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DEEPAK BAJAJ

v.

STATE OF MAHARASHTRA & ANR.

(Writ Petition (Crl.) No. 77 of 2008)

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NOVEMBER 12, 2008

[ALTAMAS KABIR AND MARKANDEY KATJU, JJ.]

Preventive Detention:

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Detention order – Challenge to, at pre-execution stage – Maintainability of – Held: Court can set aside the detention order at pre-execution stage if it is satisfied that the detention order was clearly illegal – Five grounds in Alka Subhash D *Gadia's case for quashing detention order at pre-execution stage are illustrative and not exhaustive – On facts, there was failure to place retraction of confession of alleged witnesses and other materials before Detaining Authority –Thus, detention order stands vitiated and quashed – Constitution of* E *India, 1950 – Articles 21 and 32 – Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 – s. 3(1).*

Detention order – Relevant materials – Non-placement of, before Detaining Authority – Effect of – Held: Would vitiate F *the detention order.*

Constitution of India, 1950:

Article 21 – Right of life and liberty – Held: Is a G *fundamental right – It should not be lightly transgressed.*

Articles 32 and 226 – Issuance of writs by Supreme Court and High Court – Power of – Explained.

Precedent: Reliance on – Held: Judgment of courts is

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not a statute and hence cannot be construed as such – It is not to be read mechanically as Euclid's theorem nor as if it was a statute.

The question which arose for consideration in this petition was whether the instant petition challenging the detention order at pre-execution stage was maintainable; and whether the failure to place retraction of confession before the detaining Authority would vitiate the detention order.

Allowing the writ petition, the Court

HELD: 1.1 The five grounds mentioned in Smt. Alka Subhash Gadia's case on which the court can set aside the detention order at the pre execution stage are, (i) that the detention order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The said grounds are only illustrative not exhaustive. [Para 5 and 6] [1072-E-F; 1073-A]

Additional Secretary to the Government of India and Ors. vs. Smt. Alka Subhash Gadia and Anr., **1992 (Suppl.1) SCC 496, referred to.**

1.2. A judgment of a Court is not to be read mechanically as a Euclid's theorem nor as if it was a statute. A judgment is not a statute, and hence cannot be construed as such. In Smt. Alka Subhash Gadia's case this Court only wanted to lay down the principle that entertaining a petition against a preventive detention order at a pre- execution stage should be an exception and not the general rule. The said proposition is concurred with. However, it would be an altogether different thing to say that the five grounds for entertaining

A **such a petition at a pre execution stage mentioned in Smt. Alka Subhash Gadia's case are exhaustive. They are illustrative and not exhaustive. [Paras 7 and 16] [1073-B; 1076-D-E]**

B *Additional Secretary to the Government of India and Ors. vs. Smt. Alka Subhash Gadia and Anr.* **1992 (Suppl.1) SCC 496;** *Ambica Quarry Works vs. State of Gujarat and Ors.* **(1987) 1 SCC 213 ;** *Bhavnagar University vs. Palittana Sugar Mills Pvt. Ltd.* **(2003) 2 SCC 111;** *Bharat Petroleum Corporation Ltd. and Anr. vs. N.R. Vairamani & another* **AIR** C **2004 SC 4778;** *Sarva Shramik Sanghatana (K.V.), Mumbai vs. State of Maharashtra & Ors.* **AIR 2008 SC 946 and** *Government of Karnataka and Ors. vs. Gowramma and Ors.* **AIR 2008 SC 863, referred to.**

D *Quinn vs. Leathem,* **1901 AC 495;** *London Graving Dock Co. Ltd. vs. Horton* **1951 AC 737;** *Home Office vs. Dorset Yacht Co.* **1970 (2) All ER 294 and** *Herrington vs. British Railways Board* **1972 (2) WLR 537, referred to.**

1.3. Every person has a fundamental right of liberty E **vide Article 21 of the Constitution. Article 21, which gives the right of life and liberty, is the most fundamental of all the Fundamental Rights in the Constitution. Though, no doubt, restrictions can be placed on these rights in the interest of public order, security of the State, etc. but they** F **are not to be lightly transgressed. If a person is sent to jail then even if he is subsequently released, his reputation may be irreparably tarnished. [Paras 18 and 21] [1076-H; 1077-A, D]**

