PETITIONER:
UNION OF INDIA ETC.

Vs.

RESPONDENT:
BHANUDAS KRISHNA GAWDE AND ORS. ETC.

DATE OF JUDGMENT25/01/1977

BENCH:
SINGH, JASWANT
BENCH:
SINGH, JASWANT
RAY, A.N. (CJ)
BEG, M. HAMEEDULLAH

CITATION:
1977 AIR 1027 1977 SCR (2) 719
1977 SCC (1) 834

ACT:

Conservation of Foreign Exchange and Prevention of Smuggling Activities (Maharashtra Conditions of Detention) Order 1974,--Validity of--High Court--If could examine the vires of the Act--If could entertain a petition under Art. 226 of the Constitution during Emergency.

HEADNOTE:

The Conservation of Foreign Exchange and Prevention of Smuggling Activities (Maharashtra Conditions of Detention) Order, 1974 provides that security prisoners shall not be allowed to supplement their diet even at their own expense, restricts the security prisoner from receiving funds from relatives and friends; restricts the number of meetings with relatives and friends and medical attention is allowed only through the Medical Officer of the prison in the same way as a convicted criminal and so on.

Writ Petitions field by the detenus under Arts. 226, and 227 of the Constitution, two High Courts .have struck down the Order as ultra vires.

On appeal it was contended by the State that the right of a person to move. any Court for the enforcement of the rights conferred by Arts. 14, 19, 21 and 22 of the Constitution having been suspended by the Presidential Orders of June 27, 1975 and January 8, 1976 issued under Art. 359(1) for the period during which the Proclamation of Emergency was inforce, no person had locus Mandi to move an application under Art. 226 for the 'issue of a writ to enforce any right to personal liberty.

Allowing the appeals,

(per Ray, C.J. and Jaswant Singh, J.)

HELD: The Writ Petitions were not maintainable and the High Courts were clearly in error in passing the impugned directions which were not warranted by any relevant law including the law relating to preventive detention. [732 D]

1. It is well settled by the decisions of this Court that if a person was deprived of his personal liberty not under the 'Defence of India Act, 1962 or any rule or order made thereunder but in contravention thereof, his locus standi to move any court for the enforcement of the rights conferred by Arts. 21 and 22 was not barred. On the other

hand since the Presidential Orders dated June 27, 1975 and January 8, 1976 were not circumscribed by any limitation, their applicability was not made dependent upon the fulfilment of any conditions precedent. They imposed a total or blanket ban on the enforcement of the fundamental rights conferred by Arts. 19, 21 and 22. There is,therefore, no room for doubt that these Presidential Orders unconditionally suspended the enforceability of the right conferred upon any person, including a foreigner, to move any Court for the enforcement of the rights conferred by Arts. 14, 19, 21 and 22 of the Constitution. [742 E, G-H]

Additional District Magistrate, Jabalpur v. Shiva Kant Shukla [1976] 2 S.C.C. 521--A.I.R. 1976 S.C. 1207, Makhan Singh v. State of Punjab [1964] 4 S.C.R. 797--A.I.R. 1964 S.C. 381, State of Maharashtra v. Prabhakar Pandurang Sanzgiri [1966] 1 S.C.R. 702--A.I.R. 1966 S.C. 424, Dr. Ram Manohar Lohia v. State of Bihar [1966] 1 S.C.R. 709--A.LR. 1966 S.C. 740, A.K. Gopalan v. The State of Madras [1950] S.C.R. 88--A.I.R. 1950 S.C. 27 and Kharak Singh v. State of U.P. [1964] 1 S.C.R. 332--A.I.R. 1963 S.C. 1295, followed,
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2. When a person has no locus standi to move any Court to challenge his order of detention, the High Court could not issue directions disregarding the provisions of the Act, which is a self-contained code, and particularly ss. 5 and 12(6) which are mandatory. [745 F-H]
Maqbool Hussain v. The State of Bombay [1953] S.C.R. 730, followed.

3. As Articles 19, 21 and 22 of the Constitution have been suspended during the operation of the Proclamation of Emergency, the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act and the orders made or passed thereunder were not open to challenge on the ground of their being inconsistent with or repugnant to Arts. 14, 19, 21 and 22 of the Constitution in view of the Presidential Orders, dated June 27, 1975 and January 8, 1976. [742 G-H]

In the instant case the detenus covertly sought to enforce the vary rights which were suspended. It was not open to the High Courts to strike down the impugned clauses of the Maharashtra Conditions of Detention Order 1974.

4. The avowed object of the Act, as mainrest from its preamble, being the conservation and augmentation of foreign exchange and the prevention of smuggling activities secretly organised and carried on, it is essential that contact 0f the detenus with the outside world should be reduced to the minimum. It is for the State Governments who are in full possession of all material facts and not for the Courts who have neither the necessary knowledge of the facts nor the. legal competence, to regulate conditions of detention Of persons, including their maintenance, interviews or communications with others. [746 A-C]

5. When a person is detailed, he can exercise only such privileges as are conferred on him by the order of detention or by the rules governing his detention.

State of Maharashtra v. Prabhakar Pandurang Sanzgiri [1966] I SCR 702AIR 1966 S.C. 424 referred to.

6. The mere fact that a detenu is confined in a prison for the sake of administrative convenience does not entitle him to be treated as a civil prisoner or to be governed by the provisions of the Prisons Act. The view of the High Courts to the contrary cannot be sustained. [746 D-E]
Maqbool Hussatn v. The State of Bombay [1953] S.C.R. 730, followed.

7. The contention that the Presidential Orders did not bar the Court from examining the vires of the detention orders because what was sought to be enforced was not a right of personal liberty but a redress against unreasonableness of the order was misconceived. The Presidential Orders imposed a blanket ban on every judicial enquiry into the validity of an order depriving a person of his personal liberty irrespective of whether it stems from the initial order directing his detention or from an order laying down the conditions in his detention. [743 A-E]

Additional District Magistrate, .Jabalpur v. Shiva Kant Shukla [1976] 2 S.C.C. 521--A.I.R. 1976 S.C. 1207 followed.

(Per Beg. J.) Concurring.

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The High Courts, acting under Art. 226 have not been given the power to interfere in any matter involving the assertion or enforcement of a right to personal freedom by the detenus during an Emergency, when exercise of such power by the High Courts is suspended. In times of Emergency the remedy for all the grievances of the detenus lies with the executive and administrative authorities of the State. [754 B-C]

1. Shukla's case held that 'it was not the fundamental rights which were suspended by the Presidential Order under Art. 359 but the right to move any Court for the enforcement of such right conferred by Part III as may be mentioned in the Order which is suspended for the duration of_the Emergency. This mean that it is the 'jurisdiction of Courts, to the extent to which a petitioner seeks to enforce the fundamental rights mentioned in the Presidential Order, which is suspended. [749 G-H]

Additional District Magistrate, Jabalpur v. Shivakant Shukla AIR 1976 SC 1283, applied.

A.K. Gopalan v. State of Madras, [1950] SCR 88, Kharak Singh v. State of U.P., [1964] 1 SCR 332, 1. C. Golakanath v. State of Punjab [1967] 2 SCR 762.

His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala, [1973] Supp. SCR 1 and Haradhan Saha v. The State of West Bengal & Ors., [1975] (1) SCR 778--AIR 1974 SCR 154 referred to.

2. The term "any other purpose" in Art. 226 means purposes similar to those for which one of the specified writs would issue subject to certain exceptions The writ of habeas corpus is wider in scope than the enfrocement of fundamental rights which are available against the State only and its officers and agents. But so far as mere directions or orders for any other purpose are concerned, the jurisdiction of High Courts does not extend to making orders against private individuals. On the other hand, if an officer is duly empowered and has passed a detention order, that order is not capable of being questioned under Art. 226. All enquiry into the conditions of exercise of such. power is barred under the constitutional provisions during the emergency.

[750 D-E, H, 751 A, C-D]

3. In the instant case the remedy sought was clearly covered by the Presidential inhibition which operates against the High Courts. The claims made by the detenus were not matters which the High Court could consider in petition under Art. 226 of the Constitution. [751 E-F]

4. If the object of a proceeding is to enforce the fundamental right, to personal freedom, a High Court's jurisdiction under Art. 226 is barred during an Emergency even if it involved adjudication on the question of vires of a rule made under enactments authorising preventive deten-

tion. It is impossible to invalidate a rule either intended for or used for regulating the conditions of detention of a person detained under one of the Acts authorising preventive detention on the ground that the rule could only be used for persons in punitive detention. The attack on the validity of such a rule cannot succeed on the ground that the object of the rule should be shown to be preventive and not punitive. [754 E-F]

5. Shukla's case indicates that Arts. 19 and 21 embrace every aspect of an alleged infringement of the right of personal freedom by a State authority or officer purporting to act under a law. Even if the action violates, a protection conferred by Art. 21 upon citizens as well as non-citizens in ordinary times, the result of the suspension, of the protection given by Art. 21 must necessarily be that the protection cannot be enforced during an Emergency. If that be the effect of the Presidential declaration under Art. 359, the Court cannot go behind this declaration of law and the express letter of the law as embodied in the Constitution and enforce what may be covered by the right to personal freedom in ordinary times whether it parades under the guise of natural law or statutory law or constitutional law. [755 F-H]

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JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 310 & 363 of 1976.

(From the Judgments and Orders dated the 1st September, 1975 of the Bombay High Court in Criminal Appln. No. 20/75) and

Criminal Appeals Nos.: 348-349, 350, 195-201, 170-176, & Crl. As. Nos. 181-182 of 1976.

(Appeals by Special Leave Petitions from the Judgments and Orders dated the 14th/18th July, 1975, 9th July, 1975, 3rd April, 1976, 13th March, 1976, and 19th March, 1975, of the Bombay High Court in Criminal Appln. Nos. 794, 784/75, 833-839/76 and 614620/76 and 385-386/76 respectively and

Criminal Appeal No. 397 of 1976.

(Appeals by Special Leave from the Judgments and Orders dated the 23rd March, 1976 and 6th April, 1976 of the Karnataka High Court in Writ Petitions Nos. 1454 and 2096/76 respectively) and

Criminal Appeal No. 397 of 1976.

(From the Judgment and Order dated the 3rd September, 1975 of the Bombay High Court in Criminal Application No. 792/75) and

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 573 of 1976.

