FULL BENCH

Before Mehar Singh, A. N. Grover, D. K. Mahajan, H. R. Khanna and S. K. Kapur, JJ.

RAM KUMAR,—*Petitioner*

versus

DISTRICT MAGISTRATE, DELHI,—*Respondent*

Criminal Writ No. 10-D of 1965.

1965

May, 28th.

Constitution of India (1950)—*Art.* 226—*Second petition for writ of habeas corpus—When competent—Petition for writ of habeas corpus— Who can make.*

Held, that a second petition for a writ of *habeas corpus* will not lie to the High Court on a ground on which a similar petition has already been dismissed by it. A second petition for a writ of *habeas corpus* will, however, lie when a fresh and a new ground of attack against the legality of detention or custody has arisen after the decision on the first petition, and where for some exceptionable reason a ground has been omitted in an earlier petition in appropriate circumstances. High Court will hear the second petition on such a ground for ends of justice. In the last case it is only a ground which existed at the time of the earlier petition and was omitted from it, that will be considered, but merely because an argument was missed at the time of the hearing of the earlier petition in support of a ground, that will not justify entertainment of the second petition. In other words, second petition for writ of *habeas corpus* will not be competent on the same ground merely because an additional argument is available to urge with regard to the same.

Held, that a petition for writ of *habeas corpus* is ordinarily moved by the person detained or in custody and can be moved also by a friend or relation but not by an utter stranger because he cannot explain why the detained person is himself not able to move in the matter and he cannot possibly make an affidavit with regard to the facts and circumstances which go to show whether or not the detention or custody is illegal. In the rarest of cases, where the Court has been apprised of material which immediately and obviously establishes the illegality of the detention or custody, of course the Court will, for the ends of justice, proceed to issue the necessary writ, direction or order and in such rare cases a stranger may come in, but such a contingency should appear to be so rare as to be almost non-existent.

Petition under Article 226 of the Constitution of India, praying that a writ in the nature of Habeas Corpus *may kindly be issued for the production of Abdullah Shaukat in court so that he may be dealt with according to law and in case his detention is found to be illegal, he may be set at liberty.*

GURCHARAN SINGH AND R. L. TANDON, ADVOCATES, for the Petitioner.

BISHAMBER DAYAL, YOGESHWAR DAYAL, M. K. CHAWLA, D. R. SETHI AND KESHAV DAYAL, ADVOCATES, for the Respondent.

ORDER

Mehar Singh, J. MEHAR SINGH, J.—This is a petition by Ram Kumar petitioner under Article 226 of the Constitution and section 491 of the Code of Criminal Procedure for a writ of *habeas corpus* for the production and release of Abdulla Shaukat detenu from his detention, which is claimed to be unlawful. The petitioner asserts that he is a friend of the detenu.

The District Magistrate of Delhi, respondent, made an order on July 25, 1964, under rule 30(1)(b) of the Defence of India Rules, 1962, for detention of the detenu stating in the order that he was 'satisfied from information received, that it is necessary to detain Shri Abdulla Shaukat, son, of Shri Karamat Ali Khan, resident of 4416, Gali Shahtara, Ajmeri Gate, Delhi, with a view to preventing him from acting in any manner prejudicial to the maintenance of public order'. Pursuant to that order the detenu was arrested on November 17, 1964, and since then is detained in Central Jail, Tehar (New Delhi).

On December 28, 1964, one Babu, claiming to be partner in business and *pairokar* of the detenu, moved an application under section 491 of the Code of Criminal Procedure for release of the detenu. In that application he alleged that in November, 1963, contraband gold having been seized at the Punjab-Pakistan border, the Customs authorities on suspicion searched the premises of the detenu. They wanted to search his premises again on November 14, 1963, to which he took exception, whereupon he was taken to the Customs Office for interrogation, and was arrested. He was produced before a Magistrate of the

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First Class who ordered his release on bail. On March 10, 1964, the detenu went to Pakistan to arrange his marriage and after his return he moved an application on October 29, 1964, before the Sessions Judge of Delhi for reduction of the amount of bail. In that connection he appeared in that Court on November 17, 1964, and when he came out of the Court, he was arrested pursuant to the detention order already referred to. The petitioner sought release of the detenu on the ground that the detention is *mala fide,* with an ulterior purpose and oblique motive without there being any material with the detaining authority and without any incident prior to the order of detention which may be associated with the detenu and would be of the nature that is likely to affect the maintenance of public order, and is fraud on law as the respondent has no material to proceed against the detenu and has adopted this oblique course of detention, without showing that there exists a co-relation between the allegations and the purpose of detention. In substance, the ground is that the order of detention has been made in bad faith without any material with the respondent to connect the activities of the detenu with the maintenance of public order and thus with an ulterior motive. It was also said in the petition that in the order of detention no grounds of detention have been indicated and the detenu has not been made aware of the nature of allegations against him. There is reference in the petition to the action taken against the detenu by the Customs authorities, and this gives the clear indication that the petitioner was aware that the detenu had been detained in connection with smuggling activities, but he insisted that there was no past history of the detenu in that respect. In this affidavit the respondent stated that he has material with him showing that the detenu is a member of a gang of Indo-Pakistan smugglers of contraband gold from Pakistan and of currency from India and thus he is a potential danger to the economy of the country and risk to the security of the State and hazardous to public order. He further pointed out that on the material before him the facts available to him are that on October 28, 1963, the Amritsar Police recovered 30 kilograms of gold with foreign marking near Beas bridge from Manohar Lal and others in a car and, during the course of investigation, it was revealed that that gold has been smuggled from Pakistan on behalf of a smuggling

