

(2006) 01 GAU CK 0011

In the Gauhati High Court

Case No : Writ Petition (C) (HC) No. 01 of 2005

Dhan Kumar Deb Barma @ Arowa

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 27-01-2006

Acts Referred:

Arms Act, 1959 — Section 27, 3, 7
Constitution of India, 1950 — Article 80M
General Clauses Act, 1897 — Section 21
National Security Act, 1980 — Section 11, 12(1), 3(2), 3(3), 3(4)
Penal Code, 1860 (IPC) — Section 148, 149, 302, 396

Citation : (2006) 1 GLT 729

Hon'ble Judges : I.A. Ansari, J;A.B. Pal, J

Bench : Division Bench

Advocate : S. Deb, for the Appellant; P.K. Biswas and S. Chakraborty, for the Respondent

Judgement

I.A. Ansari, J.—While the Petitioner herein, Dhan Kumar Debbarma, was injudicial custody in Khowai Sub-Jail in connection with Kalyanpur PS case No. 38/2004 under Sections 148/149/302/396 IPC read with Section 27 of the Arms Act, Kalyanpur PS Case No. 27/2002 under Sections 149/302 IPC read with Section 27 of the Arms Act, Kalyanpur PS Case No. 50/2003 under Sections 148/149/302 IPC read with Section 27 of the Arms Act, an order was passed, on 26.03.2005, by the Respondent No. 2 herein, namely, District Magistrate, West Tripura, under Sub-section (3) of Section 3 of the National Security Act. 1980 (in short, the NS Act) placing the Petitioner in detention. When the Petitioner was ordered to be released on bail in connection with the cases aforementioned the said order of detention dated 26.03.2005 was served on the Petitioner on 12.05.2005 and the Petitioner was accordingly, kept detained in the Central Jail, Agartala. While so placing the Petitioner under detention, Respondent No. 2 also furnished to him the grounds of his detention.

2. On passing of the said order of detention, dated 26.03.2005, the Respondent

No. 2 aforementioned, vide his letter, dated 26.03.2005, informed the Special Secretary, department of Home, Govt. of Tripura, about the said order of detention and while so informing the State Government, Respondent No. 2 also enclosed, along with the order of detention, the grounds for detention of the Petitioner. The said order was approved by the State Government on 05.04.2005. After taking the Petitioner into detention on 12.05.2005 the Petitioner was served with an order, dated 10.06.2005 issued by the department of Home, Govt. of Tripura, whereby the Petitioner was informed that his detention had already been approved by the State Government under Sub-section (4) of Section 3 of the NS Act. When the matter came up before the Advisory Board even the Advisory Board reported that there were in its opinion sufficient cause for detention the Petitioner whereupon the State Government has in terms of Sub-section (1) of Section 12 of the NS Act, confirmed the detention of the Petitioner and directed that detention of the Petitioner shall continue until expiration of 12 months from the date of detention.

3. With the help of the present application made under Article 226 of the Constitution of India the Petitioner has sought for inter alia issuance of writ of Habeas Corpus setting aside and quashing the impugned order of detention dated 26.03.2005 and the orders passed by the State Government in this regard thereafter detaining the Petitioner for a period of 12 months as mentioned hereinabove and commanding the Respondents to release the Petitioner from detention.

4. We have heard Mr. Somik Deb, learned Counsel for the Petitioner and Mr. S. Chakraborty, learned Govt. Advocate appearing for the Respondent Nos. 1 and 2. we have also heard Mr. P.K. Biswas learned Assistant Solicitor General, appearing on behalf of Respondent No. 3.

5. Though the Petitioner challenges his detention on several grounds, the principal grounds on which the Petitioner's challenge to his detention rests are taken up for consideration by us for the purpose of decision of this writ petition.