(Appeal by Special Leave from the Judgment and Order dated the 26th March, 1976 of the Bombay High Court in Criminal Appln. No. 31 of 1976) and

Special Leave Petitions (Civil) Nos. 2443-2444, 2864, 3061 of 1976.

(From the Judgments & orders dated 8-4-76, 7-4-76, 12-4-76 & 8-4-76 of the Karnataka High Court in W.P. Nos. 2918/76, 6693/75, 1977, 2012 & 1295/76) and

Dy. Nos. 3002 & 3003 0f 1976.

(From the Judgments and Orders dated the 8-4-1976 of the Karnataka High Court in Writ Petitions Nos. 2355 and 1968 of 1976 respectively) and

Civil Appeals Nos. 1365-1367 of 1976.

(From the Judgment and Order dated the 23-3-1976 of the Karnataka High Court in Writ Petitions Nos. 2293, 2477

and 2503/76 respectively) and
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Civil Appeal No. 434 of 1976.
(From the Judgment and Order dated the 1-4-1976 of the Karnataka High Court in IA No. IV in Writ Petition No. 4177 of 1970).

Narayan Nettar for the appellants in Crl. A. 210 and CAs Nos. 1365-1367/76 and Crl. A. 192 and for Petitioners in SLPs (Civil) Nos. 2443, 2444, 2864, 2865 and 3061/76 and R. 3 in CA 434/76.

V.P. Raman, Addl. Sol. Genl. (In Crl. A 310, 348, 397, 195 and 181/76), M/s. R.N. Sachthey and M.N. Shroff with him for the Appellant in Crl. A. 310, 348, 397, 349, 350, 363, 170-176, 181,182 add 195-201 and C.A. 573/76 and 434/76 and for R. 3 in Crl. A. 310 and 348 and RR 2 and 4 in Crl. A. 350/76.
Jail Petitioners for the Petitioners in Petn. Under Dy. No. 3002 3003/76.

H.M. Seervai (In Crl. A. Nos. 310, 340, 349, 363 and CA 573/ 76), Ashok H. Desai, A.J. Rane. (In CA 573/76), L R. Gagrat and B.R. Agarwala for RR. 1 and 2 in Crl. A. 310, 363 and 397 and R. 1 in Crl. As. 348-349 and RR in CA 573/76.

A.K. Sen, R.H. Dhebar and B.V. Desai for R. 1 in Crl. A. No. 350/76.

V.M. Tarkunde, Ashok H. Desai and V.N. Ganpule for RR in Crl. A. 170 to 176, 181, 182, 195-201/76.

H.M. Seervai, Dr. N. M. Ghatate, S. Balakrishnan, S. S. Khanduja, (Miss) Rani Jethamalani and Altar Ahmed for R. 1 in CA 434/76.

The Judgment of A.N. Ray C.J. and Jaswant Singh, J. was delivered by Jaswant Singh J., Beg, J. gave a separate opinion.

JASWANT SINGH J. These appeals, some of which have been preferred by certificates granted under Articles 133 and 134(1)(e) of the Constitution and Others by Special leave granted by this Court under Article 136 of the Constitution, and which are directed against various final and interim judgments and orders of the High Courts of Bombay and Karnataka passed in writ petitions filed under Articles 226 and 227 of the Constitution by or on behalf of certain persons who are detained under orders of the appropriate authorities made under section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Act No. 52 of 1974) (hereinafter referred to as 'the Act') complaining of certain constraints imposed on them under orders made under section 5 of the Act and claiming facilities in excess of those provided in the said orders, shall be disposed 0f by this judgment. A gist of the orders appealed against
12--112SCI/77.
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and particulars of the petitions in which they have been passed given in the sub-joined table for facility of reference :---
FIRST BATCH OF APPEALS
1.Sr. No.
2.No. of appeal
3. Date of the order appealed against
4. No. of the application in which the order appealed against has been passed
5. Name of the High Court which passed the order
6. Name of the detenu in whose favour or against whom the order against has been passed.
7. substance of the order appealed against
Sr.No.-1
2. Crl. A.No. 310/1976

3. 1-9-1975
4. Crl. Application No. 20/1975
5. Bombay
6. Krishna Budha Gawda

7. Clauses 9(iii) 10, 12(i)and (xi), 19, 20, 21, 23, 24 and 31 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Maharashtra Conditions of Detention) Order, 1974 struck down and directions issued requiring the detaining authority to keep the detenu under detention as a 'civil prisoner' within the terms of and in all respects in conformity with the provisions of the Prisons Act, 1894 and further directing the detaining authority to,permit the detenu to maintain himself by receiving such funds not exceeding the sum of Rs. 200/- per month us he may desire to have lot that purpose from any of his relatives or friends, and to purchase or receive from private sources at proper hours food. clothing, bedding, and other necessaries, including toilet requisites, toilet soap. cigarettes and tobacco, subject to examination gild to such rules, if any, as may be approved by the Inspector General , as also to permit the detenu to meet persons with whom he may desire to communicate at proper times anti tinder proper restrictions.

Sr. No. 2.
2. Crl. A. No.
3. -do-
4. -do-
5. -do-
6. -do-
7. -do-

Sr.No. 3
2. Crl. A. No. 397/1976
3. 3-9-1975
4. Crl. Application No. 792/1975
5. Bombay ram Kewalji
6. Ghamandi Gowani
7. [Nil]

SECOND BATCH OF APPEALS

Sr. No.1.
2. Crl. A. No.348/1976
3. Interim order dated 14-7-1975
4. Crl. Application No. 794/1975
5. Bombay
6. Ramlal Narang

7. Directions issued to the detaining authority to permit the detenu (1) to have his food from out side at his own expense, subject to routine check: (2) to have one interview with his legal advisers for two hours in the presences

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of a Customs Officer, but not within Iris hearing; (3) to have one interview per month with ally Of tile Family members, which should be in accordance with and subject to subclauses (iii), (vi), (vii) and (ix)of clause 12 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Maharashtra Conditions of

Detention) Order, 1974.
2. Crl. A. No 348/1976
3. Interim order dated 14-7-1975
4. Crl. Application No. 794/1975
5. Bombay
6. Yusuf Abdulla Patel
7. Directions issued to the detaining authority (1) to permit the detenu to have his food from outside at his own expense subject to routine check,(2) to have the detenu examined at least once a week by Doctors at St. George's Hospital and to permit the detenu's doctor being present at such examination. (3) to permit the detenu to take specially prescribed medicines at his own cost.(4) not to remove the detenu to another jail from the Arthur Road Prison, Bombay, without giving at least 24 hours notice in writing (excluding Sundays and other holidays) to his Attorneys, (5) to permit the detenu to have one interview with his legal advisers for two hours in the presence of a Customs Officer but not within his hearing and (6) to permit the detenu to have interview with relatives as per clause 12(ii) of Maharashtra Conditions of Detention Order, 1974.

THIRD BATCH OF APPEALS
Sr.No .1
2. Crl. As. Nos. 195-201/1976
3. 3-4-1976
4. Crl. Applications 833-839/1976
5. Bombay
6. Ratan Singh Gokaldas Rajda & others
7. Directions issued to the detaining authority to have the detenus taken under custody to the site of the meeting of the Bombay Municipal Corporation and enable them to exercise their votes at the mayoral election.if and when it takes place.

Sr.No. 2
2. Crl. As. Nos. 170-176/1976
3. 13-3-1975
4. Crl. Applications 614-620/1975
5. Bombay
6. Smt. Ahilya Pandurang Rangankar and others
7. While rejecting the application for release on parole directions issued the detaining in authority to have the detenus taken under custody to vote at the election of statutory Committees to be held on 15-3-1976 at 3 P.M. at the Bombay Municipal Corporation Bombay.

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Sr.No. 3
2. Crl. As. Nos. 181-182/1976
3. 19-3-1976
4. Crl. Applications Nos. 385-386/1976
5. Bombay
6. Ganesh Prabhakar Pradhan and others
7. Directions issued to the detaining author-

ity to have the the detenus taken under custody to the Maharashtra Legislative Council Hall for the limited purpose of enabling them to exercise their right to the statutory Committess on 30-3-1976.

Sr.No. 4
2. Crl As. Nos. 1365-67/1976
3. 23-3-1976
4. W. Ps. Nos. 2293, 2477, 2503/1976
5. Karnataka
6. C.R. satish and Others

7. Directions issued to the detaining authority to have the detenus taken not later than 11 A.M. on 24-3-1976 under police escort to the place where the election of the President of the Town Municipal Council, Chikmaglur was to be held and after they exercised their right to vote to have them brought back under police escort to the jails in which they were then detained.

Sr. No. 5
2. C.A. Nos. 434/1976
3. 1-4-1976
4. I.A. No. IV W.P. No. 4177/1976
5. Karnataka
6. L.K. Advani

7. Directions issued to the detaining authority to have the detenu taken under police escort to New Delhi so as to enable him to be in Rajya Sabha on 3-4-1976 before 10.45 A.M. and to allow him to take oath of affirmation and thereafter to take his seat in Rajya Sabha and to have him brought back under police escort to the Central Jail Banglore on 3-4-1976 or on 4-4-1976 whichever date is convenient to the detaining authority.

FOURTH BATCH OF APPEALS
Sr. No. 1
2. Crl. A. No. 192/1976
3. 23-3-1976
4. W.P. Nos 1454/1973
5. Karnataka
6. Gurunath Kulkarni

7. Directions issued to the detaining authority (1) to have the detenu taken under police escort on or before 3-4-1976 to the shops in Bellary to enable them to purchase stationary required for the examination and to the college where detenu had 10 get the admission ticket to the examination. (2) to have the detenu taken on each day of the examination under police escort from the jail at Bellary to the Examination centre and to see that he reached such centre at least 20 minutes before the commencement of the examination and was brought back after the day's examination was over from such centre to the jail under police escort. Directions also issued to the jail authorities to ascertain well in advance the programme of the examination which the detenu had to take.