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syndicate headed by one Mohd. Latif of Lahore and Abdulla Shaukat (detenu) as his agent in India. The detenu admitted before the Customs authorities that he had smuggled huge quantity of gold through one Dayal Singh between October, 1962 and August, 1963, some 20 to 25 times and each time the quantity of gold was about 2,000 Tolas. Again between August and October, 1964, on four occasions the quantity of gold involved was 8,000 Tolas and he remitted the sale-proceeds out of India every time. The detenu was thereupon arrested for his unlawful activities but released on bail. The respondent further affrmed that the detenu is a notorious smuggler of gold into India from Pakistan and of currency from India and as such is a danger to the economy of India and his connections with bad characters and smugglers of Pakistan have further rendered his activities dangerous to the security of the State as also the maintenance of public order. In this manner, in the affidavit of the respondent, the detenu obtained the material on the basis of which his detention had been ordered, material which, to my mind, he was not entitled to ask from the respondent.

The petition was dismissed by my learned brother S. K. Kapur J., on January 8, 1965. The petition had been presented by a counsel for the then petitioner and was argued by him before the learned Judge. He urged two grounds—(a) that the order of detention is *mala fide*, and (b) that the petitioner not being in custody on August 6, 1964, when the detention order was reviewed under rule 30-A, there was no valid review according to that rule. The learned Judge negatived these two contentions. On the ground of *mala fide*, the learned Judge considered, among other matters, the contention on behalf of the then petitioner that nothing was said in the affidavit of the respondent as to how and in what manner the detenu was involved in the activities of smuggling. After due consideration of the contention of the learned counsel for the then petitioner, the learned Judge proceeded to dismiss the petition.

Information having been obtained of the material, on the basis of which the respondent has made the order of detention against the detenu, from the affidavit of the respondent in that previous petition, the present petitioner,

Ram Kumar, asserting to be a friend of the detenu, has filed this second petition for a writ in the nature of *habeas corpus* under Article 226 of the Constitution and section 491 of the Code of Criminal Procedure. This is also filed through a counsel. In this petition it is stated that the detenu has never been arrested for any act involving violence and his detention is *mala fide* in law, as the allegations against him are that he associates with persons engaged in smuggling of gold. It is said that such smuggling activities in the matter of gold have no relation to the maintenance of public order and as such the detention is for matters extraneous to rule 30, and so *mala fide*. Stress is then laid on this very fact that, in this manner, the provisions of rule 30 have been grossly abused for purpose extraneous to the Defence of India Act, 1962, and hence the detention of the detenu is bad being *mala fide* in law and fact. It is further stated that since this matter was not raised in the previous petition and was not specifically placed before the learned Judge nor considered by him, so the second petition has been moved for the release of the detenu. The return of the respondent by way of an affidavit, in substance, reproduces what was affirmed by him in his affidavit in the previous petition, and the respondent affirms that because of the persistent and prolonged smuggling activities of the detenu in smuggling huge quantities of gold in this country and sending away huge amount of currency of this country, and in that connection his association with a gang of smugglers, are activities which are a great risk to the security of the State and hazardous to the maintenance of public order especially during the present emergency.

The petition came for hearing before Gurdev Singh J., and the learned Judge has referred these three questions to a Full Bench and this is how the case comes before this Bench.—

(1) Does a petition for writ in the nature of *habeas corpus* made under Article 226 of the Constitution or section 491 of the Code of Criminal Procedure lie when a similar petition in respect of the same detenu and questioning the same order has been earlier dismissed on merits ?

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(2) Can a person, who is neither a friend nor a relation of the detenu, be not permitted to apply for a writ in the nature of *habeas corpus* under Article 226 of the Constitution or section 491 of the Code of Criminal Procedure, and if not, is it not open to the Court to issue the necessary writ, order, or direction once the invalidity of the detention order is brought to its notice even by a stranger ?

(3) Can the detention of a person under rule 30 of the Defence of India Rules, 1962, be ordered on the bare allegation that he is engaged in smuggling, has taken to life of crime, is a dangerous character, or has no ostensible means of livelihood ?

