(1951) 03 MAD CK 0005

Madras High Court

Case No: Criminal Miscellaneous Petition No. 354 of 1951

In Re: A.K. Gopalan — APPELLANT

Vs

RESPONDENT

Date of Decision: March 19, 1951

Acts Referred:

- Constitution of India, 1950 - Article 154, 162, 226, 53
- Criminal Procedure Code, 1898 (CrPC) - Section 491
- Preventive Detention Act, 1950 - Section 12, 3, 3A

Citation: AIR 1953 Mad 41 : (1952) 65 LW 876 : (1952) 2 MLJ 690

Hon'ble Judges: Satyanarayana Rao, J; Raghava Rao, J

Bench: Division Bench

Advocate: M.K. Nambiar, for Row and Reddy, for the Appellant; A.G. and Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

Satyanarayana Rao, J.
On the 22nd February 1951, this Court directed that the petitioner should be set at liberty forthwith and at that time

the petitioner was present in court. We reserved judgment in Crl. M. P. No. 153 of 1951 in which that order was made on 19th February 1951.

According to a note made by the Bench Clerk, the delivery of our judgment was completed on the 22nd February 1951 at 11-40 a.m. The

petitioner then asked us whether he was free to go as the police officers were present in court. We then told him that he was at liberty to go

wherever he pleased as he became a free citizen. The petitioner has filed an affidavit in support of this petition, which is also supported to some

extent by the affidavit filed by Mr. V.G. Row, an advocate of this court, who was advising the petitioner in several proceedings before this court

and was present in court when Crl. M. P. No. 153 of 1951 was argued and when we pronounced judgment on the 22nd February 1951. The

events that transpired subsequently have been narrated in these two affidavits and the facts are not seriously controverter by the respondents.

Immediately after our order was pronounced, the petitioner, along with his advocate, Mr. Row, went out of the court hall with the intention of

proceeding to the office of the advocate in the Andhra Insurance Buildings in Thambu Chetti Street, Madras. After they proceeded about ten yards

from the gate of the High Court two C. I. D. officers who followed them from the High Court told the petitioner that he was under arrest as there

was an order of detention against him. This happened within five minutes after our judgment was pronounced. At the time of the arrest, the

petitioner was not shown the order of detention but was taken in a car to the office of the Commissioner of Police, Egmore, Madras. In the car the

order was shown to the petitioner. He was taken to the office of the Commissioner of Police and the order of detention was served on him at the

office of the Commissioner at about 12-30 p.m. He was thereafter taken to the Penitentiary where on the same day he swore to an affidavit before

an Honorary Presidency Magistrate, Madras, setting out these facts and contending that his arrest and detention were clearly intended to flout the

order of this court and that it was illegal. He filed this petition on 22-2-1951 under Article 226 of the Constitution of India and Section 491 Crl. P.

C. to order his production before this Honourable Court and to set him at liberty by issuing a writ of habeas corpus. He was taken to the

Cuddalore Jail on the morning of 23-2-1951, in a Police Van.

2. The petition and affidavit were placed before us on the 23rd for orders by the direction of the Honourable the Chief Justice, The matter was

posted to 26th February 1951 as the petitioner wanted permission to argue the petition for the purpose of issuing a rule nisi and it was taken up for

consideration on that day. We admitted the petition after hearing arguments and issued a rule nisi. As the learned Advocate General was present in

court at that time, in consultation with him, the petition was posted for final disposal on 5th March 1951.

3. Two counter affidavits were filed on behalf of the respondents one by the Deputy Secretary to Government. Public Department and the other by

the Assistant Commissioner of Police, Intelligence Section, Madras City Police. The Assistant Commissioner in his affidavit states that he was

present in the High Court when the order releasing the petitioner was pronounced by this Court and under instructions of the Superintendent of

Police, Special Branch, C. I. D. he arrested the petitioner in pursuance of an order of detention, a copy of which, intended to be served on the

petitioner was presumably in his possession and custody at that time for he admits in the affidavit that after he got into the car along with the

petitioner after arresting him, he showed the order to the petitioner. From this affidavit, it is a legitimate inference to draw that the order of

detention which is now questioned in these proceedings, bearing date 22-2-1951 was made before we pronounced our judgment on that date.

This fact is admitted in the further affidavit filed on 14-3-1951 by the Deputy Secretary. This fact was not disputed and indeed, it could not be

disputed. The Deputy Secretary in his long counter affidavit, states the circumstances under which the order of detention was passed on 22-2-

1951. It would be convenient to quote his own language relating to this matter.

He says in paragraph 2:

The petitioner had moved the High Court in Crl. M. P. No. 153 of 1951 for a writ of Habeas Corpus challenging the legality of his detention, his

main contention being that the order passed by the Government u/s 12(2) of the Preventive Detention Act, 1950, continuing his detention under the

said Act did not specify the period of his detention. After the arguments in the case were over, the Government were informed by their legal

advisers that the petitioner would, in all probability, be released by the High Court on that technical contention. In view of the petitioner''s

antecedents & his violent nature as manifested by him in his activities both when he was at large and when he was inside the Jail, the Government

were satisfied that in the event of his being released by the High Court, the petitioner would go underground at once and carry on subversive

activities prejudicial to the security of the State and the maintenance of public order. Immediate action was therefore called for; and after full

consultation with their legal advisers the Government issued a fresh order of detention under the Preventive Detention Act, 1950, on 22nd

February 1951.

4. After we reserved judgment in this case, in view of certain events which happened in court, it became necessary to direct the Deputy Secretary

to give particulars in an affidavit on two questions:

1. Who the legal advisers were that were consulted and were referred to in paragraph (2) of the counter affidavit; 2. the reason why the fact that

an order of detention which was made before we pronounced the judgment was not communicated to the legal adviser, i.e., the learned Advocate

General who was present in court when we pronounced our judgment.

These particulars have been given by the Deputy Secretary and he states in the affidavit now filed as follows:

1. In connection with the reference to ""Consultation with the Legal Advisers of the Government"" in paragraph 2 of my original affidavit, the legal

Advisers referred to, and, who were consulted, were the learned Advocate General, the learned Public Prosecutor, and the Secretary to the

Government of Madras in the Legal Department.

2. On 22nd February 1951, the order of detention was passed at 10-30 a.m. and it did not at all occur to Government then that it was necessary

to communicate the fact of making the order to the learned Advocate General or the Public Prosecutor.

