05.10.2021
SL No.1
Court No.30

WPA (H) 43 of 2021

Heisnam Chaoba Singh
Vs.
The Union of India & Ors.

Mr, Uday Sankar Chattopadhyay,
Mr. Dibakar Sardar,
Mr. Pronay Basak,
Mr. Santanu Maji,
Ms. Snigdha Saha,
Mr. Subhayu Das,
...for the Petitioner.

Mr. Y.J. Dastoor, Ld. A.S.G,
Mr. Vipul Kundalia,
Ms. Anamika Pandey,
...for the Union of India.

Mr. Saibal Bapuli, Ld. A.P.P.,
Mr. Md. Sabir Ahmed,
...for the State.

Mr. Phiroze Edulji,
Mr. Arijit Mazumdar,
...for the respondents no. 7 to 9.

"The jurisdiction of suspicion" is invoked by the writ petitioner in view of the order of detention passed by the Joint Secretary to the Government of India on 1st April, 2021 under Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988 (as amended), (in short PITNDPS Act) the petitioner was directed to be detained and kept in Malda Correction Home, Kolkata is the subject matter of challenge in this writ of habeas corpus.

The petitioner has a chequered history.

A case under Narcotic Drugs and Psychotropic Substance Act, 1985 was initially initiated against the persons including the petitioner in connection with recovery of 384.21 kg of ganja on 29th June, 2017 from a truck. The contraband was claimed to have been concealed

behind the cabin of the truck. Two persons were apprehended, namely, Mohd. Rafe and P. Shyam Singh. On the basis of the statements of Mohd. Rafe and P. Shyam Singh recorded under Section 67 of the NDPS Act, the petitioner was apprehended. On the basis of the complaint filed on behalf of NCB, a NDPS Case No. 111 of 2017 was initiated by the appropriate Court at Kamrup and thereafter trial commenced before the learned Additional Sessions Judge No.2, Kamrup(M), Guwahati. The record reveals that the petitioner was absconding and non-bailable warrant of arrest was issued against the absconder/petitioner repeatedly since 2nd May, 2018 until he was arrested on 12th December, 2019 in connection with the another NDPS Case, this time at Malda

He was fleeing from justice.

In view of the recovery of about 391.4 kgs of Ganja from a Tata Truck, and on examination of two persons on the spot and their statements recorded under Section 67 of the NDPS Act on 11th December, 2019, the petitioner was apprehended and it is alleged that the petitioner in his statement under Section 67 of the NDPS Act confessed his guilt and shared further information to the Investigating Agency. While he was on detention, in relation to the Malda case, the petitioner filed an application for bail before a Coordinate Bench. The prayer for bail was allowed by the Coordinate Bench on 21st December, 2020. The learned Additional Solicitor General opposes the prayer for bail. The learned Additional Solicitor General appears to have submitted before the Coordinate Bench that the petitioners, which include the present petitioner was found in a hotel near the place of seizure and call detail records (CDRs) would show active communication between the petitioners and the other accused persons. The statement of the co-accused and of the petitioners recorded under Section 67 of the NDPS Act was also relied upon to establish the charge of conspiracy relating to illegal transportation of narcotic substance. The Coordinate

Bench presided over by the Justice Joymalya Bagchi disposed of the said application for grant of bail relying upon the decision in ***Tofan Singh Vs. State of Tamil Nadu*** reported in ***(2020) SCC Online SC 882***. The relevant observations of the Coordinate Bench are:

> *"In reply, learned Senior Counsel submits that the statements are inadmissible in law in the light of the law declared in Tofan Singh Vs State of Tamil Nadu reported in (2020 SCC Online SC 882).*
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> *In said report, Apex Court held that such statements are inadmissible in law. Hence, we are not inclined to look into the statements made by the petitioners and co-accused before the investigating agency. If such statements are excluded, remaining materials on record against the petitioners are extremely speculative and flimsy. Mere presence near the place of occurrence or telephonic conversation with co-accused persons, even believed to be true, may give rise to mere suspicion but would not justify a prima facie case of conspiracy so as to deny the petitioners' liberty, at this stage, in spite of the statutory restrictions under Section 37 of the NDPS Act. (emphasis supplied)*
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> *Hence, we are inclined to hold that in the aforesaid factual matrix the petitioners have been able to rebut the aforesaid restrictions and in view of the period of detention suffered by them, as aforesaid, we are inclined to grant bail to the petitioners.*
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> *Accordingly, we direct that the petitioners shall be released on bail upon furnishing a bond of Rs.1,00,000/- (Rupees One Lac Only) each with five registered sureties of Rs.20,000/-each, to the satisfaction of the learned Judge, Special Court under the NDPS Act at Malda, subject to the condition that the petitioner nos.1 and 2 shall reside within the district of Malda and provide the address to the Investigating Officer and the Court below and meet the Investigating Officer once in a month until further orders. Petitioner no.3, being a resident of district of Murshidabad in the State of West Bengal, shall reside in the said district until further orders and shall not leave the said district without the leave of the Trial Court except for the purpose of attending court proceedings. They shall appear before the trial court on every date of hearing until further orders and shall not intimidate the witnesses and/or tamper with evidence in any manner whatsoever. In the event the petitioners fail to appear before the trial court without justifiable cause, the trial court shall be at liberty to cancel their bail in accordance with law without further reference to this Court."*

The record reveals that the NCB authorities approached the Kamrup Court for execution of the warrant of arrest against the petitioner while he was in custody. The petitioner presumably could not immediately avail the benefits of bail due to financial difficulty and arranging sureties until 30th March, 2021 to furnish his bail bond. In the meantime, an approach was made by the NCB before the Kamrup Court for the execution of the warrant of arrest. During pendency of execution of warrant of arrest on 1st April, 2021, the authorities passed an order of preventive detention. The order reads:-

> *"Whereas, I, Ravi Pratap Singh, Joint Secretary to the Government of India, specially empowered under Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988, (as amended), am satisfied with respect to the person known as Heisnam Chaoba Singh, that with a view to preventing him from engaging in illicit trafficking of narcotics drugs & psychotropic substance, in future, it is necessary to make the following order:*
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> *Now, therefore, in exercise of the powers conferred by Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988 (as amended), I direct that the said Heisnam Chaoba Singh, S/o Heisnam Matumba Singh, R/o Wangoo Sandangkhong Mayai Leikai, Moirang Sub-Division, Bishnupur, Manipur-795133 be detained and kept in Malda Correction Home, Kolkata.*
>
> *(Ravi Pratap Singh)*
>
> *Joint Secretary to the Government of India"*

The grounds on which the detention order was passed have also been communicated to the detenu so as to enable him to make a representation. The grounds of detention relate to a seizure of narcotics at Kamrup and Malda. The grounds also referred to the order passed by the Coordinate Bench and on consideration of the conduct of the petitioner it was observed by the authorities concerned that the petitioner was engaged in prejudicial

activities of illicit trafficking which poses serious threat to the health and welfare not only to the citizens of the country but to every citizen of the world, besides deleterious effect on the national economy. The authority was also of the further opinion that the acts of the petitioner as revealed shows propensity and inclination to engage in such act of prejudicial activity. Accordingly, the detention order was passed on 1st April, 2021 for a period of one year. The petitioner made a representation to the Advisory Board. Since the order of the Advisory Board is confidential, we directed the authorities to produce the original file containing the report of the Central Advisory Board under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988.

