A.F.R.
Judgement reserved on 6.12.2021
Judgement delivered on 23.12.2021

E-HABEAS CORPUS WRIT PETITION No. - 362 of 2021
Petitioner :- Abhayraj Gupta
Respondent :- Superintendent, Central Jail, Bareilly
Counsel for Petitioner - Daya Shankar Mishra, Senior Advocate, Chandrakesh Mishra, Advocate,
Counsel for Respondents :- Sri. Syed Ali Murtaza, A.G.A., A.S.G.I., Ms. Sadhana Singh, Advocate

Hon'ble Mahesh Chandra Tripathi, J.
Hon'ble Subhash Vidyarthi, J.

(Delivered by Hon'ble Subhash Vidyarthi, J.)

1. Heard Shri Daya Shankar Mishra, learned Senior Advocate, assisted by Shri Chandrakesh Mishra and Shri Abhishek Mishra Advocates, learned Counsel appearing for the petitioner, Shri Syed Ali Murtaza. learned Additional Government Advocate for the State-respondents (1) Superintendent, Central Jail, Bareli, (2) the District Magistrate, Shahjahanpur and (3) the State of Uttar Pradesh and Ms. Sadhna Singh, learned Standing Counsel for the Union of India.

2. The instant Writ Petition under Article 226 of the Constitution of India has been filed by the petitioner Abhay Raj Gupta, who is in custody in Central Jail, Bareilly, through his mother, seeking issuance of a Writ of Habeas Corpus challenging his detention under an order dated 23-01-2021 passed under Section 3 (2) of the **National Security Act, 1980**[1] and the entire consequential proceedings and continued detention as being illegal and

1 **NSA, 1980**

unconstitutional and a prayer has been made to issue a Writ of Mandamus commanding the respondents to release the petitioner from custody.

3. The detention order dated 23-01-2021 states that the District Magistrate has been satisfied that it has become necessary to pass a detention order under Section 3 (2) of the NSA, 1980 to prevent the petitioner from acting in any manner which would be prejudicial to the maintenance of public order. The grounds of detention are contained in a separate communication of the same date issued by the District Magistrate, which narrates the incident which led to the passing of the detention order. As per the report given by the informant, the deceased Rakesh Yadav accompanied by Kuldeep Jaiswal alias Sonu, Driver Shadab and the informant, reached the P.W.D. Office at about 01:15 p.m. on 02-12-2019. Three unidentified persons present there started firing at Rakesh Yadav with the intention to kill him. As soon as Kuldeep Jaiswal alias Sonu took aim with the licensee pistol of Rakesh, they fired at him also. People starting running away. Rakesh Yadav was killed and Kuldeep Jaiswal was admitted for treatment. On the information of the brother of the deceased, Case Crime Number 837/19 under Sections 302, 307 IPC was registered on 03-12-2019 at 00:53 in Police Station Sadar Bazar, Shahjahanpur.

4. The Second F.I.R. under Case Crime Number 873/19 under Section 307 IPC was registered on 22-12-2019 in Police Station Sadar Bazar, Shahjahanpur on the allegation that when the police apprehended the petitioner to arrest him for the aforesaid incident which occurred on 02-12-2019, he fired at the Police personnel with the intention to kill. The petitioner was taken in custody and was lodged in Jail on 23-12-2019.

5. On the ground of the same incident, a third F.I.R. was lodged

under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 as Case Crime No. 221/20 in Police Station Sadar Bazar, Shahjahanpur, in which the petitioner is in custody since 01-05-2020.

6. The detention order states that because of the incident which occurred in P.W.D. Office on 02-12-2019 at about 01:15, the students present in the Gandhi Faiz-e-Aam College adjacent to the P.W.D. College got panicked. Upon coming to know about the incident the guardians of the students also got panicked and in talks with the college management they expressed their concern regarding the safety of their children. The Principal, G. F. College has given an application in this regard to the Police, which establishes that because of the offence of gruesome murder done by the petitioner's accomplices under a conspiracy hatched by him, people got afraid and panicked and the public order was disturbed.

7. It has been averred in the writ petition that there has been an old animosity between the deceased Rakesh Yadav and his family members and the family members of the petitioner. The petitioner's grand father Radheyshyam had lodged a first information report in relation to murder of the petitioner's uncle Ashutosh Gupta against Giran Yadav and Kamlesh Yadav uncles of the deceased Rakesh Yadav and in that case Giran Yadav, father of the deceased Rakesh Yadav had to remain in jail for a period of 18 months.

8. The detention order has been challenged by means of the instant Writ Petition mainly on five grounds. The first ground of challenge is that the alleged incident was an offence against an individual which affected "law and order", but it does not affect "public order" so as to attract the provisions of Section 3(2) of the NSA, 1980. The second ground of challenge is that the incident which took place on 02-12-2019 is a stale incident which has no

proximity with the detention order and the invocation of the provisions of the NSA, 1980 after a long delay on 23-01-2021 was neither warranted nor justified. The third ground of challenge is that copies of the entire relevant material referred to and relied upon in the detention order have not been provided to the petitioner. The documents provided with the detention order have been mentioned in an index, a copy whereof has been filed as Annexure No. 5 to the writ petition and at serial No. 46 it mentions the bail application filed in case crime No. 221 of 2020 under Section 2/3 of the Gangsters Act contained one page only. The petitioner has filed a copy of the index of the aforesaid bail application as Annexure No. 4 to the writ petition which indicates that its index was of one page only and the entire bail application consisted of as many as of 19 pages. The copies of the report of the District Magistrate and that of the advisory Board were not provided to the petitioner as also comments on the said applications have not been provided to the petitioner in violation of the principles of natural justice, which renders the detention order unsustainable in law. Lastly the detention order has been assailed on the ground that on 23-01-2021, i.e. on the date of passing of the detention order, the petitioner was already in custody and he had not even filed an application for Bail in Case Crime No. 221 of 2020 under the U. P. Gangsters and Anti-Social Activities (Prevention) Act and there was no possibility of the petitioner acting in any manner prejudicial to the maintenance of public order and in these circumstances, the provisions of Section 3 (2) of the NSA, 1980 are not attracted and the detention order is unsustainable in law.

9. In support of his submissions, Shri Daya Shankar Mishra, learned Senior Advocate has placed reliance on the judgments in the cases of Ichhu Devi Choraria Vs. Union of India and others, 1980 AIR 1983, Mohinuddin @ Moin Master Vs. District Magistrate, Beed and others, 1987 AIR 1977, State of U.P. Vs. Kamal Kishore

Saini, 1988 AIR 208, M. Ahamedkutty Vs. Union of India, 1990 SCR (1) 209, Inamul Haq Engineer Vs. Superintendent, Division/District Jail, Azamgarh, 2001 Cri.L.J. 4398, Lallan Goswami Ajayn Vs. Superintendent, Central, 2002 (45) ACC 1089, Brijbasi Pathak Vs. State of Uttar Pradesh and others, 1985 (suppl.) ACC 273, Mrs. T. Devaki Vs. Government of Tamil Nadu and others, 1990 AIR 1086, Smt. Angoori Devi for Ram Ratan Vs. Union of India and others, 1989 AIR 371, Ram Manohar Lohia Vs. State of Bihar and another, AIR 1966 SC 740, Sant Singh Vs. District Magistrate and others, 2000 CriLJ 2230, Ram Kripal Singh Vs. State of U.P. And others, 1986 CriLJ 1437, Banka Sneha Sheela Vs. The State of Telangana and others, (2021) 9 SCC 415, Mahesh Kumar Chauhan alias Banti Vs. Union of India and others, 1990 0 Supreme (SC) 298, Prabhu Dayal Deorah etc. Vs. District Magistrate, Kamrup and others, 1973 0 Supreme (SC) 320, Imran @ Tendu Vs. Adhikshak, Janpad Karagar, Muzaffar Nagar and others, 2018 0 Supreme (All) 346, Ayya alias Ayub Vs. State of U.P. and another, 1989 AIR 364, SK. Serajul Vs. State of West Bengal, AIR 1975 Supreme Court 1517, Sk. Nizamuddin Vs. State of West Bengal, 1975 CRI. L.J. 12, Jagan Nath Biswas Vs. The State of W.B, AIR 1975 Supreme Court 1516, Md. Sahabuddin Vs. The District Magistrate 24 Parganas and others, 1975 CRI. L.J. 1499, Vijay Narain Singh Vs. State of Bihar and others, 1984 1 Crimes (SC) 914, Shesh Dhar Mishra Vs. Superintendent, Naini Central Jail, 1985 All L.J. 1222.

10. The District Magistrate, Shahjahanpur has filed a counter affidavit on behalf of the State-respondents stating that during the course of investigation of the heinous crime committed in broad day light in P.W.D. Office, in which one Rakesh Yadav was shot dead and another person Kuldeep Jaiswal alias Sonu received grievous injuries, the complicity of the petitioner came into knowledge. The

act of the petitioner created terror and panic in the locality and peaceful atmosphere was disturbed and after considering this aspect of the matter, the provisions of NSA, 1980 have been imposed upon the petitioner, after considering the report of the Sponsoring Authority, Police Authority and the entire facts available on record and after serving relevant documents upon the petitioner through jail authorities.