5. In the counter affidavit, the Deputy Secretary denies also the allegation made by the petitioner that the detention order was passed by the

Government mala fide in order to flout the orders of the High Court and asserts that it was passed solely with a view to prevent the petitioner from

acting in a manner prejudicial to the security of the State and the maintenance of public order. After setting out fully the state of affairs existing on

22-2-1951 before the Government passed the order, the rest of the affidavit sets out the long history of the petitioner''s detention in custody for

one reason or another from 1947. The grounds of detention communicated to the petitioner on 24-2-1951 are substantially the same grounds on

which the previous order of detention was made. As the learned counsel for the petitioner finally confined his arguments to the question whether the

order of detention was bona fide or not, it is unnecessary to advert to the other allegations in the counter affidavit or to the grounds of detention. .

6. At the outset, no doubt, learned counsel for the petitioner attacked some of the provisions of the Amending Act of 1951 as being ultra vires on

the ground that they infringed the provisions of Sub-clause (7) of Article 22 of the Constitution; but he later abandoned that contention. The

learned Advocate General also stated that he is not going to rely upon the first order of detention read with Act IV of 1951 in this proceeding (to?)

justify the legality of the order of detention which is now challenged. The point for consideration in these proceedings, therefore, is whether the

order of detention made by the Government on the 22nd February was a bona fide one and whether the order of release passed by this court on

22-2-1951 does not affect the legality of the fresh order of detention made on the same day before our judgment was pronounced and it does not

in our judgment automatically terminate the fresh order of detention as well.

7. That an order of detention passed under the law relating to preventive detention can be challenged on the ground that there is lack of bona fides

on the part of the authority exercising the statutory power is established by the Full Bench decision in -- ''Narayanaswami v. Inspector of Police'',

ILR (1949) Mad 377 and is stated as proposition (c) at page 427 by the learned Chief Justice and at page 454 by Govindarajachari J. A statutory

authority, it is established law, must always be exercised honestly and without fraud or malice. This view is based upon the observations in --

''Liversidge v. Anderson'', (1942) A.C. 206, -- ''Greene v. Secy., of State for Home Affairs'', (1942) A. C. 284 and -- ''Emperor v. Sibnath

Banerji'', 1945 2 Mad L J 325 (PC) and -- ''Rex v. Haliday'', (1917) A.C. 260. See also the observations of Viswanatha Sastri J. in -- ''Manj v.

District Magistrate,. Mathurai'', 1949-2 Mad L J 310 where the point was considered by the learned Judge. The power, therefore, should be

exercised bona fide and it should not be a fraudulent or colourable exercise of the power and the power conferred under the Act should not be

abused with a view to gain an ulterior object; in other words, it should not be a mala fide exercise of the power. It may not be possible to state

when and under what circumstances, it can be inferred that the power was exercised mala fide. In my opinion, it is a question to be decided

according to the circumstances of each case & no hard & fast rule can be laid down.

8. The practice in England in matters relating to habeas corpus seems to be that when a rule nisi is issued, a return is made containing a copy of all

the causes of the prisoner''s detention. It should also state the facts relied on as constituting a valid ground for detention of the person alleged to

have been illegally detained. It is open if sufficient ground is shown, to amend or substitute another return by leave of the court or Judge. The

following passage at page 737, paragraph 1258 of Halsbury''s Laws of England, Hailsham Edn. Vol. 9 may be quoted:

A prisoner who has been discharged from illegal custody on habeas corpus cannot be again imprisoned or committed for or in respect of the same

offence; but is not privileged from being immediately rearrested on criminal process in relation to some matter other than that in respect of which he

has been discharged, though he is privileged from re-arrest on civil process whilst returning to his place of abode from the court discharging him.

All this applies to a warrant issued to arrest the person after an order of discharge was made by the court. An order of detention passed when the

judgment in an application for habeas corpus was pending, stands on a different footing. I shall presently consider the effect of the order of release

on the fresh order of detention made on the same day.

9. Is the contention of the petitioner that the order lacks bona fides and was made with the intention of flouting the order of this court and

disobeying it well founded? The situation at the time the order was made by the Government, was, they were uncertain about our decision and

even if they gathered that our decision was going to be against them, they could not be certain about the ground or grounds on which our judgment

was going to be rested. A perusal of the judgment in Crl. M. P. No. 153 of 1951 would indicate that arguments before us in that petition covered

a wider ground. The validity of the grounds to sustain the order of detention, the power of this court to consider the matter afresh in view of the

order of the Supreme Court, were all matters, which were debated before us and on which we took time to consider our judgment. There was

also the additional argument that since the decision of the Supreme Court dismissing his petition in September last, fresh circumstances had arisen

and that we were not precluded from considering the legality of the order of detention. It was therefore impossible for any person to have made up

his mind regarding the basis of our judgment.

According to the counter affidavit of the Deputy Secretary, even the legal advisers of the Government did not definitely assure them that the order

of this court is going to be rested on a technical ground that the detention was illegal as the period of detention was not specified in the order. All

that the legal advisers stated to the Government, according to this counter affidavit, was that in all probability the petitioner would be released on

the technical contention, That does not exclude the possibility of the order of detention being set aside by us on all or any of the grounds that have

been urged before us.

Was there then any basis for the Government to make up its mind that our judgment was going to be rested on technical grounds and that therefore

they would be entitled to pass a fresh order of detention as there was going to be no pronouncement by this court on the legality of the grounds or

on the question whether there was fresh material or change in situation which warranted the release of the detenu? Without actually seeing the

judgment or hearing it, it was impossible, in my opinion, for any person much less the legal advisers of the Government or even the Government, to

have made up its mind regarding the grounds on which we were going to set aside the order of detention even if it was evident that we were going

to set it aside. It does not stop there. Having made the order, they have communicated it to the Superintendent of Police, Special Branch, C. I. D.

who in his turn issued instructions, even, before our judgment was pronounced to the Assistant Commissioner, to arrest the petitioner, in pursuance

of the order of detention which can only mean that if we should release the petitioner, he should immediately be rearrested. This circumstance is

beyond doubt as is clear from the affidavit of the Assistant Commissioner of Police itself. He stated in clear unambiguous terms that he had

received instructions from the Superintendent of Police, which must only mean before he came to the High Court as he admits he was present in

the High Court when the order was pronounced by this court and what is more, he had in his pocket at the time a fresh order of detention. The

stage therefore was set for the arrest of the petitioner immediately after our order of release was pronounced and he was set at liberty. What is the

justification for these preparations and for this order of detention after taking legal advice? It can only be to flout the order of this court, if it should

go against them and to disobey it by arresting the petitioner before he enjoyed freedom for a few minutes.