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Sr. No. 2
2. Crl. A. No. 210/1976

3. 6-4-1976
4. W.P. No. 2096/1976
5. Karnataka
6.K.T. Shivanna

7. Directions issued to the detaining authority to release the detenu on parole on the afternoon of 10-4-1976. The detaining authority also directed to arrange to have the detenu either taken under police escort to his home at Novavirakare, Tiprut Talu, starting from Bangalore on the afternoon of 10-4-1976 and to have him brought back under police escort from his home to the Central Jail, Bangalore, starting from Honavinskere on the afternoon of 12-4-1976 OR release the detenu at the gate of the Central jail Bangalore on his executing a self bound for Rs. 6,000/- undertaking to surrender himself to the jail authorities on 12-4-1976 not later than 6 P.M. and not take part in political activities or other activities detrimental to the security of the State during the period he remained on parole. The police, however given the liberty to keep a watch around the detenu's house and to follow his movements outside his house during the period he continued on parole.

Sr.No. 3
2. S.L.P.(Civil) No. 2443/1976
3. 8-4-1976
4. W.P. No.2918/1972
5. Karnataka
6. K.A.Nagaraj

7. Directions issued to the detaining authority (1) to release the detenu on parole, (2) to have the detenu taken on the evening of 9-4-1976 under police escort to his houses and brought back to the Central Jail, Bangalore. under police escort on the evening of 10-4-1976; and (3) again have the detenu taken on the evening 01 14-4-1976 under police escort to his house and brought back under police escort to the Central Jail, Bangalore, on the evening of 15-4-1976. The police, however, given tile liberty to keep a watch around the house of the detenu and to follow his movements during the period he remained on parole.

Sr. No. 4
2. S.L.P.(Civil) No. 2444/1976
3. 8-4-1976
4. W.P. No.6693/1975
5. Karnataka
6. P.B.Satyanarayana Rao

7. Directions issued to the detaining authority to release the detenu on parole on 14-4-1976 and to have him taken under police escort to his home and brought back under police escort to the jail On the afternoon of 16-4-1976. The police, however, given the liberty to keep a watch around the house of the detenu and to watch his movement outside his house during his release on parole.

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Sr. No. 5
2. S.L.P.(Civil) No. 2864/1976
3. 7-4-1976
4. W.P. No. 1977/1976
5. Karnataka
6. M.Sanjeev Gatti

7. Directions issued to the detaining authority either (i) to arrange the detenu taken under police escort to his native place. Bangalore, starting from Bangalore on 8-4-1976 and brought back under police escort to the Central Jail Bangalore on 14-4-1976.

and

(ii) to release the detenu at the gate of the Central Jail. Bangalore. on the morning of 8-4-1976 his executing a sell-bond of Rs. 5,000/- undertaking to surrender himself to the jail authorities not later than 5 P.M. on 15-4-1976 and not to take part in any political activity or other activity detrimental to the security of the State.

The police, however, given the liberty to keep a watch around the house houses in which the detenu stayed and to follow his movements outside the house or houses during the period he remained on parole.

Sr.No. 6
2. S.L.P. (Civil) No. 2865/1976
3. 8-4-1976
4. W.P. No. 2012/1976
5. Karnataka
6. V.S. Acharya

7. Directions issued to the detaining authority either to arrange to have the detenu taken under police escort from Central Jail. Bangalore, to Udupi starting from Bangalore on the morning of 13-4-1976 and to have him brought back under police escort from Udupi starting there from on the morning of 21-4-1976 or release the detenu at the gate of the Central Jail, Bangalore, on his execut-ing a self-bond lot Rs. 5,000/- undertaking not to take part in any political activity or in any activity detrimental to the security of the State during the period he remained on parole as to surrender him-self to the Jail authorities not later than 6 P.M. on 21-4-1976. The police however, given the liberty to keep a watch over the detenu and to follow him movements during the period he remained on parole.

Sr.No. 7
2. S.L.P. (Civil) No. 3061/1976
3. 8-4-1976
4. W.P. No. 1295/1976
5.Karnataka
6. C.V.Shankar Rao Jadhav

7. Directions issued to the detaining authority either (1) to arrange to have the detenu taken too his home at Nandya

under police escort starting from Bangalore on the evening of 10-4-1976 and to have him brought back under police escort to the Central Jail Bengal starting from Nandya on the morning 13-4-1977.

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or (2) to release him at the gate of the Central Jail, Bangalore on the evening of 10-4-1976 on his executing a self-bond for Rs. 5,000/- undertaking to surrender himself to the Jail authorities not later than 4 P.M. on 12-4-1976 and not to take part in any political activity or other activity detrimental to the security of the State during the period of his release on parole. The police, however, given the liberty to keep a watch around the detenu's house and to follow his movements outside his house during the period of his release on parole.

FIFTH BATCH OF APPEALS

Sr.No. 1
2. Dy. No. 3002/1976
3. 8-4-1976
4. W.P. No. 2355/1976
5. Karnataka
6. D.J. Shivaram

7. Prayer of the detenu allow him to be released on parole to enable him to take the final LL.B. examination rejected in view of the orders made by this Court i.e. the Supreme Court in High Court W.P. No. 1454/1976

Sr. No. 2.
2. Dy. No.3003/1976
3. 8-4-1976
4. W.P. No. 1968/1976
5. Karnataka
6. Hanumant Gururao Inamdar

7. Prayer of the detenu to allow him to be released on parole to enable him to take the Second Year LL.B. examination rejected in view of the orders made by this Court on in High Court W.P. No. 1454/1976.

SIXTH BATCH OF APPEALS

Sr. No.1
2. C.A. No. 349/1976
3. 18-7-1975
4. Crl. Application No.794/1975
5. Bombay
6. Ramlal Narang

7. Directions issued to the detaining authority not to remove the detenu till further order to another jail outside the State without giving at least 3 hours notice in writing (excluding Sunday and holidays to the detenu attorneys.

Sr. No. 2.
2. C.A. No. 573/1976
3. 20-3-1976
4. Crl. Application No. 31/1976
5. Bombay
6. Prabhudas Tribhovandas

7. Directions issued to the detaining authority to detain the detenu in such prison where the detenu would have the bene-

fit of the Company of other women detenus as also other facilities under the rules.

Clauses 9(iii), 10, 12(ii) & (xi), 19, 20, 21, 23, 24 & 31 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Maharashtra Conditions of Detention) Order, 1974 (hereinafter referred to as "the Maharashtra Conditions of Detention Order, 1974") which have been struck down by the High Court of Bombay read as under :---

"9. ... .

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(iii) Security prisoners shall not be allowed to supplement their diet even at their own expense. Any security prisoner who wishes to supplement his diet on medical grounds. may apply to the Commissioner or the Superintendent, as the case may be. The Commissioner or the Superintendent shah get him examined by a Medical Officer attached to the place of detention who may order such modification of, or addition to, his diet, as he may consider necessary on medical grounds.

10. Supply of funds :--(i) A security prisoner may, with the previous sanction of the detaining authority, receive from a specified relative or friend at intervals of not less than a month, funds not exceeding Rs. 30/- per month and may spend these funds or a similar sum from his own private funds on such objects and in such manner as may be permissible under the rules, in case in which for want of funds any security prisoners are compelled to do without small amenities which their fellow prisoners enjoy, such amenities may, if considered absolutely necessary by the Commissioner or the Superintendent be supplied to them at Government costs.

(ii) All funds so received shall be kept by the Commissioner or the Superintendent and spent by him on behalf of the security prisoners concerned.

(iii) Amounts in excess of those prescribed in subclause (i) may be received by the Commissioner or the Superintendent on behalf of security prisoners, but they shall not be spent in any month beyond the limits laid down in the said sub-clause.

12. .. ..

(ii) The number of interviews which a security prisoner may be permitted to have shall not ordinarily exceed one per month.

(xi) In addition to the interviews permissible under the preceding provisions of this clause, a security prisoner may with the permission of the detaining authority, be granted not more than two special interviews, for the settlement of his business or professional affairs, such interviews shall ordinarily take place within a period not exceeding two months from the date of detention of the security prisoner. concerned and shall be conducted in accordance with the provisions of this clause as regards place, duration and conditions of the interview, and the proceedings shall be strictly confined to the objects

for which the interview is granted.

19. Medical attendance :--(i) The Superintendent of the Hospital or the Civil Surgeon, as the case may be, shall depute a medical officer to visit each security prisoner detained

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in a police lock-up and report of his physical condition. The said Medical Officer shall visit the prisoner at least once a week and more often if the Superintendent of the Hospital or the Civil Surgeon or the Commissioner as the ease may be thinks fit, and submit the report on his condition to the Commissioner or the detaining authority, after the first day of each month and at any other time he considers necessary.

(ii) Security prisoner detained in a jail or sub-jail shall in the event of illness, be treated in the same way as convicted criminal prisoner or treated under the rules made under the Prisons Act, 1894.

20. Toilet :--(i) Every security prisoner shall be supplied with neam or babul stick at Government expense.

(ii) Every security prisoner shall be supplied with one cake of jail made toilet soap per month for bathing at Government expense. The weight of such cake shall be 113 grams approximately and if jail made soap is not available in any medium quality, toilet soap manufactured in India: and available locally shall be supplied.

21. Service of barbers etc. :--(i) A security prisoner shall not be permitted to have shaving equipment of his own.

(ii) Every security prisoner shall be allowed to have the services of the jail barber once a week.

23. Smoking and tobacco:--Except cigarettes or bidies and chewing tobacco, which are available at the jail canteen, no other facilities to smoke or chew tobacco shall be permitted.

24. Games :--Security prisoners shall not be pertained to play indoor games like cards or to play chess, draughts and carrom.

31. Power to withhold any concessions or facilities: The State Government may, by general or special order, withhold any of the concessions or facilities provided by or under any of the provisions of this order in respect of any security prisoner or class of security prisoner, and for such period or periods, as the State Government may, from time to time specify.