11. A counter affidavit has been filed on behalf of the Union of India also stating that the report as envisaged under Section 3 (5) of the NSA, 1980 forwarded by the Government of Uttar Pradesh by a letter dated 01-02-2021 was received in the Ministry of Home Affairs on 08-02-2021. The same was examined in detail alongwith the documents attached therewith by the Deputy Secretary (Security) who noted that there was no reason to interfere with the said detention order. A copy of the representation dated 13-02-2021 of the detenue alongwith para-wise comments of the detaining authority, forwarded by the District Magistrate, Shahjahanpur by the letter dated 15-02-2021, was received in the Ministry of Home Affairs on 18-02-2021 and on 19-02-2021, the same was processed for consideration of Union Home Secretary. Being aware of the effects and sensitivity of detention under the NSA, 1980, the representation was duly considered at various levels to ascertain the merit. Thereafter, the Union Home Secretary having carefully gone through the material on record, including the order of detention, the grounds for detention, the representation of the detenue and the comments of the detaining authority thereon concluded that the detenue had failed to put forth any material cause or ground in his representation to justify the revocation of the order by exercise of the power of the Central Government under Section 14 of the NSA, 1980. He, therefore, rejected the representation and the detenue was informed vide wireless message No. II/15028/25/2021-NSA dated

24.2.2021.

12. Opposing the writ petition, Shri Syed Ali Murtaza, learned A.G.A. has submitted that there is no thumb rule that the preventive detention can be ordered only if a bail application is pending. Its genesis lies under Article 22 of the Constitution of India. However, normally preventive detention is ordered only when a bail application is pending. As the petitioner was already in custody in a case under Section 302 I.P.C., the NSA, 1980 was not invoked. The cause of action for invoking the NSA, 1980, was that the petitioner was granted bail in Case Crime No. 837 of 2019 and Case Crime No. 873 of 2019 and he had filed an application for bail in the case under the Gangster Act. He has submitted that whether the case involves a threat to maintenance of "public order" or "law and order" depends upon the facts of each case and the order of preventive order has to be passed by the detaining authority on the basis of his subjective satisfaction in this regard. Mr. Murtaza has submitted that the incident took place at a public place due to which the PWD office and the nearby shops were closed and the students of college situated nearby got panicked and, therefore, it involves breach of public order and not merely a law and order. He has submitted that the detention order under NSA, 1980 can be passed in any of the following conditions: (a) if the accused is not in custody or when he is in custody (b) the detaining authority is satisfied that he may be enlarged on bail (c) where no bail application is pending.

13. In response to the petitioner's contention that the entire relevant material was not provided to him, Sri Murtaza has submitted that although the detention order refers to the two criminal cases bearing Case Crime Nos. 837 of 2019 and 873 of 2019, but it is not a ground of the detention order and it has not been relied upon by the detaining authority. Hence, the first information report of these two cases was not a relevant material required to be furnished by the

detaining authority. The bail applications filed by the petitioners regarding these two cases were his own documents and, therefore, the petitioner did not suffer any prejudice due to non-supply of the bail applications and the connected documents. The material is to be provided because it would affect the satisfaction of the detaining authority regarding the grounds of detention and secondly to enable the detenue to make an effective representation. The criminal cases pending against the petitioner were not going to affect or change the mind of the detaining authority.

14. Sri Syed Ali Murtaza has further submitted that even if the Court comes to the conclusion that the relevant material was not provided to the petitioner, it would not affect the validity of the detention order because the detention order has been passed on many grounds and not on one. Section 5 A of the NSA, 1980 provides that the detention order shall not be deemed to be invalid or inoperative merely because one or some of the grounds for passing the detention order is vague, non-existent, not relevant, not connected or not proximately connected with such person or invalid for any other reason, whatsoever.

15. Sri Syed Ali Murtaza has placed reliance on judgments rendered in Baby Devassy Chully alias Bobby Vs. Union of India and others, (2013) 4 SCC 531, Arun Ghosh Vs. West Bengal, 1970 SC 1228, Alijan Miya Vs. District Magistrate, 1983 SC 1130 and K.K. Saravana Vs. State of Tamil Nadu, (2008) 9 SCC 89 and Kamarunnissa Vs. Union of India and another, AIR 1991 SC 1640.

16. Ms. Sadhna Singh, learned counsel appearing for the Union of India has advanced her submissions opposing the Writ Petition and she has tried to justify the detention order. She has placed reliance on Devesh Chourasia Vs. The District Magistrate, Jabalpur and Ors., WP No. 10177/2021 in The High Court of Madhya Pradesh (Indore

Bench) Decided On: 24.08.2021 and Pankaj Vs. State of U.P. and others, 2016 1 Crimes (HC) 8.

17. In the case of **Devesh Chourasia vs. The District Magistrate, Jabalpur and Ors.**, WP No. 10177/2021 Decided On 24.08.2021 placed by Ms. Sadhna Singh, an FIR was lodged against employee of Pharmaceutical Department of a hospital under sections 274, 275, 308, 420, 120-B of IPC read with Sec. 53 of Disaster Management Act, 2005 and Sec. 3 of the Epidemic Act, 1897 on the allegations that the accused procured and used fake Remdesivir injections to gain illegal profits during the pandemic era thereby endangering human life. Keeping in view the peculiar facts of the case and after taking into consideration numerous precedents on this point, the Madhya Pradesh High Court summarized the principles applicable to preventive detention as follows: -

> *"36. In view of aforesaid judgments of Supreme Court, we can cull out the principles as under:-*
>
> *[1] It is not necessary that authority passing the detention order must always be in possession of complete information at the time of passing the order.*
>
> *[2] The information on the strength of which detention order is passed may fall far short of legal proof of any specific offence. If order indicates strong probability of impending commission of a prejudicial act, it is sufficient for passing a detention order.*
>
> *[3] The Court is not obliged to enquire into the correctness/truth of facts which are mentioned as grounds of detention.*
>
> *[4] Whether grounds of detention mentioned in the order are good or bad is within the domain of competent authority.*
>
> *[5] The satisfaction of competent authority in passing the detention order can be assailed on limited grounds including the ground of mala-fide and no evidence at all.*
>
> *[6] The jurisdiction under the NSA Act is different from that of judicial trial in courts for offence and of judicial orders for prevention of offence. Even unsuccessful judicial trial would not operate as a bar to a detention order or make it mala-fide.*
>
> *[7] An improperly recorded confession u/S. 161 of Cr.P.C. cannot be used as substantive evidence against the accused in criminal case but it cannot be completely brushed aside on that ground for the purpose of preventive detention.*

[8] The Court cannot examine the materials before it and give finding that detaining authority should not have been satisfied on the material before it. The sufficiency of ground of detention can not be subject matter of judicial review.

[9] The justification for detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence. Thus, it is called as 'suspicious jurisdiction'.

[10] In a habeas corpus petition, Court needs to examine whether detention is prima-facie legal or not and is not required to examine whether subjective satisfaction on a question of fact is rightly reached or not.

[11] The statements/evidence gathered during investigation falls within the ambit of "some evidence" which can form basis for detaining a person.

[12] The detention order is an administrative order."

18. However, we are not inclined to follow the aforesaid decision cited by Mr. Sadhna Singh as in this decision, Madhya High Court has not taken into consideration the law laid down by the Hon'ble Supreme Court in the case of **Vijay Narain Singh v. State of Bihar**[2]**,** which is as follows:

"the view that "those who are responsible for the national security or for the maintenance of public order must be the sole judges of what the national security or public order requires" It is too perilous a proposition. Our Constitution does not give a carte blanche to any organ of the State to be the sole arbiter in such matters. Preventive detention is considered so treacherous and such an anathema to civilised thought and democratic polity that safeguards against undue exercise of the power to detain without trial, have been built into the Constitution itself and incorporated as Fundamental Rights. There are two sentinels, one at either end. ***The Legislature is required to make the law circumscribing the limits within which persons may be preventively detained and providing for the safeguards prescribed by the Constitution and the courts are required to examine, when demanded, whether there has been any excessive detention, that is whether the limits set by the Constitution and the Legislature have been transgressed. Preventive detention is not beyond judicial scrutiny.****"* (emphasis supplied)

19. The law relating to preventive detention vis-a-vis the Fundamental Right to liberty guaranteed by Article 21 of the Constitution of India has been discussed by the Hon'ble Supreme

2 (1984) 3 SCC 14

Court in a recent decision in the case of ***Banka Sneha Sheela v. State of Telangana***[3] in the following words: -