6. The primary challenge to the detention of the Petitioner is on the ground that though the order of detention was passed as early as on 26.03.2005 and the Petitioner, being admittedly injudicial custody, could have been served with the order of detention the said order was not served on the Petitioner until 12.05.2005 and for the omission to promptly serve the detention order on the Petitioner, no reason far less cogent and convincing reason, has been signed by the Respondents and thereby a valuable right which was available to the Petitioner to make a representation to the authorized officer, namely Respondent No. 2 who had passed the order of detention was denied to the Petitioner inasmuch as the order of detention in the meanwhile and before the same was served on the Petitioner on 12.05.2005 already stood approved by the state Government on 05.04.2005. In consequence of belated service of the order of detention the Petitioner also lost it is contended his right to make a representation to the State Government before the State Government could have

approved the order of the Petitioner's detention.

7. While considering the above submissions made on behalf of the Petitioner it is pertinent to note that though a bald averment has been made in their affidavit by the Respondent Nos. 1 and 2 that all procedural formalities had been complied with at the time of passing of the order of detention, at the time of approval thereof by the State Government and also execution thereof by the authorities concerned, no explanation has been offered by the Respondents as to why the order of detention was not served on the Petitioner on 26.03.2005 (i.e., the date on which the order of detention was made) or promptly thereafter.

8. While considering the above aspect of the matter, it is also of immense importance to bear in mind that the Petitioner enjoys like any other person a fundamental right under Article 21 not to be deprived of his personal liberty except according to the procedure prescribed by law. When a person is placed under preventive detention the conditions prescribed under Article 22 relating to his preventive detention coupled with the procedural safeguards, which the relevant enactment whereunder the preventive detention is resorted to provide shall ordinarily and unless the law, otherwise, provides, be scrupulously followed and complied with for, except the procedural safeguards, a detenu really has hardly any room to challenge his detention. The procedural safeguards, so prescribed, include the periods which are envisaged as time bound stages for the purpose of rendering an order of detention valid, effective and sustainable.

9. While considering the above aspect of the matter, what also needs to be borne in mind is that an order of detention cannot really be passed against a person unless placing him under preventive detention becomes wholly indispensable and imperative. The order of detention, therefore is made only when the State is left with no real option but to promptly resort to placing the person concerned in preventive detention. Thus, there is a live and proximate link between the grounds of detention and the purpose of detention. If this live link is snapped or is not shown to have existed or does not appear to survive or exist, the detention order cannot be sustained. It is for this reason that undue, unreasonable and unexplained delay in securing the detention of the person against whom an order of detention is made indicates that there was no urgency to place the person proceeded against. In other words, in such a given situation it is reasonable to infer that putting the person concerned in detention was not wholly indispensable and/or imperative. This in turn in such a case implies that no reasonable just and fair reason existed between the grounds of detention and the purpose of detention.

10. On umpteen number of occasions has reminded the Supreme Court that unexplained undue and unreasonable delay in executing an order of detention would render the detention order liable to be set aside. In fact, a detention order can be set at naught on the sole ground of delay in execution of the order of detention. As a custodian of the fundamental rights of every person who is subject to the Constitution of India a duty is thus cast on the High Court to set

aside an order of detention on the ground of delay if the delay is as indicated herinbefore unexplained undue unreasonable and unjustified. We may in this regard refer to Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another, wherein Chinnappa Reddy, J. Speaking for the Court has explained the consequences of delayed execution of an order of preventive detention as follows:

It is further the that there must be a "live and proximate link" between the grounds of the detention alleged by the detaining authority and the avowed the purpose of detention namely the prevention of the smuggling activities. We may in appropriate cases assume that the link is "snapped" if there is a long and unexplained delay between the date of the order of detention and the arrest of the detainee. In such a case, we may strike down the on an order of detention unless the grounds indicate a fresh application of the mind of the detaining authority to the new situation and the changed circumstances. But where the delay is not only adequate explained us is found to be the result of the recalcitrant or refractory conduct of the detainee in evading the arrest, there is warrant to consider the "link" no snapped but strengthened.

11. In Shah Phoolchand Lalchand Vs. Parvathi Bai, Sabyasachi Mukharji, Chief Justice, having regard to the fact that there was a delay of two-and-a half months in detaining the Petitioner (detenue) therein, pursuant to the order of detention, concluded "...there was undue delay, not commensurate with the facts situation in that case and the conduct of the Respondent authorities betrayed that there was no real and genuine apprehension that the detainee was likely to Act in any manner prejudicial to public order. The order, therefore, is bad and must go". However, the learned Chief Justice clarified, "Whether the delay was unreasonable depends on the facts and circumstances of each case."