Appearing on behalf of the Union of India and the States of Maharashtra and Karnataka, the learned Additional Solicitor General has, while very fairly stating that though the appropriate Government may have no objection to the issue of special orders permitting the detenus to receive or purchase toilet requisites, toilet soap and to consult private doctors in case of genuine necessity if an application is made to it in that behalf, submitted that the right of any person to

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move any court for the enforcement of the rights conferred by Article 21 (which is the sole repository of the right to life and personal liberty) and Articles 14, 19 and 22 of the Constitution having been suspended by virtue of the Presidential Orders dated June 27, 1975 and January 8. 1976 issued under clause (1) of Article 359 of the Constitution (which are absolute in terms) for the period during which , the proclamation of emergency made on June 25, 1975 under clause (1) of Article 352 of the Constitution is in force, no person has a locus standi to move any application under Article 226 or Article 227 of the Constitution for issue of a writ, order or direction to enforce any right to personal liberty. He has further urged that since it is for the appropriate Government to specify the place of a detenu's detention and to lay down by means of a general or special order the conditions as to his maintenance, interviews or communications with others with a view to prevent his contact with the outside world and sincewhat was sought to be enforced in the instant cases by means of the applications filed by or on behalf of the detenus under Article 226 and 227 of the Constitution in the aforesaid High Courts was nothing but various facts of personal liberty under Articles 19, 21 and 22 of the Constitution, the applications were not maintainable and the High Courts were not competent to deal with them and to either strike down the aforesaid clauses of the Maharashtra Conditions of Detention Order, 1974 or to issue the aforesaid directions to the detaining authorities.

Mr. Seervai Mr. Ashok Sen, Mr. Desai and Mr. Dattar, learned counsel for the detenus have, on the other hand, emphasized:

(1) that preventive detention does not stand on the samefooting as punitive detention and while it cannot be gainsaid that persons who can be prosecuted and punished for offences against the law can also be preventively detained they cannot be punitively treated;

(2) that considerations relevant for applications seeking relief of release by habeas corpus are not relevant to cases in, which conditions of detention fall for consideration;

(3) that the principle of legality and the doctrine of ultra vires are not abrogated even during the times of emergency and the exercise of power under section 5 of the Act must have a reasonable nexus with the purpose for which the power is conferred;

(4) that if according to the majority judgment in Additional District Magistrate, Jabalpur v. Shiva Kant Shukla(1) even habeas corpus could issue in cases where the order is not duly authenticated then the conditions of detention can certainly be scrutinized and relief can be granted if those conditions are found to be illegal or ultra vires;

(1) [1976] 2 S.C.C 521= A.I.R. 1976 S,C. 1207.=[1976] Supp. S,C.R. 172.

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(5) that the aforesaid clauses of the Maharashtra Conditions of Detention Order, 1974, being ultra vires and violative of the principles of reasonableness and legality have rightly have been struck down by the High

Court of Bombay:

(6) that a curtain cannot be drawn round the detenu ,red while he can be cut off from undesirable contacts, he cannot be cut off from unobjectionable contacts;

(7) that if the place of detention mentioned in a detention order is a prison, then the detenu would be governed by the Prisons Act but not if the detenu is lodged elsewhere;

(8) that the detenus' grievances are not 'echoes' of Article of the Constitution but are the echoes of the 'totality' law;

(9) that it is not right to say that what is not contained in Article 19 of the Constitution is contained in Article 21 of the Constitution as this submission ignores Articles 15, 25 and 26 of the Constitution which are applicable even to non-citizens.

The learned Additional Solicitor General has, in his rejoinder, contended that while total release is of course different from regulating conditions of detention, the former not being available by virtue of the Presidential Orders dated 27th June, 1975 and January 8, 1976 issued under Article 359 (1) of the Constitution which are unconditional even conditions of detention cannot be enforced by moving a court during the period of emergency and that the contention based upon the principles of legality and reasonables and doctrine of ultra vires is misconceived. The Additional Solicitor General has further submitted that legality has to be understood as meaning the authority of law and it so understood, a person detained in accordance with the conditions framed under section 5 of the Act cannot complain that the conditions are illegal or ultra vires, broader challenges based on fundamental rights not being available; that the principle of reasonableness and the doctrine of ultra vires have no bearing on subordinate legislation framed under emergency laws; that the court cannot grant relief on vague and indeterminate philosophical theories like the totality of law; that as the line of demarcation between preventive and punitive detention which is easily perceivable at the stage of detention becomes progressively elusive and hazy when one comes to conditions of detention. there is little scope for generalisation; that curtain has to be drawn round a detenu to ensure effectiveness of detention which cannot be sacrificed in the interest of security of the State; that the observations made by the majority in Shivakant Shukla's case (supra) regarding the area of judicial interference which are sought to be relied upon on behalf of the detenus relate to the obvious eases where the Executive itself could not and would not seek to defend a detention order and can be of no assistance in the present cases where the detenus seek to

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enforce a right to do something or to get something which is not con t:erred on and given to them by law; that any right to personal liberty or any facet or aspect thereof has to be found in some constitutional provision to be enforced in normal times and ex-hypothesi to become unenforceable during an emergency and reference to Articles 15, 25 and 26 of the Constitution completely ignores the fact that these rights postulate a free citizen and cannot be enforced independently of Article 21 or Article 19 of the Constitution and in any case, the rights claimed in the present cases have no relation to those Articles.

Without prejudice to the aforementioned contentions

advanced by him the learned Additional Solicitor General has further submitted that it is only where there are specific provisions in the rules framed trader section 5 of the' Act that those provisions being conditions of detention can be enforced when still available to an individual detenu that the provisions of Maharashtra Conditions of Detention Order, 1974 have to be examined and scrutinized to see if the facilities claimed by the detenus are excluded by implication, e.g. where a provision for a particular number of interviews is made, it necessarily implies a prohibition against having more interviews; that the question whether a particular act which is not specifically prohibited should be permitted or not has to be decided by keeping in view the effectiveness of detention; that allowing a detenu to go and vote at a corporate election or to take part in legislative proceedings is destructive of the purpose of detention and in any event approach must be made to the Executive to exercise its rights of parole or relaxation which is implicit in sections 12 and 5 of the Act as for instance if the release is necessitated by exigencies like performance of obsequieal ceremonies or sharadh of a kith and kin, but an order directing the detenu to be taken under police guard to the place where obsequies of a dead relation are to be performed cannot be made by a court as it tantamounts to onforcing his personal liberty; that while Iramane considerations are generally borne in mind by the authorities having the custody of the detenus and appropriate Government, they cannot furnish reliable basis for judicial relief; that the aforesaid directions of the Bombay High Court equating detenus with 'civil prisoners' amenable to the Prisons Act, 1894, does not only amount to a substitution or re-enactment of section 5 of the Act i.e. of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 but is also opposed to the definition of the 'prisoner' as contained in the Bombay Jail Manual which has not been amended so as to include persons directed to be detained under any Central or other Act providing for detention; that the mere fact that a person is detained for purposes of administrative convenience in a jail does not mean that he is a civil prisoner or that the Prisons Act applies to him; and that the necessity of having provisions in the conditions of detention orders enabling a detenu to consult private doctors in the presence of the official doctors in case of genuine necessity or to supplement his diet on medical grounds or to indulge in harmless pastimes like chess or carrom or to appear in examinations are matters for which the appropriate Government should be approached.

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We have given our anxious consideration to the submission made by counsel for the parties. In our judgment, the vital question of fundamental importance that requires to be determined at the threshold in the instant cases is whether in view of the orders dated June 27, 1975 and January 8, 1976 issued by the President under clause (1) Article 359 of the Constitution, the aforesaid petitions under Articles 226 and 227 of the Constitution were maintainable.

For a proper determination of the question, it is necessary to advert to the provisions of Articles 352, 353, 358 and 359 contained in Part XVIII of the Constitution called the Emergency Provisions, as well as to the Presidential Orders dated November 3, 1962, December 3, 1971, November 16, 1974, June 25, 1975, June 27, 1975 and January 8, 1976. The aforesaid Articles of the Constitution are in these terms :--

"Article 352. (1) If the President is

satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation make a declaration to that effect.

(2) A Proclamation issued under clause (1)--

(a) may be revoked by subsequent Proclamation;

(b) shall be laid before each House of Parliament;

(c) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament;

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months referred to in sub-clause (c), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstruction unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of People.

(3) A Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

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** (4) The power conferred on the President by this article shall include the power to issue different proclamations on different grounds, being war or external aggression or internal disturbance or imminent danger of war or external aggression or internal disturbance whether or not there is a Proclamation already issued by the President under clause (1), and such Proclamation is in operation.

(5) Notwithstanding anything in this Constitution,

(a) the satisfaction of the President mentioned in clause (1) and clause (3) shall be final and conclusive and shall not be questioned in any court on any ground;

(b) subject to the provisions of clause (2), neither the Supreme Court nor any other court shall have jurisdiction to entertain any question, on any ground, regarding the validity of--

(i) a declaration made by Proclamation by the President to the effect stated in clause (1); or

(ii) the continued operation of such Proclamation."

"Article 353. While a Proclamation of Emergency is in operation then-
(a) notwithstanding anything in this Constitution, the
executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised;
(b) the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorising the Conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding' that it is one which is not enumerated in the Union List."

"Article 358. While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to. the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

** Inserted retrospectively by section 5 of the Constitution (Thirty-eighth Amendment) Act, 1975.

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"Article 359. (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the fight to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

**(1A) While an order made under clause (1) mentioning any of the rights conferred by Part III is in operation, nothing in that Part conferring those rights shall restrict the power of the State us defined in the said Part to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

(2) An order made as aforesaid may extend to the whole or any part of the territory of India.

(3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament."

It is hardly necessary to emphasize that the provisions of the Articles reproduced above arc designed to arm the

State with special powers to meet extraordinary situations created in times of grave national emergencies due to war, external aggression and internal disturbance when the security of the State nay the very existence of the nation is threatened necessitating the subordination of individual rights to the paramount consideration of the welfare of the State, and to give effect to the well recognized principle to which particular attention was called by E.C.S. Wade and Godfrey Phillips by inserting the following passage in their Constitutional Law, 8th Edition, Chapter 48, pp. 717, 718:--

> "It has always been recognized that times of grave national emergency demand the grant of special powers to the Executive. At such times arbitrary arrest and imprisonment may be legalised by Act of Parliament."

