IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/LETTERS PATENT APPEAL NO. 454 of 2020
In
R/SPECIAL CIVIL APPLICATION NO. 8091 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MR. VIKRAM NATH **Sd/-**

and
HONOURABLE MR. JUSTICE J.B.PARDIWALA **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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VIJAY ALIAS BALLU BHARATBHAI RAMANBHAI PATNI(KAPTIYWALA)
Versus
STATE OF GUJARAT

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Appearance:
MR O I PATHAN(7684) for the Appellant(s) No. 1
for the Respondent(s) No. 2,3
MR DHARMESH DEVNANI, AGP - ADVANCE COPY SERVED TO GOVERNMENT PLEADER/PP(99) for the Respondent(s) No. 1

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CORAM: **HONOURABLE THE CHIEF JUSTICE MR. VIKRAM NATH**
and
HONOURABLE MR. JUSTICE J.B.PARDIWALA

Date : 31/08/2020

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1 This appeal under Clause 15 of the Letters Patent is at the instance of the original writ applicant (detenue) and is directed against the judgement and order passed by a learned Single Judge of this Court dated 4th August 2020 in the Special Civil Application No.8091 of 2020, by which the learned Single Judge rejected the writ application affirming the order of preventive detention dated 7th April 2020 passed against the appellant herein under Section 3(2) of the Gujarat Prevention of Anti-social Activities Act, 1985 [for short, "the Act, 1985"] branding the appellant as a "dangerous person", as defined under Section 2(c) of the Act, 1985.

2 The learned Single Judge, while rejecting the writ application, observed thus:

> *"3. The learned advocate for the petitioner has contended that only two offences are registered against the petitioner. In the detention order though it has been mentioned two different occasions when the alleged act is committed but no offence is registered. It does not have any bearing in the order. The detaining authority has to satisfy that the alleged anti social activity of the detenue affect adversely or are likely to affect adversely the maintenance of the public order.*
>
> *4. While the learned AGP appearing for the State has drawn my attention towards detention order, wherein it is stated that in the report itself it is stated that after registration of alleged offences the present petitioner had given threat to one of the witnesses who is a shop-keeper and demanded Rs.1,000/- towards ransom money. It is also stated in the report that the petitioner has travelled in auto-rickshaw and refused to pay the auto fair. He had torn the hood of the auto-rickshaw and the auto driver was beaten. He had pointed knife to the witness and he was threatened that he would be killed. The learned AGP has contended that both the offences are committed in public place and due to his conduct crowd had gathered and public peace*

was disturbed.

5. The contention is raised about non-application of mind on the part of the detaining authority to the extent that registration of only two offences and that too the petitioner is bailed out, cannot result into breach of public order and case of breach of law and order can be dealt with by taking recourse to ordinary course of law.

6. Thus, from the order of the detention, it reveals that the petitioner has used lethal weapon by administering threat to the complainant and witnesses at public place and in view of detaining authority it has resulted not only into breach of law and order but also public order and, therefore, detaining authority by applying its mind arrived at subjective satisfaction, cannot be said to have been vitiated. Further, the detention of a person is not to punish him but to prevent him from doing so in future. The basis of detention is the substantial of the execution of the reasonable probability to a likelyhood of a detenue acting in a similar manner by his act and preventing him by detaining from doing the same. The power of preventive detention is precautionary power exercised in reasonable anticipation. It may or may not relate to offence. It is not parallel proceedings. There is a very thin line between question of law and order situation and a public order situation and some time, the acts of a person relating to law and order situation turn into the situation of a public order situation. The conduct of collecting ransom amount and not paying fair to the auto-rickshaw driver clearly shows the activity of the person likely to disturb the public order and peace. If such person moves freely in society, no one can live with peace.

7. Under the circumstance, I am of the view that the satisfaction arrived at by the detaining authority is based on the actual facts and does not require any interference. Under the circumstances, I am of the view that the present petition requires to be dismissed and is hereby dismissed and the order of detention dated 07.04.2020 passed by the respondent – detaining authority is hereby confirmed with no order as to costs. Rule is discharged. Interim relief, if any, stands vacated forthwith."

3 Being dissatisfied with the judgement and order passed by the learned Single Judge referred to above, the appellant (detenue) is hereby before this Court with the present appeal.

4 Mr. O.I. Pathan, the learned counsel appearing for the

appellant vehemently submitted that the learned Single Judge committed a serious error in rejecting the writ application and thereby affirming the order of detention. The learned counsel would submit that by any stretch of imagination, having regard to the materials on record, it cannot be said that the appellant falls within the ambit of "dangerous person", as defined under Section 2(c) of the Act, 1985. He would argue that mere registration of two First Information Reports for the offences under the I.P.C., by itself, would not be sufficient to arrive at the conclusion that the activities of the appellants are prejudicial to the maintenance of public order.

5 In such circumstances referred to above, the learned counsel prays that there being merit in his appeal, the same be allowed and the impugned order passed by the learned Single Judge be set aside. He prays that the Special Civil Application No.8091 of 2020 be allowed and the impugned order of detention may be quashed.

- **SUBMISSIONS ON BEHALF OF THE STATE:**

6 Mr. Dharmesh Devnani, the learned A.G.P. appearing for the State has vehemently opposed this appeal. He would argue that no error, not to speak of any error of law could be said to have been committed by the learned Single Judge in passing the impugned judgement and order. Mr. Devnani would submit that the detaining authority, having regard to the materials on record, was subjectively satisfied that the nefarious activities of the appellant, are prejudicial to the maintenance of public order. Mr. Devnani would submit that the appellant could be termed as a "dangerous person", as defined under Section 2(c) of the Act,

1985. Mr. Devnani would submit that the learned Single Judge could not be said to have committed any jurisdictional error in passing the impugned order warranting interference in the present appeal.

7 Mr. Devnani would submit that there is nothing wrong about the decision making process adopted by the detaining authority. He also pointed out that no malafides can be attributed to the detaining authority. He invited our attention to the grounds of detention and pointed out the extent of the prejudicial activities of the appellant. He urged that in the light of the said prejudicial activities that the detaining authority passed the order of detention in a bonafide manner branding the petitioner as a 'dangerous person'. He urged that there being no merit in this appeal, the same be dismissed.