The reason urged for making the order is that in the event of the petitioner being released by the High Court, he would go underground at once and

carry on subversive activities prejudicial to the security of the State and maintenanee of public order. It, therefore, according to the affidavit, called

for immediate action [by passing an order of detention. The affidavit also says that the detenu would go underground thereby suggesting that the

moment he steps out of the compound of the High Court, he is a danger to the public order and to the security of the State and that it would be

almost impossible to rearrest him & that the Government were certain that he would carry on subversive activities prejudicial to the security of the

State and the maintenance of public order. It is rather difficult to accept this as a reason justifying the conduct of the Government in making an

order of detention with such haste on that day and making arrangements to rearrest him immediately after the judgment was pronounced. Suppose

the petitioner goes to his own district or to some other part of the State, was it impossible for the Government with its police, regular and special,

and its C. I. D. establishment to have traced and arrested a single individual if he is going to be a danger to the State? Does it mean that as against

this one man, the entire establishment of the police-would be impotent and incapable of tracing him out and arresting him? Did the situation really

demand that he should not be allowed to enjoy freedom even for a few minutes? Even if it is assumed that the situation was so precarious and

dangerous were there not other methods of catching him and depriving him of his freedom? And was it necessary to make an order of detention,

almost suggesting that whatever the order of the High Court may be ""they were going to circumvent it by their order of detention passed and kept

ready"".

If, as was strenuously contended on behalf of the Government by the learned Advocate General, the Government acted in a perfectly legal, and

constitutional manner and really felt that there was a serious danger to the State of Madras by the release of this man by the High Court, why was

not the fact, that a fresh order of detention was made, brought to our notice at least on the day on which we pronounced our judgment. The

affidavit of the Deputy Secretary dated the 14th March 1951 states that the order of detention was passed'' at 10-30 a.m. on the 22nd February

1951. This order was, issued, as stated in the counter affidavit, after full consultation with their legal advisers, viz., the learned Advocate General,

the learned Public Prosecutor and the Secretary to the Government of Madras in the Legal Department. At the time we pronounced our judgment

on, that day, the Assistant Commissioner of Police was present in court with instructions from the Superintendent of Police, Special Branch, C.I.D.

Madras to arrest the petitioner in pursuance of the order oï¿½ detention after his release. We proceeded to deliver the judgment at about 10-50

a.m. The Assistant Commissioner of Police was in court by that time, if not earlier. Between the time of the passing of the order at 10-30 a.m. and

his presence in court, he had received instructions from the Superintendent of Police. Special Branch, C. I. D. to arrest the petitioner in pursuance

of an order of detention which he must have come into possession by then as he showed it to the petitioner when he was in the car. The order

actually served oh the petitioner, which was produced in court, shows that it was communicated among others to the Superintendent of Police,

Special Branch, C. I. D. Madras. So within fifteen minutes time, the order was communicated to the Superintendent of Police with a copy and he

issued instructions after sending a copy of the order of detention to the Assistant Commissioner to arrest the petitioner after release. The quick

movement of these events within a very short interval of fifteen minutes indicates that the Government moved in the matter with surprising alacrity to

give effect to the order of detention.

Be that as it may the order was undoubtedly within the knowledge of the Deputy Secretary and the Assistant Commissioner of Police, the latter of

whom was actually present in court and yet no steps were taken to bring the order to the notice of this court and according to the affidavit of the

Deputy Secretary dated 14th March 1951, it did not occur to the Government then that it was necessary to communicate the fact of making the

order to the learned Advocate General or the Public Prosecutor. This is really an unconvincing explanation. In view of the affidavit now filed by the

Deputy Secretary it may be taken that the order of detention actually passed i.e., the fair order, was not communicated to the Advocate General

on that day. The counter affidavit originally filed and now amplified establishes that the fresh order of detention was issued by the Government

after full consultation with their legal advisers"", viz., the learned Advocate General, the learned Public Prosecutor, and the Secretary to the

Government of Madras in the Legal Department. The consultation could only have been whether it was proper for the Government to make a fresh

order, particularly in view of the fact that our judgment was pending. The propriety to be considered could only be with reference to the situation

going to be created if we were to direct the release of the petitioner by our judgment. They had no definite knowledge that our judgment was going

to be based upon any particular view. Whatever other questions may be that would have received attention at that consultation the Government

and its legal advisers must have weighed and considered the propriety of passing a fresh order so as in effect to prevent the operation of our

judgment. Whether the arrest could be made within or outside the premises of the High Court must also have received attention. It was a ""full

consultation"" in the sense that all aspects of the various questions were discussed and considered and it was then determined that a fresh order of

detention should issue. It must have been a conference of the officials of the Government and the legal advisers. All of them must have put their

heads together to decide the difficult question of the propriety of issuing a fresh order and its terms and the manner and mode of giving effect to it.

Though the fair copy of the order and its issue to the Police was not within the knowledge of the Advocate General, in view of the categorical

statement of the Deputy Secretary in the affidavit, it is obvious that the legal advisers were aware of the fact that the Government had made up their

minds to issue a fresh order of detention. What remained to be done was merely the formal act of issuing a fair order.

The distinction between knowledge of the decision reached by the Government in consultation with the legal advisers and the knowledge of the

existence of a fair order is not very much. It should have at least put the legal advisers on enquiry to ascertain whether the decision reached

sometime that day to issue a fresh order of detention so as to prevent practically giving effect to our order of release took the shape of a fair order

or not. The omission by the Government to bring to our notice the fresh order passed after due deliberation on that day prior to the delivery of our

judgment which was communicated even to the police to put it into effect is a serious circumstance reflecting upon the bona fides of the

Government in making the order.

It was contended that the Government had discretion under the statute to make a fresh order of detention and this power could be exercised

validly by them. To a situation where there is a conflict between the exercise of the power by the Government and by the Judiciary, the law stated

by Sir George Farwell in the judgment of the Privy Council in the -- ''Eastern Trust Co. v. Makenzie. Mann & Co. Ltd.''. (1915) A. C. 750

applies. It was a case in which when a person was restrained by court from receiving certain monies from the Government, received the money

from the Government notwithstanding the order of the court and the Government claimed that they were entitled to pay the amount as they were

given such a power over the subject-matter by the legislature and that the court had no ground for interfering at all directly or indirectly with the

exercise of such a discretion by the executive. At page 759, Sir George Farwell observes:

If it was the case of a private individual, he would be clearly liable to make good the wrongful payment and to purge his contempt. In the case of

the Crown there is no ground for Idington J''s proposition that the Government may fairly say that they were given such power by the Legislature

over the subject-matter and that the courts have no ground for interfering at all, directly or indirectly, with the exercise of such a discretion. There is

nothing on which to found the existence of the alleged discretion or to support a decision which pronounced the Executive Government free to

dispose of money the right to which is sub judice inter partes and held in medio by the order of the court.

