act alleged against the petitioner was a daring act of decoity in a village by a gang consisting of the petitioner and his associates and if this act is judged in its correct setting, grave proportions and clear implications, it would be clear that it cannot be a stray isolated act but must be the work of a habituated and hardened criminal given to commit dacoities the District Magistrate could, therefore, reasonably arrive at a satisfaction that with a view to preventing the petitioner from carrying on such activities it was necessary to detain him. Moreover,.... witnesses were unwilling to give evidence in open court against the petitioner and his associates and it was, therefore, felt that it was futile to proceed with the criminal case and it was decided to drop it against the petitioner. Now, if the criminal cases were dropped, the petitioner would have to be released and in that event he would be free to carry on his nefarious activities..... It is, therefore, not possible to say that the District Magistrate could not have arrived at a subjective satisfaction on the basis of the incident set out in the grounds of detention, or that the subjective satisfaction reached by him was sham or unreal....This act of dacoity created a panic in the locality and seriously disturbed the even tempo of life of the community in the village. There was clearly disturbance of public order and the act alleged against the petitioner had nexus with the object of maintenance of public order. The subjective satisfaction reached by the District Magistrate could not, therefore, be said to be based on an irrelevant ground”.

Again in Haru Sarkar V. State of West Bengal\(^1\), the petitioner argued that in arriving at his subjective satisfaction it was necessary to detain the petitioner with a view to preventing him from carrying on

\(^1\) AIR 1974 SC 2240:: 1974-SCC (4) 520
prejudicial activities and the District Magistrate took into account not only
the solitary incident intimated to the petitioner by the communication but
the additional ground and the fact, that the petitioner was a notorious
railway criminal was not communicated to the detenu.

For this argument Justice held that, 'what was already contained
with communication dated 18.07.1972 is a sufficient ground in arriving at
the requisite satisfaction and the District Magistrate did not rely on any
grounds not communicated to the petitioner and in making of the order of
detention there was no violation of the statutory provision in Section 8 or
of the constitutional safeguards in Art. 22 clause (5)'.

Similarly in Serajul's case, the petitioner challenged the validity
of the order of detention u/sec. 3 of MISA 1971, stating that there was
considerable delay between issuing him an order of detention and his
arrest (the first incident took place on 21.11.1971, second was on
24.11.1971 and the third was on 15.1.1972 and he was arrested on
22.2.1973). For the above contention Justice held that "the delay, unless,
satisfactorily explained would throw considerable doubt on the
genuineness of the 'subjective satisfaction' of the District Magistrate
revealed in the order of detention".

When the learned counsel for the state government gave
explanation with regard to the delay in making the order of detention and
arresting the petitioner that there is no such complaint was made in the
petition, Justice observed that, "this is hardly an argument which can avail
the state when it is called upon to answer a rule issued on a petition for a
writ of habeas corpus......It is the obligation of the state or the detaining
authority in making its return to the rule in such a case to place all the
relevant facts before the court and if there is any delay in making the order

of detention or in arresting the detenu which is *prima facie* unreasonable, the state must give reasons explaining the delay”.

Apart from the above discussed cases, there are some sort of peculiar cases where the people are languishing in jails for a long period without any reasonable ground and living in the shocking and pathetic conditions which shook the conscience of Justice P.N. Bhagwati are came in the form of Sant Bir v. State of Bihar and Veena Sethi v. State of Bihar.

In Santbir’s case, Justice Bhagwati observed that “this was clearly sympathetic of the utter callousness and indifference on the part of the officers of the State Government. In this case the petitioner was sentenced to life imprisonment on 28th Feb. 1949, since his condition was not stable, on 20th Nov. 1951 transferred to another jail as a criminal lunatic. The Medical History sheet and medical report showed that the petitioner was fully recovered and was free from any symptoms since 23.12.1966 and was fit for discharge. The same was informed to the State Government by the Jail Superintendent recommending that the petitioner is fit for release, instead release of the petitioner the state government directed the jail superintendent to keep the petitioner in safe custody as a criminal lunatic for 3 years as there was nobody who was ready to stand surety for the petitioner”.

For the above situation Justice Bhagwati further observed that “it was not understandable as to why the State Government should have insisted on a surety before releasing the petitioner from the jail when the petitioner was found to be completely recovered and was perfectly fit for discharge and there was absolutely no warrant or justification in law to detain him. It was shocking to our conscience that a perfectly sane person

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1. AIR 1982 SC 1470
2. AIR 1983 SC 339
should have been incarcerated with in the walls of a prison for almost 16 years without any justification in law whatsoever". Hence Justice Bhagwati made an directions to the release of petitioner forthwith.

In Veena Sethi’s case Justice responded in a sympathetic attitude. In this case some prisoners were arrested in connection with certain offences and were detained in prison for the protracted period of 37 years to 19 years. They were declared in sane at the time of their trial and were put in central jail with directions to submit half yearly medical reports. Though they were declared sane in later, no action was taken for their release by the authority for years to come. For the above situation Justice expressed his anguish in the following way: ‘the prisoners remained in jails for no fault of their and because of the callous and lethargic attitude of the authorities’.

One can witness the Supreme Court’s inventionistic role again in the case of Sheela Barse V. Union of India1. In this case the Supreme Court speaking through Justice Bhagwati indicted the attitude of the Government of Assam towards non-criminal lunatics and directed the State Government to examine and communicate their acceptance of the proposals for rehabilitation.

Apart from the above discussed cases in the year 1994 dealing with the case of Joginder Kumar v. State of UP2, the Supreme Court laid down certain guidelines to protect innocent citizens from being arrested and harassed by the police merely on the suspicion of complicity in an offence. Thus Justice Bhagwati rendered his contribution to protect the rights of the detained persons and through his directions to the subordinate Courts and relevant authority by reminding their obligations he lightened the rigorous conditions of preventive detention conditions.

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1. AIR 1986 SCC (3) 596
2. 1994 SCC (4) 62