It is, however, necessary to state that there is an appreciable difference between Articles 358 and 359(1) of the Constitution. Whereas simultaneously with the declaration of emergency under Article 352, Article 358 by its own force removes the restrictions on the power of the Legislature to make laws inconsistent with Article 19 of the Constitution as also on the power of the Executive to take

** Inserted retrospectively by section 7 of the Constitution (Thirty-eighth Amendment) Act, 1975.

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actions which may be repugnant to Article 19 of the Constitution so long as the proclamation of emergency continues to operate but does not suspend any fundamental right which was available to a citizen under Article 19 of the Constitution prior to the promulgation of emergency, Article 359(1) empowers the President to suspend the right of an individual to move any court for enforcement of such of the rights conferred by Part III of the Constitution as may be specified by him (the President) in his order. In other words, while Article 358 proporio vigore suspends the fundamental rights guaranteed by Article 19 of the Constitution thus enabling the State during the period the proclamation of emergency is in operation to make laws in violation of Article 19 of the Constitution and to take Executive action under those laws despite the fact that those laws constitute an infringement of the rights conferred by Article 19, Article 359(1) of the Constitution does not suspend any fundamental right of its own force but authorises the President to deprive an individual of his right to approach any Court for enforcement of any or all of the rights conferred by Part III of the Constitution. In Mohd. Yaqub etc. v. The State of Jammu & Kashmir(1), a Constitution Bench of this Court consisting of seven Judges inter alia pointed out that there is a distinction between Articles 358 and 359(1) of the Constitution. Whereas Article 358 by its own force suspends the fundamental rights guaranteed by Article 19, Article 359(1) of the Constitution has the effect of suspending the enforcement of specified fundamental rights so. that these concept cannot be used to test the legality of an Executive action.

Reference in this connection may also usefully be made to a passage in Shivakant Shukla's case (supra) where my. Lord the Chief Justice who headed the majority opinion while pointing out the difference between Articles 358 and 359 of the Constitution observed :--

> "The vital distinction between Article 358 and Article 359 is that Art. 358 suspends the rights only under Article 19 to the extent that the legislature can make laws contraven-

ing Article 19 during the operation of a Proclamation of Emergency and the Executive can take action which the Executive is competent to take under such laws. Article 358 does not suspend any fundamental fight. While a Proclamation of Emergency is in operation the Presidential Order under Article 359(1) can suspend the enforcement of any or all fundamental rights. Article 359(1) also suspends any pending proceedings for the enforcement of such fundamental right or rights, The purpose and object of Article 359(1) is that the enforcement of any fundamental right mentioned in the Presidential Order is barred or it remains suspended during the emergency. Another important distinction between the two Articles is that Article 358 provides for indemnity whereas Article 359(1) does not, Article 359(1A) is on the same lines as Article 358 but Article 359(1A) now includes all fundamental rights which may be mentioned in a Presidential Order and is, therefore, much wider than Article 358 which includes Article 19 only. (1)

[1968] 2 S.C.R. 227.

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A person can enforce a fundamental right both in the case of law being made in violation of that right and also if the Executive acts in non-compliance with valid laws or acts without the authority of law. It cannot be said that the scope of Article 359(1) is only to restrict the application of the Article to the Legislative field and not to the acts of the Executive. The reason is that any enforcement of the fundamental rights mentioned in the Presidential Order is barred and any challenge either to law or to any act of the Executive on the ground that it is not in compliance with the valid law or without authority of law will amount 'to enforcement of fundamental rights and will, therefore, be within the mischief of the Presidential Order. The effect of the Presidential Order suspending the enforcement of fundamental right amounts to bar the locus standi of any person to move the court on the ground of violation of a fundamental right."

Thus the foregoing discussion makes two things perfectly clear(1) that Article 359(1) (which makes no distinction between the threat to the security of India by war or external aggression or internal disturbance) is wider in scope than Article 358 and (2) that it is not open to any one either to challenge the validity of any law or any Executive action on the ground of violation of a fundamental right specified in the Presidential Order promulgated under Article 359(1). of the Constitution. It would be apposite at this stage to mention that in England in Liversidge v. Anderson(1) and Greene v. Secretary of State for Home Affairs(2) and in India in Sree Mohan Chowdhury v. The Chief Commissioner, Union Territory of Tripura(3) and Makhan Singh v. State of Punjab(4) the right of any person to challenge any executive action taken during emergency on the ground that it was arbitrary or unlawful has been negatived. In the Liversidge's case (supra) the following

memorable observations made by the House of Lords in the King v. Halliday, Ex parte zadig(5) were referred to and relied upon :-

> "However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment namely, national success in the war or escape from national plunder or enslavement. Liberty is itself the gift of the law and may by the law be forfeited or abridged."

Having noticed the amplitude of the provisions incorporated in our Constitution by its rounding fathers in relation to the threat posed by three types of grave emergencies on the basis of the experience gained . in England and United States of America and their effect, let us now turn to the various Presidential Orders and notice their effect.

(1) [1942] A.C. 206.
(2) [1942] A.C. 284.
(3) [1964] 3 S.C.R. 442 = A.I.R. 1964 S.C. 173.
(4) [1964] 4 S.C.R. 797 = A.I.R. 1964 S.C. 381.
(5) [1917] A.C. 260.

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Presidential Order dated November 3, 1962 issued under clause (1) of Article 359 of the Constitution after the proclamation of emergency made on October 26, 1962 under clause (1) of Article 352 of the Constitution consequent on the invasion of India by China on September 8, 1962 ran as follows :--

> "New Delhi, the 3rd November, 1962
> G.S.R. 1464--In exercise of the powers Conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person to move any court for the enforcement of the rights conferred by Article 21 and Article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of Article 352 thereof on the 26th October, 1962 is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder."

Be it noted that addition of Article 14 was made in the above Presidential Order of November 3, 1962 by the Presidential Order dated November 11, 1962 and the aforesaid emergency declared on October 26, 1962 was revoked vide Presidential Order dated January 10, 1968 issued under Article 352(2)(a) of the Constitution.

Proclamation of emergency issued by the President of India under Article 352(1) of the Constitution on December 3, 1971, consequent upon the Pakistani aggression reads as under :--

> "In exercise of the powers conferred by clause (1) of Article 352 of the Constitution, I, V.V. Giri, President of India, by this. Proclamation declare that a grave emergency exists whereby the security of India is threatened by .external aggression."
>
> Presidential Order dated November 16, 1974 issued under clause (1) of Article 359 of the Constitution is in these terms :--
>
> "In exercise of the powers conferred by clause (1) of Article 359 of the Constitution,

the President hereby declares that :--

(a) the right to move any court with respect to orders of detention which have already been made or which may hereafter be made under section 3 (1)(c) of the Maintenance of Internal Security Act, 1971 as amended by Ordinance II of 1974 for the enforcement of the rights conferred by Article 14, Article 21 and clauses (4), (5), (6) and (7) of Article 22 of the Constitution, and

(b) all proceedings pending in any court for the enforcement of any of the aforesaid rights with respect to orders of detention made under the said section 3(1)(e) shall remain suspended for a period of six months from the

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date of issue of this order or the period during which the Proclamation of Emergency issued under clause (1) of Article 352 of the Constitution the 3rd December, 1971, is in force, whichever period expires earlier.

(2) This order shall extend to the whole of the territory of India."

On June 20, 1975, the President of India amended the above order by substituting "twelve months" for "six months" in the order.

Proclamation of Emergency issued by the President of India on June 25, 1975 is to the following effect :--

"PROCLAMATION OF EMERGENCY.

In exercise of the powers conferred by clause (1) of Article 352 of the Constitution, I, Fakhruddin Ali Ahmed, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatended by internal disturbances.

New Delhi Sd/F.A. Ahmed
the 25th June, 1975 President."

Presidential Order dated June 27, 1975 promulgated under clause (1) of Article 359 of the Constitution runs thus :--

"In exercise of the power conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending in any court for the enforcement of the above mentioned rights shall remain suspended for the period during which the Proclamations of Emergency made under clause (1) of Article 352 of the Constitution on the 3rd December, 1971 and on the 25th June, 1975 are both in force.

This order shall extend to. the whole of the territory of India except the State of Jammu and Kashmir.

This order shall be in addition to and not in derogation of any order made before the date of this order under clause (1) of 'Article 359 of the Constitution."

On June 29, 1975, another. order was issued by the President whereby the words "except the State of Jammu and

Kashmir" in the order dated June 27, 1975 were omitted. On September 25, 1975, another Presidential Order was issued as a result of which the last paragraph in the Presidential Order dated June 27, 1975 was omitted.

On January 8, 1976, the President issued yet another order under Article 359(1) of the Constitution declaring that the right to move

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any court for the enforcement of the rights conferred by Article 19 and the proceedings pending in any court for the enforcement of those rights shall remain suspended during the operation of the proclamations of emergency dated December 3, 1971 and June 25, 1975.

The difference between the Presidential Order dated June 27, 1975 which was supplemented by the Presidential Order dated January 8, 1976 and the earlier Presidential Orders barring the right of a person to move any court for enforcement of certain fundamental rights conferred by Part III of the Constitution may now be noticed. While the Presidential Order dated June 27, 1975, which, as already stated, was supplemented by the Presidential Order dated January 8, 1976 was absolute and unconditional in terms, the earlier Presidential Orders alluded to above were conditional and limited in scope. Apart from the fact that the Presidential Order dated November 3, 1962 did not make any mention of the pending proceedings, it was, as pointed out by this Court in State of Maharashtra v. Prabhakar Pandurang Sanzgiri(1) Dr. Ram Manohar Lohia v. State of Bihar(2) Makhan Singh v. State of Punjab (supra) and by the majority in .A.D.M. Jabalpur v. Shivakant Shukla (supra), hedged by a condition inasmuch as it declared that the right of any person to move any court for the enforcement of rights conferred by Articles 21 and 22 of the Constitution shall remain suspended for the period during which the proclamation of emergency issued under clause (1) of Article 352 thereof on October 26, 1962 is in force if such a person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) (which was later on replaced by the Defence of India Act, 1962) or any rule or order made thereunder." Accordingly, if a person was deprived of his personal liberty not under the Defence of India Act or any rule or order made thereunder but in contravention thereof, his locus standi to move any court for the enforcement of his rights conferred by Articles 21 and 22 of the Constitution was not barred. More or less, similar was the pattern and effect of the Presidential Order dated November 16, 1974. The position with respect to the Presidential Orders dated June 27, 1975 and January 8, 1976 is, however, quite different. These orders are not circumscribed by any limitation and their applicability is not made dependent upon the fulfilment of any condition 'precedent. They impose a total or blanket ban on the enforcement inter alia of the fundamental rights conferred by Articles 19, 21 and 22 of the Constitution which comprise all varieties or aspects of freedom of person compendiously described as personal liberty. (See/1. K. Gopalan v. The State of Madras(1), Kharak Singh v. State of U.P.(2) and A.D.M. Jabalpur v. Shivakant Shukla (supra). Thus there is no room for doubt that the Presidential Orders dated June 27, 1975, and January 8, 1976, unconditionally suspend the enforceability of the right conferred upon any person including a foreigner to move any court for the enforcement of the rights enshrined in Articles 14, 19, 21 and 22 of the Constitution.