G *Govt. of Andhra Pradesh vs. P. Laxmi Devi J.T.* **2008 (2) SC 639;** *Francis Coralie Mullin vs. Union Territory of Delhi* **AIR 1981 SC 746;** *Francis Coralie Mullin vs. W.C. Khambra and Ors.* **AIR 1980 SC 849;** *State of Maharashtra and Ors .vs. Public Concern for Governance Trust and Ors.* **2007 (3) SCC 587;** *Joginder Kumar vs. State of U.P. and Ors.* **AIR 1994** H **SC 1349, referred to.**

Ghani vs. Jones **(1970)1 Q.B. 693, referred to.** A

1.4. If a person against whom a preventive detention order has been passed comes to Court at the pre execution stage and satisfies the Court that the detention order is clearly illegal, there is no reason why the Court should stay its hands and compel the petitioner to go to jail even though he is bound to be released subsequently (since the detention order was illegal). [Para 24] [1078-C-D] B

2. It cannot be accepted that a writ of habeas corpus lies only when there is illegal detention, and in the instant case since the petitioner has not yet been arrested, no writ of habeas corpus can be issued. Firstly, Article 226 and Article 32 of the Constitution permit the High Court and the Supreme Court to not only issue the writs which were traditionally issued by British Courts but these Articles give much wider powers to Supreme Court and the High Court. This is because Article 32 and Article 226 state that the Supreme Court and High Court can issue writs in the nature of habeas corpus, mandamus, certiorari, etc. and they can also issue orders and directions apart from issuing writs. The words `in the nature of' imply that the powers of Supreme Court or the High Court are not subject to the traditional restrictions on the powers of the British Courts to issue writs. Thus the powers of Supreme Court and the High Court are much wider than those of the British Courts. Secondly, what the petitioner really prays for is a writ in the nature of certiorari to quash the impugned detention order and/ or a writ in the nature of mandamus for restraining the respondents from arresting him. Hence, even if the petitioner is not in detention a writ of certiorari and/or mandamus can issue. [Para 28] [1079-D-F; 1079-H; 1080-A] C D E F G

Dwarka Nath vs. Income-Tax Officer, Special Circle, D H

A *Ward, Kanpur and Anr.* **AIR 1966 SC 81;** *Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust and Ors. vs. V.R.Rudani and Ors.,* **AIR 1989 SC 1607, relied on.**

B *R vs. Secretary of State for Home Affairs; ex parte O'Brien* **(1923) 2 KB 361 : 1923 AC 603 : 92 LJKB 797; Darnel, Re (1627) 3 St Tr. 1, referred to.**

Halsbury's Laws of England 4th Edn., **Vol.11, para 1454, p.769, referred to.**

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3.1. Non-placement of the relevant materials before the Detaining Authority vitiates the detention order, and grounds (iii) & (iv) of the decision of this Court in Alka Subhash Gadia's case are attracted in such a situation. D **Hence, even if the five exceptions mentioned in Alka Subhash Gadia's case as are treated as exhaustive, the instant case is covered by the (iii) & (iv) exceptions of those five exceptions. [Para 27] [1079-A-B]**

Additional Secretary to the Government of India and Ors. E *vs. Smt. Alka Subhash Gadia and Anr.* **1992 (Suppl.1) SCC 496 and** *Rajinder Arora vs. Union of India and Ors.* **2006 (4) SCC 796, referred to.**

3.2. Most of the retractions were made to the DRI, and F **he belongs to the same department as Sponsoring Authority, who is the Additional Director, Revenue Intelligence. Hence, it was the duty of DRI to have communicated these retractions of the alleged witnesses to the Sponsoring Authority, as well as the Detaining Authority. There is no dispute that these retractions were** G **indeed made by persons who were earlier said to have made confessions. These confessions were taken into consideration by the Detaining Authority when he passed the detention order. Had the retractions of the persons who made these confessions also been placed before** H **Detaining Authority it is possible that the Detaining**

Authority may not have passed the impugned detention order. Hence, the retractions of confessions should certainly have been placed before the Detaining Authority, and failure to place them before him, vitiates the detention order. [Para 39] [1083-E-G]

3.3. Even if the retractions in the present case were not placed before the Detaining Authority that will not be of any avail to the respondents since it has been held that it was the duty of the authorities before whom the retractions were made to have forwarded them to the Detaining Authority and the Sponsoring Authority. [Para 41] [1084-H; 1085-A]