We have gone through the order passed by the Advisory Board. The Advisory Board has gone through the substance of the charge and the basis of the order passed by the detaining authority under Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988. Based on the documents and the materials placed before the detaining authority and considering the motive of detenu, the detaining authority recorded its satisfaction with regard to the detenu's continued tendency and inclination to indulge in acts of the illicit traffic and narcotic drugs and psychotropic substance in a planned manner. The modus operandi according to the detaining authority adopted by the detenu with his associate gives rise to the reasonable apprehension that if he is not detained he would indulge in similar activities of illicit traffic and narcotic drugs and psychotropic substance.

The learned Counsel for the petitioner submits that the order of detaining authority was on a colourable exercise of power and the purpose and motive behind the said order was to set at naught the order passed by the Hon'ble Division Bench in releasing the petitioner on bail. It is submitted that once the Hon'ble Division Bench has

come to a conclusion that the petitioner cannot be detained on the basis of a statement of co-accuseds in view of the latest pronouncement of the Hon'ble Supreme Court in **Tofan Singh** (supra), the detention order was passed with a view to render the said order nugatory. The learned counsel has also referred to and relied upon the observation made by the co-ordinate Bench with regard to insufficiency of materials available on record to sustain the plea of guilt. It is submitted that the law of preventive detention does not give an unfettered and unbridled power to the detaining authority and while scrutinising the order of the detaining authority, one should have due regard to Articles 21 and 22 of the Constitution of India. The requirement of the authority concerned to exercise the power of detention in good faith and not to act as a ruthless master. Section 3 of PITNDPS Act in so far as it empowers the detaining authority to exercise the power of detention on the basis of subjective satisfaction, imposes unreasonable restriction on the rights of the petitioner detenu under Articles 21 and 22 of the Constitution. It was further submitted that the apprehension the detenu was likely to be released from the custody and hence a preventive detention order is required to be passed, is completely a misuse of the power and in any event, having regard to the fact that the petitioner was in custody, there was no requirement to pass any preventive detention order. It is argued that there is no material on record to show that the petitioner if released on bail was likely to commit activities prejudicial to public interest. The NDPS Act provides a complete remedy read with the Criminal Procedure Code and the authorities having accepted the order of the coordinate bench in releasing the petitioner on bail therefore, under the garb of compelling necessity could not have resorted to preventive detention. It is further submitted that it is the requirement of the law that detaining authority must disclose a case where the detenu

is already in jail that there is cogent and valuable material of fresh fact to necessitate making of an order of detention.

The conclusion that the detenu may be released on bail cannot be *ipse dixit* of the detaining authority.

The aforesaid submissions are based on the following decisions:

i. Khudiram Das vs. The state of West Bengal & Ors. reported in AIR 1975 Supreme Court 550 (paras 5, 12, 13, and 15)

ii. Dharmendra Suganchand Chelawat & Anr. vs. Union of India & Ors. reported in AIR 1990 Supreme Court 1196 :: 1990(1) SCC 746 (paras 1, 2, 3, 4, 7, 20 and 21);

iii. Ahmedhussin Shaikhhussain @ Ahmed Kalio Vs. Commissioner of Police, Ahmedabad & Anr. reported in (1989) 4 Supreme Court Cases 751 (paras 8, 9, 10 & 11)

iv. Smt. Shashi Aggarwal vs. State of U.P. & Ors. reported in AIR 1988 Supreme Court 596 (paras 5, 6, 9, 10, 11, 12, 13)';

v. ***Abdul Razak vs. S. N. Sinha Commissioner of Police, Ahmedabad & Ors. reported in AIR 1989 Supreme Court 2265 (paras 21 and 22).***

The learned Additional Solicitor General appearing on behalf of the respondents has submitted that the preventive detention is different from criminal prosecution and the two are mutually exclusive. The essential concept of 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 only requirement is that the detaining authority has to come to the satisfaction that there exists 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. The preventive detention is an anticipatory measure and does

not relate to an offence while criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The action of the executive in detaining a person being only precautionary, normally the matter has necessarily to be left to the discretion of the executive authority. The satisfaction of the detaining authority is considered to be of primary importance, great latitude is to be shown in the exercise of its discretion. It is submitted the standard of evidence required for conviction is different from that required for a reasonable satisfaction of the necessity for detention in the interest of public safety or maintenance or public order. For conviction the court has to be convinced of the guilt of the accused and the benefit of a reasonable doubt goes to the accused. But for the purpose of detention it is enough if the government or any officer duly empowered is reasonably satisfied of the necessity of his detention, and there can be no benefit of doubt since the public safety and maintenance of public order are the paramount concern.

In aid of his submission, the learned Additional Solicitor General has relied upon the following decisions:

i) Haradhan Saha vs. State of West Bengal & Ors. reported in (1975) 3 SCC 198 : 1974 SCC (Cri) 816;

ii) Commissioner of Police & Ors. vs. C. Anita (Smt) reported in (2004) 7 SCC 467 : 2004 SCC (Cri) 1944

iii) Gajanan Krishna Yalgi & Ors. vs. Emperor reported in AIR 1945 Bombay 533;

The learned Additional Solicitor General has submitted that the detention of an accused person in a criminal prosecution who is already in custody is permissible if there is substantive satisfaction on the part of the detaining authority that the accused may be released on bail and if so, will continue with his nefarious activities. The detaining authority's awareness of the fact and

existence of compelling necessity for detention despite the custody of detenu is adequately reflected from the order of of the detaining authority. The possibility of detenu's release on bail and his indulging in prejudical activity after release could be a compelling necessity. This subjective satisfaction arrived at by detaining authority on proper application of mind on the question of compelling necessity is not open to judicial review and in this regard he has relied upon the decision of the Hon'ble Supreme Court in ***Abdul Sathar Ibrahim Manik Vs. Union of India & Ors reported in (1992) 1 SCC 1: 1992 SCC (Cri) 1***. The learned A.S.G. has for the present purpose relied upon Paragraph 12 of the said decision where a Constitution Bench decision in Rameshwar Shaw was relied upon and quoted to argue that if the authority is bona fide satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released.

Countering argument on behalf of the petitioner that the statement of the co-accused under Section 67 of the NDPS Act is inadmissible in evidence and held to be so in **Tofan Singh** (supra) could not form the basis of preventive detention, it is argued that inadmissibility of the statement in the criminal prosecution is no bar and same being used by the detaining authority to arrive at such subjective satisfaction necessary for the detention of the person. In this regard he has relied upon a Division Bench decision of the Kerala High Court in ***Jamseena Vs. Union of India & Ors.*** **WP(CRL) No. 118 of 2021** ***decided on 23rd day of September, 2021 (Paragraphs 18 to 21)***. It is submitted that similar to the NDPS Act, the statement recorded under Section 108 of the Customs Act was relied upon for passing a detention order under the provision of COFEPOSA Act on the ground that the said proceeding is not before a Court and, therefore, Section 65(b)(4) of the Indian Evidence Act will not apply and on that basis, it was held that neither Section 65B of the Evidence Act nor Section 138C of the

Customs Act would be applicable to the proceedings of the detaining authority for passing an order of detention. Lastly, the learned A.S.G. has relied upon a recent decision of the Hon'ble Supreme Court in ***Union of India Vs. Dimple Happy Dhakad reported in (2019) 20 SCC 609 (Paragraphs 31 to 41)***. It is submitted that in the said decision, it has been reiterated that the satisfaction of the detaining authority that the detenu is already in custody and is likely to be released on bail and on being released, he is likely to indulge in the same prejudicial activities is the subjective satisfaction of the detaining authority based on materials and normally subjective satisfaction is not to be interfered with in a judicial review.