> ***"24.*** *In Rekha v. State of T.N. [Rekha v. State of T.N., (2011) 5 SCC 244 : (2011) 2 SCC (Cri) 596] , a three-Judge Bench of this Court spoke of the interplay between Articles 21 and 22 as follows: (SCC p. 252, paras 13-14 and 17)*
>
> *"13. In our opinion, Article 22(3)(b) of the Constitution of India which permits preventive detention is only an exception to Article 21 of the Constitution. An exception is an exception, and cannot ordinarily nullify the full force of the main rule, which is the right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting the civil liberties of the people, and not to put them in jail for a long period without recourse to a lawyer and without a trial. As observed in R. v. Secy. of State for the Home Deptt., ex p Stafford [R. v. Secy. of State for the Home Deptt., ex p Stafford, (1998) 1 WLR 503 (CA)] : (WLR p. 518 F-G)*
>
> *'… The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law.'*
>
> *Article 22, hence, cannot be read in isolation but must be read as an exception to Article 21. An exception can apply only in rare and exceptional cases, and it cannot override the main rule.*
>
> *14. Article 21 is the most important of the fundamental rights guaranteed by the Constitution of India. Liberty of a citizen is a most important right won by our forefathers after long, historical and arduous struggles. Our Founding Fathers realised its value because they had seen during the freedom struggle civil liberties of our countrymen being trampled upon by foreigners, and that is why they were determined that the right to individual liberty would be placed on the highest pedestal along with the right to life as the basic right of the people of India.*
>
> ***
>
> *Article 22(1) of the Constitution makes it a fundamental right of a person detained to consult and be defended by a lawyer of his choice. But Article 22(3) specifically excludes the applicability of clause (1) of Article 22 to cases of preventive detention. Therefore, we must confine the power of preventive detention to very narrow limits, otherwise the great right to liberty won by our Founding Fathers, who were also freedom fighters, after long, arduous and historical struggles, will become nugatory."*
>
> ***25.*** *This Court went on to discuss, in some detail, the conceptual nature of preventive detention law as follows: (Rekha case [Rekha v. State of T.N., (2011) 5 SCC 244 : (2011) 2 SCC (Cri) 596] , SCC p. 255, paras 29-30)*
>
> *"29. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however,*

3 **(2021) 9 SCC 415**

Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous and historic struggles. It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.

*30.**Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is: was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal**. In the present case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation. Hence, in our opinion, for this reason also the detention order in question was illegal." (emphasis supplied)*

***26.** In an important passage, this Court then dealt with certain general observations made by the Constitution Bench in Haradhan Saha v. State of W.B. [Haradhan Saha v. State of W.B., (1975) 3 SCC 198 : 1974 SCC (Cri) 816] as follows: (Rekha case [Rekha v. State of T.N., (2011) 5 SCC 244 : (2011) 2 SCC (Cri) 596] , SCC pp. 255-57, paras 33-36 and 39)*

*"33. No doubt it has been held in the Constitution Bench decision in Haradhan Saha case [Haradhan Saha v. State of W.B., (1975) 3 SCC 198 : 1974 SCC (Cri) 816] that even if a person is liable to be tried in a criminal court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in Articles 21 and 22 of the Constitution (which we have already explained). [**Ed.**: The matter between two asterisks has been emphasised in original.] Article 22(3)(b) is only an exception to Article 21 and it is not itself a fundamental right [**Ed.** : The matter between two asterisks has been emphasised in original.] . It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him an opportunity of placing his defence through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (the Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.*

34. Hence, the observation in SCC para 34 in Haradhan Saha case [Haradhan Saha v. State of W.B., (1975) 3 SCC 198 : 1974 SCC (Cri) 816] cannot be regarded as an unqualified statement that in every case where a person is liable to be tried, or is actually being tried, for a crime in a criminal court a detention order can also be passed under a preventive detention law.

35. It must be remembered that in cases of preventive detention no offence is proved and the justification of such detention is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as a "jurisdiction of suspicion" (vide State of Maharashtra v.

Bhaurao Punjabrao Gawande [State of Maharashtra v. Bhaurao Punjabrao Gawande, (2008) 3 SCC 613 : (2008) 2 SCC (Cri) 128] , SCC para 63). The detaining authority passes the order of detention on subjective satisfaction. Since clause (3) of Article 22 specifically excludes the applicability of clauses (1) and (2), the detenu is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest. To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however technical, is, in our opinion, mandatory and vital.

36. ***It has been held that the history of liberty is the history of procedural safeguards.*** *(See Kamleshkumar Ishwardas Patel v. Union of India [Kamleshkumar Ishwardas Patel v. Union of India, (1995) 4 SCC 51 : 1995 SCC (Cri) 643] vide para 49.)* ***These procedural safeguards are required to be zealously watched and enforced by the court and their rigor cannot be allowed to be diluted on the basis of the nature of the alleged activities of the detenu.*** *As observed in Rattan Singh v. State of Punjab [Rattan Singh v. State of Punjab, (1981) 4 SCC 481 : 1981 SCC (Cri) 853] : (SCC p. 483, para 4)*

'4. … May be that the detenu is a smuggler whose tribe (and how their numbers increase) deserves no sympathy since its activities have paralysed the Indian economy. But the laws of preventive detention afford only a modicum of safeguards to persons detained under them, and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenus.'

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39. Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. The stringency and concern of judicial vigilance that is needed was aptly described in the following words in Reverend Thomas Pelham Dale case [Reverend Thomas Pelham Dale case, (1881) LR 6 QBD 376 (CA)] : (QBD p. 461)

'Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue."

20. Keeping in mind the aforesaid dictum of the Hon'ble Supreme Court, we proceed to examine the grounds of challenge to the validity of the detention order dated 23-01-2021. The first ground of challenge is that the alleged incident was an offence against an individual which affected "law and order", but it does not affect "public order" so as to attract the provisions of Section 3 (2) of the NSA, 1980.

21. Before proceeding further, it would be appropriate to have a look at Section 3 (2) of the NSA, 1980, which is as follows:

> ***"3. Power to make orders detaining certain persons.—***
>
> ……
>
> *(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.*
>
> ……
>
> *(3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section:*
>
> *Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time."*

22. An order of detention can be passed under the aforesaid provision with a view to prevent a person from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order. Numerous judgments have been cited by the learned Senior Advocate appearing for the petitioner as well as by the learned A.G.A. on the interpretation of the phrase "public order".

23. We now proceed to examine a few precedents in detail so as to ascertain whether the facts of the present case make out a case of disturbance to "public order" or it would merely fall under the category of a disturbance to "law and order".

24. In **Arun Ghosh Vs. State of West Bengal**[4], the preventive detention was ordered on the following allegations against the accused: -

> *"18-5-1966 Teased one Rekha Rani Barua, and when her father protested confined and assaulted him.*
> *29-3-1968 One Deepak Kumar Ray was wrongfully restrained and assaulted with lathis and rods.*
> *1-4-1968 Attempt was made to assault Deepak Kumar Ray at the Malda Sadar Hospital where he was being treated for his injuries in the previous assault.*
> *2-9-1968 Threatened one Phanindra C. Das that he would insult his daughter publicly.*
> *26-10-1968 Embraced Uma Das d/o Phanindra C. Das and threw white powder on her face (Criminal case started).*
> *7-12-1968 Obscenely teased Smt Sima Das, sister of Uma Das and beat her with chappals.*
> *18-12-1968 Smt Sima Das was again teased*
> *26-1-1969 Threatened the life of Phanindra C. Das."*

25. In the light of the aforesaid facts, the Hon'ble Supreme Court proceeded to hold as follows:-

> ***"3. <u>The submission of the counsel is that these are stray acts directed against individuals and are not subversive of public order and therefore the detention on the ostensible ground of preventing him from acting in a manner prejudicial to public order was not justified</u>**. In support of this submission reference is made to three cases of this Court: Dr Ram Manohar Lohia v. State of Bihar (1966) 1 SCR 709 ; Pushkar Mukherjee v. State of W.B. WP No. 179 of 1968, decided on November 7, 1968 : (1969) 1 SCC 10 and Shyamal Chakraborty v. Commissioner of Police, Calcutta WP No. 102 of 1969, decided on August 4, 1969 : (1969) 2 SCC 426. In Dr Ram Manohar Lohia case [(1966) 1 SCR 709] this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. **<u>Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its affect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order</u>**. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A*

4 **(1970) 1 SCC 98**

man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its affect upon the public tranquility there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. ***It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society.*** *The French distinguish law and order and public order by designating the latter as order publique. The latter expression has been recognised as meaning something more than ordinary maintenance of law and order. Justice Ramaswami in Writ Petition No. 179 of 1968 drew a line of demarcation between the serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large from minor breaches of peace which do not affect the public at large. He drew an analogy between public and private crimes. The analogy is useful but not to be pushed too far. A large number of acts directed against persons or individuals may total up into a breach of public order. In Dr Ram Manohar Lohia case examples were given by Sarkar and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its affect upon the community.* ***The question to ask is: Does it lead to disturbance of the current of life of the community so as to amount a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another."***

5. In the present case all acts of molestation were directed against the family of Phanindra C. Das and were not directed against women in general from the locality. Assaults also were on individuals. The conduct may be reprehensible but it does not add up to the situation where it may be said that the community at