3.4. Failure to place the retractions and other materials referred in the petition before the Detaining Authority would certainly vitiate the impugned detention order. The relevant material was not placed before the Detaining Authority when it passed the detention order, and thus, the detention order is vitiated. The impugned detention order deserves to be set aside and are quashed. [Paras 46, 50 and 51] [1086-B; 1087-B, C]

Ashadevi vs. K. Shivraj and Anr. **1979 (1) SCC 222;** *Adishwar Jain vs. Union of India and Anr.* **2006(11) SCC 339;** *V.C. Mohan vs. Union of India* **AIR 2002 SC 1205;** *Additional Secretary to the Government of India and Ors. vs. Smt. Alka Subhash Gadia and Anr.* **1992 (Suppl.1) SCC 496;** *Rajinder Arora vs. Union of India & Ors.* **2006 (4) SCC 796;** *P. Saravanan vs. State of Tamil Nadu and Ors.* **2001(10) SCC 212;** *Ahamed Nassar vs. State of Tamil Nadu and Ors.* **1999(8) SCC 473;** *Sita Ram Somani vs.State of Rajasthan* **AIR 1986 SC 1072;** *Union of India vs. Manoharlal Narang* **1987 (2) SCC 241;** *A. Sowkath Ali vs. Union of India and Ors.* **2000(7) SCC 148, relied on.**

State of Maharashtra vs. Bhaurao Punjabrao Gawande **AIR 2008 SC 1705;** *Alpesh Navinchandra Shah vs. State of*

Maharashtra and Ors. **2007 (2) SCC 777;** *Maqsood Yusuf Merchant vs. Union of India and another Criminal* **Appeal No. 1337 of 2008 decided by S.C. on 22.8.2008;** *T.A. Abdul Rehman vs. State of Kerala and Ors.* **AIR 1990 SC 225, referred to.**

Case Law Reference:

AIR 2008 SC 1705	Referred to.	Para 3, 49
1992 (Suppl.1) SCC 496	Referred to.	Para 3, 5, 6, 24, 27
2006 (4) SCC 796	Referred to.	Para 3, 27
2007 (2) SCC 777	Referred to.	Para 3, 48
1901 AC 495	Referred to.	Para 8
(1987) 1 SCC 213	Referred to.	Para 9
(2003) 2 SCC 111	Referred to.	Para 10
AIR 2004 SC 4778	Referred to.	Para 11
1951 AC 737	Referred to.	Para 12
1970 (2) ALL ER 294	Referred to.	Para 13
1972 (2) WLR 537	Referred to.	Para 14
AIR 2008 SC 946	Referred to.	Para 15
AIR 2008 SC 863	Referred to.	Para 15
1992 (Suppl.1) SCC 496	Relied on.	Para 16, 43
(1970)1 Q.B. 693	Referred to.	Para 19
J.T. 2008 (2) SC 639	Referred to.	Para 20
2007 (3) SCC 587	Referred to.	Para 21
AIR 1994 SC 1349	Referred to.	Para 22

AIR 1981 SC 746	**Referred to.**	**Para 25**	A
AIR 1980 SC 849	**Referred to.**	**Para 26**	
AIR 1966 SC 81	**Relied on.**	**Para 28**	
AIR 1989 SC 1607	**Relied on.**	**Para 28**	B
(1923) 2 KB 361	**Referred to.**	**Para 30**	
(1627) 3 ST TR. 1	**Referred to.**	**Para 31**	
1979 (1) SCC 222	**Relied on.**	**Para 40**	
2006 (11) SCC 339	**Relied on.**	**Para 42**	C
AIR 2002 SC 1205	**Relied on.**	**Para 42**	
2006 (4) SCC 796	**Relied on.**	**Para 43**	
2001(10) SCC 212	**Relied on.**	**Para 43**	D
1999(8) SCC 473	**Relied on.**	**Para 43**	
AIR 1986 SC 1072	**Relied on.**	**Para 43**	
1987 (2) SCC 241	**Relied on.**	**Para 44**	E
2000 (7) SCC 148	**Relied on.**	**Para 45**	
AIR 1990 SC 225	**Referred to.**	**Para 49**	

ORIGINAL CRIMINAL JURISDICTION : Writ Petition (Crl.) No. 77 of 2008. F

(Under Article 32 of the Constitution of India)

Soli Sorabjee, Sr. Adv., Vikram Chaudhary, Nikhil Jain, Ajay Pal and Anand Mishra for the Appellant. G

Shekhar Nafade, Sr. Avd., Ravindra Keshavrao Adsure, Satish Aggarwal and Pooja Bhaskar, Advs., for the Respondents.