(1) [1966] 1 S.C.R. 702 = A.I.R. 1966 S.C. 1924.

(2) [1966]1 S.C.R. 709 = A.I.R. 1966 S.C. 540.

(3) [1950] S.C.R. 88 = A.I.R. 1950 S.C. 27.
(4) [1964] 1 S.C.R, 332 = A.I.R. 1963 S.C. 1295.
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The main contention advanced on behalf of the detenus that the Presidential Orders dated June 27, 1975 and January 18, 1976 do not bar the Court from examining the legality or vires or reasonableness of the Maharashtra Conditions of Detention Order, 1974 and that what is sought by means of the aforesaid petitions filed by or on their behalf is not the enforcement of the right to personal liberty conferred by Articles 14, 19, 21 and 22 of the Constitution but a redress of the complaint against illegality or ultra vires or unreasonableness of the Maharashtra Conditions of Detention Order, 1974 which imposes unwarranted constraints on them and does not provide them with facilities to which even the ordinary prisoners are entitled is totally misconceived. It overlooks the well recognized canon of construction that the doctrines of legality and vires which are sacrosanct in times of peace have no relevance in regard to a legislative or an executive measure taken in times of emergency in the interest of the security of the State. It also ignores the well settled position that in times of, emergency when the security of the State is of utmost importance, the subordinate legislation has to be benevolently construed and the strict yardstick of reasonableness cannot be appropriately applied. It also ignores the stark reality that the Presidential Orders dated June 27, 1975 and January 8, 1976 impose blanket bans on any and every judicial enquiry or investigation into the validity of an order depriving a person of his personal liberty no matter whether it stems from the initial order directing his detention or from an order laying down the conditions of his detention. It has to be borne in mind that the rule of law during the emergency is no other than what is contained in Chapter XVIII of the Constitution which is the positive and transcendental law. The following observations made by my Lord the Chief Justice in this connection in A.D.M. Jabalpur V. Shivakant Shukla's case (supra) are worth perusing :--

> "The Constitution is the mandate. The Constitution is the rule of law ..... The rule of law is not a mere catchword or incantation. The rule of law is not a law of nature consistent and invariable at all times and in all circumstances. ...The suspension of right to enforce fundamental right has the effect that the emergency provisions in Part XVIII are by themselves the rule of law during times of emergency. There cannot be :any rule of law other than the constitutional rule of law. There cannot be any pre-Constitution or post-Constitution Rule of Law which can run counter to the rule of law embodied in the Constitution, nor can there be any invocation to any rule of law to nullify the constitutional provisions during the times of emergency."

Again as observed by my learned brother Beg, J. in A.D.M. Jabalpur v. Shivakant Shukla's case (supra) "the only Rule of Law which can be recognised by Courts of our country is what is deducible from our Constitution itself. The Constitution is, for us, the embodiment of the highest "positive law" as well as the reflection of all the rules of natural or ethical or common law lying behind it which can
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be recognised by Courts. It seems to me to be legally

quite impossible to successfully appeal to some spirit of the Constitution or to any law anterior to or supposed to lie behind the Constitution to frustrate the objects of the express provisions of the Constitution. I am not aware of any Rule of law or reason which could enable us to do that. What we are asked to do seems nothing short of building some imaginary parts of a Constitution, supposed to lie behind our existing Constitution, which could take the place of those parts of our Constitution whose enforcement is suspended and then to enforce the substitutes. Even in emergencies, the power of the courts to test the legality of some executive act is not curtailed during the period the proclamation of emergency is in operation. Courts will apply the test of legality 'if the person aggrieved brings the action in the competent court'. But, if the locus standi of the person to move the court is gone and the competence of the court to enquire into the grievance is also impaired by inability to peruse the grounds of executive action of their relationship with the power to act, it is no use appealing to this Particular concept of the Rule of Law. It is just inapplicable to the situation which arises here. Such a situation is governed by the Emergency provisions of the Constitution. There provisions contain the Rule of Law for such situations in our country .....

If the meaning of the emergency provisions in our Constitution and the provisions of the Act is clearly that what lies in the executive fled, as indicated above, should not be subjected to judicial scrutiny or judged by judicial standards of correctness, I am unable to see how the courts can arrogate unto themselves a power of judicial superintendence which they do not, under the law during the emergency, possess."

The observations made by my learned brother Chandrachud, in A.D.M. Jabalpur v. Shivakant Shukla's case (supra) are also apposite and may be conveniently referred to at this stage :--

> "The rule of law during an emergency, is as one finds it in the provisions contained in Chapter XVIII of the Constitution. There cannot be a brooding and omnipotent rule of law drowning in its effervescence the emergency provisions of the Constitution."
>
> The following observations made by my learned brother Bhagwati, J. in A.D.M. Jabalpur v. Shivakant Shukla's case (supra) will also repay perusal :--
>
> "In the ultimate analysis, the protection of personal liberty and the supremacy of law which sustains it must be governed by the Constitution itself. The Constitution is the paramount and supreme law of the land and if it says that even if a person is detained otherwise than in accordance with the law, he shah not be entitled to enforce his right of personal liberty, whilst a Presidential Order under Article 359, clause (1) specifying Article 21 is in force, the Court has to give effect to it as the plain and emphatic command of the Constitution."

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The observations made by this Court in Dhirubha Devisingh Gohil v. State of Bombay(1) and reiterated in A.D.M. Jabalpur v. Shivakant Shukla (supra) that if any pre-Constitution right has been elevated as a fundamental

right by its incorporation in Part III, the pre-existing right and the fundamental right are to be considered as having been grouped together as fundamental rights conferred by the Constitution cannot also be ignored.

The conclusion, therefore, seems to us to be irresistible that as Articles 19, 21 and 22 of the Constitution which, according to the decisions of this Court in 4. K. Gopalan v. State of Madras (supra), Kharak Singh v. State of U.P. (supra) and A.D.M. Jabalpur v. Shivakant Shukla .(supra) cover and form the source of all the varieties or aspects of the rights that go to constitute what is compendiously described as personal liberty are suspended during the operation of the proclamation of emergency and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act and the orders made or passed thereunder are not open to challenge on the ground of their being inconsistent with or repugnant to Articles 14, 19, 21 and 22 of the Constitution in view of the aforesaid Presidential Orders dated June 27, 1975 and January 8, 1976 which totally take away the locus standi of the detenus to move any court for the enforcement of the aforesaid fundamental rights and the petitions out of which the present appeals have arisen did not seek to enforce the orders laying down the conditions of detention but on the contrary challenged them and covertly sought to enforce the very rights which are suspended, they were clearly untenable and it was not open to the High Court of Bombay to strike down the aforesaid clauses of the Maharashtra Conditions of Detention Order, 1974 ignoring the weighty observations made by this Court in the State of Bombay v. Virkumar Gulabchand Shah(2) to the effect that measures which often have to be enacted hastily to meet a grave pressing national emergency in which the very existence of the State is at stake should be construed more liberally in favour of the State than peace-time legislation.

Now if no person has a locus standi to move any court to challenge the conditions of detention embodied in the Maharashtra Conditions of Detention Order, 1974, or other such orders or rules, the position whereof is the same as that of the .Punjab Communist Detenus Rules, 1950, which, as held by a Constitution Bench of this Court in Maqbool Hussain v. The State of Bombay(3) constitute a body of. self'-contained rules prescribing the conditions of the detenus' maintenance, discipline etc., we cannot understand how the High Courts of BOmbay and Karnataka could issue the aforesaid directions 'disregarding the provisions of the Act particularly sections 5 and 12(6) thereof which are mandatory in character and the aforesaid orders which in any case appear to have been issued in the interest of the effective detention of the detenus.

(1) [1955] 1 S.C.R. 691 = A.I.R. 1955 S.C. 47.
(2) [1952] S.C.R. 877 at 884
(3) [1953] S.C.R. 730

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The avowed object of the Act as manifest from its preamble being the conservation and augmentation of foreign exchange and the prevention of smuggling activities of considerable magnitude secretly organised and carried on which have a baneful effect on the national economy and gravely undermine the security of the State, it is essential that the contact of the detenus with the outside world should be reduced to the minimum. It is, therefore, for the State Governments who are in full possession of all material facts including the peculiar problems posed by foreign exchange and smuggling and not for the Courts who

have neither the necessary knowledge of the facts nor the legal competence to regulate conditions of detention of persons including their maintenance, interviews or communications with others.

The High Court also seem to have ignored the observations made by this Court in State of Maharashtra v. Prabhakar Pandurang Sanzgiri & Anr. (supra) and in A.D.M. Jabalpur v. Shivakant shukla (supra) to the effect that when a person is detained, he loses his freedom. He is no longer a free man and, therefore, he can exercise, only such privileges as are conferred on him by the order of detention or by the rules governing his detention.

We would also like to reiterate here the observations made by a Constitution Bench of this Court in Maqbool Hussain v. The State Bombay (Supra) that the mere fact that a detenu is confined in a prison for the sake of administrative convenience does not entitled him to be treated as a civil prisoner or to be governed by the provisions of the Prisons Act. The view of the High Court of Bombay to the contrary cannot, therefore, be sustained.

It has also been contended by Mr. Seervai that in asking for their temporary removal from their places of detention to their homes to perform funeral ceremonies or to appear at any examination or to be taken to a doctor of their choice for social medical attention, the detenus are not enforcing their rights to freedom. The contention is not sound. Any relief that may be asked for through the aid of court for giving facilities to a detenu to be taken from his place of detention to his home or to an examination hall or for special medical treatment under a doctor of his choice or for any other facility would be enforcing fundamental rights through the aid of Court. The Presidential Proclamation is a complete answer against the enforcement of such reliefs through the aid of Court.