8 The learned AGP, in support of his submissions, placed reliance on the decision of the Supreme Court in the case of **Smt. Phulwari Jagdambaprasad Pathak v. Shri R.H.Mendonca** and others, reported in **JT 2000(8) SC 209**, and drew our attention to para 16, which reads as under :

> *"Then comes the crucial question whether 'in-camera' statements of persons/witnesses can be utilised for the purpose of arriving at subjective satisfaction of the detaining authority for passing the order of detention. Our attention has not been drawn to any provision of the Act which expressly or impliedly lays down the type of material which can form the basis of a detention order under section 3 of the Act. Preventive detention measure is a harsh, but it becomes necessary in larger interest of society. It is in the nature of a precautionary measure taken for preservation of public order. The power is to be used with caution and circumspection. For the purpose of exercise of the power it is not necessary to prove to the hilt that the person concerned had committed any of the offences as stated in the Act. It is sufficient if from the material available on record the detaining authority*

could reasonably feel satisfied about the necessity for detention of the person concerned in order to prevent him from indulging in activities prejudicial to the maintenance of public order. In the absence of any provision specifying the type of material which may or may not be taken into consideration by the detaining authority and keeping in view the purpose the statute is intended to achieve the power vested in the detaining authority should not be unduly restricted. It is neither possible nor advisable to catalogue the types of materials which can form the basis of a detention order under the Act. That will depend on the facts and situation of a case. Presumably, that is why the Parliament did not make any provision in the Act in that regard and left the matter to the discretion of the detaining authority. However, the facts stated in the materials relied upon should be true and should have a reasonable nexus with the purpose for which the order is passed."

9 The learned AGP, placing reliance on the aforesaid observations made by the Supreme Court, submitted that the in-camera statements have been accepted as a piece of strong circumstance.

- **ANALYSIS:**

10 Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration in this appeal is whether the learned Single Judge committed any error in passing the impugned judgement and order?

11 The essential concept of the preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. The basis of detention is the satisfaction of the executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. A criminal conviction on the other hand is for an act already

done which can only be possible by a trial and legal evidence. There is no parallel between the prosecution in a Court of law and a detention order under the Act. One is a punitive action and the other is a preventive act. In one case a person is punished to prove on proof of his guilt and the standard is proof beyond the reasonable doubt whereas in the preventive detention a man is prevented from doing something which it is necessary for reasons mentioned in Section 3 of the Act to prevent.

12 The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not over lap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention, may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution. *(See Haradhan Saha v. The State of W.B. and others, 1974 Cri.L.J.1479].*

13 In HALSBURY'S LAWS OF ENGLAND, it is stated thus:

> *"The writ of habeas corpus ad subjiciendum" unlike other writs, is a prerogative writ, that is to say, it is an extraordinary remedy, which is issued upon cause shown in cases where the ordinary legal remedies are inapplicable or inadequate. This writ is a writ of right and is granted ex debito justitiate. It is not, however, a writ of course. Both at common law and by statute, the writ of habeas corpus may be granted only upon reasonable ground for its issue being shown. The writ may not in general be refused merely because an alternative remedy by which the validity of the detention can be questioned. "Any person is entitled to*

institute proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment and any person who is legally entitled to the custody of another may apply for the writ in order to regain custody. In any case, where access is denied to a person alleged to be unjustifiably detained, so that there are no instructions from the prisoner, the application may be made by any relation or friend on an affidavit setting forth the reason for it being made."

14 In CORPUS JURIS SECUNDUM, the nature of the writ of habeas corpus is summarized thus:-

"The writ of habeas corpus is a writ directed to the person detaining another, commanding him to produce the body of the prisoner at a designated time and place with the day and cause of his caption and detention to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf." 'Habeas corpus' literally means "have the body". By this writ, the court can direct to have the body of the person detained to be brought before it in order to ascertain whether the detention is legal or illegal. Such is the predominant position of the writ in the Anglo- Saxon Jurisprudence."

15 In CONSTITUTIONAL AND ADMINISTRATIVE LAW BY HOOD PHILLIPS & JACKSON, it is stated thus:

"The legality of any form of detention may be challenged at common law by an application for the writ of habeas corpus. Habeas corpus was a prerogative writ, that is, one issued by the King against his officers to compel them to exercise their functions properly. The practical importance of habeas corpus as providing a speedy judicial remedy for the determination of an applicant's claim for freedom has been asserted frequently by judies and writers. Nonetheless, the effectiveness of the remedy depends in many instances on the width of the statutory power under which a public authority may be acting and the willingness of the Courts to examine the legality of decision made in reliance on wideranging statutory provision. It has been suggested that the need for the "blunt remedy' of habeas corpus has diminished as judicial review has developed into an ever more flexible jurisdiction. Procedural reform of the writ may be appropriate, but it is important not to lose sight of substantive differences between

habeas corpus and remedies under judicial review. The latter are discretionary and the court may refuse relief on practical grounds; habeas corpus is a writ of right, granted ex debito justitiae."

16 The ancient prerogative writ of habeas corpus takes its name from the two mandatory words "habeas" and "corpus". 'Habeas Corpus' literally means 'have his body'. The general purpose of these writs as their name indicates was to obtain the production of the individual before a court or a judge. This is a prerogative process for securing the liberty of the subject by affording an effective relief of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. This is a writ of such a sovereign and transcendent authority that no privilege of power or place can stand against it. It is a very powerful safeguard of the subject against arbitrary acts not only of private individuals but also of the Executive, the greatest safeguard for personal liberty, according to all constitutional jurists. The writ is a prerogative one obtainable by its own procedure. In England, the jurisdiction to grant a writ existed in Common Law, but has been recognized and extended by statute. It is well established in England that the writ of habeas corpus is as of right and that the court has no discretion to refuse it. "Unlike certiorari or mandamus, a writ of habeas corpus is as of right" to every man who is unlawfully detained. In India, it is this prerogative writ which has been given a constitutional status under Articles 32 and 226 of the Constitution. Therefore, it is an extraordinary remedy available to a citizen of this Country, which he can enforce under Article 226 or under Article 32 of the Constitution of India.