The second point taken by Idington J. is equally untenable and even more important. The non-existence of any right to bring the Crown into court,

such as exists in England by petition of right, and in many of the colonies by the appointment of an officer to sue and be sued on behalf of the

Crown does not give the Crown immunity from all law, or authorise the interference by the Crown with private right at its own mere will. There is a

well-etsablished practice in England in certain cases where no petition of right will He,. under which the Crown can be sued by the Attorney

General and a declaratory order obtained, as has been recently explained by the Court of Appeal in England, in -- ''Dyson v. Attorney General''.

(1911) 1 K. B. 410 and in -- ''Burghes v. Attorney General'', (1912) 1 Ch. 173. ''It is the duty of the Crown and of every branch of the executive

to abide by and obey the law. If there is any difficulty in ascertaining it the courts are open to the Crown to sue and it is the duty of the Executive in

cases of doubt to ascertain the law, in order to obey it not to disregard it''. (The underlining (here in "" "") is mine).

If, as is now contended, the situation was such that the detenu, the petitioner, was a dangerous communist and should not be allowed to be set at

liberty, if we were to reach the conclusion in our judgment that the prior order of detention was defective only on a technical ground, it was open to

the Government, as pointed out by Farwell J. in the passage underlined (here in "" "") above, to state frankly to this court, immediately after the

judgment was pronounced that in view of the imperative necessity and immediate danger to the State its security and peace and in view of cur

judgment not based on merits, but only on a technical point, that they propose to pass a fresh order of detention and that to meet such a

contingency they had prepared one and wished to proceed to arrest the petitioner in pursuance of that order. The Government is as much bound to

obey the law as an ordinary citiren and show respect to the law. In view of the circumstances considered above which speak for themselves, it is

my opinion clear that the fresh order of detention lacks bona fides. I regret the conclusion but the facts leave no option.

10. I adopt in this connection the language of Desai J. in -- ''Hirji Shivram v. Commissioner of Police, Bombay'', AIR 1948 Bom 417, where the

learned Judge observed in a similar situation :

Where then a situation arises which lends itself to the construction that the action of the police commissioner is an attempt to supersede the order

of the Magistrate, courts of justice must be vigilant to see that justice is not brought into ridicule and rendered impotent and that a tendency

towards autocracy does not prevail in the minds of the representatives of democracy.

To similar effect are the observations of Das J. in -- Subodh Singh Vs. Province of Bihar, , where under somewhat analogous circumstances, the

teamed Judge observed:

Even if there were any practical difficulties, they cannot override the law; nor can they override the basic principle of the liberty of the subject on

which the ordered progress of society and the state depends. I consider it necessary that it should be made clear at once for all that no officer can

flout or disobey the order of this court for the release of a prisoner. If any officer, however highly placed he may be, does so intentionally, he does

so at his peril.

With great respect to the learned Judges of the Bombay and Patna High Courts, I have no hesitation in accepting these pronouncements. It must

be observed, as I observed during the course of the arguments, that this court is not concerned with persons or personalities and has to administer

justice according to law without consideration of the character of the person who invokes our jurisdiction and if he is entitled to his liberty under the

law, it should not be denied to him on a consideration of expediency. The Judiciary is after all another limb of the same Government and it is as

much the duty of the executive as that of anybody else, to maintain the dignity of this court and to see that its prestige is not lowered in the eyes of

the public. The situation on the facts of this case, is certainly regrettable, but it cannot be helped.

11. The Patna High Court in -- Subodh Singh Vs. Province of Bihar, has taken the view that when the court is called upon to exercise its

jurisdiction u/s 491, Cr. P. C. it is not restricted to a consideration of the validity of the order of detention which was the subject-matter of the

petition but if subsequently before the judgment was pronounced, another order of detention was made, the validity of that also can be considered.

This view is based on the decision of the Federal Court in -- AIR 1945 18 (Federal Court) where it was pointed out that the analogy of civil

proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings cannot be invoked in

habeas corpus proceedings. It is open to the court in such a proceeding to consider if there was a valid order which came into existence later

directing the detention and decline to release the person even if the earlier order was invalid. It, however, the Government did not disclose the

existence of such an order and allow the judgment of the court directing the release of the detenu to be pronounced, the second or the fresh order

of detention would also automatically cease to have operation. As pointed out, if once a return to the writ is made it is a recognised practice of the

courts in England to permit an amendment of the return or a substitution of the return by leave of the court. It was perfectly open to the Provincial

Government to have pleaded even before we pronounced the judgment that there was a subsequent order of detention passed by the Government

which is not vitiated by the defect of not stating the period of detention. But it has not done so.

We. are concerned in a writ of habeas corpus with the justification for the detention. The justification may be based upon an order originally

passed or an order which was subsequently made and brought to the notice of the court. But the essence of the matter is that if an order came into

existence before the judgment is pronounced, it is the duty of the Government to bring it to the notice of the court. If the Government does not

produce it and does not seek to justify the detention on that ground, the fault is that of the Government and they must thank themselves for their

default. It is not open to the Government thereafter to put forward the fresh order of detention for arresting and detaining the person if the judgment

is pronounced. As observed by the learned Judge, Das J. in -- Subodh Singh Vs. Province of Bihar, :

I am clearly of the view that it was the duty of the Provincial Government to bring to the notice of this court all orders of detention which might

justify the detention of the person whose application for release was being considered by this court on 7th October 1948.

In an earlier part of the judgment, the learned Judge stated:

If the Provincial Government have a second order of detention, which would justify the detention of the prisoner, it is clearly the duty of the

Provincial Government to bring forward that order to the notice of the court.

Of course, these observations are confined to antecedent orders of detention passed before an order of discharge made by the court but not to

orders of detention passed on a later date. I do not see any reason nor is any sufficient ground urged for not accepting the principle of that decision

and apply it to the present case. In view of this decision it follows that apart from the question of the mala fide nature of the order, our order

directing the release of the petitioner on the 22nd February 1951, automatically discharged the fresh order of detention passed earlier on that day.

For these reasons, I am of opinion that the rule nisi must be made absolute and the petitioner should be set at liberty forthwith.

Raghava Rao, J.

12. This case has raised rather embarrassing questions for argument of the learned Advocate General and rather far-reaching issues for

determination of the court. The material facts have been stated in full and, with respect, correct detail by my learned brother and need not be

repeated by me. They are by no means complicated and are more or less even beyond the pale of controversy. The difficulty involved in the case

which I have rather keenly and anxiously felt is as to the inferences from them so far as such inferences are pertinent to the decision of some of the

questions debated. The difficulty has only stood aggravated and not lightened because of the psychological considerations on which the inferences

are in ''rerum naturae'' dependent. An analysis and ascertainment of the motives at the basis of individual conduct is a task hard enough, for not

even the devil can dive into the mind of man. Harder still must of course be an analysis and ascertainment of the motive springs of action of that

theoretically abstract but practically concrete, corporate body known as the Government which is the supreme executive of any State functioning

through its many officers in its many departments of activity.