> ***large was being disturbed or in other words there was a breach of public order or likelihood of a breach of public order. The case falls within the dictum of Justice Ramaswami and the distinction made in Dr Ram Manohar Lohia case.****"* (emphasis supplied)

26. In **Subhash Bhandari Vs. District Magistrate and others**[5]**,** the facts mentioned in the detention order were that: -

> *"...on September 15, 1984 there was a tender for the supply of ballast in PWD in which tenders had been submitted by him in K.P. Singh's name. You keep share with K.P. Singh. On account of your and K.P. Singh's terror no other person submits any tender against you people for which reason you people obtain tenders at rates of your choice. If any other person submits his tender you and K.P. Singh terrorise him. On account of the rates of his tender being lower on September 15, 1984, the tender of the complainant was accepted in one group and in the remaining groups the tenders of K.P. Singh etc. were accepted. For this reason you and K.P. Singh bore a grudge against the complainant.*
>
> *On September 25, 1984 at about 3.45 p.m. when Surya Kumar was going, in connection with his tender, in his Ambassador car No. USS 7418, accompanied by his brother-in-law, opposite to the National Highway Khand, he saw some contractors. On reaching near them the complainant had just started talking to them, when suddenly in two cars, you with a pistol, Phool Chand with a revolver, Jaleel with a revolver, Ashok with desi katta, Ashok Sonkar and Saarif with hand-grenade and Shankar Dey with a gun along with three other persons came and with intent to kill the complainant fired at the complainant, threw hand-grenades which fell on the car of the complainant. Consequently, there was a commotion. Traffic was obstructed and public tranquillity was disturbed.……"*

27. In the backdrop of the above mentioned facts, the Hon'ble Supreme Court proceeded to formulate the question to be decided as follows: -

> ***"6.*** *The High Court of Allahabad after hearing the parties and on a consideration of the decisions cited before it found that whether an act creates a mere law and order problem or affects the even tempo of the life of the community, it is to be seen what is the extent of the impact of the act in question upon the society as a whole; whether the effect is restricted to an individual or a few individuals alone or it creates a sense of insecurity, danger and apprehension in the minds of the people in general apart from those who are the victims of the incident; whether the act or acts disturb the even tempo of life of the society or a section of society; whether the act leads to disturbance of public order or only law and order. The High Court further found that in the context the act committed tends to teach a lesson to the complainant and to act as a warning to prospective*

5 **1987 4 SCC 685**

tenderers in future who may not dare to avail of the opportunity to submit their tenders against that of the appellants. It was also found that the impact and reach of the act in question goes beyond the individual and affects the community of contractors who take contracts for executing the public works. The court further held that the order of detention made by the detaining authority is legal and valid and the writ petitions were dismissed.

……..

8. *The main question which falls for decision is whether the act referred to in the grounds of detention is directed against certain individuals creating a law and order problem or the reach and potentiality of the act is so deep as to disturb the society to the extent of causing a general disturbance of public tranquility."*

28. The aforesaid question was decided by the Hon'ble Supreme Court in the following manner: -

"9. *It has now been well settled by several decisions of this Court (the latest one being Gulab Mehra v. State of U.P. [(1987) 4 SCC 302] judgment which was pronounced by us on September 15, 1987) that public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order or it affects public order. It has also been observed by this Court that an act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Therefore it is the impact, reach and potentiality of the act which in certain circumstances affect the even tempo of life of the community and thereby public order is jeopardized. Such an individual act can be taken into consideration by the detaining authority while passing an order of detention against the person alleged to have committed the act.*

10. ***In the instant case the alleged act of assault by firearms is confined to the complainant Surya Kumar and not to others. It is an act infringing law and order and the reach and effect of the act is not so extensive as to affect a considerable members (sic number) of the society. In other words, this act does not disturb public tranquillity nor does it create any terror or panic in the minds of the people of the locality nor does it affect in any manner the even tempo of the life of the community. This criminal act emanates from business rivalry between the detenus and the complainant. Therefore such an act cannot be the basis for subjective satisfaction of the detaining authority to pass an order of detention on the ground that the impugned act purports to affect public order i.e. the even tempo of the life of the community which is the sole basis for clamping the order of detention…..****"* (emphasis supplied)

29. The following passage from the **State of U.P. v. Kamal Kishore Saini**[6]**,** throws light on the difference between "public order" and "law and order" in a very succinct manner: -

> ***"8.*** *The High Court has found that the incidents mentioned in Ground 1 and 2 are confined to law and order problem and not public order inasmuch as these incidents concerned particular individuals and do not create any terror or panic in the locality affecting the even tempo of the life of the community. This Court in the case of Dr Ram Manohar Lohia v. State of Bihar [AIR 1966 SC 740 : 1966 Cri LJ 608 : (1966) 1 SCR 705] has observed:*
>
> *"**The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large.** There are three concepts according to the learned Judge (Hidayatullah, J.) i.e. 'law and order', 'public order' and 'security of the State'. It has been observed that to appreciate the scope and extent of each of them one should imagine three concentric circles. The largest of them represented law and order, next represented public order and the smallest represented the security of the State. An act might affect law and order but not public order just as an act might affect public order but not the security of the State." (Emphasis supplied by this Court)*

30. The detention order under challenge in a Full Bench decision of this Court in **Sheshdhar Misra versus Superintendent, Central Jail, Naini**[7]**,** was passed on the allegations that (1) the accused along with his brother and father at about 5.30 p.m. shot dead Binda Prasad Misra, Advocate, at Balwaghat crossing; On the occurrence of the incident people closed the doors of their shops and houses and ran away on account of fear and an atmosphere of terror and fear gripped the public and (2) he threatened a witnesses of the Crime and in this way spread fear and terror among the people and disturbed the public order. This Court took into consideration the following previous judgments of the Hon'ble Supreme Court passed in light of similar facts of the cases: -

> ***"31.*** *In Dipak Bose V. State of West Bengal, (1973) 4 SCC 43 : AIR 1972 SC 2686 the grounds of detention alleged that the detenu had along with his associates committed murder on two different dates on public road as a result of which fear and terror was created in the locality which disturbed public order. The Court held that since the*

6 **(1988) 1 SCC 287**

7 **1985 All. L. J. 1222**

even tempo of the life of the community was not disturbed the grounds were not related to disturbance of public order. The Court observed:—

*"**Every assault in a public place like a public road and terminating in the death of a victim is likely to cause horror and even panic and terror in those who are spectators but that does not mean that all such incidents do necessarily cause disturbance or dislocation of the community life of the localities in which they are committed. There is nothing in the two incidents set out in the grounds in the present case to suggest that either of them was of that kind and gravity which would jeopardise the maintenance of public order. No doubt bombs were said to have been carried by those who are alleged to have committed the two acts stated in the grounds. Possibly that was done to terrify the respective victims to prevent them from offering resistance. But it is not alleged in the grounds that they were exploded to cause terror in the locality so that those living there would be prevented from following their usual avocations of life. The two incidents alleged against the petitioner thus pertain to specific individuals and therefore related and fell within the area of law and order. In respect of such acts the drastic provisions of the Act are not contemplated to be resorted to and the ordinary provisions of the penal laws would be sufficient to cope with them.**"*.

***32.** In Manu Bhushan v. State of West Bengal, (1973) 3 SCC 663 : AIR 1973 SC 295 it was held that **a single incident of murderous assault on a person in a public place, though created panic among the people of the locality, could not be held to be an act prejudicial to maintenance of public order. The Court observed that a solitary assault on one individual which may well be equated with an ordinary murder can hardly be said to disturb public peace or place public order in jeopardy so as to bring the case within the purview of the Act. It can only raise a law and order problem and no more, its impact on the society as a whole cannot be said to be so extensive, widespread and forceful as to disturb the normal life of the community, thereby rudely shocking the balanced tempo of orderly life of the general public."** (emphasis supplied)*

31. Finally, the majority judgment of the Full Bench held as follows: -

"35.** The first information report which was lodged by Jagannath brother of deceased Binda Prasad Misra, Advocate at the Police Station on the basis of which the ground was formulated, itself stated that there was a long standing enmity between the petitioner and Binda Prasad, Advocate, which clearly indicates that the murderous assault on Binda Prasad was made by the petitioner on account of personal animosity. The allegations contained in ground No. 1 do not suggest that the petitioner or his associates fired gun shots indiscriminately or that they intended to terrorise or kill the local residents. **Since the murder was committed in a public place at a crossing of roads it was bound to have created some disorder temporarily as a result of which local residents closed the doors of their houses and shops. The question arises did this single incident cause such an impact that it disturbed the even tempo of the life of

the community affecting public order? No such inference is possible on the facts stated in ground No. 1.

36. It is not possible to hold that the single act of murder alleged to have been committed by the petitioner on account of personal animosity had its impact on the society to such an extent as to disturb the normal life of the community, thereby rudely shocking the ordinary tempo of the normal life of the public. Merely because the local residents closed the doors of their houses and shops does not mean that the balanced tempo of the life of the general public was disturbed as a result of which the members of the public could not carry on normal avocation of their life.