17 It is the duty of the Court to issue this writ to safeguard the freedom of the citizen against arbitrary and illegal detention. Habeas corpus is a remedy designed to facilitate the release of persons detained unlawfully, not to punish the person detaining and it is not, therefore, issued after the detention complained of has come to an end. It is a remedy against unlawful detention. It is issued in the form of an order calling upon the person who has detained another, whether in prison or in private custody, to 'have the body' of that other before the Court in order to let the Court know on what ground the latter has been confined and thus to give the Court an opportunity of dealing with him as the law may require. By the writ of habeas corpus, the Court can cause any person who is imprisoned to be brought before the Court and obtain knowledge of the reason why he is imprisoned and then either set him free then and there if there is no legal justification for the imprisonment, or see that he is brought speedily to trial. Habeas Corpus is available against any person who is suspected of detaining another unlawfully and not merely against the police or other public officers whose duties normally include arrest and detention. The Court must issue it if it is shown that the person on whose behalf it is asked for is unlawfully deprived of his liberty. The writ be addressed to any person whatever-an official or a private individual-who has another in his custody. The claim (for habeas corpus) has been expressed and pressed in terms of concrete legal standards and procedures. Most notably, the right of personal liberty is connected in both the legal and popular sense with procedures upon the writ of habeas corpus. The writ is simply a judicial command directed to a specific jailer directing him or her to produce the named prisoner together with the legal cause of

detention in order that this legal warrant of detention might be examined. The said detention may be legal or illegal. The right which is sought to be enforced by such a writ is a fundamental right of a citizen conferred under Article 21 of the Constitution of India, which provides:

> *"21. **Protection of life and personal liberty**.-No person shall be deprived of his life or personal liberty except according to procedure established by law."*

18 The Supreme Court on several occasions examined the concepts of "law and order" and "public Order". Immediately after the Constitution came into force, a Constitution Bench of the Supreme Court in the case of **Brij Bhushan & Another v. The State of Delhi, (1950) SCR 605** dealt with a case pertaining to public order. The court observed that "public order" may well be paraphrased in the context as "public tranquility".

19 Another celebrated Constitution Bench judgment of the Supreme Court is in the case of **Romesh Thappar v. The State of Madras, (1950) SCR 594.** In this case, Romesh Thappar, a printer, publisher and editor of weekly journal in English called Cross Roads printed and published in Bombay was detained under the Madras Maintenance of Public Order Act, 1949. The detention order was challenged directly in the Supreme Court of India by filing a writ petition under Article 32 of the Constitution. The allegation was that the detenu circulated documents to disturb the public tranquility and to create disturbance of public order and tranquility.

The Supreme Court observed:-

> *"... `Public order' is an expression of wide connotation and signifies that state of tranquillity which prevails among the members of a political society as a result of internal regulations enforced by the Government which they have established .... ... it must be taken that `public safety' is used as a part of the wider concept of public order ..... "*

20 The distinction between "public order" and "law and order" has been carefully defined in a Constitution Bench judgment of the Supreme Court in the case of **Dr. Ram Manohar Lohia v. State of Bihar and Others, (1966) 1 SCR 709**. In this judgment, His Lordship Hidayatullah, J. by giving various illustrations clearly defined the "public order" and "law and order". Relevant portion of the judgment reads thus:

> *"....Does the expression "public order" take in every kind of disorder or only some? The answer to this serves to distinguish "public order" from "law and order" because the latter undoubtedly takes in all of them. Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival communities and one of them tried to raise communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. 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. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act but disturbances which subvert the public order are. A District Magistrate is entitled to take action under Rule 30(l)(b) to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances.*
>
> *It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less*

gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State...."

21 In the case of **Arun Ghosh v. State of West Bengal, (1970) 1 SCC 98**, His Lordship Hidayatullah, J. again had an occasion to deal with the question of "public order" and "law and order". In this judgment, by giving various illustrations, very serious effort has been made to explain the basic distinction between "public order" and "law and order". The relevant portion reads as under:

"...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. 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 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..."

22 The concept of `public order' and `law and order' has been dealt with in the case of **Pushkar Mukherjee & Others v. The State of West Bengal, AIR 1970 SC 852.** In this case, the Supreme Court had relied on the important work of Dr. Allen on `Legal Duties' and spelled out the distinction between `public' and `private' crimes in the realm of jurisprudence. In considering the material elements of crime, the historic tests which each community applies are intrinsic wrongfulness and social expediency which are the two most important factors which have led to the designation of certain conduct as criminal. Dr. Allen has distinguished `public' and `private' crimes in the sense that some offences primarily injure specific persons and only secondarily the public interest, while others directly injure the public interest and affect individuals only remotely. There is a broad distinction along these lines, but differences naturally arise in the application of any such test.

23 The Supreme Court in the case of **Babul Mitra alias Anil Mitra v. State of West Bengal & Others, (1973) 1 SCC 393** had an occasion to deal with the question of "public order" and "law and order". The Supreme Court observed that the true distinction between the areas of "law and order" and "public Order" is one of degree and extent of the reach of the act in question upon society. The court pointed out that the act by itself is not determinant of its own gravity. In its quality it may not differ but in its potentiality it may be very different.

24 In **Dipak Bose alias Naripada v. State of West Bengal, (1973) 4 SCC 43**, a three-Judge Bench of the Supreme Court explained the distinction between "law and order" and "public order" by giving illustrations. Relevant portion reads as under:

> *"..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 the spectators. But that does not mean that all of 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 and 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, pertained to specific individuals, and therefore, related to 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 our penal laws would be sufficient to cope with them."*

25 In **Kuso Sah v. The State of Bihar & Others, (1974) 1**

SCC 185, the Supreme Court had also considered the issue of "public order". The Supreme Court observed thus:

> *"These acts may raise problems of law and order but we find it impossible to see their impact on public order. The two concepts have well defined contours, it being well established that stray and unorganised crimes of theft and assault are not matters of public order since they do not tend to affect the even flow of public life. Infractions of law are bound in some measure to lead to disorder but every infraction of law does not necessarily result in public disorder...."*

26 The Supreme Court in yet another important case of **Ashok Kumar v. Delhi Administration & Others, (1982) 2 SCC 403** clearly spelled out a distinction between `law and order' and `public order'. In this case, the Court observed as under:-

> *"13. The true distinction between the areas of "public order" and "law and order" lies not in the nature or quality of the act, but in the degree and extent of its reach upon society. The distinction between the two concepts of "law and order" and "public order" is a fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order, while in another it might affect public order. The act by itself therefore is not detrimental of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order...."*

27 It has to be seen whether the detenu's activity had any impact on the local community, or to put it in the words of His Lordship Hidayatullah, J., had the act of the detenu disturbed the even tempo of the life of the community of that specified locality?