After the matter was heard at length and reserved for order, we felt that certain clarifications are required from the parties and, accordingly, on 4th October, 2021, the matter was listed when we passed the following order:-

> *"This matter was heard on 29th September, 2021. While deliberating on the issues and going through the various decisions, subsequent to the hearing we felt that clarifications are required on the issues as to (i) whether in absence of any fresh material during detention an order of preventive detention could be validly passed. (ii) In the event the detaining authority did not exercise its power under Section 8 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 what would be its consequence in view of grant of bail by this court during custody and response of the learned Counsel for the parties with regard to the two decisions of the Hon'ble Supreme Court in* ***Banka Sneha Sheela Vs. The State of Telangana & Ors.*** *reported at* ***MANU/SC/0493/2021*** *and* ***Huidrom Konungjao Singh Vs. State of Manipur*** *reported at* ***(2012) 7 SCC 181***.
>
> *The matter is fixed for further consideration tomorrow, i.e., 5th October, 2021 at the top.*
>
> *The original file produced earlier is returned to the learned Additional Solicitor General.*
>
> *Photostat plain copy of this order duly counter-signed by the Assistant Registrar (Court) be given to the parties on usual undertaking."*

The learned Additional Solicitor General in response to our queries has submitted that in considering the validity of the order of detention, it is necessary to take into consideration the statement of objects and reasons of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988. It is submitted that the statement of objects and reasons has clearly stated that the said legislation is necessary to prevent transit traffic in illicit drugs which has caused problems of abuse and addiction. The order of detention can be passed if the authorities concerned are of the opinion that it is necessary to do so with a view to preventing him from committing any illicit trafficking of narcotic drugs and psychotropic substances. Our attention is drawn to the definition "illicit traffic" in Section 2(e) and 2(e)(iv) in particular to show that the persons dealing in any activities in narcotic drugs or psychotropic substances other than those provided in sub-clauses (i) to (iii) would come within the definition of "illicit traffic". The purpose is to prevent the detenu from engaging in any illicit trafficking of narcotic drugs and psychotropic substances. It is submitted that the detaining authority after taking into consideration the past conduct of the petitioner, the order passed by the Coordinate Bench presided over by Justice Bagchi and the pendency of the matter before the Kamrup Court had decided to pass the order of detention. It is submitted that Section 8 of 1988 Act would not be applicable in this case as no detention order was passed when the petitioner was absconding.

The learned A.S.G. has submitted that the latest decision of the Hon'ble Supreme Court in ***Banka Sneha Sheela Vs. The State of Telangana & Ors.*** reported at ***2021 SCC OnLine SC 530:: MANU/SC/0493/2021*** is distinguishable on facts as it relates to public order as opposed to the public health and safety which is the predominant object of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988.

Our attention is drawn to Paragraph 15 of the judgment which reads:-

> *"15. There can be no doubt that for 'public order' to be disturbed, there must in turn be public order. Mere contravention of law such as indulging in cheating or criminal breach of trust certainly affects 'law and order' but before it can be said to affect 'public order', it must affect the community or the public at large."*

With regard to the decision in ***Huidrom Konungjao Singh Vs. State of Manipur*** reported at ***(2012) 7 SCC 181*** it is submitted that all the requirements that are to be satisfied before an order of detention is passed as mentioned in Paragraph 9 of the said judgment has been scrupulously followed.

It is further submitted that it is possible that the Kamrup Court may on the basis of the order of the Coordinate Bench grant bail to the petitioner in the pending criminal case.

It is, thus, submitted that the detaining authority has taken into consideration all relevant factors and on subjective satisfaction has passed the order of detention.

Per contra, Mr. Uday Sankar Chattopadhyay, learned Counsel appearing on behalf of the petitioner has submitted that the ratio decidendi of the aforesaid two decisions are apposite and has specifically drawn our attention to the judgment of the Hon'ble Supreme Court reported in **Abdul Razak** (supra) and **Dharmendra Suganchand Chelawat** (supra).

It is submitted that in **Dharmendra Suganchand Chelawat** (supra) in paragraphs 20 and 21 it has been clearly stated that the apprehension that the detenu is likely to be released from custody if not supported by any material, the order of detention cannot survive. The said paragraphs read as follows:-

> *"20. If the present cases are examined in the light of the aforesaid principles, it can be said that the first condition is satisfied in as much as the grounds*

of detention show that the detaining authority was aware of the fact that the appellants were in custody on the date of passing of the order of detention. Can it be said that there was a compelling reason for passing the order for the detention of the appellants, although they were in custody? The learned Attorney General wants the said question to be answered in the affirmative. He has invited our attention to the grounds of detention and has submitted that the appellants were found engaging in the transportation and abetting in the export inter-state of Psychotropic Substances and in the event of their release from custody, the appellants would continue to engage in those activities. The learned Attorney General has also pointed out that the appellants had been remanded to judicial custody upto October 13, 1988 only and their further remand could be refused by the Magistrate and the appellants could be released from custody on October 13, 1988. The submission of the learned Attorney General is that, keeping in view the' activities of the appellants and the likelihood of their being released from custody on their remand being not extended by the Magistrate on October 13, 1988, the detaining authority, on October 11, 1988, when it passed the order of detention, was satisfied that the detention of the appellants was necessary even though they were in custody at that time.

21. We have given our careful consideration to the aforesaid submission of the learned Attorney General. We are, however, unable to agree with the same. In the grounds of detention the detaining authority has only mentioned the fact that the appellants has been remanded to judicial custody till October 13, 1988. The grounds of detention do not show that the detaining authority apprehended that the further remand would not be granted by the Magistrate on October 13, 1988, and the appellants would be released from custody on October 13, 1988. Nor is there any material in the grounds of detention which may lend support to such an apprehension. On the other hand we find that the bail applications moved by the appellants had been rejected by the Sessions Judge a few days prior to the passing of the order of detention on October 11, 1988. The grounds of detention disclose that the appellants were engaged in activities which are offences punishable with imprisonment under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985. It

cannot, therefore, be said that there was a reasonable prospect of the appellants not being further remanded to custody on October 13, 1988 and their being released from custody at the time when the order for preventive detention of that appellant was passed on October 11, 1988. In the circumstances, we are of the view that the order for detention of the appellants cannot be sustained and must be set aside and the appellants should be released forthwith. These are the reasons on the basis of which we passed the order for the release of the appellants on January 11, 1990. It is, however, clarified that in case the appellants are released from custody in the aforesaid criminal proceedings, the question of their preventive detention under the Act on the above material may be reconsidered by the appropriate authority in accordance with law and this decision shall not be construed as an impediment for that purpose."

We have briefly summarised the facts at the beginning and also the submissions made on behalf of the parties.

Preventive detention would normally regard as anathema to liberty.