37. The petitioner is alleged to have committed the murder of Binda Prasad on account of enmity. There is nothing on record to suggest that the petitioner had inclination or tendency to commit murders in future also. It is true that we cannot sit in appeal over the satisfaction of the detaining authority but the satisfaction of the detaining authority must be based on material on the basis of which a reasonable person could come to the same kind of satisfaction. The material which was taken into account by the detaining authority in the instant case relates to a single incident of murderous assault on Binda Prasad. There was no material before the detaining authority, nor any such material has been placed before the Court to suggest that the petitioner if not detained would have indulged into similar activities of murder*.*

38. *Section 3 of the Act confers power on the detaining authority to detain a person with a view to prevent him from acting in any manner prejudicial to the maintenance of public order. This power can be exercised only if the detaining authority on the basis of the past prejudicial conduct of the detenu is satisfied about the probability of the detenu acting similarly in future. This means that the past activity of the detenu on the basis of which such a prognosis is made must be reasonably suggestive of a repetitive tendency or inclination on the part of the detenu to act likewise in future. These observations were made by the Supreme Court in Lal Kamal Dass v. State of West Bengal, (1975) 4 SCC 62 : AIR 1975 SC 753 where it was further held that a solitary incident can hardly be suggestive of a tendency or inclination of the detenu to indulge in an act likewise in future.*

…….

42. ***A single murderous assault on an individual on account of personal animosity and holding out threat to individual witnesses to desist from deposing in court do not justify exercise of power under S. 3(2) of the Act for detaining the petitioner. If a murder has been committed or if the witnesses have been threatened or compelled to file affidavit, the police have ample power under the ordinary laws of the land to proceed against the petitioner. Preventive detention under S. 3 of the Act cannot be invoked to deal with the crimes and criminals who can adequately be proceeded against under the Penal Code and under other ordinary laws of the land. If this is permitted it would be frought with great danger. The provisions of the Act conferring power for detention of a person without trial have to be used strictly in accordance with the Act to achieve the object and purpose designated under S. 3 of the Act. The detaining authority has no power to detain a citizen merely because he is alleged to have committed certain offences unless the offence has potentiality***

and propensity to disturb the public peace and order. In the instant case, I am of the opinion that the two grounds on which the petitioner was detained do not relate to public order."

(emphasis supplied)

32. The law which has emerged from the precedents on this point is that public order is said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order or a disturbance to public order. It means therefore that the question whether a person has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society, which depends the facts of each particular case.

33. Applying the principles which emerge from the aforesaid precedents to the facts of the present case, we find that the allegation against the petitioner is that as soon as the deceased Rakesh Yadav accompanied by his driver and two other persons, reached the P.W.D. Office, three unidentified persons present there since before started firing at Rakesh Yadav with the intention to kill him and when a person accompanying him took aim with the pistol, they fired at him also. People starting running away. Rakesh Yadav was killed and Kuldeep Jaiswal was admitted to a Hospital for treatment. It has been averred in the writ petition that there was an old animosity between the deceased Rakesh Yadav and his family members and the

family members of the petitioner. The petitioner's grand father Radheyshyam had lodged a first information report in relation to murder of the petitioner's uncle Ashutosh Gupta against Giran Yadav and Kamlesh Yadav uncles of the deceased Rakesh Yadav and in that case Giran Yadav father of the deceased Rakesh Yadav had to remain in jail for a period of 18 months. Therefore, the offence was directed against an individual and not against the society. The alleged act directed against an individual was in violation of law, which obviously disturbed the order in the locality for some time. This conduct may be reprehensible and punishable, for which the petitioner is being prosecuted and tried in accordance with the penal statutes. But it does not add up to the situation where it may be said that the community at large was disturbed by the petitioner's act and there was a breach of public order or likelihood of a breach of public order.

34. Moreover, the detention order contains a bald averment that in case the petitioner comes out on bail, he may again indulge in crime but neither there is any reasonable basis to record this apprehension nor is there any averment that the apprehended activity would be prejudicial to public order and, therefore, it is necessary to detain him with a view to prevent him from acting in any manner prejudicial to the maintenance of public order. This power can be exercised only if the detaining authority on the basis of the past prejudicial conduct of the detenu is satisfied about the probability of the detenu acting similarly in future. This means that the past activity of the detenu on the basis of which such a prognosis is made must be reasonably suggestive of a repetitive tendency or inclination on the part of the detenu to act likewise in future, which is clearly missing in the present case.

35. Therefore, in our opinion, the act allegedly committed by the petitioner on 02-12-2019 did not cause a disturbance of public order

as it did not disturb the society to the extent of causing a general disturbance of public tranquility and the single act of murder of a person because of old family animosity was not suggestive of a repetitive tendency or inclination on the part of the petitioner to act likewise in future so as to justify invocation of powers under Section 3 (2) of the NSA, 1980. The order of preventive detention passed under Section 3 (2) of the Act is unsustainable for this reason.

36. Now we proceed to examine the second ground of challenge, i.e. that the incident which took place on 02-12-2019 is a stale incident which is not proximate to the time when the detention order was passed on 23-01-2021 and there was no live link between the alleged prejudicial activity and the purpose of detention and for this reason, the invocation of the provisions of the NSA, 1980 after a long delay of about 14 months was neither warranted nor justified.

37. Sri. D. S. Misra, learned Senior Advocate appearing for the petitioner has placed reliance on the following dictum of the Hon'ble Supreme Court in the case **Ali Jaan Miyan Vs. District Magistrate, Dhanbad**[8]: -

> ***"…….when there is undue and long delay between the prejudicial activities and the passing of detention order, the Court has to scrutinise whether the detaining authority has satisfactorily explained such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the casual connection has been broken in the circumstances of each case.***
>
> ***39.*** *In the instant case, the last offence was committed on 3-6-1993 and the detention order was passed on 4-5-1994. No explanation is forthcoming in the return. It is argued that the S.P.'s report states that the detenu was absconding and case was filed under S. 299, Cr.P.C. The period during which he was allegedly absconding is not disclosed. In these circumstances, we are of the opinion that the live link between the alleged incident or the series of incidence and the detention order is snapped and there is no proximity between the crime committed and the order of detention."*

8 (1983) 4 SCC 301

38. In **Jagan Nath Biswas v. State of W.B.**[9]**,** the Hon'ble Supreme Court quashed the detention order holding that

> *"**2.**The incidents themselves look rather serious but also stale, having regard to the long gap between the occurrences and the order of detention. One should have expected some proximity in time to provide a rational nexus between the incidents relied on and the satisfaction arrived at."*

39. In **Mohd. Sahabuddin v. Distt. Magistrate, 24 Parganas**[10]**,** the Hon'ble Supeme Court quashed the order of preventive detention on the sole ground that the order of preventive detention was passed nearly seven months after the criminal incident.

40. In **Shalini Soni v. Union of India,**[11]**,** the Hon'ble Supreme Court while examining the validity of a detention order held as follow:-

> **"…..It is an unwritten rule of the law, constitutional and administrative, that whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote….."** (emphasis supplied)

41. In the present case, the incident in question took place on 02-12-2019, the petitioner was arrested on 22-12-2021, he was lodged in jail on 23-12-2021 and he was continuing to be in custody till 23-01-2021 – the date on which the impugned order of prevention was passed. The incident which occurred on 02-12-2019, i.e. about 14 months prior to passing of the detention order, is certainly a stale incident which is not proximate to the time when the detention order dated 23-01-2021 was passed and there was no live link between the alleged prejudicial activity and the purpose of detention and the invocation of the provisions of the NSA, 1980 against the petitioner

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9 (1975) 4 SCC 115
10 (1975) 4 SCC 114
11 (1980) 4 SCC 544

after a long delay of about fourteen months was neither warranted nor justified.

42. The next ground of challenge to the detention order is that copies of the entire material referred to and relied upon the detention order has not been provided to the petitioner. None of the documents relating to Case Crime Nos. 93 of 2019 and 666 of 2015 which have been mentioned in the detention order dated 23.1.2021 has been provided to the petitioner. The documents provided with the detention order have been mentioned in an index, a copy whereof has been filed as Annexure No. 5 to the writ petition and at serial No. 46 it mentions the bail application filed in case crime No. 221 of 2020 under Section 2/3 of the Gangsters Act consisting of one page only. The petitioner has filed a copy of the index of the aforesaid bail application as Annexure No. 4 to the writ petition which indicates that its index was of one page only and the entire bail application consisted of as many as of 19 pages, which vitiates the detention order.