It is the High Court which has power under Article 226 of the Constitution of issuing a writ in the nature of *habeas corpus*. And again under section 491 of the Code of Criminal Procedure it is the High Court that has power to direct that a person illegally or improperly detained in public or private custody within the limits of its jurisdiction be set at liberty. The power under Article 226 of the Constitution is a much wider power than that under section 491 of the Code of Criminal Procedure, and these provisions overlap, but where a *habeas corpus* petition is made under Article 226 of the Constitution, reference to section 491 of the Code of Criminal Procedure is for practical purposes a superfluity and is probably made merely as a matter of caution. So the power to issue a writ in the nature of *habeas corpus* resides in the High Court and not in any single or particular Judge of a High Court or a division Bench or a larger Bench of it. It is true that for the exercise of its jurisdiction in disposing of various causes before it, the Letters Patent of this Court make provision for hearing and disposal of certain of the causes and matters by Single Judges and others by Division Benches or larger Benches. In this manner of exercise of jurisdiction clause 10 of the Letters Patent deals with the matter of appeal when a decision is made by a Single Judge in a cause or matter. All this is, however, internal arrangement for the exercise of its jurisdiction by this High Court

and when pursuant to the provisions of the Letters Patent a cause or matter is either heard by a Single Judge or by a Division Bench or a larger Bench, the decision is of this Court, and it is not a decision of a Single Judge as a separate Court or of a Division Bench or a larger Bench as a separate Court. When a decision is given either by a Single Judge or by a Division Bench or a larger Bench in a petition seeking a writ in the nature of *habeas corpus*, it is a decision of the Court.

In England an impression prevailed that a petition for writ of *habeas corpus* could be taken from Judge to Judge, but that is no longer correct, in view of the decision by a Divisional Court of the Queens Bench Division reported as *Re Hastings* (No. 2), (1) in which Lord Parker, C. J., has considered the history of the matter and has come to the conclusion that it was never the law that in term time successive writs of *habeas corpus* lay from judge to judge. The learned Lord Chief Justice has pointed out that there were previously three independent courts, the Court of Exchequer, the King's Bench Division, and the Common Pleas, and a writ of *habeas corpus* could be made successively to each one of those courts. In vacation it could be made from judge to judge. The petitioner in that case, on that, filed another petition before the Chancery Division and that is reported as *Re Hastings* (No. 3), (2) and this is what Harman J. says about the present position of the law in this respect in England emerging out of the previous decision of the Lord Chief Justice: "It is always sad to be stripped of any illusion; and I, like, I expect most lawyers, have grown up in the belief that in cases of *habeas corpus* the suppliant could go from judge to judge until he could find one more merciful than his brethren. That illusion was stripped from me when I read the report of the decision in the Queen's Bench Divisional Court last year *Re Hastings* (No. 2), in this very case. The decision was based on this, I think, that there never had been such a right. There had been a right to go from court to court; there had been right in Vacation to go from judge to judge, for the simple reason that the court was not sitting in bench; but there had never been a right

(1) (1958) 3 All. E. R. 625.
(2) (1959 1 All. E. R. 698.

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in term time to go from one judge to another when the court was available to which the applicant could properly apply". The learned Lord Chief Justice points out that the three independent courts have been abolished and in their place there is only one High Court though having various Divisional Courts as parts of it. It has been held in these two cases that when an application for writ of *habeas corpus* has been disposed of by one Divisional Court, no second application on the same ground lies either to the same Divisional Court or to another Divisional Court as a part of the High Court. In regard to the question of successive applications from judge to judge, the learned judges in the second of these cases point out that in these days a Single Judge cannot hear an application for a writ of *habeas corpus*, which can only be heard under the rules by a Divisional Court so that when such an application is made to a Single Judge, he is bound to refer it to a Divisional Court which will then proceed to dismiss it on the ground that a similar application had already been disposed of in the High Court. The reason why previously, when there were three independent courts in England, an application for a writ of *habeas corpus* could be made from court to court and in vacation from judge to judge has been considered by Lord Goddard in 'A Note on *Habeas Corpus* (1949) 65 Law Quarterly Review 30. Lord Goddard says—

> "Before the Act of 1679 there is no authority for saying that if a writ was refused, or if on the return the prisoner was remanded, an application could be made to another Court..... Before the Act of 1679 the King's Bench or a judge thereof in vacation was the only court from which the writ issued. Although Coke says that it ought to issue out of the Court of King's Bench in term time and out of the Chancery in term or vacation, Wilmot C. J. in the opinion delivered to the House of Lords on the second reading of a Habeas Corpus Bill in 1758 (which never became law) strongly denied that the Chancellor could issue the writ before the Act of 1679. Throughout his opinion he never refers to any court as issuing the writ except the