28 Mr. Pathan, the learned counsel further placed reliance on the decision of the Supreme Court in the case of **Binod Singh v. District Magistrate, Dhanbad, Bihar & Others, (1986) 4 SCC 416**. In this case, the court observed as follows:-

> *"7. It is well settled in our constitutional framework that the power of directing preventive detention given to the appropriate authorities must be exercised in exceptional cases as contemplated by the various provisions of the different statutes dealing with preventive detention and should be used with great deal of circumspection. There must be awareness of the facts necessitating preventive custody of a person for social defence."*

29 In **Commissioner of Police & Others, v. C. Anita (Smt.), (2004) 7 SCC 467**, the Supreme Court again examined the issue of "public order" and "law and order" and observed thus:

> *"7. ....The crucial issue is whether the activities of the detenu were prejudicial to public order. While the expression "law and order" is wider in scope inasmuch as contravention of law always affects order, "public order" has a narrower ambit, and public order could be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specified locality. The distinction between the areas of "law and order" and "public order" is one of the degree and extent of the reach of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of the public, it could raise problem of law and order only. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps to distinguish it as an act affecting "public order" from that concerning "law and order". The question to ask is:*
>
> > *"Does it lead to disturbance of the current life of the community so as to amount to 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 its facts."

30 In **R.Kalavathi v. State of Tamil Nadu, (2006) 6 SCC 14,** the Supreme Court while dealing with the case affecting the public order observed that even a single act which has the propensity of affecting the even tempo of life and public tranquility would be sufficient for detention.

31 In **Darpan Kumar Sharma alias Dharban Kumar Sharma v. State of T.N. and others,** reported in **AIR 2003 SC 971,** the Supreme Court made the following observations :

> *"The basis upon which the petitioner has been detained in the instant case is that he robbed one Kumar at the point of knife a sum of Rs.1000/-. Any disorderly behaviour of a person in the public or commission of a criminal offence is bound, to some extent, affect the peace prevailing in the locality and it may also affect law and order but the same need not affect maintenance of public order. Under the definitions in the Act it is stated that the case of 'Goonda' the acts prejudicial to public order are 'when he is engaged, or is making preparations for engaging, in any of his ativities as a goonda which affect adversely, or are likely to affect adversely, the maintenance of public order'. The question whether a man has only committed a breach of law and order or has acted in a manner likely to cause disturbance of the public order is a question of degree and the extent of the reach of the act upon the society; that a solitary assault on one individual 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 providing for preventive detention."*

> *"In the present case, the three alleged incidents to which the Commissioner of Police has referred to, are thefts arising under Section 379, IPC and, therefore, there is only a solitary instance wherein the detenu is alleged to have robbed in a public place one Kumar. Therefore, there is no material on record to show that the reach and potentiality of the single incident of robbery was so great as to disturb the even tempo or normal life of the*

community in the locality or disturb general peace and tranquility or create a sense of alarm and insecurity in the locality. Though in the grounds of detention the detaining authority had stated that by committing this offence in public the detenu created a sense of alarm, scare and a feeling of insecurity in the minds of the public of the area and thereby acted in a manner prejudicial to the maintenance of public order which affected even tempo of life of the community, but citation of these words in the order of detention is more in the nature of a ritual rather than with any significance to the content of the matter. Thus, a solitary instance of robbery as mentioned in the grounds of detention is not relevant for sustaining the order of detention for the purpose of preventing the petitioner from acting in a manner prejudicial to the maintenance of public order. This ground is enough to quash the order of detention made by the respondents."

32 Thus, from the various decisions of the Supreme Court referred to above, it could easily be said that the detaining authority has failed to substantiate that the alleged antisocial activities of the detenu affect adversely or are likely to affect adversely the maintenance of public order. It is true that there is a very thin line between the question of law and order situation and a public order situation, and some times, the acts of a person relating to law and order situation can turn into a question of public order situation. What is decisive for determining the connection of ground of detention with the maintenance of public order, the object of detention, is not an intrinsic quality of the act but rather its latent potentiality. Therefore, for determining whether the ground of detention is relevant for the purposes of public order or not, merely an objective test based on the intrinsic quality of an act would not be a safe guide. The potentiality of the act has to be examined in the light of the surrounding circumstances, posterior and anterior. Just because two cases have been registered against the detenu of the offence under Sections 307 and 324

respectively of the Indian Penal Code and various in-camera statements have been recorded of the witnesses whose identity has not been disclosed, by itself do not have any bearing on the maintenance of the public order. The detenu may be punished for the offence which has been registered against him but, surely, the acts constituting the offence cannot be said to have affected the even tempo of the life of the community. It may be that the detenu is a 'dangerous person' within the meaning of Section 2(c) of the PASA Act, but merely because he is a 'dangerous person' he cannot be preventively detained under the PASA Act ,unless as laid down in sub-section (4) of Section 3 of the PASA Act, his activities as a 'dangerous person' affected adversely or are likely to affect adversely the maintenance of public order.

33 While this Court examines the legality and validity of the order of detention under Article 226 of the Constitution of India, this Court has to examine the decision making process. The order of preventive detention is an order of very drastic nature. The result of passing of an order of preventive detention is to deprive the detenu of his liberty without a trial. Therefore, the order of preventive detention cannot be passed in a casual and lighthearted manner. Passing an order of preventive detention involves careful application of mind and recording of subject satisfaction on the basis of the materials on record that the grounds of detention provided by the Statute exists.

34 As observed by the Supreme Court in the case of **Darpan Kumar Sharma (supra)** that any disorderly behaviour of a person in the public or commission of a criminal offence is

bound, to some extent, affect the peace prevailing in the locality and it may also affect the law and order, but the same need not affect the maintenance of public order. The foundation upon which the detenu has been detained in the instant case is that he committed an offence under Section 324 of the IPC and the same was registered at the Meghaninagar Police Station vide C.R No. I-92/19 and the second offence under Section 307 of the I.P.C. being I-C.R. No.388/19 at the Shaherkotda Police Station, coupled with the in-camera statements of the witnesses whose identity has not been disclosed on the request made by those witnesses.

35 By placing reliance on the two F.I.Rs. and the statements of the witnesses, whose identity has not been disclosed, the Detaining Authority has reached to the subjective satisfaction that the act of the detenu created a sense of alarm, scare and a feeling of insecurity in the minds of the public of the area and thereby acted in a manner prejudicial to the maintenance of the public order, which affected the even tempo of life of the community. The citation of these words in the order and grounds of detention is more in the nature of a ritual or a parrot like chant, rather than with any significance to the content of the matter. In our view, the two statements are as vague as anything. However, without going into the genuineness of such statements, even if we believe them to be true, in our view, the two F.I.Rs. and the statements narrated by the witnesses are not relevant for sustaining the order of detention for the purpose of preventing the petitioner from acting in a manner prejudicial to the maintenance of the public order.