43. Before proceeding to examine this ground, it will be apt to have a look at the Article 22(5) of the Constitution of India for a better understanding of the rival submissions. It says: -

> *"When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."*

44. The effect and purport of the provision contained in Article 22 (5) has been explained by the Hon'ble Supreme Court in **Shalini Soni v. Union of India (supra),** in the following words: -

> ***"7.*** *The Article has two facets: (1) communication of the grounds on which the order of detention has been made; (2) opportunity of making a representation against the order of detention. Communication of the grounds presupposes the formulation of the*

grounds and formulation of the grounds requires and ensures the application of the mind of the detaining authority to the facts and materials before it, that is to say to pertinent and proximate matters in regard to each individual case and excludes the elements of arbitrariness and automatism (if one may be permitted to use the word to describe a mechanical reaction without a conscious application of the mind). It is an unwritten rule of the law, constitutional and administrative, that whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote. Where there is further an express statutory obligation to communicate not merely the decision but the grounds on which the decision is founded, it is a necessary corollary that the grounds communicated, that is, the grounds so made known, should be seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went in to make up the mind of the statutory functionary and not merely the inferential conclusions. ***Now, the decision to detain a person depends on the subjective satisfaction of the detaining authority. The Constitution and the statute cast a duty on the detaining authority to communicate the grounds of detention to the detenu. From what we have said above, it follows that the grounds communicated to the detenu must reveal the whole of the factual material considered by the detaining authority and not merely the inferences of fact arrived at by the detaining authority****. The matter may also be looked at from the point of view of the second facet of Article 22(5). An opportunity to make a representation against the order of detention necessarily implies that the detenu is informed of all that has been taken into account against him in arriving at the decision to detain him. It means that the detenu is to be informed not merely, as we said, of the inferences of fact but of all the factual material which have led to the inferences of fact. If the detenu is not to be so informed the opportunity so solemnly guaranteed by the Constitution becomes reduced to an exercise in futility. Whatever angle from which the question is looked at, it is clear that "grounds" in Article 22(5) do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences.* ***The "grounds" must be self-sufficient and self-explanatory. In our view copies of documents to which reference is made in the "grounds" must be supplied to the detenu as part of the "grounds"****.*

8.*This was what was decided by Bhagwati and Venkataramiah, JJ. In Icchu Devi Choraria v. Union of India [(1980) 4 SCC 531]. It was observed by Bhagwati, J., who spoke for the court: (SCC p. 539, para 6)*

"Now it is obvious that when clause (5) of Article 22 and sub-section (3) of Section 3 of the COFEPOSA Act provide that the

grounds of detention should be communicated to the detenu within five or fifteen days, as the case may be, what is meant is that the grounds of detention in their entirety must be furnished to the detenu. ***If there are any documents, statements or other materials relied upon in the grounds of detention, they must also be communicated to the detenu, because being incorporated in the grounds of detention, they form part of the grounds and the grounds furnished to the detenu cannot be said to be complete without them.*** *It would not therefore be sufficient to communicate to the detenu a bare recital of the grounds of detention, but copies of the documents, statements and other materials relied upon in the grounds of detention must also be furnished to the detenu within the prescribed time subject of course to clause (6) of Article 22 in order to constitute compliance with clause (5) of Article 22 and Section 3 sub-section (3) of the COFEPOSA Act. One of the primary objects of communicating the grounds of detention to the detenu is to enable the detenu, at the earliest opportunity, to make a representation against his detention and it is difficult to see how the detenu can possibly make an effective representation unless he is also furnished copies of the documents, statements and other materials relied upon in the grounds of detention. There can therefore be no doubt that on a proper construction of clause (5) of Article 22 read with Section 3 sub-section (3) of the COFEPOSA Act, it is necessary for the valid continuance of detention that subject to clause (6) of Article 22 copies of the documents, statements and other materials relied upon in the grounds of detention should be furnished to the detenu along with the grounds of detention or in any event not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days from the date of detention. If this requirement of clause (5) of Article 22 read with Section 3 sub-section (3) is not satisfied, the continued detention of the detenu would be illegal and void."*

45. In **M. Ahamedkutty v. Union of India**[12]**,** the Hon'ble Supreme Court was dealing with a challenge to a detention order on the ground of non-supply of bail application and bail order to the accused person and it will be useful to reproduce the relevant portion of the judgment of the Hon'ble Supreme, which is as follows: -

"19.*The next submission is that of non-supply of the bail application and the bail order. This Court, as was observed in Mangalbhai Motiram Patel v. State of Maharashtra [(1980) 4 SCC 470: 1981 SCC (Cri) 49: (1981) 1 SCR 852] has 'forged' certain procedural safeguards for citizens under preventive detention. The*

12 **(1990) 2 SCC 1**

constitutional imperatives in Article 22(5) are twofold: (1) The detaining authority must, as soon as may be, i.e. as soon as practicable, after the detention communicate to the detenu the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detenu the earliest opportunity of making the representation against the order of detention. The right is to make an effective representation and when some documents are referred to or relied on in the grounds of detention, without copies of such documents, the grounds of detention would not be complete. ***The detenu has, therefore, the right to be furnished with the grounds of detention along with the documents so referred to or relied on****. If there is failure or even delay in furnishing those documents it would amount to denial of the right to make an effective representation. This has been settled by a long line of decisions: Ramachandra A. Kamat v. Union of India [(1980) 2 SCC 270: 1980 SCC (Cri) 414: (1980) 2 SCR 1072], Frances Coralie Mullin v. W. C. Khambra [(1980) 2 SCC 275: 1980 SCC (Cri) 419: (1980) 2 SCR 1095], Ichhu Devi Choraria v. Union of India [(1980) 4 SCC 531: 1981 SCC (Cri) 25: (1981) 1 SCR 640], Pritam Nath Hoon v. Union of India [(1980) 4 SCC 525: 1981 SCC (Cri) 19: (1981) 1 SCR 682], Tushar Thakker v. Union of India [(1980) 4 SCC 499: 1981 SCC (Cri) 13], Lallubhai Jogibhai Patel v. Union of India [(1981) 2 SCC 427: 1981 SCC (Cri) 463], Kirit Kumar Chaman Lal Kundaliya v. Union of India [(1981) 2 SCC 436: 1981 SCC (Cri) 471] and Ana Carolina D'Souza v. Union of India [1981 Supp SCC 53 (1): 1982 SCC (Cri) 131 (1)].”*

20. ***It is immaterial whether the detenu already knew about their contents or not****. In Mehrunissa v. State of Maharashtra [(1981) 2 SCC 709: 1981 SCC (Cri) 592]* ***it was held that the fact that the detenu was aware of the contents of the documents not furnished was immaterial and non-furnishing of the copy of the seizure list was held to be fatal. To appreciate this point one has to bear in mind that the detenu is in jail and has no access to his own documents****. In Mohd. Zakir v. Delhi Administration [(1982) 3 SCC 216: 1982 SCC (Cri) 695] it was reiterated that it being a constitutional imperative for the detaining authority to give the documents relied on and referred to in the order of detention pari passu the grounds of detention, those should be furnished at the earliest so that the detenu could make an effective representation immediately instead of waiting for the documents to be supplied with.* ***The question of demanding the documents was wholly irrelevant and the infirmity in that regard was violative of constitutional safeguards enshrined in Article 22(5)****.*

21. *It is also imperative that if the detenu was already in jail the grounds of detention are to show the awareness of that fact on the part of the detaining authority, otherwise there would be non-application of mind and detention order vitiated thereby. In the instant case though the order of detention ex facie did not mention of the detenu having been in jail, in paragraph 3 of the grounds of*

detention it was said that he was arrested by the Superintendent (Intelligence) Air Customs, Trivandrum on January 31, 1988 and he was produced before the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam the same day. It was clearly said: "You were remanded to judicial custody and you were subsequently released on bail." From the records it appears that the bail application and the bail order were furnished to the detaining authority on his enquiry. It cannot, therefore, be said that the detaining authority did not consider or rely on them. It is difficult, therefore, to accept the submission of Mr Kunhikannan that those were not relied on by the detaining authority. The bail application contained the grounds for bail including that he had been falsely implicated as an accused in the case at the instance of persons who were inimically disposed towards him, and the bail order contained the conditions subject to which the bail was granted including that the accused, if released on bail, would report to the Superintendent (Intelligence) Air Customs, Trivandrum on every Wednesday until further order, and that "he will not change his residence without prior permission of court to February 25, 1988". This being the position in law, and non-supply of the bail application and the bail order having been apparent, the legal consequence is bound to follow.

22. *In Khudiram Das v. State of West Bengal [(1975) 2 SCC 81: 1975 SCC (Cri) 435: (1975) 2 SCR 832] this Court held that where the liberty of the subject is involved it is the bounden duty of the court to satisfy itself that all the safeguards provided by the law have been scrupulously observed and that the subject is not deprived of his personal liberty otherwise than in accordance with law. The constitutional requirement of Article 22(5) is that all the basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to making the detention order must be communicated to the detenu so that the detenu may have an opportunity of making an effective representation against the order of detention: (SCC p. 96, para 13)*

"It is, therefore, not only the right of the court, but also its duty as well, to examine what are the basic facts and materials which actually in fact weighed with the detaining authority in reaching the requisite satisfaction. The judicial scrutiny cannot be foreclosed by a mere statement of the detaining authority that it has taken into account only certain basic facts and materials and though other basic facts and materials were before it, it has not allowed them to influence its satisfaction. The court is entitled to examine the correctness of this statement and determine for itself whether there were any other basic facts or materials, apart from those admitted by it, which could have reasonably influenced the decision of the detaining authority and for that purpose, the court can certainly require the detaining authority to produce and make available to the court the entire record of the case which was before it. That is the

least the court can do to ensure observance of the requirements of law by the detaining authority."