King's Bench and his opinion is the more valuable as he was Chief Justice of the Common Pleas. There is, however, an anonymous case reported in Carter 222, the date of which is about 1670, where three judges of the Common Pleas against the opinion of Vaughan C. J., graned the writ. From the report it would appear likely that the writ was granted by the Common Pleas because the applicant was a privileged person, presumably an officer of the court or an attorney, who at that time had the privilege of being sued only in the Common Pleas. There is no trace of the writ ever having been granted by the Exchequer before 1679. The practice of going from court to court, therefore, seems to have arisen solely as a consequence of that Act which conferred the power of issuing the writ on the Chancellor and on any of the judges and barons, and obliged them to do so. The writ was always 'of right' but not 'of course' and, therefore, the court was only obliged to issue the writ on an affidavit showing some ground for the application.

The right to go from court to court was not only where the writ was refused but where on the return the prisoner was remanded. In *Cox* v. *Hakes* (3), Lord Bramwell emphasises that each Court was exercising primary jurisdiction; 'it need not have heard of the former application nor known of the materials on which it was founded and, indeed, those before it might be different from the former. Now if an applicant applied to the Common Pleas on grounds different from those on which he had applied to the King's Bench, no technical difficulty would arise, but we have now to inquire if the King's Bench had remanded, thereby adjudging the detention lawful, how another court could come to a different gaoler was the same in each case, or if after the decision if the warrant of commitment returned by the gaoler was the same in each case, or if after the Act of 1816, which gave power for the first time to the Court to inquire into the facts of the

(3) 15 App. cases 506.

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case, they proved to be the same ? It will be remembered that before the Act of 1816 a court had no power to inquire into the facts. They could only see whether on the face of the commitment the detention was lawful. The truth as to why the prisoner was committed could only be inquired into by means of an action for a false return: see Wilmot's opinion referred to above. Why then could not the respondent return on a second application that the prisoner had been remanded by order of the King's Bench and rely on the principle of *res judicata* ? This question would not, I think, arise where one court merely refused to grant the writ as this would only be a a refusal to allow proceedings to initiate.....

.....

.....The reason is to be found in a highly technical rule which also helps to explain why, when a prisoner was once discharged, the discharge could not be questioned. Until the procedural reforms effected in the reign of Queen Victoria, beginning with the Common Law Procedure Act, 1852, the only method of challenging the decision of one of the superior Courts in bench was by Writ of Error. From 1585 onwards the Exchequer Chamber entertained error from the King's Bench and until 1830 the King's Bench exercised jurisdiction in error over the Common Pleas. It was, however, well established that a Writ of Error was never allowed in the case of a prerogative writ though there seems to have been some doubt with regard to Prohibition. This was laid down in the *City of London Case* where Coke says that the rule applies to *Habeas Corpus* as well as to *Mandamus* and *Certiorari*. There is a direct decision of the House of Lords to that effect in *Pender* vs. Herle (4). The reason for this rule first appears in *R.* v. *The Dean and Chapter of Dublin* (5). In those days the Court of King's Bench in England exercised Jurisdiction in Error over Irish Courts. The case was one of *Mandamus* and the court decided that Error did not lie. It was held that Error could

(4) (1725)3 Brown Parl Cases 505.
(5) 1 Str. 536.

not be brought on a prerogative writ because there was no 'ideo consideratum est'. In other words, technically there was no judgment. That case was cited in *Pender* v. *Herle* and to quote the headnote, it was there held that no Writ of Error law it being merely an award of the court and not a strict formal judgment. This seems to supply the reason why *res judicata* could not be raised where a second court was asked to grant a writ which had been refused by another court. There was no judgment in the formal sense."

There were in those days thus three separate courts in England having in this matter independent jurisdiction and the reason why an application for a writ of *habeas corpus* could be filed from court to court was because in regard to a decision on an application for a prerogative writ, there was no way of challenging that decision for there was no appeal against it and the only remedy of writ of Error was not available. The ground stated for that is that such a decision is no judgment. Lord Goddard sums up his conclusions at the end and the first two may be stated "(1) that it was in consequence of the Act of 1679 and of that only that successive applications for the writ to the same or to different courts could be made and the Judicature Acts leave that right untouched and give no right of appeal if the appplication is in a criminal cause or matter; and (2) the true reason why the court is bound to hear the application *de novo* is that the refusal, whether on an *ex parte* application or after argument, does not amount to a judgment." It has been shown in the two *Hastings cases* that now that there is only one High Court in England into which all jurisdiction has merged, it has been held that there is only one court and its Divisional Courts are not separate Courts. The result then is that no successive applications for a writ of *habeas corpus* are now competent to the same court. The position here is that there is only one High Court and there are no separate parts of the High Court exercising jurisdiction independently that can be called a High Court separately. So that there is one High Court. In England a writ of Error did not lie from a decision in an application for a writ of *habeas corpus* in criminal cases, an appeal has been competent in an application for a writ of *habeas corpus* in civil cases to the Court of Appeal and thereafter