13. Before I proceed to deal with the questions arising for decision, I must express my genuine appreciation of the commendable restraint and

sobriety with which the learned Advocate General, who was called upon, on the very second day of his assumption of office, to deal with a case of

this complex kind, has conducted himself throughout the argument, with due regard to his dual position as the accredited head of a Bar responsible

in the matter of its conduct to this court, as the highest Court of the Province, who is required generally to accept with respect any remark

emanating from this Bench, right or wrong, and as the accredited champion of the highest official rank of the powers and privileges of the

Government who is sometimes called upon to press and stress such powers and privileges if somewhat unduly. I must also declare, to all whom it

may concern, that the judgment of this Court even on such delicate questions as arise here shall never issue except in accordance with the oath of

our high office, that is, except in a true spirit of faith and allegiance to the Constitution and its laws which we have to uphold and in performance of

our duties to the best of our ability, knowledge and judgment, without fear or favour, ill-will or affection.

14. Mr. Nambiar for the petitioner has raised as many as five points for our consideration which, according to his formulation are as follows:

1. That the order of detention now challenged must be treated as void ''ab initio'' because it was intended to flout our decision in Cri. M. P. No.

153 of 1951.

2. That the order is invalid because it contravenes the provisions of the Constitution which ensure for the High Court its power to issue the writ of

habeas corpus.

3. That the Government in issuing the order acted mala fide, that is, without the proper kind of satisfaction under the relevant statute (Central Act

IV of 1951) and that, therefore, the order is liable to be quashed by us.

4. That there was no service of the order on the petitioner simultaneously with his arrest and that the arrest is, therefore, illegal,

5. That Section 12(1) of the Amending Act (Central Act IV of 1951) is ultra vires and that, therefore, the order of detention based upon it is

lacking in validity. This last contention although persisted in for the better part of a whole day was eventually abandoned by the learned Counsel for

the petitioner. We are not, therefore, called upon to pronounce upon the validity of the contention. Nor are we called upon seriously to notice the

fourth point raised before us. Non-service of the detention order simultaneously with the arrest does not necessarily render the arrest illegal. It is all

a question of substance, whether subsequent service is or is not sufficient compliance with law. In the present case there was no such long or even

seriously noticeable interval between the actual arrest and the exhibition of the order to the petitioner in the van as may nullify the process of the

Government. It thus remains for me to deal only with the three other points.

It may be mentioned at the outset that the first and third points are allied to each other in the sense that if we hold in favour of the first, we must

necessarily hold in favour of the third. The contention of the learned counsel on these points comes to this : that the conduct of the Government and

its officers in promulgating this order of detention was inspired by malice and stands thereby vitiated. Malice in law, generally can mean nothing

more than an intention to injure another by doing an act in disregard of the letter''s right wrongfully, & wilfully, without reasonable & probable

cause. It does not necessarily mean personal illfeeling or spite. Further ""'mala fides"" & ""malice"" in relation to the contention before me are cognate

terms expressive of the legal idea of an intention on the part of the Government to misuse or abuse the power vested in it and not necessarily

connotative of moral turpitude on the part of the Government or of anybody connected with it. Mr. Nambiar could not and did not, seriously

suggest any kind of personal ill-feeling or spite between any officer of the Government and his client. He did not and could not, therefore, frame his

contention as on the basis of anything more than an ulterior intention on the part of the Government to somehow flout our order in Crl. M. P. No.

153 of 1951. That if such circumvention were made out the order of detention must be held to be lacking in the satisfaction on the part of the

Government requisite under the Statute cannot be seriously disputed. It is open to the detenu as held in -- AIR 1945 18 (Federal Court) to show

that the order was a fraudulent exercise of the power vested in the Government The burden of showing that is on him and he can only sustain the

burden by successfully rebutting the presumption of bona fides on the part of the Government.

15. This Bench had occasion recently in, --''App. No. 13 of 1948'' to consider want of bona fides alleged in relation to a power vested in the

Government to acquire property under the Land Acquisition Act. I had occasion then to observe as follows referring to the relevant passages in

Lord Halsbury''s Laws of England, 2nd Edn:

As to the law on the matter, I wish to make it clear that, as I apprehend it, in the case of fraudulent execution of a statutory power as in the case

of fraudulent execution of a power to appoint under a deed or will or of any common law power, the fraud does not necessarily imply any moral

turpitude, but consists in the exercise of the power for purposes foreign to those for which it is in law intended. Persons exercising such a power

cannot be held responsible and the exercise of such power by them cannot be held invalid except on proof of mala fides or indirect motive or of

some improper conduct materially affecting such exercise.

Applying these tests of irrelevant purpose, indirect motive and improper conduct to the situation with which we are concerned, what we are called

upon to decide is firstly, whether the purpose for which the power has been exercised by the Government is such irrelevant purpose and secondly,

whether the motives which actuated the Government in making the order are such indirect motives, and thirdly whether there is improper conduct

of the Government proved materially affecting the exercise of the power.

16. The purpose of the arrest is said to be the prevention of activities prejudicial to the security of the State on the part of the petitioner, Since the

soundness of the grounds of detention was not pronounced upon by us in our judgment in Crl. M. P. No. 153 of 1951, and has not been

canvassed before us now, 1 am prepared to assume that the purpose behind the order is not foreign to the power exercised through it. But then

what of the indirect motive and improper conduct alleged against it by the petitioner which still remain for consideration?