12. Having taken note of a number of decisions on the above aspect of the preventive detention laws, the Apex Court, in P.U. Iqbal Vs. Union of India (UOI) and Others, observed and laid down as follows:

9. In view of the above object of the preventive detention, it becomes very imperative on the part of the detaining authority as well as the executing authority to be very vigilant and the keep their eyes skinned but not to the turn a blind eye in securing the detainee and executing the detention order because any indifferent attitude on the part of the detaining authority or executing authority will defeat the very purpose of the preventive action and turn the detention order as a dead letter and frustrate the entire proceedings.

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18. It is manifestly clear from a conspectus of the above decisions of the this Court, that the law promulgated on this aspect is that if there is unreasonable delay between, the date of the order of detention and the date of the arrest of the detainee, such delay unless satisfactorily explained throws a considerable

doubt on the genuineness of the requisite subjective satisfaction of the detaining authority in passing the detention order and consequently renders the detention order bad and the invalid because the live and proximate link" between the grounds of the detention had the purpose of detention is snapped in arresting the detainee. A question whether the delay is unreasonable pursuant to the order of detention, concluded,...there was undue delay, delay no commensurate with the facts situation in that case and the conduct the Respondent authorities betrayed that there was no real and genuine apprehension that the detainee was likely to act in any manner prejudicial to public order. The order, therefore, is bad and must go". However, the learned Chief Justice classified that "Whether the delay was unreasonable depends on the facts and circumstances of each case.

13. Making more explicit the position of law that when there is undue delay in execution of an order of detention, the detention would be rendered unsustainable the Supreme Court in K.P.M. Basheer Vs. State of Karnataka and another, had this to say. 11. Under these circumstances, we are of the view that the order of detention cannot be sustained since the "live and proximate link" between the grounds of detention and purpose of detention is snapped on account of the undue and unreasonable delay in securing the Appellant/detainee and detaining him. As we have now come to the conclusion that the order of detention is liable to be set aside on this ground alone, we are not dealing with other contentions raised in the memorandum of appeal as well as in the writ petition."

14. An unreasonable delay in executing an order of detention creates in fact as already pointed out above a serious doubt on the genuineness of the action of the detaining authority in considering immediate placing of a person in detention imperative in order to meaningfully prevent such a person from indulging in any such activity which in the considered view of a detaining authority leads to passing of the order of detention. Such an order of detention can be quashed if the Court is justified in opining that the order of detention was not passed in lawful and bona fide exercise of powers vested in the authorities concerned. Referring to and making explicit this requirement of a valid order of detention the Supreme Court in SMF Sultan Abdul Kader Vs. Jt. Secy., to Govt. of India and Others, observed and held....

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...The Joint Secretary has not explained why no attempt was made from 14.3.1996 to 25.4.1996 to apprehend the detainee and put him under detention even though the detention order was passed on 14.3.1996. It further appears that no attempt was made to see that the Petitioner was immediately apprehended. No serious efforts were made by the police authorities to apprehend the detainee. Only once in a month the police had tried to find out the Petitioner. It is also not stated where they looked for him and what inquiries were

made to find out his whereabouts. The Joint Secretary himself had made no effort to find out from the police authority as to why they were not able to apprehend the Petitioner. No material has been produced on the basis of which it can be said that the police authorities had made reasonable efforts to locate the Petitioner and apprehend him and yet they were not efforts to locate the Petitioner and apprehend him and yet they were not successful in finding him out. There is also no material to show that the detaining authority had made any serious attempt during this whole period of delay to find out if the detention order was executed or not. Thus, the delay in execution of the detention order remains unexplained. The unreasonable delay in executing the order creates a serious doubt regarding the genuineness of the detaining authority as regards the immediate necessity of detaining the Petitioner in order to prevent him from carrying on the prejudicial activity referred to in the grounds of detention. We are of the opinion that the order of detention was passed by the detaining authority not in lawful exercise of the power vested in him. We, therefore, allow this petition, set aside and quash the order of detention and direct that the Petitioner be set at liberty forthwith unless his presence is required in jail in connection with any other case.