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to the House of Lords. The Note by Lord Goddard also refers to an application for *habeas corpus* writ in civil cases. There has been some difference of judicial opinion in regard to the character and nature of *habeas corpus* proceedings under section 491 of the Code of Criminal Procedure though perhaps the better opinion is that those proceedings are criminal in nature in view of the definition, for that purpose, of the expression 'High Court' in section 4(1) of the Code. In so far as a petition for writ of *habeas corpus* under Article 226 of the Constitution is concerned, it has been held in the *The Assessing Authority, Ludhiana,* v. *Shri Mansa Ram* (6) by a Full Bench of this Court, though the matter did not directly concern a petition for writ of *habeas corpus,* that proceedings for a writ of *habeas corpus* are criminal proceedings. Again, although the matter was not debated before their Lordships, in *Biren Dutta* v. *Chief Commissioner of Tripura* (7), appeals on a petition for writ of *habeas corpus* have been referred to as 'criminal appeals'. Those appeals dealt with cases of detention under the Defence of India Rules, 1962. At the same time in *Greene* v. *Secretary of State for Home Affairs* (8), the observations of Lord Maugham at page 291 and of Lord Wright at page 203, show that proceedings for a writ of *habeas corpus* in a case of preventive detention are civil proceedings. In that case the Divisional Court had refused an application for such a writ and the order was affirmed by the Court of Appeal and it was in further appeal that the House of Lords was considering the legality of the detention. The other cases of preventive detention in the same line are *The King* v. *Halliday* (9), *The King* v. *Secretary of State for Home Affairs,* Ex parte *O. BRIEN* (10), *R.* v. *Home Secretary* Ex Parte *BUDD* (11), *and R.* v. *Bottrill* : Ex Parte *KUECHENMEITSTER,* (12). All these were cases of preventive detention and yet on refusal of an application for

(6) I.L.R. (1965)2 Punj. 143=1965 Current Law Journal (Pb.) 442.

(7) A.I.R. 1965 S.C. 596.

(8) (1942) A.C. 284.

(9) (1917) A.C. 260.

(10) (1923)2 K.B. 361.

(11) (1942)1 All. E.R. 373.

(12) (1946)2 All. E. R. 434.

writ of *habeas corpus*, in each case, appeal was taken to the Court of Appeal and that could only be if the decision was a civil cause and not a criminal cause or matter. So in England, when such a right did exist, it was only in a petition for writ in a criminal cause or matter that the petitioner could go from court to court or in vacation from judge to judge. This distinction of criminal or civil proceedings in the matter of writ of *habeas corpus* seems to be no longer of importance here in view of the very wide powers conferred on a High Court to issue a writ of *habeas corpus* under Article 226 of the Constitution. Whether a petition for writ of *habeas corpus* is considered as criminal proceedings or as civil proceedings, an appeal can go to the Supreme Court on a certificate of fitness under Article 134 in the former case, and under Article 133 in the latter case, and in either case an appeal is competent to the Supreme Court on a special leave having been granted in that behalf under Article 136. So that unlike the situation in England that a decision in a petition for writ of *habeas corpus* in a criminal cause or matter was not open to reconsideration because no writ of Error was competent against the same and now there is no right of appeal, here the same is open to reconsideration by way of an appeal to the Supreme Court. Under Article 133, subject to the conditions of it, an appeal lies to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, and under Article 134, subject to its conditions, again an appeal lies to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of High Court. The words 'judgment' and 'final order', appear in both the Articles. It cannot be denied that a decision in a petition for writ of *Mandamus*, Prohibition, *Quo Warranto* or *certiorari* is a judgment or, in any case, a final order of the High Court from which an appeal lies to the Supreme Court either on a certificate of fitness granted by the High Court or on a special leave for appeal granted by the Supreme Court. It cannot be that while such a decision in the case of those writs is a 'judgment' or, in any case, 'final order', but it is not so when the decision is given in a petition for writ of *habeas corpus*. It has been held in *S. Kuppuswami Rao* v. *The King* (13), that the expression 'final order' must be an order

(13) A.I.R. 1949 F. C. 1.