17. As to motive, what is contended by the learned counsel for the petitioner, to use his own language, is that the order of detention was intended

to flout our order on Crl. M. P. No. 153 of 1951. Although the use of the word ""flout"" in this context was not accepted by the learned Advocate

General it could not be disputed by him that the order was intended to render our judgment in Crl. M. P. No. 153 of 1951 of no force and effect

whatsoever in relation to the release of the petitioner which would automatically follow on it. The learned Advocate General has given us reiterated

assurances that the Government never intended to disrespect our order but'' only desired to devise some further method of ensuring the

continuance of the detention of the petitioner in the interests of public safety, which would be a legitimate means of getting over the difficulty

created by our judgment. If the mode of circumvention of our judgment resorted to by the Government is something substantially justified by the

law 1 do not think we can pronounce the order as void at the inception as contended by Mr. Nambiar. The law on the point is perfectly clear. That

an order of detention can be passed against a person who is already under detention and that there is nothing inherently illegal about successive

orders passed against him on the same grounds, where the sufficiency of the grounds is not examinable by the court has been ruled by the Federal

Court in -- ''Basanta Chandra v. Emperor'', AIR 1945 F. C. 18. Again, that where the court has declared the detention of a person to be without

justification upon the merits, a fresh order of detention made in order to circumvent the decision would be mala fide has been decided by the Full

Court of Orissa in -- Prahalad Panda Vs. Province of Orissa, . Further, a Full Bench of five Judges of the High Court of Calcutta have ruled in --

''Bupendra v. Chief Secretary, Govt. of West Bengal'', AIR 1949 Cal 633 that if however the decision proceeded simply on the ground that the

law under which the order had been made was invalid or the order was irregular in form, a fresh order of detention in a valid form or under fresh

legislation would not be necessarily mala fide. Justification for the order in the present case is sought by Government not in any fresh legislation like

Act IV of 1951 (Central), as conceded by the learned Advocate General but in the circumstances that our judgment in Crl. M. P. No. 153 of

1951 did not proceed on a consideration of the grounds of the petitioner''s detention but only on the technical ground that there was a time limit

required by the law to be fixed in the Original as well as the confirmatory order of detention u/s 3 and Section 12 respectively of the Preventive

Detention Act, IV of 1950. It is contended that the order under challenge was thought of in order to set right the technical defect of the previous

order of detention as it was competent to Government so to do, after it had been informed of the expectation of the learned Advocate General at

the conclusion of the argument before us that we were in all likelihood going to base our decision upon the technical ground. It is also contended

that in drawing up an order even before our delivery of judgment the Government acted only ''ex majore cautela''; and only desired to lose no time

over service of the order on the petitioner for the purpose of his re-arrest. The order was not, it is said, intended to take effect in any other

contingency than that of our judgment proceeding on the narrow basis of the technicality referred to above.

In order to assess and ascertain the validity of these contentions it is necessary to advert to certain circumstances which the contentions overlook.

If it was really the intention of the Government to make the order in view of the possibility that we might rest our decision on the technical ground,

one should find some mention in the order of the time limit which we held it necessary for the Government to specify in any order u/s 3 of the Act

IV of 1950. If the Government had sought to abide by such decision which they aver they anticipated bona fide we should have expected them to

issue the order in a manner consonant to our decision as to the time limit. That, however, is not the position which we find Government took up in

issuing the order as it did. The order was prepared on the same grounds of detention as before and without the slighest attempt at rectification of

the defect which we actually pointed out in our judgment. If indeed the Government is to justify the omission of any time limit in the order by any

suggestion that there was a decision of the Supreme Court or an unreported decision of this court (Govinda Menon and Basheer Ahmed Sayeed

JJ.) to the contrary of our judgment--decisions adverted to before this court on the 12th inst, in a statement by Mr. Kuttikrishna Menon, the

predecessor in office of the Advocate General who has argued this case before us--it was for the Government to have brought these decisions to

our notice before our delivery of judgment on the 22nd February 1951.

The then Advocate General, Mr. Kuttikrishna Menon, did endeavour to avert our judgment till after the production by him of an authenticated

copy of the amending Act (IV of 1951) Central, but did not mention to us the decisions above referred to. The fact of the non-mention of the

decisions to us--for which there is no explanation at all forthcoming -- can only lead to the inference that these decisions were not responsible for

the admission in the order of the time limit required by our judgment. The Government was in all honesty and fairness bound to respect our

judgment and introduce the time limit into the order in accordance with our decision. Our decision might be right or wrong; but the Government

had no business to disregard it even if there were decisions to the contrary, of which they do not seem to have been aware, of which they did not

inform us and on which they could not have and do not seem in truth and in fact, to have acted.

It turns out too on information supplied to us by the learned Advocate General himself during the delivery of this judgment that the decision of the

Supreme Court to the contrary of our judgment was in fact pronounced on 23-2-50, a day after ours and published in the Hindustan Times only on

24-2-50 two days later than ours. The decision was not and could not be within the knowledge of the Government on the date of our judgment on

which date it was that the Government framed the order now under challenge in anticipation of our judgment. It was scant respect therefore which

Government showed to us in"" framing the order as they did even on the assumption that they expected our judgment to rest upon the technical

ground on which it eventually rested. It is difficult to resist the conclusion in the circumstances that the intention of the Government in promulgating

the order was not so much to devise legitimate means for surmounting the difficulty created by our judgment but to some-how evade its operation.

That, in my opinion, is sufficient proof of the lack of bona fides vitiating the order under the Full Bench decision reported in -- ''Narayanaswami v.

Inspector of Police'', ILR (1949) Mad 377. The motives operating on the human mind are not always easy to ascertain and often mixed in

character and even if one could not, on the basis of non-mention of any time limit in their order of 22-2-51, which certainly assert the intention of

the Government to be to flout our prior judgments, such non-mention in disregard of our judgment is, in my opinion, certainly ""improper conduct

materially affecting the exercise of the power"" according to the third of the tests of mala fides indicated supra in this judgment.

18. Whether the non-production ofp1 the order before us on the day of our judgment is not another circumstance strengthening the inference of

mala fides on the part of the Government whether from the stand point of ""indirect motive"" or from the standpoint of ""improper conduct"" is the

further aspect of the matter which we have to consider. It was bad enough of the Government to have done all that they had done before our

delivery of judgment on assumptions and premonitions with reference to our judgment which was still pending. Even if they felt themselves justified

in doing so in shrewd anticipation of what our judgment was to be, the least that the Government ought to have done--it is indeed surprising that

they did not do that much at least--in all fairness to the petitioner as well as to this Court and in their own interest, after reaching their decision in

consultation with their legal advisers to re-arrest the petitioner immediately after our order, if it should turn out to be in his favour on the technical

ground, was to inform their legal advisers who were to appear on that day in court to take judgment, of the order which they had already made.

The production of the order would undoubtedly have a material bearing upon the order to be passed by us on the earlier habeas corpus petition

which was then pending judgment.