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A The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. This writ petition under Article 32 of the Constitution of India has been filed to challenge the detention order dated 22.05.2008 passed against the B petitioner, Deepak Gopaldas Bajaj, resident of Mumbai under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short 'the Act'), copy of which is Annexure P-1 to this petition.

2. Heard Shri Soli Sorabjee, learned senior counsel for the C petitioner and Shri Shekhar Nafade and Shri Ravindra Keshavrao Adsure, learned counsels for the respondents and perused the record.

3. An objection has been taken by the learned counsels D for the respondents that this petition should not be entertained because the petition has been filed at a pre-execution stage i.e. before the petitioner has surrendered or was arrested. Learned counsel for the respondents has relied on the decisions of this Court in *State of Maharashtra vs. Bhaurao Punjabrao Gawande* AIR 2008 SC 1705, which has followed E the decision of this Court in *Additional Secretary to the Government of India & Ors. vs. Smt. Alka Subhash Gadia & Anr.* 1992 (Suppl.1) SCC 496, and the other decisions of this Court in *Rajinder Arora vs. Union of India & Ors.* 2006 (4) SCC 796, *Alpesh Navinchandra Shah vs. State of Maharashtra & F Ors.* 2007 (2) SCC 777, etc.

4. We have carefully perused the aforesaid decisions and we are of the opinion that the legal position regarding the power of this Court or the High Court to set aside a preventive G detention order at the pre execution stage needs to be further explained.

5. Since the aforesaid decisions have basically followed the decision of this Court in Additional Secretary to the *Government of India & Ors. vs. Smt. Alka Subhash Gadia &* H

Anr. (supra), it would be useful to refer to the aforesaid decision. In paragraph 30 of the aforesaid decision in *Smt. Alka Subhash Gadia's* case (supra) this Court observed :

> "30. As regards his last contention, viz., that to deny a right to the proposed detenu to challenge the order of detention and the grounds on which it is made before he is taken in custody is to deny him the remedy of judicial review of the impugned order which right is a part of the basic structure of the Constitution, we find that this argument is also not well merited based as it is on absolute assumptions. Firstly, as pointed out by the authorities discussed above, there is a difference between the existence of power and its exercise. Neither the Constitution including the provisions of Article 22 thereof nor the Act in question places any restriction on the powers of the High Court and this Court to review judicially the order of detention. The powers under Articles 226 and 32 are wide, and are untrammeled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences. However, the courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary extraordinary and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other

A efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which the seextraordinary powers are used and are declined to be used by the courts. To accept Shri Jain's present contention would mean that the courts B should disregard all these time-honoured and well-tested judicial self-restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibal for the appellants, as far as detention orders C are concerned if in every case a detenu is permitted to challenge and seek the stay of the operation of the order before it is executed, the very purpose of the order and of the law under which it is made will be frustrated since such orders are in operation only for a limited period. Thirdly, and this is more important, it is not correct to say that the D courts have no power to entertain grievances against any detention order prior to its execution. The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have E interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be F executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial G review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question."

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6. We have carefully perused the above observations in *Smt. Alka Subhash Gadia's* case (supra) and we are of the opinion that the five grounds mentioned therein on which the Court can set aside the detention order at the pre execution stage are only illustrative not exhaustive.

7. It is well settled that a judgment of a Court is not to be read mechanically as a Euclid's theorem nor as if it was a statute.

8. On the subject of precedents Lord Halsbury, L.C., said in *Quinn vs. Leathem,* 1901 AC 495 :

> "Now before discussing the case of *Allen Vs. Flood* (1898) AC 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all."

We entirely agree with the above observations.

9. In *Ambica Quarry Works vs. State of Gujarat & others* (1987) 1 SCC 213 (vide paragraph 18) this Court observed :

> "The ratio of any decision must be understood in the background of the facts of that case. It has been said a long time ago that a case is only an authority for what it

A actually decides and not what logically follows from it".

10. In *Bhavnagar University vs. Palittana Sugar Mills Pvt. Ltd.* (2003) 2 SCC 111 (vide paragraph 59), this Court observed :

B "It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision".