15. Satisfaction of the detaining authority, reached on the basis of the materials on record that resort to the passing of an order of detention is if we may emphasis a condition precedent for passing of an order of detention. So construed, it would obviously imply that when an order of detention was made, it was made considering the urgency in placing the person under detention so as to disable him or prevent him from indulging into activities which were, according to the grounds of detention considered prejudicial activities by the state. The satisfaction so reached is really a positive state of mind. No order of detention can therefore, be passed unless the person passing such an order has reached a convincing state of mind that placing the person concerned under detention is wholly imperative. If such were the reasons for passing of a detention order a very heavy duty rests on the detaining authority to explain satisfactorily the delay in executing the order of detention. One may at this stage refer to Manju Ramesh Nahar Vs. Union of India and Others, wherein the Apex Court referring to a large number of its earlier decisions observed and concluded as follows:

7. The Act provides for preventive detention. Section 3 gives power to the Central Government or the State Government or any officer of the Central or the State Government of the specified status, to pass, with respect to any person with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from smuggling activities specified therein or harbouring persons engaged in smuggling activities, an order directing that such person be detained. The action under this section can be taken only on "satisfaction". The further requirement is that the order should have been passed for preventing that person from carrying on the prejudicial activities.

This implies that as soon as the Government or its officer feels satisfied that an order under this section is necessary, it has to be passed and implemented forthwith so that the prejudicial activities earned on by the person against whom the order has been passed, may be stopped immediately or at the earliest.

8. This object can be achieved if the order is immediately executed. If, however., the authorities or those who are responsible for the execution of the order, sleep over the order and do not execute the order against the person against whom it has been issued, it would reflect upon the "satisfaction" of the detaining authority and would also be exhibitivie of the fact that the immediate necessity of passing that order was wholly artificial or non-existent.

9. In T.A. Abdul Rahaman Vs. State of Kerala and others, it was held as under: (SCC p. 749, para 11)

II. Similarly when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detainee, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detainee with a view to preventing him from acting in a prejudicial manner.

10. In P.M. Hari Kumar Vs. Union of India and others, the view was reiterated and it was held that unexplained delay in the execution of the order of detention would vitiate the order.

11. In another decision in SMF Sultan Abdul Kader Vs. Jt. Secy., to Govt. of India and Others, to which one of us (Saghir Ahmad, J.) was a Member, the unexplained delay in the execution of the order of detention was held "fatal".

12. If the instant case is examined in the light of the above principles, it would be noticed that in the counter-affidavit filed by the Respondents in this case, the delay in execution of the order has been explained as under:

...Further, in spite of efforts made by the sponsoring authority and the police officials of the PCB, Mumbai, the detainee would not be apprehended as he was absconding. Finally the detainee was apprehended and the detention order was served on 23.4.1998....

13. Except making a vague allegation that the Appellant was absconding and was apprehended on 23.4.1998 when the order was executed against him, the Respondents have not given details of any steps that might have been taken in the meantime to execute the order against Ramesh Nahar. They could have taken appropriate steps u/s 7 of the Act or even under the provisions of the Code of Criminal Procedure for securing the arrest of the husband of the Appellant.

14. The detention order was passed on 3.2.1997 but it was executed on 23.4.1998. Obviously, the effect of non-execution of the order was that the

authorities themselves gave liberty to the detainee to carry on his earlier activities giving rise, in that process, to a question whether the activities complained of were really prejudicial activities within the meaning of Section 3 of the Act. As pointed out above, the execution of the order of detention long after it was passed would have the effect of vitiating the order as also the "Satisfaction" of the authorities who passed that order.