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which finally determines the points in dispute and brings the case to an end. Now, when a petition for writ of *habeas corpus* is either granted allowing release of the detenu or person in illegal custody or is refused after hearing arguments on merits, that determines the right of the detenu or the person in custody to be released from detention or custody. This is a valuable right and one which involves the liberty of the subject. When a decision is given determining the claim of a party to such a right, obviously it finally determines the right claimed by the party and it is a judgment, but in any case, it is a final order. It must give reasons and the basis of the decision and thus is a speaking order and it must be so because an appeal may be taken to the Supreme Court. In *Jamnadas Prabhudas* v. *Commissioner of Income-tax, Bombay City* (14), Chagla, C.J., with whom Tendolkar, J., concurred, said ".....in our opinion,—and our opinion is supported by authorities as I shall presently point out....., the expression 'judgment, decree or final order' used in Article 133(1) is used in its technical English sense, which means a final declaration or determination of the rights of parties and it also means a decision given on merits. 'Judgment, decree or final order', is a compendious expression and each one of the parts of this expression bears the same connotation, viz., that there is an adjudication by the Court upon the rights of the parties who appear before it". When in a petition for writ of *habeas corpus* decision is given on merits after hearing arguments, whether the petition is allowed or is refused, it determines the right of the detenu or person in illegal custody to be released from the same or not, and at the same time the right of the party having the custody to maintain the same or not. In this manner such a decision is a judgment or, as I have already said, in any case, a final order. *In King Emperor* v. *Sibnath Banerji and others* (15), the question for consideration before their Lordships was that of detention of various respondents, and in this connection, although the matter was not put into controversy and no arguments were addressed on it, their Lordships referred repeatedly to the decisions of the High Court in the matter of petitions for *habeas corpus* as 'orders and judgments' of the High Court. Thus, whatever may be, for historical reasons, the approach in England to a

(14) A.I.R. 1952 Bom. 479.
(15) (1945)72 I.A. 241.

decision in an application for a prerogative writ, here such a decision for a writ under Article 226 is a judgment or is, at least, a final order against which, subject to certain conditions, an appeal lies to the Supreme Court. Before the constitution of one High Court in England, in place of three courts of independent jurisdiction, the considerations which led to permitting a petitioner to file successive petitions for writ of *habeas corpus* from one court to another and in vacation from one judge to another were—(i) existence of three courts of separate and independent jurisdiction, (ii) availability of no remedy for reconsideration of a decision in such a petition for writ of Error was not competent, and (iii) a decision in such a petition has been considered as not a judgment. Not one of these considerations apply here. There is one High Court and a remedy by way of an appeal against its decision in a petition for writ of *habeas corpus* is open to the Supreme Court and its decision in such a petition is a judgment, or, in any case, a final order in the nature of a judgment. So that here there is no basis for a second petition for writ of *habeas corpus* on the same ground if a previous petition has been refused. Same view has prevailed with a Special Bench of the Bombay High Court in *Malhari Ramaji Chikate* v. *Emperor* (16), and *In re Prahlad Krishana Kurne* (17). The decision of this Court in *Ramji Lal* v. *Rex* (18), no longer holds good because it was a decision under section 491 of the Code of Criminal Procedure only and by that time there was no question of consideration of a petition for writ of *habeas corpus* under Article 226 of the Constitution. Broadly, that decision has proceeded on the consideration that a decision in a petition for writ of *habeas corpus* is not a judgment, which opinion can no longer be accepted in regard to a decision in a writ petition under Article 226. The conclusion then is that no second petition for a writ of *habeas corpus* on the same ground, on which a previous similar petition has been refused by this Court, lies in this Court, for in the words of Lord Chief Justice Parker, the petitioner is met with the objection—'You have been heard once : we cannot enter into this matter again'. There is no difficulty that, if after the decision of the first petition, a new and a fresh ground becomes available which in-

(16) A.I.R. 1948 Bom. 326.
(17) A.I.R. 1951 Bom. 25 (F.B.).
(18) A.I.R. 1949 E.P. 67 (F.B.).

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validates and renders illegal the detention or custody, a second petition, on a good ground, for writ of *habeas corpus* will lie, although it challenges the legality of the same detention or custody as was challenged in the first petition. The basis for that is that the ground on which the challenge is made in the second petition did not exist at the time of the decision of the first petition and on its basis the legality and validity of detention or custody could not be impugned. There is then the third aspect of this matter, and that is of a case in which on the same facts and allegations and for the same relief a petition for a writ of *habeas corpus* having been refused, a second similar petition is made and on a ground, which was available at the time of the first petition but was omitted from it for some reason or other, a question arises whether such a second petition is competent ? In *Daryao* v. *State of Uttar Pradesh* (19), their Lordships have held that the general rule of *res judicata* applies to decisions under Article 226, but not the technical rule of constructive *res judicata* under section 11 of the Code of Civil Procedure. In this very case their Lordships considered the two *Hastings* cases (No. 2 and No. 3) but did not express final opinion with regard to what is decided in those cases and the effect of those cases on the question of successive applications. But it is clear from that case that their Lordships have not accepted that the technical rule of constructive *res judicata* applies to decisions in proceedings for writs under Article 226 of the Constitution. This gives an indication that in a situation as now under consideration, a second petition ought not to be incompetent. The powers of this Court under Article 226 are very wide and in appropriate and proper facts and circumstances in a petition for writ of *habeas corpus* when the omission of the ground in the earlier petition is satisfactorily explained and it is a ground which goes to render detention or custody illegal, this Court will interfere for the ends of justice to give relief in such a petition. Of course the petitioner will have to make out a rather strong case, but this Court is not powerless to provide a remedy even in such circumstances when the ground directly shows the illegality of detention or custody. The learned Judge has framed the questions rather widely. As will be shown presently, only one aspect of the matter arises on the facts of this case and that is the first, the other two do not, but