11. As held in *Bharat Petroleum Corporation Ltd. & another vs. N.R. Vairamani & another* (AIR 2004 SC 4778), C a decisioncannot be relied on without disclosing the factual situation. In the same judgment this Court also observed :

"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the D fact situation of the decision on which reliance is placed. *Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of the context.* These observations must be read in the context in which they appear to have been E stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they F do not interpret judgments. They interpret words of statutes; *their words are not to be interpreted as statutes.*

(emphasis supplied)

12. In *London Graving Dock Co. Ltd. vs. Horton* (1951 AC G 737 at page 761), Lord Mac Dermot observed :

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J. as though they were part of an Act of Parliament and applying the rules

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of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge". A

13. In *Home Office vs. Dorset Yacht Co.* (1970 (2) All ER 294) Lord Reid Said, "Lord Atkin's speech ... is not to be treated as if it was a statute definition; it will require qualification in new circumstances, Megarry, J. in (1971) 1 WLR 1062 observed : B

"One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament". C

14. And in *Herrington vs. British Railways Board* (1972 (2) WLR 537) Lord Morris said :

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. D

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper. The following words of Lord Denning in the matter of applying precedents have become locus classicus : E F

Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo, J.) by matching the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. G

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A *Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path of justice clear of obstructions which could impede it."*

B (emphasis supplied)

15. The same view was taken by this Court in Sarva Shramik Sanghatana *(K.V.), Mumbai vs. State of Maharashtra & Ors.* AIR 2008 SC 946 and in *Government of Karnataka &* C *Ors. vs. Gowramma & Ors.* AIR 2008 SC 863.

16. Shri Shekhar Nafade learned senior counsel for the State of Maharashtra submitted that the five conditions mentioned in *Smt. Alka Subhash Gadia's* case (supra) were D exhaustive and not illustrative. We cannot agree. As already stated above, a judgment is not a statute, and hence cannot be construed as such. In Smt. *Alka Subhash Gadia's* case (supra) this Court only wanted to lay down the principle that entertaining a petition against a preventive detention order at E a pre- execution stage should be an exception and not the general rule. We entirely agree with that proposition. However, it would be an altogether different thing to say that the five grounds for entertaining such a petition at a pre execution stage mentioned in *Smt. Alka Subhash Gadia's* case (supra) are F exhaustive. In our opinion they are illustrative and not exhaustive.

17. If a person against whom a prevention detention order has been passed can show to the Court that the said detention order is clearly illegal why should he be compelled to go to jail? To tell such a person that although such a detention order G is illegal he must yet go to jail though he will be released later is a meaningless and futile exercise.

18. It must be remembered that every person has a fundamental right of liberty vide Article 21 of the Constitution.

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Article 21, which gives the right of life and liberty, is the most fundamental of all the Fundamental Rights in the Constitution. Though, no doubt, restrictions can be placed on these rights in the interest of public order, security of the State, etc. but they are not to be lightly transgressed.

19. In *Ghani vs. Jones* (1970)1 Q.B. 693 (709) Lord Denning observed :

> "A man's liberty of movement is regarded so highly by the law of England that it is not to be hindered or prevented except on the surest ground"

20. The above observation has been quoted with approval by this Court in *Govt. of Andhra Pradesh vs. P. Laxmi Devi J.T.* 2008 (2) SC 639 (vide para 90).

21. If a person is sent to jail then even if he is subsequently released, his reputation may be irreparably tarnished. As observed by this Court in *State of Maharashtra & Ors. vs. Public Concern for Governance Trust & Ors.* 2007 (3) SCC 587, the reputation of a person is a facet of his right to life under Article 21 of the Constitution (vide paragraphs 39 and 40 of the said decision).

22. As observed by the three Judge bench of this Court in *Joginder Kumar vs. State of U.P. & Ors.* AIR 1994 SC 1349

(vide para 24) :

> ".....The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. *Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person."*
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> (emphasis supplied)

A 23. In the Geeta Lord Krishna said to Arjun :

''सम्भावितस्य चाकीर्तिर्मरणादतिरिच्यते''

(Geeta : Chapter 2 Shloka 34)

B which means -

"For a self respecting man, death is preferable to dishonour"

24. If a person against whom a preventive detention order
C has been passed comes to Court at the pre execution stage and satisfies the Court that the detention order is clearly illegal, there is no reason why the Court should stay its hands and compel the petitioner to go to jail even though he is bound to be released subsequently (since the detention order was
D illegal). As already mentioned above, the liberty of a person is a precious fundamental right under Article 21 of the Constitution and should not be lightly transgressed. Hence in our opinion *Smt. Alka Subhash Gadia's* case (supra) cannot be construed to mean that the five grounds mentioned therein for quashing
E the detention order at the pre execution stage are exhaustive.