36 We may at this stage point out that although the detaining authority in the grounds of detention has stated that the witnesses or the victims are not ready and willing to come forward to file their individual complaints against the appellant herein on account of fear, yet it appears that when the two offences came to be registered at the respective police station referred to above as many as 13 witnesses have given their statements before the police. Such statements were recorded under Section 161 of the Code of Criminal Procedure. This fact itself would suggest that the satisfaction recorded by the detaining authority that the affected persons and the witnesses are not coming forward to lodge their complaints against the appellant herein appears to be absolutely without any basis and contrary to the materials on record. If that be so, then, although the in-camera statements are acceptable as a piece of strong circumstance, yet the Court owes a duty to scrutinize such statements very closely with a view to see that the same inspire confidence, and more particularly, even if the contents of such statements are believed to be true, whether the public order could be said to have been affected or likely to be affected.

37 We also take note of the fact that the detaining authority has claimed the privilege under Section 9(2) of the Act, 1985 for not disclosing the identity of the persons whose statements came to be recorded in-camera.

38 Section 9(2) of the Act, 1985 reads thus:

"9. ***Grounds of order of detention to be disclosed to detenu-***

(1) … …

(2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose."

39 In the aforesaid context, we may refer to and rely upon a Full Bench decision of this Court in the case of **Chandrakant N. Patel vs. State of Gujarat and others [1994 (1) GLR 761].** The Full Bench has observed thus:

"On careful reading of the said decision, it can be said that the ratio of the decision is that the privilege u/s 8[2] of the National Security Act *can be claimed by the detaining authority only when it is properly and genuinely satisfied that it is against public interest to disclose the facts which are withheld while communicating the grounds of detention to the detenu, and that while deciding whether it is necessary to withhold the materials, facts and particulars to the detenu on the ground that it will be against public interest to do so, another public interest which requires disclosure of all the relevant materials and particulars on which the order of detention is based with a view to affording an adequate opportunity of making an effective representation to the detenu against the order of detention must be borne in mind and the delicate balance between the two must be maintained. If the privilege is claimed bona fide and after proper application of mind, then the detenu cannot legitimately complain that he has been deprived of his right to make an effective representation because of the vagueness of the grounds of detention. The observations which have been made by this Court in that case as regards the promise of confidentiality, etc., are by way of elaboration as to what can be regarded as sufficient or not sufficient for the purpose of arriving at the bona fide satisfaction of the detaining authority in that behalf."*

40 The Full Bench while referring to on the case of **Balkrishna Kashinath Khopkar vs. District Magistrate, Thana, [1956 [58] BLR 614]**, also observed that the privilege can only be claimed in

public interest. While claiming the privilege, the detaining authority must act with a sense of responsibility and it must consider which facts should not be disclosed to the detenu by reason of the fact that it would be against public interest to disclose those facts. The Full Bench then observed, "If we examine the decisions in the case of Bai Amina and in the case of Balkrishna closely, it becomes clear that what has been briefly stated as the correct legal position as regard the nature and extent of the privilege in the case of Balkrishna, has been more elaborately stated in the case of Bai Amina."

41 The Full Bench then observed, "Since the satisfaction in this behalf has to be of the detaining authority, obviously, the promise of confidentiality given by the person recording the statement cannot by itself be regarded as sufficient ground for withholding the disclosure of such particulars and materials. But if, after considering the general background, character, antecedent, criminal tendency or propensity, etc., of the detenu and the reluctance of the witnesses who gave the statements against the detenu, the detaining authority is satisfied about the necessity of withholding some particulars or materials, then it cannot be said that the same was not done in public interest, and that public interest likely to be subserved by nondisclosure did not outweigh or override the public interest intended to be served by disclosure of the relevant particulars and materials to the detenu."

42 In this view of the matter, the detaining authority while exercising powers under Section 9[2] of the PASA Act for claiming privilege is expected to consider the general

background, character, antecedents, criminal tendency of propensity etc. of the detenu. In the instant case, if the grounds of detention are considered, all that is recorded by the detaining authority is that the fear expressed by the witnesses is found to be genuine and correct by the detaining authority. The detaining authority has recorded that it has carefully scrutinized, examined and considered all the materials that were produced before him by the sponsoring authority. It is, therefore, clear that the detaining authority, while verifying the statements of the witnesses and while considering the question of exercising the privilege under Section 9(2) of the PASA Act, has not taken any independent steps for considering general background, character, antecedents, criminal tendency etc. while recording subjective satisfaction, but has relied solely on the material produced by the sponsoring authority. There is no contemporaneous record to indicate the steps taken by the detaining authority and the grounds and reasons for arriving at the subjective satisfaction. It is therefore very difficult to conclude that the detaining authority has considered general background, character, antecedents, criminal tendency and propensity etc. of the detenu while arriving at the subjective satisfaction, for the need for exercise of powers under Section 9(2) of the PASA Act and claim privilege by not disclosing identity of the anonymous witnesses.

43 In this regard, the decision in Special Civil Application No. 9005 of 1998 in the case of **Shobhnaben wife of Chandrakant Chhara vs. Commissioner of Police**, decided on 4th August 1999 may also be considered. In that case, the detaining

authority while recording a subjective satisfaction in respect of the petitioner's activities being prejudicial to the maintenance of public order, relied on the statements given by the witnesses. The said witnesses were summoned before the detaining authority and the detaining authority verified the correctness of the fear of retaliation expressed by the witnesses. But the detaining authority did not record its satisfaction in respect of credibility of the witnesses and genuineness of the statements given by them. While relying on the decision in the case of **Mohd. Sharif alias Kaliyo Nurmohammadsarnibapu Shaikh vs. Commissioner of Police, Ahmedabad city [1997(1) GLH 1017]**, the Court quoted the observations made therein as under:

> *"The question which requires consideration in the facts of the present case is as to whether the Detaining Authority had applied its mind to the statements of these witnesses with regard to these incidents while forming an opinion so as to warrant the detention." .... "Except the contents of these statements, there is no other contemporaneous evidence on the basis of which the detaining authority could form the opinion with reference to any contemporaneous evidence relating to the date of the respective incidents so as to form the opinion that the petitioner detenu was a dangerous person and that he would be subjected to the detention under the provisions of the Gujarat Prevention of Anti Social Activities Act. When the verified statements are placed for consideration before the detaining authority, the detaining authority has to apply its mind and such application of mind must be made manifest in the body of the order itself and in any case, when it is alleged that the order had been passed without application of mind, it must be shown before the court by way of filing the affidavit or otherwise on the basis of some contemporaneous evidence and the reasons which can be said to be germane so as to warrant the detention."*