Personal liberty of an individual is precious, invaluable and to be jealously secured and protected. The word "preventive" is different from 'punitive' as said by ***Lord Finley in R.V. Haliday*** reported in **1917 AC 260.**

The law of preventive detention operate harshly on the accused and, therefore, it should be strictly construed and should not be used merely to clip the wings of the accused who has involved in the criminal prosecution. Freedom from arbitrary arrest is a basic human right recognised over the years. This right has been preserved and respected whenever there has been cases of preventive detention unless there were compelling necessity or reasons. The courts have upheld the sanctity of the personal liberty and placed it over all other rights. In cases of habeas corpus there is a principle which "is one of the pillars of liberty", that in English Law every imprisonment is prima facie unlawful and that it is for a person directing

imprisonment to justify his act. (Observation of Lord Atkin in Liversidge v. Anderson; 1942 AC 206). This epoch making statement fearlessly expressed by Lord Atkin was confirmed in R v. Home Secretary ex p. Khawaza; 1984 AC 74 where Lord Wilberforce at page 105 and Lord Scarman at page 110 made a clear statement that a prisoner carries the initial burden of proof is difficult to understand, since the fact of imprisonment makes a prima facie case. The burden of proof of the existence of grounds for preventive detention is on the custodian and the aforesaid decision stated the principle plainly that since unjustified detention is a trespass to the person the custodian has to satisfy in a judicial review that its decision to take the person in custody by way of preventive detention was proper. The reason being that the individual would be in danger of being detained upon allegations which he may have no means of disproving.

It may appear to be strange that amongst the loudest critics who were members of the independent movement and might have suffered preventive detention in British India without even being tried or convicted, however, were in favour of inserting preventive detention in the Constitution and thereafter in various legislation authorising detention without trial. The sweeping power given to executive to arrest and detaine a person for months together without even seeking the confirmation of the advisory board, however, has now been diluted due to various judicial pronouncements which uphold the constitutional rights of detenue notwithstanding the right of the detaining authority to issue order for preventive detention and similar legislation setting a time limit for such consideration.

Sardar Ballavbhai Patel, the first Home Minister of independent India moving the Bill which culminated in the preventive detention Act 1950 told parliament that it was directed against persons “whose avowed object is to create disruption, dislocation and tamper(ing) with

communication, to suborn loyalty and make it impossible for normal Government based on law to function.

The intervention of judiciary to uphold the constitutional rights vis a vis the law of preventive detention since the time of **Gopalan v. State of Madras reported at AIR 1950 SC 27** would show that the law of preventive detention would not be regarded "as unreasonable as the principle of natural justice in so far as they are compatible with detention laws are present" (Per Ray, CJ in **Haradhan Saha vs. State of West Bengal; AIR 1974 SC 2154**. However, in **Gopalan** (supra) Justice Mukherjee acknowledged that it is a drastic provision in the constitution which cannot but be regarded as a most "unwholesome encroachment upon the liberties of the people".

Justice Vivian Bose a crusader of personal liberty in his dissenting judgment in S. Krishnan Koths v. State of Madras reported at AIR 1951 SC 301 in the context of the validity of the Preventive Detention (Amendment) Act 1951. observed:

"I cannot bring myself to believe that the framers of our Constitution intended that the liberties guaranteed should be illusory and meaningless or that they could be toyed with by this person or that. They did not bestow on the people of India a cold, lifeless, inert mass of malleable clay but created a living organism, breathed life into it and endowed it with purpose and vigour so that it should grow healthily and sturdily in the democratic way of life, which is the free way. In the circumstances, I prefer to decide in favour of the freedom of the subject. ……I am not speaking technically at the moment. I am viewing it broadly as the man in the street would. I am placing myself in the position of the detenu and looking at it through his eyes. The niceties of the law do not matter to him. He does not care about grammar. All that matters to him is that he is behind the bars and that Parliament has not fixed any limit in his kind of case and that local authorities tell him that they have the right to say how long he shall remain under detention. I cannot bring

myself to think that this was intended by the Constitution". (emphasis supplied)

Justice Bose's dissent reflects his liberal approach to interpretation of Fundamental Rights in our constitution and his intellectual integrity.

The catena of decisions relied upon by the learned Counsel for the petitioner and Addl. Solicitor General would show that the courts have tried to balance between the personal liberty and the necessity for curtailment such freedom or liberty. One would argue that when a person has committed acts which are punishable as crime be detained under the grab of preventive detention. It is quite arguable that a detention can never be proper as the very object of the detention keeping the culprit behind bars can be achieved by any ordinary criminal court by convicting him for offence. However, the concept that emerged that while the object of a trial and a conviction is punitive the object of detention without trial is preventive. This is echoed in the judgment of Justice Ray in **Haradhan Saha** (supra) and Justice Dua in **Borjahan vs. State of West Bengal; AIR 1972 SC 2256.**

"To quote Ray, CJ:

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. (Haradhan Saha v State of West Bengal, op cit note 13, at 2160 [emphasis supplied].)

To quote Dua J, in Borjahan v State of West Bengal: (AIR 1972 SC 2256, 2257.)

The fields of these two jurisdictions are not co-extensive nor are they alternative. The jurisdiction under the Act may be invoked when the available evidence does not come up to the standard of judicial proof but is otherwise cogent enough to give rise to the suspicion in the mind of the authorities concerned that there is a reasonable likelihood of repetition of past conduct…."

The petitioner would argue that permitting detention on mere suspicion in the minds of executive should not be treated as sacrosanct and the court would still retain its

jurisdiction to review such decision to ascertain if the satisfaction recorded by the detaining authority is bona fide based on cogent materials on the basis of which a reasonable person could arrive at a conclusion that the detention of a person is necessary.

In the scheme of things detention order should not be made only in order to bypass a criminal prosecution which may be irksome because of the inconvenience of proving guilt in the court of law as observed by Justice Bhagwati, C.J. in **Shiv Ratan Makim v. Union of India; AIR 1986 SC 610** and it would certainly be an abuse of the power of the preventive detention and the order of detention would be bad if such were the consideration. However, if the object of making the order of detention is to prevent the commission in future of activities injurious to the community it would be a perfectly legitimate exercise of power to make the order of detention.

The PITNDPS Act in Section 3 requires the detaining authority to record its satisfaction with respect to any person with a view to preventing him from engaging in illicit traffic in Narcotic Drugs and it is necessary to detain the said person, the object being, that such illicit traffic in Narcotic Drugs possesses the serious threat to the health and welfare of the people and the activities of persons engaged in such illicit traffic are having deleterious effect on the national economy. The person aggrieved by the order of detention can make a representation of the advisory board and the advisory board if is of the opinion that there is sufficient case for the detention of the person concern would submit a report to the appropriate government for confirmation of the detention order. In relation to absconding person the powers are to be exercised under Section 8.

In the instant case, the order of preventive detention was passed after the coordinate bench of this court has released the petitioner on bail which he availed only on 30th

March, 2021 almost 3 months after the order was passed in his favour.

The legislature has used the word “satisfy” in Section 3 and “opinion” in Section 9(c) of the Act which goes to show that in a judicial review the courts are entitled to look into the materials to ascertain whether sufficient cause exists for detention of a person. The record must show that circumstances do exists and are such that it is possible for the authority concerned to form an opinion therefrom suggestive of the persons engaged in such illicit traffic. The court would not ordinarily interfere with the said formation of opinion and the subjective satisfaction regarded by the detaining authority unless it appears to the court on the basis of the available record that formation of such opinion was tainted with malafide, bad faith, improper, unreasonable and in colourable exercise of power. The test of reasonable person may be applied to ascertain if the exercise of power was proper and not arbitrary.