25. In *Francis Coralie Mullin vs. Union territory of Delhi* AIR 1981 SC 746 this Court observed (vide para 3) :

F " ....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
G courts have to be ever vigilant to see that this power is not abused or misused."

26. In *Francis Coralie Mullin vs. W.C. Khambra and others* AIR 1980 SC 849 this Court observed (vide para 5) :

H "No freedom is higher than personal freedom and no duty

higher than to maintain it unimpaired" A

27. Apart from the above, in our opinion non-placement of the relevant materials before the Detaining Authority vitiates the detention order, and grounds (iii) & (iv) of the decision of this Court in *Alka Subhash Gadia's* case (supra) are attracted in B such a situation as held in *Rajinder Arora vs. Union of India* (supra) (vide para 25 of the said decision). Hence, even if we treat the five exceptions mentioned in *Alka Subhash Gadia's* case (supra) as exhaustive, the present case is covered by the 3rd and 4th exceptions of those five exceptions, as held in C *Rajinder Arora's* case (supra).

28. Learned counsel for the respondent submitted that a writ of habeas corpus lies only when there is illegal detention, and in the present case since the petitioner has not yet been arrested, no writ of habeas corpus can be issued. We regret D we cannot agree, and that for two reasons. Firstly, Article 226 and Article 32 of the Constitution permit the High Court and the Supreme Court to not only issue the writs which were traditionally issued by British Courts but these Articles give much wider powers to this Court and the High Court. This is E because Article 32 and Article 226 state that the Supreme Court and High Court can issue writs in the nature of habeas corpus, mandamus, certiorari, etc. and they can also issue orders and directions apart from issuing writs. The words 'in the nature of' imply that the powers of this Court or the High F Court are not subject to the traditional restrictions on the powers of the British Courts to issue writs. Thus the powers of this Court and the High Court are much wider than those of the British Courts vide *Dwarka Nath vs. Income-tax Officer, Special Circle, D Ward, Kanpur & Anr.* AIR 1966 SC 81 (vide G para 4), *Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust & Ors. vs. V.R. Rudani & Ors.* AIR 1989 SC 1607 (vide para 16 to 18), etc. Secondly, what the petitioner really prays for is a

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A writ in the nature of certiorari to quash the impugned detention order and/or a writ in the nature of mandamus for restraining the respondents from arresting him. Hence even if the petitioner is not in detention a writ of certiorari and/or mandamus can issue.

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29. The celebrated writ of habeas corpus has been described as `a great constitutional privilege of the citizen' or `the first security of civil liberty'. The writ provides a prompt and effective remedy against illegal detention and its purpose is to safeguard the liberty of the citizen which is a precious right not C to be lightly transgressed by anyone. The imperative necessity to protect those precious rights is a lesson taught by all history and all human experience. Our founding fathers have lived through bitter years of the freedom struggle and seen an alien government trample upon the human rights of our citizens. It is D for this reason that they introduced Article 21 in the Constitution and provided for the writs of habeas corpus, etc.

30. In *R vs. Secretary of State for Home Affairs; ex parte O'Brien* (1923) 2 KB 361 : 1923 AC 603 : 92 LJKB 797, E Scrutton, LJ observed:

> "The law in the country has been very zealous of any infringement of personal liberty. This case is not to be exercised less vigilantly, because the subject whose liberty F is in question may not be particularly meritorious. It is indeed one test of belief in principles if you apply them to cases with which you have no sympathy at all. You really believe in freedom of speech if you are willing to allow it to men whose opinion seem to you wrong and even G dangerous; and the subject is entitled only to be deprived of his liberty by due process of law, although that due process if taken will probably send him to prison. A man undoubtedly guilty of murder must yet be released if due forms of law have not been followed in his conviction. *It is* H *quite possible, even probable, that the subject in this*

case is guilty of high treason; he is still entitled only to be deprived of his liberty by due process of law.