19. As I had occasion to point out in my judgment in Crl. M. P. No. 153 of 1951 the writ of habeas corpus is in England a prerogative writ but at

the same time it is also o writ of right remedial in nature and grantable ''ex debito justitiae'', which is inapplicable if the illegal detention has ceased

before the application for the writ. So I said in my judgment in that case having regard to this basic nature of the writ that I did not feel quite so

clear as my learned brother did that the disappearance of two of the grounds of detention which were relied upon by the petitioner, did not affect

the merits of the habeas corpus petition which was to be decided and disposed of in accordance with the circumstances in existence at the time of

issue of such order without regard to the events which may have happened subsequently to the issue of the order. I feel perfectly clear that in the

present case the order under challenge ought to have been brought to our notice at the time of our judgment as a material factor which would have

a bearing on the termination or continuance of the illegal detention which was the Substance of the complaint on the application for the writ. I am in

perfect agreement with the view to this effect enjoined on us by the ruling in -- AIR 1945 18 (Federal Court) where it is pointed out that the

analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as from the date of the institution of the proceedings

cannot be invoked in habeas corpus proceedings. This view has been accepted and acted upon by the ruling in -- Subodh Singh Vs. Province of

Bihar, , wherein it is held that the court in exercising its jurisdiction u/s 491, Cr. P. C. is not restricted to a consideration of the validity of the order

o_f detention with reference to circumstances in existence at the time of the application for the writ. So if the order was brought to our notice it was

possible for us to have held either in favour of the Government itself or in favour of the petitioner according as ''our view of the merits of the order

may have induced us to hold. This, therefore, shows the unfairness to the petitioner as well as the inexpediency in the interests of the Government

itself involved in the withholding of the order from our notice at the time of delivery of judgment. So far as we are ourselves concerned, the regret

of the situation which we cannot but feel is that we were prevented from possibly making the right decision by the Government withholding the

order from us at the time. Here again, there was improper conduct on the part of the Government materially affecting the exercise of the power,

whether or not there was indirect motive operating on their minds in the sense of an intention to flout our order.

20. As proof of mala fides on the part of the Government Mr. Nambiar has further contended that the Government instead of availing themselves

of the right of appeal against our judgment open to them under Arts. 132 and 136 of the Constitution hastened mala fide to make a fresh order of

detention against his client. It is pointed out by learned counsel mentioning --''O''brien''s case'' before the House of Lords that in England there is

no right of appeal, against an order of release. The position in India is under the Constitution, argues learned counsel, different. I am not satisfied

that the failure of the Government to take steps for an appeal to the Supreme Court would vitiate the order, if the Government felt satisfied about

the emergency of the situation, as they say they were, so far as to resort to the speedier course of a fresh order instead of to the normal remedy of

an appeal which might involve delay in making sure of the detenu, if once he gets off as he might well do. If the course adopted by the Government

is otherwise well founded, I am not prepared to say that the failure to pursue the alternative remedy of appeal to the Supreme Court renders the

order invalid or illegal. ''

21. The writ of habeas corpus more elaborately designated by some such form as habeas corpus, ''ad facisudum sub judicadum et resipiandum''

(i.e., to do, submit to & receive whatever the Judge or the court awarding such writ shall consider in this behalf) is unlike other writs of habeas

corpus such as habeas corpus, ''ad respondindum'' (writ used to -remove a prisoner from the jurisdiction of an inferior court in order to charge him

with action in a higher court) habeas corpus ''ad satisfaciunium (writ used to remove a prisoner to a superior court in order to charge him with

process of execution), habeas corpus ad testificandum (a writ used to bring a witness into court to give testimony in a cause), as pointed put in

Bacon''s Abridgement and an early English case-- ''Rex v. Pell and Offly'', (1674) 3 Keb. 279 a writ of right against which no privilege of person

or place can avail. The writ is one of the highest constitutional importance, as it is a remedy available to the meanest subject against the most

powerful (vide Halsbury''s Laws of England, 2nd Edn vol. 9. Sec, 1202 at p. 703). The source of the writ in England is part of the King''s

jurisdiction in judicial matters. In England the King in Parliament is the supreme legislative organ and the King in Cabinet is the supreme executive

organ of the State. The common law regards the King as the source or fountain of justice and certain ancient remedial processes of an

extraordinary nature which are known as prerogative writs have from the earliest times issued from the court of King''s bench in which the

sovereign was always present in contemplation of law. The court of the King''s Bench retained all the jurisdiction of the curia regis in so far as it

was not distributed among the courts; and this jurisdiction including the grant of the prerogative remedies is now under the Supreme Court at

Judicature vested in the High Court of Justice.

As Hyde C. J. points out as early as 1627 in-- Darnel''s case'', (1627) 3 State Tr. 1.

Where the commitment is by the King or others this court is a place where the King doth sit in presence and we have power to examine it; and if it

appears that any man hath injury or wrong by his imprisonment we have power to deliver and discharge him; if otherwise, he is to be remanded by

us to prison again.

22. In India the jurisdiction is embodied so far as the Supreme Court is concerned in Article 32, and so far as the High Courts are concerned in

Article 226 of the Constitution. The jurisdiction is not traceable to the King for here there is none but to the people of India who having solemnly

resolved to constitute India into a sovereign democratic republic have through their constituent assembly, adopted, enacted and given to themselves

the Constitution. While this Constitution does not in so many terms provide for a separation of powers in the strict sense of the term between the

legislature, the judiciary and the executive, there are specific provisions in regard to the three heads of powers embodied in different portion of the

Constitution which have to be read together. Whatever the relative degrees of importance enjoyed by the three organs of the state under the

Constitution there is no doubt but that the powers of each one of the three organs have to be exercised as fundamentally subject to the provisions

of the Constitution relating to that organ individually as well as to the provisions relating to the other organs.

22a. It was contended by Mr. Nambiar that the power to issue a writ of habeas corpus conferred upon the High Court as well as upon the

Supreme Court is something so absolutely sacrosanct under the Constitution that no legislation can prejudicially affect it, and no executive can

under the shelter of a piece of legislation prejudicially affecting it act in disregard of the writ if issued. It may also be that although our attention was

not specifically drawn to Arts. 358 and 359 of the Constitution counsel meant to maintain that except in the cases dealt with by these two articles

the Constitution makes the judicial power to issue the writ so far absolute that no legislative power provided for by the Constitution could possibly

override or encroach upon this judicial power. It was contended too by the learned counsel that the powers of the executive under the Constitution

are so far defined as to be liable to be treated as limited by Arts. 53, 154 and 162 of the Constitution. On the other hand, it was contended by the

learned Advocate General, that the power to issue the writ is not to be treated as immune from Legislative interference and that the powers of the

executive ought not to be treated as confined to what is defined in Arts. 53, 73, 154 and 162.