(19) A.I.R. 1961 S.C. 1457.

the matter has been considered in view of the broadness of the question. The answer to the question is that no second petition for writ of *habeas corpus* lies to this Court on a ground on which a similar petition has already been dismissed by this Court, a second such petition will lie when a fresh and a new ground of attack against the legality of detention or custody has arisen after the decision on the first petition, and where for some exceptionable reason a ground has been omitted in an earlier petition, in appropriate circumstances, this court will hear the second petition on such a ground for ends of justice. In the last case it is only a ground which existed at the time of the earlier petition, and was omitted from it, that will be considered, but merely because an argument was missed at the time of the hearing of the earlier petition in support of a ground, that will not justify entertainment of the second petition. In other words, second petition for writ of *habeas corpus* will not be competent on the same ground merely because an additional argument is available to urge with regard to the same. This has been stated for the sake of clarity, otherwise this is part of the first aspect of this matter.

In the present case details of what has been alleged in each one of the two petitions for writ of *habeas corpus* have been given above. In either petition the detention of the detenu has been questioned on the ground of bad faith on the part of the detaining authority. What has been pressed by the learned counsel for the petitioner is that when the first petition was heard and disposed of by my learned brother, S. K. Kapur, J., in that petition there was no ground that the smuggling activity, for which the detenu has been detained, is unconnected with the maintenance of public order as referred to in rule 30 and thus the detention is for an ulterior motive and fraud on that provision. Of course, the words that are now used in the petition do not appear in the earlier petition, but the substance of the matter appears there. The then petitioner said that there was no basis for the detention of the detenu and that smuggling had no concern with the detention. He further said that the detention was for an ulterior purpose, *mala fide*, and fraud on law, without there being any material with the detaining authority for the detention of the detenu, or any previous history associating the detenu with the

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activities of the nature likely to affect the maintenance of public order, or any co-relation between the allegations (meaning allegations of smuggling) and the purpose of detention. This is exactly what is being urged in the present petition, though, of course, in either petition the same matter is put in different words. In *Rattanlal Gupta* v. *The District Magistrate of Ganjam*, (20). Jagannadhadas, J., at page 58, observes—"The issue of reasonable satisfaction is not justiciable, but the case of *bona fides* of the exercise of the power or the abuse of the power when raised on proper material is justiciable. A case of want of *bona fides* may be made out, not merely by proof that the order of detention was in fact made for ulterior purposes, that is, for purposes outside the needs of prevention, but also when the order is made without taking into consideration any important circumstances which rationally and legitimately arise for consideration, when making an order of detention in a particular case". Now, in both the petitions concerning the present detenu the ground of *mala fide* has been taken and substantially in either it has been said that the detention is made in bad faith because it has been made with an ulterior motive on material not connected with the maintenance of public order as required by rule 30. So that the factual position is that the second petition by Ram Kumar is on the same ground as the earlier petition by Babu, and, as already stated, such a petition is not competent in this Court.

The second question does not present much difficulty because in *Charanjit Lal Chowdhury* v. *The Union of India* (21), Mukherjea, and Das, JJ., have been of the opinion that a writ for a relief under Article 226 of the Constitution, though not at the instance of an utter stranger, is at least available through a friend or relation of the detenu, who can apply for a writ of *habeas corpus* questioning the detention. In *Calcutta Gas Company (Proprietary) Ltd.* v. *State of West Bengal* (22), their Lordships observed that "The right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like *habeas corpus* or *quo warranto* this rule may have to

(20) A.I.R. 1952 Orissa 52.
(21) A.I.R. 1951 S.C. 41.
(22) A.I.R. 1962 S.C. 1044.

be relaxed or modified". So that a petition for writ of *habeas corpus* under Article 226 can of course be filed by the person in detention or custody, and it can also be filed, on his behalf, by a friend or relation for this reason that such a person is in a position to make an affidavit that the detenu himself is not able to move in the matter and with regard to the facts and circumstances rendering illegal the detention or custody. An utter stranger cannot possibly help the Court in this. He cannot explain why the detained person is himself not able to move in the matter and he cannot possibly make an affidavit with regard to the facts and circumstances which go to show whether or not the detention or custody is illegal. The answer to the question is that petition for writ of *habeas corpus* is ordinarily moved by the person detained or in custody and can be moved also by a friend or relation but, for the reasons stated, not by an utter stranger. In the rarest of cases, where the Court has been apprised of material which immediately and obviously establishes the illegality of the detention or custody, of course the Court will, for the ends of justice, proceed to issue the necessary writ, direction or order and in such rare cases a stranger may come in, but such a contingency should appear to be so rare as to be almost non-existent. In the present case, the question as framed in broad terms does not arise because the petitioner claims to be a friend of the detenu and there is nothing to show the contrary.