16. That it is a settled position of law that unexplained or unexplainable delay in executing an order of detention may in a given case, vitiate the subjective satisfaction of the detaining authority is succinctly emphasized in *A. Mohammed Farook v. Joint Secretary to Govt. of India* reported in (2000) 2 SCC 360, wherein while striking down an order of detention on the ground of unexplained delay of 40 days in executing the order of detention the Apex Court observed and concluded as follows:

3. Several contentions have been raised in this writ petition but, however, it is not necessary to deal with all these contentions save and except the one which relates to delay in executing the order of detention. The precise contention in this behalf is taken by the Petitioner in this petition in para 6(ii). It is stated that although the detention order was made on 25.2.1999 but the authorities have not executed the same immediately. On the contrary the authorities have chosen to execute the detention order only on 6.4.1999 after an inordinate and unreasonable delay of nearly 40 days. It is further stated that during this period the Petitioner did not abscond but he was very much available in his office and residence at Chennai.

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7. Learned Counsel for the petitioner fairly conceded that delay in execution ipso facto may not vitiate the subjective satisfaction in a given case and the detaining authority may give its explanation explaining the delay and if it is found acceptable the subjective satisfaction may not be vitiated. While Commenting upon the explanation of delay given by the detaining authority counsel urged that this is no explanation whatsoever inasmuch as no details are furnished as to what steps were taken by the executing agency in serving the detention order upon the detainee. He, therefore, urged that in the absence of a satisfactory explanation as regards the delay in serving the detention order it must be held that the detaining authority was not very serious in serving the detention order and thereby the subjective satisfaction of the detaining authority in issuing the detention order is vitiated.

8. Learned Counsel for the Petitioner in support of this contention drew our attention to the decisions of this Court in (1) *K.P.M. Basheer Vs. State of Karnataka* and another, and (2) *SMF Sultan Abdul Kader Vs. Jt. Secy., to Govt. of India and Others*,

9. There is a catena of judgments on this topic rendered by this Court wherein this Court emphasized that the detaining authority must explain satisfactorily the inordinate delay in executing the detention order otherwise the subjective satisfaction gets vitiated. Since the law is well settled in this behalf we do not propose to refer to other judgments which were brought to our notice.

10. As indicated earlier the only explanation given by the detaining authority as regards the delay of 40 days in executing the detention order is that despite their efforts the Petitioner could not be located at his residence or in his office and therefore the order could not be executed immediately. No report from the executing agency was filed before us to indicate as to what steps were taken by the executing agency to serve the detention order. In the absence of any satisfactory explanation explaining the delay of 40 days, we are of the opinion that the detention order must stand vitiated by reason of non-execution thereof within a reasonable time. From Annexure P-2 (the proceeding sheet of the Metropolitan Magistrate's Court, Madras) it appears that the Petitioner (Accused) was present in the Court of the Additional Chief Metropolitan Magistrate on 25.2.1999 as well as on 25.3.1999. Despite such opportunities neither the detaining authority nor the executing agency as well as the sponsoring authority were diligent to serve the detention order on the Petitioner at the earliest. In this view of the matter, we are of the opinion that the subjective satisfaction of the detaining authority in issuing the detention order dated 25.2.1999 is vitiated. It is in these circumstances not possible for us to sustain the detention order.

17. In the case at hand we have already indicated hereinabove that it is not the case of the detaining authority that the order of detention could not be executed for reasons beyond their control. In fact, no reason whatsoever has been assigned by the Respondents/authorities concerned as to why the order of detention was not promptly executed or served on the Petitioner, when he was already in custody in connection with the criminal cases aforementioned. This clearly shows that the Respondents have no justifiable reason to as sign as to why the order of detention was made on 26.03.2005, when the same was, eventually, executed on 12.05.2005. Hence, on account of unexplained, undue and unreasonable delay in executing the order of detention, we are constrained to hold that the necessity and imperativeness of passing of the order of detention is ex facie absent in the present case. On this ground alone, the order of detention passed against the present Petitioner needs to be interfered with.