(emphasis supplied)

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

> "Whether the commitment be by the King or others, this Court is a place where the King doth sit in person, and we have power to examine it, and if it appears that any man hath injury or wrong by his imprisonment, we have power to deliver and discharge him, if otherwise, he is to be remanded by us to prison."

32. In Halsbury's Laws of England, (4th Edn., Vol.11, para 1454,p.769), it is stated:

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

A 33. Coming now to the merits of the case. A perusal of the grounds of detention which have been annexed as Annexure P-2 to this petition shows that, the basic allegations against the petitioner are that he imported 29 consignments of goods duty free which were meant to be used as raw material for B manufacture of goods which should have been exported, but instead, he sold them in the local market. It is also alleged that he obtained duty free replenishment certificate (DFR) and misused the same. Various other allegations have also been made in the grounds of detention which runs into as many as C 76 pages.

34. Several submissions have been made by Shri Soli Sorabjee, learned counsel for the petitioner, but in our opinion it is not necessary to go into all of them since we are inclined to allow this petition on one of these grounds namely, that the D relevant material was not placed before the Detaining Authority when he passed the detention order.

35. These relevant materials have been stated in the writ petition in ground `C' entitled `Non-placement of relevant E material documents by Sponsoring Authority leading to consequent non- consideration thereof by the Detaining Authority'.

36. A large number of documents have been referred F therein, but we agree with Mr. Shekhar Nafade, learned counsel for the respondent that it is not necessary for the Detaining Authority to consider or refer to the materials which were irrelevant to the activities mentioned in Section 3(1) of the Act. However, we agree with Shri Soli Sorabjee that some of the G materials were relevant and should have been placed before the Detaining Authority and considered by him, but they were neither placed before the Detaining Authority nor were they considered.

37. The most important of these documents which were H

not placed before the Detaining Authority were the retractions given by Kuresh Rajkotwala to the DRI dated 4.12.2006, Kuresh Rajootwala's affidavit filed before the learned Addl. Chief Metropolitan Magistrate, Esplanade, Mumbai, Bharat Chavhan's retraction to DRI dated 9.5.2008, Bipin Thaker's retraction to DRI dated 19.1.2008, Sharad Bhoite's retraction dated 24.4.2007 before the Addl. Chief Metropolitan Magistrate, Esplanade Mumbai and its affidavit filed before the same authority etc.

38. Shri Nafade, learned counsel submitted that these retractions were made before the DRI and the Additional Chief Metropolitan Magistrate, and not before the Sponsoring Authority who was the Additional Director of Revenue Intelligence. Shri Nafade submitted that the Sponsoring Authority was not aware of these retractions and hence he could not have placed them before the Detaining Authority. We find no merit in this submission.

39. Most of the retractions were made to the DRI, and he belongs to the same department as the Sponsoring Authority, who is the Additional Director, Revenue Intelligence. Hence, it was the duty of the DRI to have communicated these retractions of the alleged witnesses to the Sponsoring Authority, as well as the Detaining Authority. There is no dispute that these retractions were indeed made by persons who were earlier said to have made confessions. These confessions were taken into consideration by the Detaining Authority when he passed the detention order. Had the retractions of the persons who made these confessions also been placed before the Detaining Authority it is possible that the Detaining Authority may not have passed the impugned detention order. Hence, in our opinion, the retractions of the confessions should certainly have been placed before the Detaining Authority, and failure to place them before him, in our opinion, vitiates the detention order.

40. It has been repeatedly held by this Court that if a

A confession is considered by the Detaining Authority while passing the detention order the retraction of the confession must also be placed before him and considered by him, otherwise the detention order is vitiated. Thus in *Ashadevi vs. K. Shivraj & another* 1979 (1) SCC 222 this Court observed B (vide para 7) :

> "Further, in passing the detention order the detaining authority obviously based its decision on the detenu's confessional statements of December 13 and 14, 1977 and, therefore, it was obligatory upon the Customs Officers C to report the retraction of those statements by the detenu on December 22, 1977 to the detaining authority, for, it cannot be disputed that the fact of retraction would have its own impact one way or the other on the detaining authority before making up its mind whether or not to issue D the impugned order of detention. Questions whether the confessional statements recorded on December 13 and 14, 1977 were voluntary statements or were statements which were obtained from the detenu under duress or whether the subsequent retraction of those statements by E the detenu on December 22, 1977 was in the nature of an after-thought, were primarily for the detaining authority to consider before deciding to issue the impugned detention order but since admittedly the aforesaid vital facts which would have influenced the mind of the detaining authority F one way or the other were neither placed before nor considered by the detaining authority it must be held that there was non-application of mind to the most material and vital facts vitiating the requisite satisfaction of the detaining authority thereby rendering the impugned detention order G invalid and illegal".