46. Sri. Daya Shankar Mishra, learned Senior Advocate for the petitioner has placed reliance on a judgment of this Court in the case of **Lallan Goswami @ Ajaynath Goswami *Vs* Superintendent, Central Jail Naini, Allahabad and others**[13]

> ***"10.*** *Sri Mishra thirdly submitted that relevant materials were not placed before the detaining authority, the District Magistrate, as stated in paragraphs 35 and 36 of the writ petition. This relevant material consisted of the bail rejection order in the case of the petitioner, the bail order granted to the co-accused Sanjay Goswami, and the judgment of this Court in the case of Sunita Goswami (copy of which is Annexure-RA-9 to the rejoinder affidavit). This fact is also not disputed by the respondent. Hence in our opinion this also vitiate the impugned order, as* ***it is settled law that the relevant material must be placed before the detaining authority*** *vide Inamul Huq v. Adhikshak Mandal/Janpad Karagar, Habeas Corpus Petition No. 52650 of 2001 decided on 22.5.2001 (which decision has referred to several Supreme Court and High Court decisions on the point).* ***……."***

47. On the other hand, opposing this plea, Sri. Syed Ali Murtaza, the learned A.G.A. has submitted that non-supply of a copy of the entire bail application to the petitioner would not affect the validity of the detention order as the bail application was the petitioner's own document and he already knew its contents. No prejudice has been caused to the petitioner due to non-supply of a copy of his own bail application. He has placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Baby Devassy Chully v. Union of India**[14]**,** in which the Hon'ble Supreme Court was pleased to hold as follows: -

> ***"19. …..****There is no quarrel as to the proposition, in fact, the sponsoring authority has to place all the relevant documents before the detaining authority. We reiterate that all the documents which are relevant, which have bearing on the issue, which are likely to affect the mind of the detaining authority should be*

13 **2002 SCC OnLine All 789**
14 **(2013) 4 SCC 531**

placed before it. Further, a document which has no link with the issue cannot be construed as relevant. …..”

48. In the present case, the petitioner was arrested on 22-12-2021 and he was lodged in jail on 23-12-2021 and he was continuing to be in custody till 23-01-2021 – the date on which the impugned order of prevention was passed. Although the detention order makes a reference to Case Crime No. 93 of 2019 and Case Crime No. 666 of 2015 and the petitioner’s application for bail in Case No. 221 of 2020, copies of any document regarding Case Crime Nos. 93 of 2019 and 666 of 2015 and that of the application for bail in case No. 221 of 2020 have not been supplied to the petitioner. The Court has to bear in mind that the petitioner is in jail and has no access to his own documents. It is immaterial whether the petitioner knew about the facts of Case Crime Nos. 93 of 2019 and 666 of 2015 and the contents of his bail application or not. The bail application contained the grounds for bail and it has been referred to by the detaining authority. Therefore, the Court is unable to accept the submission of Sri Murtaza that the aforesaid documents were not relevant material and non-supply of the same would not have any legal effect on the order of detention. In view of the law laid down in the cases of **Shalini Soni and M. Ahamedkutty (Supra)**, we are of the view that the petitioner was entitled to receive the entire material referred to or relied upon by the detaining authority in the detention order and the non-supply of copies of the documents relating to Case Crime Nos. 93 of 2019 and 666 of 2015 and that of the bail application in case No. 221 of 2020 vitiates the detention order and its legal consequence is bound to follow.

49. Now we come to the last ground of challenge to the detention orders that on 23-01-2021, i.e. on the date of passing of the detention order, the petitioner was already in custody and he had not even filed an application for Bail in Case Crime No. 221 of 2020 under the U.

P. Gangsters and Anti-Social Activities (Prevention) Act and there was no possibility of the petitioner acting in any manner prejudicial to the maintenance of public order and in these circumstances, the provisions of Section 3 (2) of the NSA, 1980 are not attracted and the detention order is unsustainable in law.

50. Sri. Syed Ali Murtaza has submitted that there is no bar against passing an order of preventive detention of a person who is already in Jail. He has placed reliance upon a decision of the Hon'ble Supreme Court in **Kamarunnissa v. Union of India**[15]**,** in which this question was decided in the following manner: -

> ***"11.*** *Counsel for the detenus, however, vehemently argued that since the detenus were in custody, there was no compelling necessity to pass the detention orders for the obvious reason that while in custody they were not likely to indulge in any prejudicial activity such as smuggling. In support of this contention reliance was placed on a host of decisions of this Court beginning with the case of Vijay Narain Singh v. State of Bihar [(1984) 3 SCC 14 : 1984 SCC (Cri) 361] and ending with the case of Dharmendra Suganchand Chelawat v. Union of India [(1990) 1 SCC 746 : 1990 SCC (Cri) 249]. It is necessary to bear in mind the fact that the grounds of detention clearly reveal that the detaining authority was aware of the fact that the detenus were apprehended while they were about to board the flights to Hong Kong and Dubai on October 5, 1989. He was also aware that the detenu M. M. Shahul Hameed had secreted diamonds and precious stones in his rectum while the other two detenus had swallowed 100 capsules each containing foreign currency notes. He was also aware of the fact that all the three detenus were produced before the Additional Chief Metropolitan Magistrate, Espalande, Bombay and two of them had applied for bail. He was also conscious of the fact that the hearing of the bail applications was postponed because investigation was in progress. His past experience was also to the effect that in such cases courts ordinarily enlarge the accused on bail. He was also aware of the fact that the detenu M. M. Shahul Hameed had not applied for bail. Conscious of the fact that all the three detenus were in custody, he passed the impugned orders of detention on November 10, 1989 as he had reason to believe that the detenus would in all probability secure bail and if they are at large, they would indulge in the same prejudicial activity. This inference of the concerned officer cannot be described as bald and*

15 **(1991) 1 SCC 128**

not based on existing material since the manner in which the three detenus were in the process of smuggling diamonds and currency notes was itself indicative of they having received training in this behalf. Even the detenus in their statements recorded on October 5, 1989 admitted that they had embarked on this activity after receiving training. The fact that one of them secreted diamonds and precious stones in two balloon rolls in his rectum speaks for itself. Similarly the fact that the other two detenus had created cavities for secreting as many as 100 capsules each in their bodies was indicative of the fact that this was not to be a solitary instance. All the three detenus had prepared themselves for indulging in smuggling by creating cavities in their bodies after receiving training. These were not ordinary carriers. These were persons who had prepared themselves for a long term smuggling programme and, therefore, the officer passing the detention orders was justified in inferring that they would indulge in similar activity in future because they were otherwise incapable of earning such substantial amounts in ordinary life. Therefore, the criticism that the officer had jumped to the conclusion that the detenus would indulge in similar prejudicial activity without there being any material on record is not justified. It is in this backdrop of facts that we must consider the contention of the learned counsel for the detenus whether or not there existed compelling circumstances to pass the impugned orders of detention. We are inclined to think, keeping in view the manner in which these detenus received training before they indulged in the smuggling activity, this was not a solitary effort, they had in fact prepared themselves for a long term programme. The decisions of this Court to which our attention was drawn by the learned counsel for the petitioners lay down in no uncertain terms that detention orders can validly be passed against detenus who are in jail, provided the officer passing the order is alive to the fact of the detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty….."