In support of the latter limb of the contention our attention was drawn by the learned Advocate General to the passages contained in Section 431

of Vol. VI of Halsbury''s Laws of England (Constitution law) at pages 431 et seq; and in particular to the statement at page 385 that executive

functions are incapable of comprehensive definition for they are merely the residue of the functions of Government after legislative and judicial

functions have been taken away. It is unnecessary for me to pronounce upon the rival contentions of counsel on these intricate points as one thing is

clear to my mind--viz; that no one of the three organs of the ""State ought to function in disharmony with the other two organs. It may be that

judicial supremacy as under the Constitution of the United States does not exist here. It may be that the theory of legislative omnipotency obtaining

in England does not hold the field under our Constitution subject to whose provisions it is that the Union Parliament and the State Legislatures have

to function. It is the respect that is accorded by one organ of the State in relation to the others that ensures that healthy working of the Constitution

which is the acid test of its merits whatever the paper value of its provisions.

23. There is no reason why from this standpoint the principle of the ruling in the --''Eastern Trust Co. v. Makenzie Mann & Co. Ltd.'', (1915) A.

C. 750 should not apply to cases under our Constitution although there is here, as I have already pointed out, no King to act as a connecting link

between the three organs of the State. The Crown in its executive side is in England bound to observe the law both by the Statute and by the terms

of the Coronation oath which embodies the contract between the Crown and people upon which the title to the Crown originally depended and still

in a large measure depends. Upon any doubtful point of Prerogative in England the Crown and its ministers must therefore bow to the decision of

the legal tribunals (vide Halsbury''s Laws of England II Edn. Vol. VI, Section 535 page 455). It is the duty of the Crown and of every branch of

the executive to abide by and obey the law. If there is any difficulty in ascertaining it courts are open to the Crown to sue and it is the duty of the

executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it.

Whatever the limits within which the judiciary in this land can function in relation to Union Parliament and State Legislatures and whatever the

residual powers of the executive under the Constitution over and above what is defined by the specific articles thereof, I have no doubt at all that

the executive must needs respect the decisions of the judiciary and can only avoid, as in England, their due operation by appropriate legislation. In

India as well as in England since it is the business of the courts to apply the Constitution and the laws in cases properly brought before them the

judiciary exercises control over executive action in so far as it would refuse to uphold as valid any act of the Government which is not supported by

the Constitution or by some law. The authority of the Courts as regards the executive action arises when the executive exceeds its authority in

which case the agents and instruments through which the action is carried out are personally responsible to law and the courts (Vide D. D. Basu''s

Commentary on the Constitution of India p. 207). While on the one hand it may readily be conceded that it is not the business of the courts to pass

judgment on the policy of executive action, it cannot on the other hand be denied that the Executive has no authority to pass verdict upon the

validity of a judgment and it is bound to assist in enforcing it, even though the Executive may believe it to be erroneous, (vide Cooley''s

Constitutional law page 20S).

Thus, in -- ''the King v. Speyer'', (1916) 1 K. B. 595, Lord C. J. Reading observed:

This is the King''s court; we sit here to administer justice and to interpret the laws of the Realm in the King''s name. It is respectful and proper to

assume that once the law is declared by a competent judicial authority, it will be followed by the Crown.

On the same principle it is that it has been held by the Privy Council in -- ''Fischer v. Secretary of State'', 22 Mad 270 that Government may in

proper cases be bound by an injunction issued in a proceeding to which it is not a party. So quote the Judicial Committee :

But then it was asked what would happen, if the Collector ignored the order of the Court? What remedy would the appellant have if it had

omitted to ask for specific relief against the Collector? It is highly improbable that any officer of the Government would set the court at defiance. It

is impossible to suppose that Government would countenance such conduct as that.

Where the powers of the Governor of Nigeria under the Deposed Chief''s Removal Ordinance were purely executive the Privy Council have held

in -- ''Eshugbayi Eleko v. Nigerian Government'', (1931) A. C. 662 that it was the duty of the court to investigate the propriety and legality of

Executive'' action, in ordering the deposed chief to leave a specified area and in default in ordering his deportation to another specified place in the

colony. Lord Atkin, in delivering the judgment of their Lordships, observes at page 670 of the report thus:

The Governor acting under the Ordinance acts solely under executive powers and in no sense as a court. As the Executive he can only act in

pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the Executive can interfere with the liberty or

property of a British subject, except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of

British justice that Judges cannot shrink from deciding such issues in the face of the Executive.

24. Judging the matter from this standpoint, the conclusion seems to me to be reasonably enough irresistible that if the order under challenge in the

present proceedings is vitiated either by an intention on the part of the Government to evade the effect of our judgment in the prior petition, Crl. M.

P. No. 153 of 1951, somehow or other or by improper conduction on the part of the Government materially affecting the exercise of the power,

as already discussed, the order cannot possibly be upheld notwithstanding any belief on the part of the Government that our judgment was

erroneous.

25. The foregoing entails too my answer to the point raised by Mr. Nambiar that the order now under challenge is in contravention of the power

conferred upon the High Court by Article 226 of the Constitution.

26. There is only one other ground raised on behalf of the petitioner which remains to be dealt with. That is that the non-mention of the order to us

at the time of the delivery of our judgment in Crl. M. P. No. 153 of 1951 operates ''proprio vigore'' to nullify the order altogether. The ground is

sought to be supported and must indeed be taken to be established by what the Patna High Court has held in -- Subodh Singh Vs. Province of

Bihar, . I am not, I must say, however fully satisfied that the non-mention has this effect, whatever may be its bearing, on the question of mala fides

on the part of the Government which I have already dealt with. Assuming that it was the duty of the Government at the time of our judgment to

bring to our notice all orders of detention which might justify the detention of the person whose application for release was under consideration

then, I am unable to discover as at present advised any intelligible legal principle on which the Government''s dereliction of duty in this respect has

the legal effect contended for. It is not a question of constructive ''res judicata'' applicable to civil proceedings whether by way of statutory

provision (i.e., Section 11 explanation IV C. P. Code) or by way of juristic principle ''de hors'' the statute; nor is it a matter by necessary

implication of our judgment that all prior orders of detention should cease to operate thereafter. What was never actually before our minds cannot

by implication be treated as something which we did pronounce against. No intention can be imputed to us to decide matters not brought to our

notice and the judgment which we delivered can only relate to the matters in fact brought to our notice.

27. In conclusion, I cannot help'' recalling to my mind Lord Mansfield''s famous judgment reversing the outlawry of Wilkes in 1768. As that noble

and learned Lord there did, so may we not here, from the responsible seats which we have been called upon to fill, and what is more, to fulfil, by

virtue of our appointments, proclaim in solemn tones from this sacred shrine of justice. The Constitution does not allow reasons of State to

influence our judgment, ''Fiat Justitiae ruat caclum.''

28. In the result the petition succeeds; and I agree with my learned brother that the rule nisi must be made absolute and the petitioner set at liberty

forthwith.