The third question, in the face of answer to the first, does not really arise in the present case, though it is also a question which has been very widely and broadly framed and outside the facts of the present case. In the present case, the allegation against the detenu has been of sustained activity of smuggling and exporting of Indian currency at an enormous scale, it is not a case of otherwise taking to life of crime or absence of ostensible means of livelihood. These matters arise in the connected cases and will be considered with regard to them. The present case is confined only to the allegations of smuggling of the type as stated, and this question has to be considered as thus narrowed down. But, as I have already pointed out, the answer to the first question renders the answer to this third question unnecessary, because the petition of the present petitioner is not competent. In *The Superintendent, Central*

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Prison, Fatehgarh, v. *Dr. Ram Manohar Lohia* (23), their Lordships have held that the expression 'public order' is synonymous with public peace, safety and tranquillity. If it was necessary to go into this question, on the facts of this case the view expressed by Falshaw, J. (as his Lordship then was), with which Soni, J., concurred, in *Bakhtawar Singh* v. *The State* (24), that *prima facie* it is difficult to see any connection whatever between smuggling which is essentially a secret operation, and the maintenance of public order, in which the operative word is 'public', obviously would prevail and it finds support from a similar case of blackmarketing, *Rex* v. *Basudeva* (25), in which their Lordships held that such activity may indirectly lead to disturbance of public order, but as it does not do so directly, it is remote in the chain of relations to the maintenance of public order. There is, however, another aspect of the matter. Falshaw, J., in *Bakhtawar Singh's case* further observed that in order to justify an order of detention on the ground of smuggling alone, it was necessary not only to allege that through smuggling the economy of the country has been adversly affected, but also to point to some facts from which such an inference could be drawn. That was a case under the Preventive Detention Act of 1950, and in that case somewhat different considerations applied than to a case under rule 30 of the Defence of India Rules, 1962, for there is some difference between the two provisions. In the affidavit by the respondent in the present petition—and his position was the same in his affidavit in the earlier petition—he has given facts and circumstances which have satisfied him that the activities of the detenu connected with smuggling and exporting of Indian currency and his connections with a gang of smugglers are a potential threat to the stability of the Indian currency and economy and are a great risk to the security of the State. The order of detention says that the detenu has been detained to prevent him from acting in any manner prejudicial to the maintenance of public order, and it does not say that it was for preventing the detenu from acting in any manner prejudicial to the public safety. If this matter was for consideration, the obvious argument was that the order of detention does

(23) A.I.R. 1960 S.C. 633.

(24) A.I.R. 1951 Simla 157.

(25) A.I.R. 1950 F.C. 67.

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not speak of the ground of which the affidavit of the respondent speaks why the detenu was detained. In *Greene's case* the order of detention said that the detenu was a person of hostile associations and for that reason it was necessary to exercise control over him, and he was consequently detained. But there was a document before the Court coming from the Advisory Committee, before whom the detenu could make objections against his detention, which document showed that the detenu had been concerned in acts prejudicial to the public safety and the defence of the realm and in the preparation and instigation of such acts and that it was necessary to exercise control over him. Now, obviously this was a different basis for detention than the one stated in the detention order, and on this ground the order of detention was challenged as illegal. This argument was negatived unless prejudice was shown, which was not, by the Court of Appeal and also by the House of Lords. If the third question had arisen for consideration, as the order of detention refers only to maintenance of public order and not to public safety, and the affidavit of the respondent refers to public safety in view of the decision in *Greene's case,* I think, it would have been necessary to send the case back to the learned Single Judge to consider the affidavit of the respondent in the light of the decision in *Greene's case* and then proceed to dispose of the matter. But it is not now necessary as has already been explained.

The learned Single Judge has referred three questions to the Full Bench and, ordinarily, when the questions have been answered, the case goes back for disposal in the normal way, but we do not consider that that course should be adopted in the present case just to enable the learned Single Judge to make a formal order of dismissal of the petition of Ram Kumar petitioner, because in view of the answer given to the first question this must follow as a matter of course. In the circumstances, in the wake of that answer, the petition of Ram Kumar petitioner is dismissed. There is no order in regard to costs in this petition.

A. N. GROVER, J.—I agree. Grover, J.

D. K. MAHAJAN, J.—I agree. Mahajan, J.

H. R. KHANNA, J.—I agree. Khanna, J.

S. K. KAPUR, J.—I agree. Kapur, J.

B. R. T.