41. It may be noted that in the above decision, this Court has held that it was the duty of the Customs Officer to have reported the retraction of the statements to the Detaining H Authority. Hence, even if the retractions in the present case

were not placed before the Detaining Authority that will not be of any avail to the respondents since it has been held that it was the duty of the authorities before whom the retractions were made to have forwarded them to the Detaining Authority and the Sponsoring Authority. We entirely agree with the above view.

42. In *Adishwar Jain vs. Union of India and another* 2006(11) SCC 339 this Court observed that where the relevant documents have not been placed before the Detaining Authority, issuing of the detention order itself would become vitiated. The same view was taken in *V.C. Mohan vs. Union of India* AIR 2002 SC 1205.

43. In *Alka Subhash Gadia's* (supra) this Court followed its earlier decision in *Rajinder Arora's* case (supra) in which case it was held that failure to place the retraction of the confession before the detaining authority vitiated the detention order. The same view was taken by this Court in *P. Saravanan vs. State of Tamil Nadu and others* 2001(10) SCC 212, *Ahmed Nassar vs. State of Tamil Nadu and others* 1999(8) SCC 473, *Sita Ram Somani vs. State of Rajasthan* AIR 1986 SC 1072, etc.

44. In *Union of India & others vs. Manoharlal Narang* 1987 (2) SCC 241 this Court deprecated the contention that the detaining authority is not required to collect all materials about any court proceedings etc from different Ministries or Departments for the purpose of issuance of a detention order. The Court observed that non-consideration of a relevant material will certainly invalidate the detention order. We respectfully agree with the above view, and reiterate it.

45. In *A. Sowkath Ali vs. Union of India and others* 2000(7) SCC 148 this Court observed that if the Detaining Authority has relied on a confessional statement then the retraction of that confession should also have been placed before the Detaining Authority, and should have been

considered by it, and failure to do so would invalidate the detention order.

46. In our opinion, failure to place the retractions and other materials referred to in paragraph 4 of the petition before the Detaining Authority would certainly vitiate the impugned detention order.

47. Shri Soli Sorabjee, learned counsel for the petitioner also submitted that the petitioner had stopped his alleged illegal activities in 2006 and hence the detention of the petitioner now would be illegal. He has relied on a decision of this Court in *Maqsood Yusuf Merchant vs. Union of India and another* Criminal Apeal No. 1337 of 2008 decided on 22.8.2008 by this Bench. In that decision it was observed that the activities of the accused who was said to have indulged in unlawful activities were of the year as far back as 2002, and thereafter the appellant had not indulged in similar activities. Hence it was held that continuing the order of detention today would be an exercise of futility and the same should not be given effect to any further.

48. Shri Soli Sorabjee also relied on a decision of this Court in *Alpesh Navinchandra Shah vs. State of Maharashtra and others* 2007(2) SCC 777(vide para 57) etc.

49. Shri Soli Sorabjee, learned counsel, invited our attention to ground `B' in the Writ Petition in which it has been stated that the petitioner has not done any business after November 2006 when the alleged last consignment was cleared by the petitioner. This averment has not been rebutted in the counter affidavit filed by the respondent. Hence, Shri Sorabjee submitted that there is now no live link between the alleged prejudicial activities and the purpose of detention now. He has also relied upon the decisions of this Court in T.A. Abdul Rehman vs. State of Kerala and others AIR1990 SC 225 *State of Maharashtra vs. Bhaurao Punjabrao Gawande* AIR 2008

SC 1705 etc. A

50. In our opinion, it is not necessary to go into this submission of Shri Soli Sorabjee since we are of the opinion that the petition deserves to be allowed on the first ground, namely, that the relevant material was not placed before the Detaining Authority, and this vitiates the detention order. B

51. The detention order in our opinion was clearly illegal and deserves to be set aside. We order accordingly. The writ petition is allowed. The impugned detention order dated 22.5.2008 stands quashed. No costs. C

N.J. Writ Petition allowed.