44 In the instant case, it cannot be said that the grounds of detention disclose the grounds and reasons which weighed and considered by the detaining authority for exercising powers under Section 9(2) of the PASA Act. No contemporaneous record of grounds and reasons which weighed with detaining authority for not disclosing the identity of the anonymous witnesses seems to have been made, nor it is disclosed in the affidavit in reply. The order of detention, has to be quashed, for the reason that except bald allegation about genuineness of fear and consequent need for withholding the identity of witnesses, there is no material to lend support the exercise of powers under Section 9(2) of the PASA Act. Here decision in the case of **Bai Amina vs. State of Gujarat and others [22 GLR 1186**], which is considered by the Full Bench of this Court in **Chandrakant N. Patel vs. State of Gujarat (supra)**, may be profitably referred to.

45 *Prima facie,* it appears on plain reading of the impugned judgement and order passed by the learned Single Judge is that what weighed with the learned Single Judge in rejecting the writ application is the fact that the appellant used lethal weapon like knife for the purpose of administering threats to the complainant and the gathering of the public at the place where such threats were administered.

46 In such circumstances referred to above, we are of the view that the order of detention passed by the detaining authority is not sustainable in law.

47 In the result, this appeal succeeds and is hereby allowed. The impugned judgement and order passed by the learned Single

Judge is hereby set aside. The Special Civil Application No.8091 of 2020 is hereby allowed and the order of detention dated 7th April 2020 is hereby quashed and set aside. The detenu is ordered to be released forthwith if not required in any other offence.

48 Before we close this matter, we would like to remind the State Government of the observations made by one of us (J.B. Pardiwala, J.) in the Special Civil Application No.536 of 2015 decided on 27th January 2015. The same reads thus:

> "The matter does not rest over here. I would like to observe something in addition to what I have stated above. I intend to say so keeping in mind that everyday not less than twenty-five matters are taken up for final hearing wherein the detention orders are challenged. I have observed that despite best of the efforts made by the learned AGPs appearing for the State, they are unable to defend the orders of detention. The reason for the same is plain and simple. The detention orders are often being passed just for the sake of passing and that too without achieving any object in that regard. The law so far as the preventive detention is concerned, is now as clear as a noon day. There are catena of decisions of the Supreme Court *taking the view that the orders of preventive detention should not be passed in a casual manner. The powers of preventive detention being drastic and when the liberty of the citizen is put within the reach of the Authority, the action must comply not only with the substantial requirements of law, but it should be with those forms which alone can indicate the substance. The contravention of law always affects 'order' but before it could be said to affect 'public order', it must affect the community or the public at large. One has to imagine three concentric circles, the largest representing "law and order", the next representing, "public order" and the smallest representing "security of State". An act may affect "law and order" but not "public order", just as an act may affect "public order" but not "security of the State." Therefore, one must be careful in using these expressions.*
>
> *The Gujarat Prevention of Anti-social Activities Act, 1985 came into force from 27th May 1985. The Presidential assent to the same was accorded on 1st August 1985. The same was*

enacted to provide for the preventive detention of bootleggers, dangerous persons, drug offenders, immoral traffic offenders and property grabbers for preventing their anti-social and dangerous activities prejudicial to the maintenance of the public order.

In exercise of the powers conferred by sub-section (2) of Section 3 of the Gujarat Prevention of Anti-social Activities Ordinance, 1985, the Government of Gujarat directed that the Commissioner of Police, Ahmedabad/Baroda/ Surat/Rajkot may also, if satisfied as provided in sub-section (1) of the said Section 3, exercise within the local limits of his jurisdiction, the powers conferred by the said sub-section (1).

In the same manner, the powers were conferred upon the District Magistrates too. Thus, the Notifications which were issued way back in the year 1985 conferring the powers of detention upon the Commissioner/District Magistrate continues even as on today and there is nothing on record to even prima-facie suggest whether the Government has made any periodical review of the circumstance prevailing/likely to prevail in the areas within the local limits of the jurisdiction of the Commissioner of Police or the District Magistrate, as the case may be. This, in my opinion, is a very dangerous situation. I may quote with profit a decision of the Supreme Court in the case of Abhay Shridhar Ambulkar Vs. S.V. Bhave, the Commissioner of Police, reported in AIR 1991 SC 397. In the said case, the Supreme Court was dealing with a matter relating to the preventive detention under the National Security Act (65 of 1980). The principal argument before the Supreme Court was that there was no valid conferment of power on the Commissioner to make the detention order. It was also argued that the Government had issued the order without applying its mind and by simply reproducing the words of sub-section (3) of Section 3. The satisfaction of the Government for conferring the power on the Commissioner for the purpose in question was purported to have been reached on the circumstances prevailing on the date of the order or likely to prevail during the three months period in question. It was also argued that the Government was not certain which of the alternative circumstances was relevant for reaching the subjective satisfaction and it was submitted that it had acted in a mechanical manner without application of mind. In that context, the observations of the Supreme Court are worth taking note of :

> *"The power to make an order of detention primarily rests with the Central Government or the State Government. The State Government, however, being satisfied with certain circumstances may order that the District Magistrate or the*

Commissioner of Police may also make an order of detention in respect of matters relating to the security of the State or Public Order or maintenance of supplies and services essential to the community against any person within their respective areas. The State Government can make such an order which shall not in the first instance exceed three months but it may extend such period from time to time making fresh order for a further period against not exceeding three months at one time. It may be noted that the conferment of this power on the District Magistrate or the Commissioner of Police is not to the exclusion of but in addition to the powers of the Government to exercise its own power.