Preventive detention is an exceptional mechanism compromising on the personal liberty of individuals. Therefore, the legal qualification of preventive detention laws ought to be interpreted strictly and preventive detention should not be permissible unless it absolutely qualifies all the necessary legal facets. The Hon’ble Courts have acknowledged the gravity and repercussions of preventive detention laws. Preventive detention is a tool in isolation which operates to curtail a person’s personal liberty. Preventive detention is more excessive than normal measures of arrest, hence preventive detention cannot be misconstrued to be a direct alternative to the normative criminal prosecution. The Indian legal jurisprudence already has a set of pre-existing criminal law legislations which caters to the culpability of various modes of offences. Preventively detaining any person is an exclusive measure and operates separately than the Indian Penal Code or Code of Criminal Procedure. Therefore, preventive

detention as a measure ideally should be utilised when the other existing criminal laws are inadequate and the preventive detention is squarely falling within the intention of the legislature to implement preventive detention.The Hon'ble Courts have looked down upon the practice of detaining a person under preventive detention when such person has been enlarged on bail in the same case. The intention with which courts have made such an observation is to ensure that preventive detention is not used as an added tool to curtail judicial decisions allowing bail of a person. The Hon'ble Supreme Court in Vijay Narain Singh v. State of Bihar (1984) 3 SCC 14 observed the following:

"*It is not intended for the purpose of keeping a man under detention when under ordinary criminal law it may not be possible to resist the issue of orders of bail, unless the material available is such as would satisfy the requirements of the legal provisions authorising such detention. When a person is enlarged on bail by a competent criminal court, great caution should be exercised in scrutinising the validity of an order of preventive detention which is based on the very same charge which is to be tried by the criminal court.*"

While the drafters of the Constitution have laid emphasis on the role of the legislature in formulating instances regarding the application of preventive detention, but the application of the same is not beyond the scope of judicial scrutiny. It is true that no authority enjoys absolute sanction in terms of restricting a person's liberty. In this regard, O. ChinappaReddy,J., concurring with the majority in the abovementioned judgement observed the following:

"*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. While adequacy or sufficiency may not be a ground of challenge, relevancy and proximity are certainly grounds of challenge. Nor is it for the court to put itself in the position of the detaining authority and to satisfy itself that the untested facts reveal a path of crime. I agree with my brother Sen,, J. when he says, "It has always been the view of this Court that the detention of individuals without trials for any length of time, however short, is wholly inconsistent with the basic ideas of our Government and the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of the citizen except in accordance with the procedure established by law."

In **Rekha v. State of Tamil Nadu, (2011) 5 SCC 244**, a 3-Judge Bench of the Hon'ble Supreme Court while providing a comparison between preventive detention in different jurisdictions observed the following:

"*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, 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."

The abovementioned observation from a 3-judge bench amply lays down the scepticism with which courts wish to approach the application of preventive detention. The excessive and outside the boundary nature of preventive detention dissuades courts from providing preventive detention with a liberal interpretation. The application of preventive detention under Article 22(3) has to read carefully, since such application of detention is only an exception to the primary fundamental right under Article 21. The courts have similarly acknowledged that in certain cases the legitimate authority might pass an order of preventive detention, even where there exists scope for criminal prosecution, but such an order will only be reasonable when the existing criminal law provisions is not sufficient to deal with the situation. Any order of preventive detention must be read within the scope of Article 21 and Article 22.

In **Yumman Ongbi Lembi Leima v. State of Manipur (2012) 2 SCC 176,** the Hon'ble Supreme Court specifically adverted to when a preventive detention order would be bad, as recourse to the ordinary law would be sufficient in the facts of a given case, with particular regard being had to bail having been granted. The Court observed:

"*23. Having carefully considered the submissions made on behalf of the respective parties, we are inclined to hold that the (sic exercise of) extraordinary powers of detaining an individual in contravention of the provisions of Article 22(2) of the Constitution was not warranted in the instant case, where the grounds of detention do not disclose any material which was before the detaining authority, other than the fact that there was every likelihood of Yumman Somendro being released on bail in connection with the cases in respect of which he had been arrested, to support the order of detention."*

According to Durga Das Basu, "preventive detention is resorted to in such circumstances that the evidence in possession of the authority, is not sufficient to make a charge or to secure the conviction of the detenu by legal proofs but may still be sufficient to justify his detention on

the suspicion that he [or she] would commit a wrongful act unless he [or she] is detained."

In ***Huidrom Konungjao Singh v. State of Manipur and Ors.*** reported at **2012 (7) SCC 181** the Hon'ble Supreme Court has discussed the impact of detention order when the detenue is already in jail. The observation are:

"6. Whether a person who is in jail can be detained under detention law has been a subject matter of consideration before this Court time and again. In Dharmendra Suganchand Chelawat & Anr. v. Union of India & Ors., AIR 1990 SC 1196, this Court while considering the same issue has reconsidered its earlier judgments on the point in Rameshwar Shaw v. District Magistrate, Burdwan, AIR 1964 SC 334; Masood Alam v. Union of India, AIR 1973 SC 897; Dulal Roy v. District Magistrate, Burdwan, AIR 1975 SC 1508; Alijan Mian v. District Magistrate, Dhanbad, AIR 1983 SC 1130; Ramesh Yadav v. District Magistrate, Etah, AIR1986 SC 315; Suraj Pal Sahu v. State of Maharashtra, AIR 1986 SC 2177; Binod Singh v. District Magistrate, Dhanbad, AIR 1986 SC 2090; Smt. Shashi Aggarwal v. State of U.P., AIR 1988 SC 596, and came to the following conclusion:

"21.The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention; and

(ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

7. In Amritlal & Ors. v. Union government through Secretary, Ministry of Finance & Ors., AIR 2000 SC 3675, similar issue arose as the detaining authority recorded his satisfaction for detention under the Act, in view of the fact that the person, who was already in jail, was going to move a bail ?application. In the grounds of detention it had been mentioned that there was "likelihood of the detenu moving an application for bail" and hence detention was necessary. This Court held that there must be cogent materials before the authority passing the detention order that there was likelihood of his release on bail. (See also: N. Meera Rani v. Govt. of Tamil Nadu, AIR 1989 SC 2027; Kamarunnissa v.

Union of India & Anr., AIR 1991 SC 1640; and Union of India v. Paul Manickam and Anr., AIR 2003 SC 4622).

8. This Court while deciding the case in A. Geetha v. State of Tamil Nadu & Anr., AIR 2006 SC 3053, relied upon its earlier judgments in Rajesh GuIati v. Govt- of NCT of Delhi, AIR 2002 SC 3094; Ibrahim Nazeer v. State of T.N. & Ors., (2006) 6 SCC 64; and Senthamilselvi v. State of T.N. & Anr., (2006) 5 SCC 676, and held that the detaining authority should be aware that the detenu is already in custody and is likely to be released on bail. The conclusion that the detenu may be released on bail cannot be ipse dixit of the detaining authority. His subjective satisfaction based on materials, normally, should not to be interfered with.

9. In view of the above, it can be held that there is no prohibition in law to pass the detention order in respect of a person who is ?already in custody in respect of criminal case. However, if the detention order is challenged the detaining authority has to satisfy the Court the following facts:

(1) The authority was fully aware of the fact that the detenu was actually in custody.

(2) There was reliable material before the said authority on the basis of which he could have reasons to believe that there was real possibility of his release on bail and further on being released he would probably indulge in activities which are prejudicial to public order.