18. Coupled with the above the Petitioner agitates, and we too notice, that in the very order of detention dated 26.03.2005, Respondent No. 2 had as the authorized officer, mentioned that there was likelihood of the release of the Petitioner on bail and if released on bail, there was likelihood of the detenue committing prejudicial activities, like murder, kidnapping, extortion, etc. and threat to public order. Respondent No. 2 has however, assigned no reason as to why he considered that there was likelihood of the Petitioner's release on bail. Not only the order of detention is silent in this regard even the grounds of

detention do not reveal as to why the detaining authority had apprehended that there was likelihood of the Petitioner's release on bail. Apart from the fact that the order of detention and the grounds aforementioned are silent in this regard, even the affidavit filed by the Respondents do not assign or reflect the reasons or the grounds, which made the detaining authority reach its satisfaction that the passing of the order of detention was indispensable, for there was likelihood of the Petitioner's release on bail. Far from this, the averments made by the Respondents indicate that the order of detention, which was passed as early as on 26.03.2005, was actually served as late as on 12.05.2005, when the Petitioner was ordered to be released on bail meaning thereby that the Petitioner remained injudicial custody till 12.05.2005. In such circumstances, the detaining authority was obliged under the law to satisfactorily explain as to why it considered as early as on 26.03.2005 i.e. almost about six weeks before the execution of the order of detention, that there was likelihood of the release of the Petitioner on bail.

19. While dealing with the above facet of the present case, it is pertinent to point out that if no justifiable or convincing reason is placed in support of the inference drawn by the detaining authority that there was likelihood of the release of a person on bail, an order of detention cannot be sustained. Reference made by Mr. Somik Deb in this regard to P.U. Abdul Rahiman Vs. Union of India and others, , Surya Prakash Sharma Vs. State of U.P. and Others, , Amrit Lal v. Union Govt. through Secretary, Ministry of Finance (2001) 1 SCC 341 , Rajesh Gulati Vs. Govt. of N.C.T. of Delhi and Another, and Union of India (UOI) Vs. Paul Manickam and Another, is not, therefore misplaced.

20. It is also at this stage pertinent to point out that passing of an order of detention against a person who is not in custody and a person who is in custody, does not stand on the same footing. In what circumstances, an order of preventive detention can be passed against a person, who is already in custody has been the subject of many authoritative pronouncements the foremost amongst these being the Constitution Bench decision in Rameswar Shaw v. District Magistrate, Burdwan reported in AIR 1964 SC 334.

21. At a later stage, in Dharmendra Suganchand Chelawat and another Vs. Union of India and others, a three-Judge Bench of the Supreme Court, taking into account the earlier decision of the Apex Court including the Constitution Bench decision in Rameswar Shaw (supra) observed as follows:

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 detainee is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detainee 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 detainee is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detainee, 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.

22. From the observations made in Dharmendra Suganchand Chelawat (Supra), it is clear that when a person is in custody and yet an order of detention is made against him, the detaining authority must be inferred to have arrived at its satisfaction of the necessity of passing of the order of detention on the basis of the materials available before it reflecting that the person, sought to be detained, is likely to be released on bail. A mere apprehension that the person concerned will, if released on bail, indulge in prejudicial activities, cannot permit making of a detention order unless compelling reasons" are reflected from the materials furnished by the detaining authorities to show that the detaining authorities had reasons to feel satisfied that the detainee though in custody, is likely to be released from the custody in the near future. In the absence of any material available in this regard an order of detention cannot be sustained.

23. Bearing in mind the above aspects of the law when we revert to the facts of the present case we notice as already indicated hereinabove, that the detaining authority has while making the order of detention observed that the detainee was likely to be released on bail. For the conclusion which the detaining authority has so reached or for the inference which the detaining authority has so drawn there ought to have been cogent materials available on record indicating that the detaining authority was justified in arriving at its satisfaction that there was likelihood of the Petitioner being released from custody on bail. There is however, not even an iota of materials placed before this Court to show that there were some materials, however inadequate to justifiably infer that the Petitioner in the present case was likely to be released on bail. In fact the detainee was released on bail after about six weeks of the passing of the order of detention. In the absence of any material whatsoever, as is the case at hand showing that the detaining authority had reasons to conclude that there was likelihood of the Petitioner's being released on bail, the detaining authority had really no power under the law to pass the order of detention.

24. That there must be likelihood of the person in detention, being released on bail in order to enable an authority to pass an order of detention has also been emphasized in Surya Prakash Sharma Vs. State of U.P. and Others, and Amrit Lal v. Union Govt. through Secretary, Ministry of Finance reported in (2001) 1 SCC 341.