The detenus may approach the competent administrative authorities for special medical attention or for facilities for performance of funeral ceremonies of their kith and kin or for facilities to appear at the examination or any other facility of similar nature. It is open to the administrative authorities to take such action as they may be advised under the relevant provisions of the Act. But if the authorities do not give any relief it was said by counsel for the detenus then the detenus could come to the court. This contention is also unsound and unacceptable because that would also be enforcing fundamental rights through the aid and process of court which is not permissible so long as the aforesaid Proclamation is in force.

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We are therefore clearly of opinion that the aforesaid writ petitions were not maintainable and the High Court of Bombay and Karnataka were clearly in error in passing the impugned directions which are not warranted by any relevant law including the law relating to preventive detention of the kind with which we are concerned in the present cases. The detenus or their relations may if so advised, approach the appropriate Governments. or other competent administrative authorities invoking their powers under section 5 read with section 12 of the Act or other relevant provisions thereof.

In the result, appeals diarised as Nos. 3002 and 3003 of 1976 fail and are hereby dismissed while the rest of the appeals are allowed and the orders and directions forming the subject-matter thereof are quashed. The special leave petitions are disposed of as infructuous as in view of our Judgment High Court Orders cannot stand.

Since during the course of arguments, it was pointed out to us that the conditions of detention laid down by some State Government differ in certain particulars, we may, in conclusion, observe that the appropriate Governments would do well to take necessary steps to bring about uniformity therein. To eliminate the chances of hardship, the appropriate Governments may as well issue standing orders to meet special contingencies which necessitate expert medical aid being provided to the detenus for the maintenance of their health or their being removed temporarily from their places of detention on humanitarian grounds to enable them to perform the obsequies of their kith and kin or for appearing in some examination without detriment to the security of the State. No order as to costs.

BEG, J. The circumstances in which the appeals now before us by special leave arose have been dealt with in extenso by my learned brother Jaswant Singh with whose judgment and proposed orders I entirely concur. I would, however, like to add some reasons of my own also to indicate why submissions made on behalf of the respondents, on the strength of certain observations found in the judgments, including mine, in Additional District Magistrate, Jabalpur v. Shivakant Shukla(1), decided by a Constitution Bench of this Court, cannot be accepted by us. I will also express my opinion, very briefly and broadly on some other contentions advanced by learned counsel for the respondents as issues relating to personal liberty, which have been matters of very special and anxious concern to this Court, arise here.

I think this Court has made it amply clear in Shukla's case (supra) that the Constitution embodies, for all Courts in this country, the highest norms of law. It is the touch-stone by which the validity of all action, whether executive, legislative, or judicial is to be judged. That is why, this Court has, on several occasions, spoken of "the supremacy of the Constitution" explained by me in Shukla's case (supra) also as follows:

(1) A.I.R. 1976 S.C. 1207, 1283=[1976] Supp. S.C.R. 172.

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> "The position in this country is clearly one in which the fundamental law found in the Constitution is paramount. The Constitution provides the test for the validity of all other laws. It seeks to determine the spheres of executive and legislative and judicial powers with meticulous care and precision. The judicial function, though wider in range, when interpreting or applying other articles of the Constitution, particularly Articles 14 and 19, the enforcement of which is also suspended during the current Emergency, is especially constricted by the elaborate provisions of Articles 21 and 22, which deal with personal liberty and preventive detention. The 'wider the sweep of the provisions of Articles 21 and 22, the more drastic must be the effect of suspending their enforcement. After all, suspension does not and cannot mean retention under a disguise".

It seems to me that the majority view in Shukla's Case (supra) was that there is no pre-existing natural or fundamental or common law which, in so far as the rights covered by Part III of our Constitution, together with implications of such rights, are involved, is not embodied in the Constitution itself. Furthermore, this Court held there, after

considering all the relevant case law on the subject, from the case of 4. K. Gopalan v. State of Madras(1), through Kharak Singh v. State of U.P.(2), I. C. Golaknath v. State of Punjab(3), His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala(4), to Haradhan Saha v. The State 0f West Bengal & Ors. (5), that the sweep of Articles 19 and 21 is wide enough to include every aspect of personal freedom. This Court recalled that, in Kharak Singh's case, a Constitution Bench of this Court had held that the concept of personal liberty, embodied in Article 21, is a compendious one and "includes all varieties of rights tO exercise of personal freedom, other than those dealt with separately by Article 19, which could fall under a broad concept of freedom of person". "It was held to include freedom from surveillance, from physical torture, and from all kinds of harassment of the person which may .interfere with his liberty".

I summarised my conclusions on this subject in Shukla's case (supra) as follows:

"For the reasons indicated above, I hold as follows:

Firstly, fundamental rights are basic aspects of rights selected from what may previously have been natural or common law rights. These basic aspects of rights are elevated to a new level of importance by the Constitution. Any

(1) [1950] S.C.R. 88.
(2) [1964] (1) S.C.R. 332.
(3) [1967] (2) S.C.R. 762.
(4) [1973] Supp. S.C.R. I
(5) [1975] (1) S.C.R. 778=A.I.R. 1974 S.C. 2154.

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other co-extensive rights, outside the Constitution, are necessarily excluded by their recognition as or merger with fundamental rights.

Secondly, the object of making certain general aspects of rights fundamental is to guarantee them against illegal, invasions of these rights by executive, legislative, or judicial organs of the State. This necessarily means that these safeguards can also, be legally removed under appropriate constitutional or statutory provisions, although their suspension does not, by itself, take away the illegalities or their legal consequences.

Thirdly, Article 21 of the Constitution has to be interpreted comprehensively enough to include, together with Article 19, practically all aspects of personal freedom. It embraces both procedural and substantive rights. Article 22 merely makes it clear that deprivations of liberty by means of laws regulating preventive detention would be included in "procedure established by law" and indicates what that procedure should be. In that sense, it could be viewed as, substantially, an elaboration Of what is found in Article 21, although it also goes beyond it inasmuch as it imposes limits on ordinary legislative power.

Fourthly, taken by itself, Article 21 of the Constitution is primarily a protection

against illegal deprivations by the executive action of the State's agents or officials, although, read with other Articles, it could operate also as a protection against unjustifiable legislative action purporting to authorise deprivations of personal freedom.

Fifthly, the most important object of making certain basic rights fundamental by the Constitution is to make them enforceable against the State and its agencies through the Courts.

Sixthly, if the protection of enforceability is validly suspended for the duration of an Emergency, declared under Constitutional provisions, the Courts will have nothing before them to enforce so as to be able to afford any relief to a person who comes with a grievance before them".

I may mention, at the risk of repetition, that I had explained in Shukla's case (supra) that it is not the fundamental rights which are suspended by the Presidential Order under Article 359 of the Constitution but "the right to move any Court for the enforcement of such right by Part III as may be mentioned in the order" which is suspended for the duration of the Emergency. Speaking for myself, I was of opinion that what is very obviously and clearly affected is the enforceability of fundamental rights during such an Emergency. This means that it is really the jurisdiction of Courts, to the extent to which a petitioner seeks to enforce a fundamental right mentioned
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in the Presidential Order, which is suspended or is in abeyance. I said there (at p. 1302) (paragraph 346):

"The result is that I think that there can be no doubt whatsoever that the Presidential Order of 27th June, 1975, was a part of an unmistakably expressed intention to suspend the ordinary processes of law in those cases where persons complain of infringement of their fundamental' rights by the executive authorities of the State".

It is these processes of law, whether statutory or outside. any statute (even assuming, for the sake of argument, that there could be any such non-statutory rights) which Article 21 expressly protects. Therefore, I am totally unable to understand how, without ignoring what our Constitution enjoins, a Court could do what is Constitutionally prohibited--i.e. to enforce a statutory or non-statutory supposed protection. .

Shukla's case (supra) and other connected cases related to the enforcement of the right to personal liberty by obtaining an order of release of detenus after issuing writs of Habeas Corpus. Article 223 of the Constitution, no doubt, gives power not only to issue specified writs but enables High Courts to issue orders and directions for "any other purpose". It seems to me that this "other purpose" has to be similar to those for which one of the specified writs could issue except to the extent that each specified writ may have special features or incidents attached to it. Now, the writ of Habeas Corpus, as is well known, is wider in scope than enforcement of fundamental rights which are available against the State only and its officers and agents. Therefore, I had said in Shukla's case (p. 1300):

"The remedy by way of a writ habeas corpus is more general. It lies even against illegal

detentions by private persons although not under Article 32 which is confined to enforcement of fundamental rights [vide: Smt. Viday Verma v. Dr. Shiv Narain Verma, (1955)C2 SCR 983=AIR 1956 SC 108]. The Attorney General also concedes that judicial proceedings for trial of accused persons would fail outside the interdict of the Presidential Order under Article 359(1). Therefore, it is unnecessary to consider hypothetical cases of illegal convictions where remedies under the ordinary law are not suspended".

As already indicated above, fundamental rights are conferred and guaranteed by the Constitution so that citizens, and, in the cases of Articles 14 and 21, even non-citizens, may get relief against the State and its agencies. The suspension of enforcement of fundamental rights, which are rights enforceable against the State only, does not, as I pointed out, in Shukla's case, debar enforcement of some right to personal freedom against a private individual by means of a writ of habeas corpus directed to him to produce a person illegally detained. But, so far as mere directions or orders for "any other purpose" are concerned, the jurisdiction of High Courts does not
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extend to making orders against private individuals. Therefore, the distinction which 1 drew in Shukla's case (supra), between a detention by an officer of the State, vasted with the power to detain and purporting to act under some law which authorises him to pass a detention order, and a detention by a private individual, has no real bearing on the cases now before us.

I had certainly expressed the view in Shukla's case that, if a detention by a person or authority is not in exercise or purported exercise of a power to detain, which is not vested in all officers of State, under statutes providing for it, the action of an officer of the State, on the facts of a particular case, may be, prima facie. indistinguishable from a detention by a private person and may not be protected at all by the Presidential Order which only covers purported actions of the State and its Officers empowered to detain. That was, as I pointed out there, was a purely hypothetical situation not presented in any of the cases before us on that occasion. If the officer concerned is duly empowered and has passed a detention order, that order is certainly not capable of being questioned, under Article 226, either on the ground of alleged ultra vires or mala fides. All inquiry into the conditions of exercise of such power is barred under Constitutional provisions during the emergency. That was the very clearly expressed majority view in Shukla's case (supra).