(3) In view of the above, the authority felt it necessary to prevent him from indulging in such activities and therefore, detention order was necessary.

In case either of these facts does not exist the detention order would stand vitiated.

12. In Rekha v. State of Tamil Nadu through Secretary to Govt. & Anr., (2011) 5 SCC 244, this Court while dealing with the issue held :

"7. A perusal of the above statement in Para 4 of the grounds of detention shows that no details have been given about the alleged similar cases in which bail was allegedly granted by the court concerned. Neither the date of the alleged bail orders has been mentioned therein, nor the bail application number, nor whether the bail orders were passed in respect of the co-accused on the same case, nor whether the bail orders were passed in respect of other co-accused in cases on the same footing as the case of the accused……

10. In our opinion, if details are given by the respondent authority about the alleged bail orders in similar cases mentioning the date of the orders, the bail application number, whether the bail order was passed in respect of the co-accused in the same case, and whether the case of the co-accused was on the same footing as the case of the petitioner, then, of course, it could be argued that there is likelihood of the accused being released on bail, because it is the normal practice of most courts that if a co-

accused has been granted bail and his case is on the same footing as that of the petitioner, then the petitioner is ordinarily granted bail……. A mere ipse dixit statement in the grounds of detention cannot sustain the detention order and has to be ignore.

27. In our opinion, there is a real possibility of release of a person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground." (Emphasis added)

Thus, it is evident from the aforesaid judgment that it is not the similar case, i.e. involving similar offence. It should be that the co-accused in the same offence is enlarged on bail and on the basis of which the detenu could be enlarged on bail." (emphasis supplied)

In a fairly recent decision in ***Union of India & Anr. v. Dimple Happy Dhakad; 2019 Cri.L.J 3735 (SC)*** concerning a case of smuggling of huge volume of gold in which the authority passed an order of detention after considering serious, impact of crime on the economy.

The law was discussed in the following paragraphs:

"31. After reviewing all the decisions, the law on the point was enunciated in Kamarunnisa v. Union of India and Another (1991) 1 SCC 128 where the Supreme Court held as under:-

"13. From the catena of decisions referred to above it seems clear to us 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 a real possibility of his being released on bail, 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 this 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 it before a higher court. What this Court stated in the case of Ramesh Yadav (1985) 4 SCC 232 was that ordinarily a detention order should not be passed merely to pre-empt or circumvent enlargement on bail in cases which are essentially criminal in nature and can be dealt with under the ordinary law. It seems to us well settled that even in a case where a person is in custody, if

the facts and circumstances of the case so demand, resort can be had to the law of preventive detention. ……."

32. The same principle was reiterated in Union of India v. Paul Manickam and Another (2003) 8 SCC 342 where the Supreme Court held as under:-

"14. …….. Where detention orders are passed in relation to persons who are already in jail under some other laws, the detaining authorities should apply their mind and show their awareness in this regard in the grounds of detention, the chances of release of such persons on bail. The necessity of keeping such persons in detention under the preventive detention laws has to be clearly indicated. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention, and the decision in this regard must depend on the facts of the particular case. Preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order or economic stability etc. ordinarily, it is not needed when the detenu is already in custody. The detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order. If the detaining authority is reasonably satisfied with cogent materials that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time, he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made.

Where the detention order in respect of a person already in custody does not indicate that the detenu was likely to be released on bail, the order would be vitiated. (See N. Meera Rani v. Govt. of T.N. (1989) 4 SCC 418 and Dharmendra Suganchand Chelawat v. Union of India (1990) 1 SCC 746) The point was gone into detail in Kamarunnissa v. Union of India (1991) 1 SCC 128. ……" [underlining added]

33. Whether a person in jail can be detained under the detention law has been the subject matter for consideration before this Court time and again. In Huidrom Konungjao Singh v. State of Manipur and Others (2012) 7 SCC 181, the Supreme Court referred to earlier decisions including Dharmendra Suganchand Chelawat v. Union of India (1990) 1 SCC 746 and reiterated that if the detaining authority is satisfied that taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.

34. In Veeramani v. State of T.N. (1994) 2 SCC 337 in para (6), the Supreme Court held as under:-

"6. From the catena of decisions of this Court it is clear that even in the case of a person in custody, a detention order can

validly be passed if the authority passing the order is aware of the fact that he is actually in custody; if he has reason to believe on the basis of the reliable material that there is a possibility of his being released on bail and that on being so released, the detenu would in all probabilities indulge in prejudicial activities and if the authority passes an order after recording his satisfaction the same cannot be struck down."

35. In the light of the well settled principles, we have to see, in the present case, whether there was awareness in the mind of the detaining authority that detenu is in custody and he had reason to believe that detenu is likely to be released on bail and if so released, he would continue to indulge in prejudicial activities. In the present case, the detention orders dated 17.05.2019 record the awareness of the detaining authority:- (i) that the detenu is in custody; (ii) that the bail application filed by the detenues have been rejected by the Court. Of course, in the detention orders, the detaining authority has not specifically recorded that the "detenu is likely to be released". It cannot be said that the detaining authority has not applied its mind merely on the ground that in the detention orders, it is not expressly stated as to the "detenue's likelihood of being released on bail" and "if so released, he is likely to indulge in the same prejudicial activities". But the detaining authority has clearly recorded the antecedent of the detenues and its satisfaction that detenues Happy Dhakad and Nisar Aliyar have the high propensity to commit such offences in future.

36. The satisfaction of the detaining authority that the detenu is already in custody and he is likely to be released on bail and on being released, he is likely to indulge in the same prejudicial activities is the subjective satisfaction of the detaining authority. In Senthamilselvi v. State of T.N. and Another (2006) 5 SCC 676, the Supreme Court held that the satisfaction of the authority coming to the conclusion that there is likelihood of the detenu being released on bail is the "subjective satisfaction" based on the materials and normally the subjective satisfaction is not to be interfered with.

37. The satisfaction of the detaining authority that the detenu may be released on bail cannot be ipse dixit of the detaining authority. On the facts and circumstances of the present case, the subjective satisfaction of the detaining authority that the detenu is likely to be released on bail is based on the materials. A reading of the grounds of detention clearly indicates that detenu Nisar Aliyar has been indulging in smuggling gold and operating syndicate in coordination with others and habitually committing the same unmindful of the revenue loss and the impact on the economy of the nation. Likewise, the detention order qua detenu Happy Dhakad refers to the role played by him in receiving the gold and disposing of the foreign origin smuggled gold through his multiple jewellery outlets and his relatives. The High Court, in our view, erred in quashing the detention orders merely on the ground that the detaining authority has not expressly recorded the finding

that there was real possibility of the detenues being released on bail which is in violation of the principles laid down in Kamarunnisa and other judgments and Guidelines No.24. The order of the High Court quashing the detention orders on those grounds cannot be sustained.

41. Observing that the object of preventive detention is not to punish a man for having done something but to intercept and to prevent him from doing so, in Naresh Kumar Goyal v. Union of India and others (2005) 8 SCC 276, it was held as under:-

"8. It is trite law that an order of detention is not a curative or reformative or punitive action, but a preventive action, avowed object of which being to prevent the antisocial and subversive elements from imperilling the welfare of the country or the security of the nation or from disturbing the public tranquillity or from indulging in smuggling activities or from engaging in illicit traffic in narcotic drugs and psychotropic substances, etc. Preventive detention is devised to afford protection to society. The authorities on the subject have consistently taken the view that preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it, and to prevent him from doing so……".