7. The first paragraph of the order dated 6th January 1990 states that Government was satisfied that having regard to the circumstances prevailing or likely to prevail in Greater Bombay Police Commissionerate it is necessary that during the period commencing on 30th January 1990 to 29th April 1990 that the Commissioner should also exercise the powers conferred under subsection (2) of Section 3 of the Act. This is indeed no more than a reproduction of the terms of subsection (3) of Section 3. But sub-section (3) refers to two independent circumstances namely : (i) the prevailing circumstances, (ii) the circumstances that are likely to prevail. The former evidently means circumstances in praesenti that is prevalent on the date of the order and the latter means the anticipated circumstances in future. If the Government wants that the District Magistrate or the Commissioner of Police should also exercise the powers for the current period, it has to satisfy itself with the prevailing circumstances. If the Government wants that the District Magistrate or the Commissioner of Police should also exercise the powers during the future period, it must be satisfied with the circumstances that are likely to prevail during that period. This seems to be the mandate of sub-section (3).

8. Subjective satisfaction for the exercise of power under sub-section (3) of Section 3 must be based on circumstances prevailing at the date of the order or likely to prevail at a future date. The period during which the District Magistrate or the Commissioner of Police, as the case may be, is to exercise the power provided by subsection (2) of Section 3 is to be specified in the order which would depend on the existence of circumstances in praesenti or at a future date. If the subjective satisfaction is based on circumstances prevailing at the date of the

order, the choice of period, which must not exceed three months, would have to be determined from the date of the order. If the conferment of power is, considered necessary because of circumstances likely to prevail during the future period, the duration for the exercise of power must be relatable to the apprehended circumstances. Therefore, the specification of the period during which the District Magistrate or Commissioner of Police is to exercise power under sub-section (2) of Section 3 would depend on the subjective satisfaction as to the existence of the circumstances in praesenti or future. Since very drastic powers of detention without trial are to be conferred on subordinate officers, the State Government is expected to apply its mind and make a careful choice regarding the period during which such power shall be exercised by the subordinate officers, which would solely depend on the circumstances prevailing or likely to prevail. The subjective satisfaction cannot be lightly recorded by reproducing both the alternative clauses of the statute. The subjective satisfaction on the prevailing Circumstances, or circumstances that are likely to prevail at a future date is the sine qua non for the exercise of power. The use of the word 'or' signifies either of the two situations for different periods. That, however, is not to say that the power cannot be exercised for a future period by taking into consideration circumstances prevailing on the date of the order as well as circumstances likely to prevail ,in future. The latter may stem from the former. For example, there may be disturbances on the date of the order and the same situation may be visualised at a future date also in which case the power may be conferred on the subordinate officers keeping both the factors in mind; but in that case the two circumstances would have to be joined by the conjunctive word 'and' not the disjunctive word 'or'. The use of the disjunctive word 'or' in the impugned Government order only indicates nonapplication of mind and obscurity in thought. The obscurity in thought inexorably leads to obscurity in language. Apparently, the Government seems to be uncertain as to the relevant circumstances to be taken into consideration, and that appears to be the reason why they have used the disjunctive word "or" in the impugned order."

Thus, the decision of the Supreme Court referred to above while dealing with the conferment of powers under subsection (3) of Section 3 of the N.S Act, makes it clear that the conferment of power has to be specific either with regard to the circumstances prevailing or likely to prevail and not for both. In that case, even

order dated 6.1.1990 of the State Government conferring the power on the Commissioner of Police recorded the satisfaction of the Government of Maharashtra that having regard to the circumstances prevailing or likely to prevail in the Greater Bombay Police Commissionerate, it was necessary that during the period commencing on January 30, 1990 and ending on April 21, 1990, the Commissioner of Police shall exercise the powers conferred by sub-section (2) of Section 3 of the Act. The same was not approved by the Supreme Court.

I have also noticed something very important so far as the PASA Act is concerned. I have tried to compare the provisions of the PASA Act, 1985 with that of the National Security Act, 1980, the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drug offenders Act, 1981, the Karnataka Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Gamblers, Gundas, Immoral Traffic Offenders and Slum-grabbers Act, 1985 and the Uttar Pradesh Gangster and Antisocial Activities (Prevention) Act, 1986. Excluding the PASA Act of 1985 with which I am concerned, one common provision which I find in the other Acts is the proviso to Section 3 (2) of the Act, which reads as under:-

> *"Provided that the period specified in the 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."*

In the Act of 1985, I do not find any such proviso. That is the reason why the Notification of the year 1985 still is in force and on the basis of which even as on today the Police Commissioners and the District Magistrates exercise their powers of the preventive detention. It necessarily implies that from 1985 till this date, there does not appear to be any review of the delegation of the power.

However, at this stage, I must also refer to a decision of the Supreme Court in the case of Navalshankar Ishwarlal Dave Vs. State of Gujarat, reported in 1994 Criminal Law Journal 2170(1), wherein the Supreme Court was dealing with a matter relating to the preventive detention under PASA and considered the contention raised on behalf of the detenu that the delegation of the power to the authorized officer was illegal or invalid. The Supreme Court made the following observations as contained in paragraph 3 of the judgment. Paragraph 3 reads as under:-

"3. Section 3(2) of PASA empowers the State Govt. that having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate and the Commissioners of Police, by an order in writing direct that District Magistrate, the Commissioner of Police, may also, if satisfied the existence of conditions envisaged in sub-sec. (1) of S. 3 to exercise the powers of the State Govt. to detain any person. The contention of Shri Ganesh, the learned counsel for the appellants is that the blanket power of delegation is a negation of satisfaction on the part of the State Govt. and likely to be abused by the District Magistrate or the Commissioner of Police. The Legislature entrusted the power to the State Govt. and if need be only selectively but not blanket delegation is permissible. After the issue of the notification in 1985 no review thereafter was done. The order of delegation made by the State Govt. without application of mind was, therefore, illegal and invalid and the sequator detention made became illegal. We find no force in the contention. PASA was made in exercise of the power under entry 3 of concurrent List III of 7th Schedule and reserved for consideration of the President and received his assent. So it is a valid law. It envisages that the State Govt. under S. 3(1) would exercise the power of detention or authorise an officer under S. 3(2) to detain bootlegger, dangerous person, drug offender, immoral traffic offender and property grabber. The PASA was made to provide for preventive detention of aforestated persons whose activities were satisfied to be prejudicial to the maintenance of public order. Sub-section (4) of S. 3 declares that a person shall be deemed to be "acting in any manner prejudicial to the maintenance of public order" when such person is engaged in or is making preparation for engaging in any activities, whether as a bootlegger, dangerous person, drug offender, immoral traffic offender and property grabber, which affect adversely or are likely to affect adversely the maintenance of public order. Explanation thereto postulates that public order shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely inter alia if any of the activities by any person referred to in the sub-section (4) directly or indirectly, is causing or is likely to cause any harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or public health. Therefore, the Act postulates satisfaction on the part of the State Govt. that the dangerous and antisocial activities of