51. Sri. Murtaza has also cited the decision of ***Baby Devassy Chully v. Union of India***[16]**,** in which the Hon'ble Supreme Court upheld the preventive detention of an accused who was already in Jail on charges of smuggling, in view of the fact that he had been granted bail but he had not availed the bail order and he could come out of the Jail at any time and indulge in activities prejudicial to maintenance of public order. The relevant portion of the said judgment is being reproduced below: -

16 **(2013) 4 SCC 531**

> *"**16. It is clear that if a person concerned is in custody and there is no imminent possibility of his being released, the rule is that the power of preventive detention should not be exercised.** In the case on hand, it is not in dispute that on 12-4-2005 itself, the competent court has granted bail but the appellant did not avail such benefit. In other words, on the date of the detention order i.e. 3-5-2005, by virtue of the order granting bail even on 12-4-2005, it would be possible for the detenu to come out without any difficulty. In such circumstances, while reiterating the principle of this Court enunciated in the above decision in Binod Singh case [Binod Singh v. District Magistrate, Dhanbad, (1986) 4 SCC 416 : 1986 SCC (Cri) 490] and in view of the fact that the detenu was having the order of bail in his hand, it is presumed that at any moment, it would be possible for him to come out and indulge in prejudicial activities, hence, the said decision is not helpful to the case of the appellant. In view of the above circumstances and of the fact that the detaining authority was aware of the grant of bail and clearly stated the same in the grounds of detention, we reject the contra arguments made by the learned counsel for the appellant. On the other hand, we hold that the detaining authority was conscious of all relevant aspects and passed the impugned order of detention in order to prevent the appellant from abetting the smuggling of goods in future."*

52. Sri. Murtaza has also placed reliance on the decision in **Ahamed Nassar v. State of T.N.[17],** in which it was held that

> *"in spite of rejection of the bail application by a court, it is open to the detaining authority to come to his own satisfaction based on the contents of the bail application keeping in mind the circumstances that there is likelihood of the detenu being released on bail. Merely because no bail application was then pending is no premise to hold that there was no likelihood of his being released on bail. The words "likely to be released" connote chances of being bailed out, in case there be pending bail application or in case if it is moved in future is decided."*

53. Ms. Sadhana Singh Advocate appearing for the Union Of India has placed reliance on the decision of this Court in **Pankaj vs. State of U.P. and Ors.[18],** in which the detaining authority has recorded its' subjective satisfaction for detaining the petitioner on the ground that *"the incident had totally disturbed the public order in*

17 **(1999) 8 SCC 473**
18 **2016 (92) ACC 816**

the area and that the petitioner who was in judicial custody had moved his bail application and there was real possibility of his being released on bail and on his coming out of the jail he will again indulge in activities which will disturb public order not only with the area of P.S. Phugana but also in the whole district of Muzaffarnagar." In these circumstances, the Court held that it cannot be said that the order has been passed without application of mind.

54. From a perusal of aforesaid pronouncements, it is clear that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is real possibility of his being released on bail and, and (b) that on being so released he would in all probability indulge in prejudicial activity; and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in his behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question the same before a higher Court.

55. In **Kamarunnissa (Supra)**, one of the accused persons had secreted diamonds and precious stones in his rectum while the other two detenus had swallowed 100 capsules each containing foreign currency notes. The detaining authority was ware of the fact that two of the accused persons had applied bail and in such cases courts ordinarily enlarge the accused on bail. He was also aware of the fact that one of the detenus had not applied for bail. Conscious of the fact that all the three detenus were in custody, he passed the impugned orders of detention as he had reason to believe that the detenus would in all probability secure bail and if they are at large, they would indulge in the same prejudicial activity since the manner in

which the three detenus were in the process of smuggling diamonds and currency notes was itself indicative of they having received training in this behalf. The fact that one of them secreted diamonds and precious stones in two balloon rolls in his rectum and that the other two detenus had created cavities for secreting as many as 100 capsules each in their bodies was indicative of the fact that this was not to be a solitary instance. All the three detenus had prepared themselves for indulging in smuggling by creating cavities in their bodies after receiving training. In Baby **Devassy Chully (Supra)** also the Directorate of Revenue Intelligence had intercepted one sea-faring vessel by carrying diesel oil of foreign origin which was smuggled into India. The officers of the DRI seized the said diesel oil weighing about 770 MTs, worth Rs 2 crores, under the Customs Act, 1962, which was being delivered to the accused person. The accused had been granted bail but he had not availed the same. The Hon'ble Supreme Court had upheld the detention orders keeping in view the peculiar facts of the aforesaid cases that the accused persons were professional smugglers, on the ground that detention orders can validly be passed against detenus who are in jail, provided the officer passing the order is alive to the fact of the detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty.

56. While examining the applicability of the aforesaid decisions, it would be appropriate to have a look at the law regarding application of precedents, as explained by the Hon'ble Supreme Court in **Roger Shashoua v. Mukesh Sharma**[19], in the following words: -

> ***"55.*** *....It is well settled in law that the ratio decidendi of each case has to be correctly understood. In Regional Manager v. Pawan Kumar Dubey, a three-Judge Bench ruled: (SCC p. 338, para 7)*
> *"7. … It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar.* ***One additional or different fact can make a world of***

19 **(2017) 14 SCC 722**

***difference between conclusions in two cases even when the same principles are applied in each case to similar facts**."*

***56.** In Director of Settlements v. M.R. Apparao, another three-Judge Bench, dealing with the concept whether a decision is "declared law", observed: (SCC p. 650, para 7)*

*"7. … But **what is binding is the ratio of the decision and not any finding of facts**. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. …"*

***57.** In this context, a passage from CIT v. Sun Engg. Works (P) Ltd. would be absolutely apt: (SCC pp. 385-86, para 39)*

*"39. … It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. **A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings**. …"*

***58.** In this context, we recapitulate what the Court had said in Ambica Quarry Works v. State of Gujarat: (SCC p. 221, para 18)*

*"18. … **The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it**. (See Lord Halsbury in Quinn v. Leathem[43].) …"*

59.** From the aforesaid authorities, it is quite vivid that a ratio of a judgment has the precedential value and it is obligatory on the part of the court to cogitate on the judgment regard being had to the facts exposited therein and the context in which the questions had arisen and the law has been declared. It is also necessary to read the judgment in entirety and if any principle has been laid down, it has to be considered keeping in view the questions that arose for consideration in the case. One is not expected to pick up a word or a sentence from a judgment dehors from the context and understand the ratio decidendi which has the precedential value. That apart, **the court before whom an authority is cited is required to consider what has been decided therein but not what can be deduced by following

a syllogistic process.”

57. Keeping in view the aforesaid dictum of the Hon’ble Supreme Court, the aforesaid principles laid down in **Kamarunnissa, Baby Devassy Chully, Ahmad Nassar and Pankaj (Supra)** in view of the peculiar facts of those cases are not applicable to the facts of the present case.

58. Moreover, even in **Baby Devassy Chully (Supra)**, the Hon’ble Supreme Court has held that if a person is in custody and there is no imminent possibility of his being released, the rule is that the power of preventive detention should not be exercised. The allegation against the petitioner is that he committed murder of a person, regarding whom the petitioner claims to have an old family animosity. He is not alleged to be a professional killer who would again start indulging in similar activities as soon as he comes out on bail. Moreover, a F.I.R. was lodged against the petitioner on the ground of the same incident, under Sections 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 as Case Crime No. 221/20 in Police Station Sadar Bazar, Shahjahanpur, in which the petitioner was in custody since 01-05-2020 and as on the date of passing of the detention order, he had not even filed an application for bail. The bail application in the aforesaid case was filed on 25-01-2021, although as per the submissions of Mr. Murtaza, a copy of the bail application had been served on 21-01-2021.

59. In a case under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 a bail order cannot be passed in a manner in which it is passed in case of any offence under the I.P.C. Section 19 of the aforesaid Act provides as follows: -

> *“19. Modified application of certain provisions of the Code. - (1) Notwithstanding anything contained in the Code every offence punishable under this Act or any rule made thereunder shall be*

deemed to be a cognizable offence within the meaning of clause (c) of Section 2 of the Code and cognizable case as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to case involving an offence punishable under this Act or any rule made thereunder subject to the modifications that-

(a) the reference in sub-section (1) thereof to "Judicial Magistrate" shall be construed as a reference to "Judicial Magistrate or Executive Magistrate";

(b) the references in sub-section (2) thereof to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "sixty days", "one year" and "one year", respectively;

(c) sub-section (2A) thereof shall be deemed to have been omitted.

(3) Sections 366, 367, 368 and 371 of the Code shall apply in relation to a case involving an offence triable by a Special Court, subject to the modification that the reference to "Court of Session" wherever occurring herein, shall be construed as reference to "Special Court".

(4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless :

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(5) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code."

60. Keeping in view the fact that the petitioner was already in Jail in a case under Sections 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, that he had not filed an application for bail in the aforesaid case and that even when he would file an application for bail, he would not be released on bail unless (a) the Public Prosecutor is given an opportunity to oppose the application for such release, and (b) the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such

offence and that he is not likely to commit any offence while on bail, it cannot be accepted that there was any material for recording the satisfaction of the detaining authority that with a view to preventing the petitioner from acting in any manner prejudicial to the maintenance of public order it was necessary to detain the petitioner under the NSA, 1980. The satisfaction that it is necessary to detain the petitioner for the purpose of preventing him from acting in a manner prejudicial to the maintenance of public order is thus, the basis of the order under section 3 (2) of the NSA, 1980 and this basis is clearly absent in the present case. Therefore, the detention order dated 23-01-2021 is unsustainable in law on this ground also.

61. In view of the aforesaid discussion, the present Writ Petition is **allowed**. The impugned order dated 23-01-2021 passed by the District Magistrate, Shahjahanpur ordering detention of the petitioner Abhay Raj Gupta under Section 3 (3) of the NSA, 1980 is hereby quashed. The Respondents are commanded to release the petitioner from detention under the aforesaid order dated 23-01-2021 forthwith.

Order Date:- 23.12.2021
Jaswant