42. Considering the scope of preventive detention and observing that it is aimed to protect the safety and interest of the society, in State of Maharashtra and others v. Bhaurao Punjabrao Gawande (2008) 3 SCC 613, it was held as under:-

"36. Liberty of an individual has to be subordinated, within reasonable bounds, to the good of the people. The framers of the Constitution were conscious of the practical need of preventive detention with a view to striking a just and delicate balance between need and necessity to preserve individual liberty and personal freedom on the one hand and security and safety of the country and interest of the society on the other hand. Security of State, maintenance of public order and services essential to the community, prevention of smuggling and blackmarketing activities, etc. demand effective safeguards in the larger interests of sustenance of a peaceful democratic way of life.

37. In considering and interpreting preventive detention laws, courts ought to show greatest concern and solitude in upholding and safeguarding the fundamental right of liberty of the citizen, however, without forgetting the historical background in which the necessity—an unhappy necessity—was felt by the makers of the Constitution in incorporating provisions of preventive detention in the Constitution itself. While no doubt it is the duty of the court to safeguard against any encroachment on the life and liberty of individuals, at the same time the authorities who have the responsibility to discharge the functions vested in them under the law of the country should not be impeded or interfered with without justification (vide A.K. Roy v. Union of India (1982) 1 SCC 271, Bhut Nath Mete v. State of W.B. (1974) 1

SCC 645, State of W.B. v. Ashok Dey (1972) 1 SCC 199 and ADM v. Shivakant Shukla (1976) 2 SCC 521)." [underlining added].

43. The court must be conscious that the satisfaction of the detaining authority is "subjective" in nature and the court cannot substitute its opinion for the subjective satisfaction of the detaining authority and interfere with the order of detention. It does not mean that the subjective satisfaction of the detaining authority is immune from judicial reviewability. By various decisions, the Supreme Court has carved out areas within which the validity of subjective satisfaction can be tested. In the present case, huge volume of gold had been smuggled into the country unabatedly for the last three years and about 3396 kgs of the gold has been brought into India during the period from July 2018 to March, 2019 camouflaging it with brass metal scrap. The detaining authority recorded finding that this has serious impact on the economy of the nation. Detaining authority also satisfied that the detenues have propensity to indulge in the same act of smuggling and passed the order of preventive detention, which is a preventive measure. Based on the documents and the materials placed before the detaining authority and considering the individual role of the detenues, the detaining authority satisfied itself as to the detenues' continued propensity and their inclination to indulge in acts of smuggling in a planned manner to the detriment of the economic security of the country that there is a need to prevent the detenues from smuggling goods. The High Court erred in interfering with the satisfaction of the detaining authority and the impugned judgment cannot be sustained and is liable to be set aside." (emphasis supplied)

In a very recent decision in ***Banka Sneha Sheela*** *(supra)* the Hon'ble Supreme Court observed that if a person granted anticipatory bail/bail wrongly there are well known remedy in the ordinary law to take care of the situation. The State can always appeal against the bail order granted and/or apply for cancellation of bail. The mere successful obtaining of anticipatory bail/bail order being the real ground for detention the same cannot be sustained. The relevant observations are in paragraphs 15, 16, 28 and 29 of the said judgment which are reproduced below:

"15. There can be no doubt that for 'public order' to be disturbed, there must in turn be public disorder. Mere contravention of law such as indulging in cheating or criminal breach of trust certainly affects 'law and order' but before it can be said to affect 'public order', it must affect the community or the public at large.

"16. There can be no doubt that what is alleged in the five FIRs pertain to the realm of 'law and order' in that various acts of cheating are ascribed to the Detenu which are punishable under the three Sections of the Indian Penal Code set out in the five FIRs. A close reading of the Detention Order would make it clear that the reason for the said Order is not any apprehension of widespread public harm, danger or alarm but is only because the Detenu was successful in obtaining anticipatory bail/bail from the Courts in each of the five FIRs. If a person is granted anticipatory bail/bail wrongly, there are well-known remedies in the ordinary law to take care of the situation. The State can always appeal against the bail order granted and/or apply for cancellation of bail. The mere successful obtaining of anticipatory bail/bail orders being the real ground for detaining the Detenu, there can be no doubt that the harm, danger or alarm or feeling of security among the general public spoken of in Section 2(a) of the Telangana Prevention of Dangerous Activities Act is make believe and totally absent in the facts of the present case.

"28. Shri Ranjit Kumar, learned senior counsel appearing on behalf of the State of Telangana relied strongly upon Subramanian v. State of Tamil Nadu (2012) 4 SCC 699, and in particular upon paragraphs 14 and 15 which read as follows:

"14. It is well settled that the court does not interfere with the subjective satisfaction reached by the detaining authority except in exceptional and extremely limited grounds. The court cannot substitute its own opinion for that of the detaining authority when the grounds of detention are precise, pertinent, proximate and relevant, that sufficiency of grounds is not for the court but for the detaining authority for the formation of subjective satisfaction that the detention of a person with a view to preventing him from acting in any manner prejudicial to public order is required and that such satisfaction is subjective and not objective. The object of the law of preventive detention is not punitive but only preventive and further that the action of the executive in detaining a person being only precautionary, normally, the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of conduct in an exhaustive manner. The satisfaction of the detaining authority, therefore, is considered to be of primary importance with certain latitude in the exercise of its discretion.

15. The next contention on behalf of the detenu, assailing the detention order on the plea that there is a difference between "law and order" and "public order" cannot also be sustained since this Court in a series of decisions recognised that public order is the even tempo of life of the community taking the country as a whole or even a specified locality. [Vide Pushpadevi M. Jatia v. M.L.

Wadhawan [(1987) 3 SCC 367 : 1987 SCC (Cri) 526] , SCC paras 11 & 14; Ram Manohar Lohia v. State of Bihar [AIR 1966

SC 740 : 1966 Cri LJ 608 : (1966) 1 SCR 709] ; Union of India v. Arvind Shergill [(2000) 7 SCC 601 : 2000 SCC (Cri) 1422] , SCC paras 4 & 6; Sunil Fulchand Shah v. Union of India [(2000) 3 SCC 409 : 2000 SCC (Cri) 659] , SCC para 28 (Constitution Bench); Commr. of Police v. C. Anita [(2004) 7 SCC 467 : 2004 SCC (Cri) 1944] , SCC paras 5, 7 & 13.]"

"29. The statement made by this Court in paragraphs 14 and 15 were on facts which were completely different from the facts of the present case as reflected in paragraphs 16 and 17 thereof which read as follows:

"16. We have already extracted the discussion, analysis and the ultimate decision of the detaining authority with reference to the ground case dated 18-7-2011. It is clear that the detenu, armed with "aruval", along with his associates, armed with "katta" came to the place of the complainant. The detenu abused the complainant in filthy language and threatened to murder him. His associates also threatened him. The detenu not only threatened the complainant with weapon like "aruval" but also damaged the properties available in the shop. When the complainant questioned the detenu and his associates, the detenu slapped him on his face. When the complainant raised an alarm for rescue, on the arrival of general public in and around, they were also threatened by the detenu and his associates that they will kill them.