any of the aforestated persons shall be deemed to be acting prejudicial to the maintenance of public order whether the person is engaged in or is making preparation for engaging in any activities enumerated in the definition clauses and the public order shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely if the activities directly or indirectly, causing or is likely to cause any harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or public health. In the counter affidavit filed on behalf of the State in the High Court and consideration thereof the High Court held that"the situation was found prevailing in the State in the year 1985 where the impact of the activities of various persons mentioned in the preamble with reference to their respective activities has heightened from being anti-social and dangerous activities to be prejudicial to the maintenance of public order." It is, with a view, to curb those dangerous or anti-social activities, the Govt. considered it appropriate to delegate the power under sub-sec. (2) of S. 3 to the "authorised officer" and the Govt. has stated in the notification that "having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of each of the District Magistrate specified in the Schedule annexed thereto,the Govt. of Gujarat is satisfied that it is necessary so to do" and accordingly exercised the power under sub-sec. (2) of S. 3 and directed the authorised officers i.e. the District Magistrate of each District specified in the Schedule and also the three Commissioners of Police in the respective Corporations to exercise within their local limits of jurisdiction, the power conferred by sub-see. (1) of S. 3.It is seen that the dangerous or anti-social activities are legislatively recognised to be prejudicial to the maintenance of public order. The enumerated activities hereinbefore referred to are not isolated but being indulged in from time to time adversely affecting the public order and even tempo. The District Magistrate concerned, being the highest Dist. Officer on the spot and the Commissioner of Police in the cities have statutory duty to maintain public order. Therefore, with a view to have then effectively dealt with, to move swiftly where public order is affected or apprehended and to take action expeditiously instead of laying information with the Govt. on each occasion and eagerly awaiting action at State Govt. level, the State Govt. having exercised the power under S. 3(2) conferred on the District Magistrate or the Commissioner the power to order detention under S. 3(1) when he considers or deems necessary to detain any person involved in any of the

dangerous or anti-social activities enumerated herein before, prejudicially affecting or "likely to affect the maintenance of public order." The later clause lay emphasis on immediacy and promptitude and the authorised officer on the spot is the best Judge to subjectively satisfy from the facts and ground situation and take preventive measure to maintain public order. The reliance by Shri Ganesh on the decision of this Court reported in A. K. Roy v. Union of India, AIR 1982 SC 710, para 72 has no application in view of the factual background in this Act. So long as the activities of bootlegger, dangerous person, drug offender, immoral traffic offender and property grabber persist within the local limits of the jurisdiction of the concerned District Magistrate and Commissioners of Police, as the case may be, and being directly responsible to maintain public order and to deal with depraved person to prevent antisocial and dangerous activities which affects adversely or are likely to affect adversely the maintenance of public order, the necessity would exist. Therefore, the question of periodical review of delegation order does not appear to be warranted."

It appears that in the said decision, there is no reference of the earlier decision of the Supreme Court in the case of Abhay Shridhar Ambulkar (supra).

Be that as it may, even if the periodical review of delegation of the power is not warranted, the same makes the responsibility and duty of the State Government more onerous when it comes to approving the order of detention passed by the Detaining Authority.

I find considerable merit in the submission of Mr.Mangukiya, the learned advocate appearing for the petitioner that while exercising the power of confirmation/approval of the order of detention, in accordance with sub-section (3) of Section 3 of the said Act, the State Government owes a duty to apply its mind to the order of detention. The stage of approval should not be treated as an empty formality. The Government owes a duty to see whether the order of detention passed by the Detaining Authority is in accordance with law, more particularly in conformity with the judicial pronouncements of the Supreme Court and the High Court of Gujarat. If the concerned Officer of the State Government had carefully read the present detention order, he might not have approved it at all in light of the said position of law that mere registration of cases under the IPC is no

ground to detain a person. The confirmation or the approval to the orders of detention in accordance with sub-section (3) of Section 3 of the PASA Act is an additional safeguard introduced by the statute, and therefore, the power of grant of approval cannot be mechanically exercised in a casual manner. The grant of approval to the order of detention in accordance with sub-section (3) of Section 3 is not an empty formality. The Government must examine whether the order is lawful and when called upon by the Court of law to show its application of mind, there should be something on record for the same. I am informed by the learned AGP that in the year 2014, almost three thousand and odd orders of detention were passed, out of which almost in 50% cases, it was recommended by the Advisory Board constituted under the Act to revoke the order This itself is suggestive of the fact that the orders of preventive detention are more or less passed in a very casual manner.

I am conscious of my powers under Article 226 of the Constitution of India. It is not permissible for me to legislate. I cannot issue a writ of mandamus to amend the Act and introduce a proviso as referred to above. That is absolutely for the State Government to consider, if it deems fit. However, I may only say that the State Government should frame appropriate guidelines for approval of the orders of detention by the State Government under sub-section (3) of Section 3. If appropriate guidelines are framed in accordance with law, probably that would be more helpful in ensuring that the order of detention is in accordance with law."

49 The aforesaid observations fell from this Court way back on 27th January 2015. Almost five years and six months has elapsed since then. We wonder whether the Home Ministry of the State Government paid any heed to the above referred observations of this Court. They are important observations because they have something to do with the implementation of the Act, 1985. In other words, the observations point out the shortcomings in the Act and how to rectify such shortcomings for better and effective implementation and execution of the provisions of the Act.

50 We are informed that the State Government is taking one

step ahead as it has decided to extend the application of the Act, 1985 to cyber criminals, loan sharks and sexual offenders amongst the others. We are informed that an ordinance in this regard to amend the PASA Act, 1985 is likely to be proposed in the cabinet meeting, which may be conveyed in the near future. While it is a welcome step on the part of the State Government, but unless and until the defects pointed out in the aforesaid observations are not duly considered and deliberated, no amount of amendments will serve the purpose. In such circumstances, we once again request the State Government to seriously study the observations and deliberate upon the same for effective implementation and execution of the provisions of the Act and at the same time also for the purpose of preventing the misuse of the provisions of the Act, 1985.

51 We are constrained to observe that ordinarily, suggestions made by the High Court are not paid heed as they are not in the form of directions. However, we would like to remind the State Government that the High Court would very rarely make suggestions and if in a particular case, any suggestions are made, they are always in larger public interest.

(VIKRAM NATH, CJ)

(J. B. PARDIWALA, J)

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