In all the cases now before us, the application considered by the High Court was for grant of a direction or order against the State or its Officers, acting in the performance of their purported duties. The remedy sought against them was clearly covered by the Presidential inhibition which operates, under the Constitution, which is supreme, against the High Courts. Hence, whatever may be the grievances of the detenus, with regard to the place of their confinement, the supply of information to them, their desire to get treatment by their own private doctors or to obtain some special or additional food required by them from their own homes, or to leave the place of their confinement temporarily to go to some other place to perform some religious ceremony or other obligation, for which they had erroneous-

ly sought permission and directions of the Court subject to any conditions, such as that the detenus could be accompanied by the police or remain in the custody of the police during the period, are not matter which the High Court had any jurisdiction to consider at all. It was, therefore, quite futile to invite our attention to the allegations of petitioners about supposed conditions of their detention. Indeed, on the face of it, the nature of the claims made was such that they are essentially matters fit to be left to the discretion and good sense of the State authorities and officers. It is not possible to believe, on bare allegations of the kind we have before us, that the State authorities or officers will be vindictive or malicious or unreasonable in attending to the essential needs of detenus.' These are not matters which the High Court could consider, in petitions under Article 226 of the Constitution, whatever be the allegations made on behalf of detenus so as to induce the High Court to interfere. The High Courts can only do so under Article 226 of the
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Constitution if they have authority or power to do it under the Constitution. Devoid of that power, the directions, which may be given by a High Court after such enquiries as it makes, would be useless as they will not be capable of enforcement at all during the Emergency under the law as we find it in our Constitution.

It will be noticed that, in most of the cases before, us, the demands made by the detenus have become infructous either because they have been promptly met by the State concerned under orders of a High Court, without any attempt by the State to do anything more than to question the jurisdiction, quite properly, of the High Court to give such directions, or because the time to which it related has expired so that there has remained nothing more than a question of law or principle for us to be called upon to determine.

I cannot help observing, having regard to some of the allegations made, that they could not be at all easily accepted by any reasonable person and may have been proved to be totally unfounded if they had been actually investigated and tried. If the State Governments promptly met, as they seem to have done, all reasonable requests, either before or after the orders of the High Court, without questioning anything other than the power of the High Court to give the directions given it could not be readily inferred that all the allegations are either correct or that the Governments concerned are taking any unreasonable stands. Indeed, we have been requested by the Solicitor General to indicate the lines on which requests by detenus, of the kind we now find in the cases before us should be dealt with. These are matters entirely outside the scope of our judicial functions. We cannot suggest what a comprehensive set of rules on such subjects should be. All that we need say on such a subject is that the attitude on behalf of the State has been very reasonable and proper in this Court. And, we have no doubt that any attempt to formulate uniform rules on such matters by authorities concerned and empowered to do so will also disclose the same reasonableness. Speaking for myself, I am inclined to suspect that a number of allegations made on behalf of the detenus have the oblique motive of partisan villification or political propaganda for which Courts are not proper places. I would not like to make any further comments on this aspect.

I would next like to make a few observations about the contention most vehemently pressed for acceptance by us by

Mr. Seervai appearing on behalf of the respondents. It was that we should adjudicate upon the validity of the rules regulating conditions of detention which are being applied to the detenus. The rules and the enactments under which they have been made have been considered in the judgment of my learned brother Jaswant Singh. I do not propose to. cover the same ground afresh. I .am in complete agreement with all that my learned brother has said. I would, however, like to add some observations on the main ground upon which the validity of the rules is assailed. It was urged before us that rules regulating conditions of their detention cannot be either so made or

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administered as to amount to punitive detention of the detenus. Reliance was placed on Haradhan Saha's case (supra), where a Constitution Bench of this Court said (at p. 2100):

> "The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution".

In Haradhan Saha's case, this Court was concerned with indicating how preventive detention and punitive detention belong to two very different and distinct categories or could be separately classified from the point of view of Art. 14 of the Constitution. Their objects and social purposes may be very different in hue and quality. The procedures applicable in cases of the two types are certainly radically different. The authorities entrusted with the power of ordering punitive and preventive detentions also act on very different principles and for very different reasons. The Constitutional justification for preventive detention was considered by this Court at some length in Shukla's case (supra). Although preventive detention, which is constitutionally sanctioned in this country, and punitive detention may be qualitatively different and be regulated by entirely different procedures and may have very different immediate objectives, yet, if we closely examine the total effects and ultimate social purposes of detention, whether preventive or punitive, it seems to me, speaking entirely for myself, that the theoretical distinctions become less obvious. It seems to me that the broad purpose of all action which results in the detention of a person by the State or its officers must necessarily be a deprivation which could, if their effects on the detenu alone were to be considered, be not incorrectly described as "punitive". Again, "preventive" detention, like "punitive" detention, may have some therapeutic or reformative purposes behind them for the detaining authorities viewing the matters from administrative or psychological points of view necessitating some action in national interest. Some jurist, who undertakes a study of the subject, may discover certain broad similarities of social purposes, side by side with the distinctions already pointed out by this Court.

In Shukla's case I indicated that the exercise of power of preventive detention during an Emergency may be viewed as a purely administrative. or. to use the term employed by Sir William Hordsworth. even "political" action lying in an area which is completely protected from judicial scrutiny. As we indicated in Shukla's case, high
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authority can be cited for such a proposition [see Liversidge's(1) case, and Rex v. zadiq(2)]. The result seems to me to be that the principle that the doctrine of State necessity is not available to a State against its own citizens becomes inapplicable during an Emergency, at least as a result of the suspension of enforceability of the rights of citizens under Articles 19 and 21 ,of the Constitution. This seems to me to flow directly from the implications of the maxim "Salus Populi Est Supreme Lax" (regard for public welfare is. the highest law) applied by us in Shukla's case (supra) and by English Courts in Liversidge's case (supra) and Zadig's .case (supra). .This, however, does not mean that the persons detained are without any remedy as was pointed out in Shukla's case. The result only' is that the remedy for all their, grievances lies, in times of Emergency, with the executive and administrative authorities of the State where they can take all their complaints. Here, we have to be content .with declaring the legal position that the High Courts, acting under Art. 226, have not been given the power to interfere in any matter involving the assertion or enforcement of a right to personal freedom by the detenus during an Emergency, when exercise of such power of High Courts is suspended. We are not concerned in these cases with other kinds of claims which may arise before the ordinary criminal or civil courts for wrongs done by officers acting maliciously in purported exercise of their powers. We are only concerned here with the powers of High Courts under Art. 226 of the Constitution.

I have no doubt whatsoever, that if the object of a proceeding is to enforce the fundamental right to personal freedom, a High Court's jurisdiction under Art. 226 is barred during an Emergency even if it involves adjudication on the question of vires of a rule made under enactments authorising preventive detention. I find it impossible to invalidate a rule either intended for or used for regulating the conditions of detention of a person detained under one of the Acts authorising preventive detention, on the ground that the rule could only be used for persons in "punitive" detention. The attack on the validity of such a rule cannot succeed on the ground that the object of the rule should be shown to be preventive and not punitive. I fail to find a reasonably practical method of distinguishing a rule which could be used for those in preventive detention under an Act authorising it from another rule which could only apply to persons in punitive detention undergoing sentences of imprisonment. These are really administrative matters with which High Courts can have no concern for the reasons given above and also in Shukla's case (supra).

Learned counsel for the detenus appear to me to be resurrecting the ghost of a "Natural law" which we thought we had laid to rest in Shukla's case (supra). As certain arguments based on what looks like "National Law" have been advanced again before us, I may cite an instructive passage from Judge Cordozo's "Nature Of the Judicial Process". He said:

(1) [1942] A.C. 206.
(2) [1917] A.C. 260.

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"The law of nature is no longer conceived of as something static and eternal. It does not override human or positive law. It is the stuff out of which human or positive law is to be woven, when other sources fail. The modern philosophy of law comes in contact with the natural law philosophy in that the one as well as the other seeks to be the science of the just. But the modern philosophy of law departs essentially from the natural-law philosophy in that the latter seeks a just, natural law outside of positive law, while the new philosophy of law desires to deduce and fix the element of the just in and out of the positive law--out of what it is and of what it is becoming. 'the natural law school seeks an absolute ideal law, 'natural law'. ..... by the side of which positive law has only secondary importance. The modern philosophy of law recognizes that there is only one law, the positive law, but it seeks its ideal side, and its enduring idea."

I respectfully agree with this statement of the relationship between natural law and positive law today, in the application of law by courts governed by and subject to the limitations of a written Constitution such as ours. Let us, however, assume, in order to test the correctness of the proposition, that a rule of natural law, having as much force and validity as a rule of positive law embodied in a statute, has been infringed. Let us go a little further, and even assume that a rule embodied in a statute has been violated by an authority functioning under the Constitution in either framing or administering a rule. Can Courts, exercising powers under Article 226, declare that rule or purported action of an executive authority dealing with a detenu under the rule, or in exercise of its discretion, to be ultra vires ? We are all aware of the dictum of Justice Holmes that "law is not logic". Nevertheless, I do not think that the Courts have the power to persue a logic of their own to overcome what the letter of the Constitution clearly prohibits. The precedents we have discussed at length in Shukla's case indicate the declarations of law, that Articles 19 and 21 embrace every aspect of an alleged infringement of the right to personal freedom by a State authority or officer purporting to act under a law, by which we are bound, Even if the action violates a protection conferred by Article 21 upon citizens as well as non-citizens in ordinary times, yet, the result of the suspension of the protection given by Article 21 must necessarily be that the protection cannot be enforced during an Emergency. If that be the effect of the Presidential declaration under Article 359, as we declared it to be after a very anxious consideration in Shukla's case we cannot go behind this declaration of law and the express letter of the law as embodied in our Constitution, and enforce what may be covered by the right to personal freedom in ordinary times whether it parades under the guise of natural law or statutory law or Constitutional, law. This consequence seems to me to flow logically and naturally and necessarily from the whole trend of reasoning and, in any ease, from the actual declaration of law and the conclusion recorded by us in Shukla's ease. I would, therefore, consider any

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stray sentences or expressions of opinion, in our judgments in Shukla's case, which may, torn out of their context, give a contrary impression, to be mere obiter dicta.

For the reasons given above, as well as those given by my learned brother Jaswant Singh, I concur with the orders

proposed by my learned brother.
P.B.R.

Appeals allowed

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