17. It is also seen from the grounds of detention that because of the threat by the detenu and his associates by showing weapons, the nearby shopkeepers closed their shops out of fear and auto drivers took their autos from their stand and left the place. According to the detaining authority, the above scene created a panic among the public. In such circumstances, the scene created by the detenu and his associates cannot be termed as only law and order problem but it is public order as assessed by the detaining authority who is supposed to safeguard and protect the interest of public. Accordingly, we reject the contention raised by the learned Senior Counsel for the appellant." This was obviously a case in which 'public order' was directly affected and not a case in which 'law and order' alone was affected and is thus distinguishable, on facts, from the present case."

In the instant case, the petitioner was apprehended at Guwahati in or about 29th June, 2017 in respect of consignment of 384.210 kg Ganja allegedly recovered from a truck and on the basis of the statement of two persons namely Md. Rafe and P. Shyam Singh. A non-bailable warrant of arrest was issued vide a memo no. 31/2019 Serial 02/2019 dated 07.01.2019 against the petitioner. Subsequently, the petitioner was arrested in relation to

recovery of 391.4 kg of Ganja allegedly concealed in the false cavity of a Tata Truck on the basis of the statement of one Imtiyas Khan recorded u/s.67 of the NDPS Act between 11th December, 2019 and 13th December, 2019. The detention order records that the statement of the petitioner was recorded u/s. 67 of the NDPS Act on 12th December, 2019. Until the petitioner was arrested on 12th December, 2019 there is nothing on record to show that he posed any serious threat to the health and welfare of the people and his engagement in such illicit traffic in narcotics has a deleterious effect on the national economy.

The NCB Guwahati initiated the case initially against Md. Rafe and Pukhrambam Shyam Singh on 19th December, 2017 and the supplementary charge-sheet was filed against the petitioner on 5th April, 2018 under the NDPS Act. In the supplementary charge-sheet the name of the petitioner was mentioned. Warrant of arrest was issued against the petitioner on 2nd May, 2018 and subsequently on 7th June, 2019 Kamrup Narcotic case was split up against the petitioner. On 13th December, 2020, the petitioner was arrested in Malda Narcotic case and was granted bail on 21st December, 2020. On 30th March, 2021, the petitioner submitted bail bond to the Special Court, Malda. Later in the day, NCB Guwahati prayed for 2 days' police remand for recording of statement and shown arrest of the petitioner and another petition was filed for production of the petitioner before learned Kamrup Court. The learned Special Court at Malda directed the Superintendent of Malda Correctional Home to take necessary steps for physical production of the petitioner before the learned Kamrup Court. On the following day, i.e., 31st March, 2021, learned Special Court, Kamrup ordered that the Superintendent of Malda Correctional Home sent a message stating that the learned Special Court, Malda has not accorded permission to hand over the accused to Guwahati police. On 1st April, 2021, the impugned detention order was passed. This conduct

shows that the authority concerned did not feel it necessary on the basis of the materials to form an opinion or had reasoned to believe that the petitioner is the person in respect of whom the detention order is necessary or becomes necessary. The petitioner was absconding. If the charges were so grave as now being projected and espoused before us by the learned A.S.G. there could have been no reason for the authority concerned not to pass an order of detention and in the event, the petitioner was absconding to take measures under Section 8 of the said Act, 1988.

It was only after the petitioner furnished the bail bond on 30th March, 2021, the detaining authority issued a purported order of detention on 1st April, 2021.

We have carefully perused the order of detention. The detaining authority did not even issue any detention order during custody. There was no fresh material available to the detaining authority subsequent to his arrest in relation to the Malda case or after the coordinate bench presided over by Justice Bagchi granted bail to the petitioner on 21st December, 2020.

The judicial pronouncement with regard to the reviewability of the detention order has been indicated in various decisions some of which we have already noted and, in fact, quoted the relevant portions which would show that the satisfaction of the detaining authority that the detenue may be released on bail cannot be ipse dixit of the detaining authority. The detaining authority after 31st March, 2021 suddenly resurrected and relying on materials which they earlier considered and were of the opinion that such materials did not make out a case for preventive detention now found it to be relevant for an order of preventive detention. This would be clearly evident from the fact that all the materials on which the subjective satisfaction for preventive detention is based were available on record and there has been no fresh material available on record against the petitioner. In this conspectus the validity and propriety of the order of detention has to be

scrutinized. The object behind the order of preventive detention should not be to set at naught or render a judicial decision nugatory or otiose and if one is inclined to accept the contention of the detaining authority that such judicial order would not be relevant for preventive detention and notwithstanding existence of such order merely on suspicion an order of preventive detention could still be passed as it happened in this case, it would be in our view an act of over-reaching a judicial order and would sound a death knell of the sanctity of the judicial order and the very existence of judiciary as a sentinel on the qui vive.

In the instant case all materials that were available before the Division bench at the time of granting bail were also available with the detaining authority prior and subsequent to the order granting bail to the petitioner. Curiously the detaining authority did not challenge the order of the coordinate bench before a higher forum or apply for cancellation of bail. The detaining authority accepted the order of the coordinate bench dated 21st December, 2020 and the said order is still in force.

We are also not satisfied with the explanation offered for not being able to produce the detenue before the Kamrup court in execution of the warrant of arrest or the production warrant as the detenue was well within the reach of the detaining authority as he was languishing in the correctional home at Malda. There could not be any apprehension in the mind of the detaining authority that the petitioner could be released on bail as warrant of arrest and production warrant were pending against the petitioner at the time when the petitioner furnished the bail bond. Accordingly, there was no immediate threat of the petitioner fleeing from justice. It was in such conspectus of fact we are of the view that the order of detention was issued in colourable exercise of power and the subjective satisfaction recorded by the detaining authority was in complete remiss of the aforesaid factors which cannot be lightly burshed aside as the liberty of an individual is of

paramount consideration and discretion should not be used as a ruthless master and any discretionary power exercised to curtail such fundamental rights must not be arbitrary or without any justiciable grounds. We also find support of our views from ***Dharmendra Suganchand Chelawat*** *(supra)* paragraphs 20 and 21 which the learned Advocate for the petitioner has relied upon and taken note of in the earlier part of the judgment. In this regard we may fruitfully refer to the following passage from ***Khudiram Das*** (supra) which reads:

> *"11. This discussion is sufficient to show that there is nothing like unfettered discretion immune from judicial review-ability. The truth is that in a Government under law, there can be no such thing as unreviewable discretion. "Law has reached its finest moments", said Justice Douglas, "when it has freed man from the unlimited discretion of some ruler, some official, some bureaucrat-Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions". United States v. Wunderlick.(6) And this is much more so in a case Where personal liberty is involved. That is why the Courts have devised various methods of judicial control so that power in the hands of an individual officer or authority is not misused or abused or exercised arbitrarily or without any justifiable grounds."* *(emphasis supplied)*

On such consideration, we set aside the order of the detaining authority and the opinion of the Central Advisory Board. The petitioner is set free forthwith.

We have been informed that the petitioner is in custody in connection with the Kamrup case. This order shall not affect any order passed in such proceeding.

We make it clear that the observations made in this judgment are only for the purpose of deciding the validity and propriety of the order of detention and shall not affect the trials pending before Malda and Kamrup court and any order of custody passed in such proceeding.

The writ petitioner being WPA (H) 43 of 2021 stands allowed.

All parties shall act on the server copies of this order duly downloaded from the official website of this Court.

(Rabindranath Samanta, J.) **(Soumen Sen, J.)**