25. In Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others, the Apex Court has made it clear that if a person is in custody and there is no imminent possibility of his being released therefrom the power of detention should not ordinarily be exercised. The Supreme Court has also held in Binod Singh (supra) that there must be cogent materials before the officer passing the detention

order to show that the detainee is likely to be released on bail. The inference must be drawn from the available materials on record and must not be the ipse dixit of the officer passing the order of detention. In the matter of preventive detention the test is not one of prejudice but one of the strict compliance with the provisions of the Act and when there is a failure to comply with these requirements further detention of the detainee becomes unsustainable (See Mrs. Tsering Dolkar Vs. Administrator, Union Territory of Delhi and Others,

26. Reminds us the Supreme Court in the following words, in Rajesh Gulati Vs. Govt. of N.C.T. of Delhi and Another, of the necessity to ensure compliance by the detaining authorities of both the subjective as well as procedural safeguards provided to a detainee:

We are of the view that the High Court erred in accepting the Respondents' submissions and rejecting the Appellant's writ application. This Court has repeatedly held that the law permitting preventive detention must be meticulously followed both substantively and procedurally by the detaining authority. (Icchu Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, ; Vijay Narain Singh Vs. State of Bihar and Others, , Hem Lall Bhandari Vs. State of Sikkim and Others, and Ayya v. State of U.P. (1989) 1 SCC 374 : 1989 SCC (Cri) 153 : AIR 1989 SC 364).

27. Preventive detention is an anticipatory measure. The law of preventive detention is not punitive in object, but only preventive. It is resorted to when the executive is convinced on the materials available or placed before it that such detention is necessary in order to prevent the person, sought to be detained from acting in a manner prejudicial to certain objects, which are specified by the law Examining the constitutional philosophy behind the preventive detention law, observed the Supreme Court in Union of India (UOI) Vs. Paul Manickam and Another, thus. "The constitutional philosophy of personal liberty is an idealistic view the curtailments of liberty for reasons of States security, public order disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions. In Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, this judicial commitment was highlighted in the following words:

The Court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of the social cost involved in the release of a possible renegade.

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In Hem Lall Bhandari Vs. State of Sikkim and Others, it was observed:

It is not permissible in matters relating to the personal liberty and freedom of a citizen to take either a liberal or a generous view of the lapses on the part of the officers....

28. What crystallizes from the above discussion is that the order of detention passed against the Petitioner cannot be allowed to survive on the ground that while making the order, not even an iota of material was available before the detaining authority and no ground existed to take the view by the detaining authority that there was likelihood of the Petitioner being released on bail. This apart, there was really no urgency or even necessity of passing of the order of detention for the order of detention for no reasons whatsoever remain unexecuted till 12.05.2005 indicating thereby complete absence of compelling reasons for passing of the order of detention as early as on 26.03.2005.

29. There is yet another aspect of the present writ petition which calls for some observations by this Court.

30. Our attention has been drawn by Mr. Somik Deb to the decision of a Division Bench of this Court in Jagdish Debbarma Vs. State of Tripura and Others, to which one of us (I.A. Ansari, J.) was a party. In Jagdish Debbarma (supra), the Court has held that if the State Government does not approve the order of detention within a period of 12 days from the date of execution of the detention order, the order becomes non est.

31. Placing reliance on the above observations made in Jagdish Debbarma (supra). It is contended by Mr. Somik Deb that since in the case at hand the order of detention was executed as late as on 12.05.2005 and after the execution of the detention order the same has not been approved by the State Government, the order of detention must be deemed to have lapsed and further detention of the Petitioner on the basis of the approval which had been granted on 05.04.2005 by the State Government to the order of detention dated 26.03.2005 is not maintainable. While dealing with this aspect of the case what needs to be noted is that this Court's observation in Jagdish Debbarma (supra) that if the State Government does not approve an order of detention under the NS Act within a period of 12 days from the date of execution of the detention order, the order becomes non est is really based on a decision of a two-Judge Bench in Navalshankar Ishwarlal Dave and another Vs. State of Gujarat and others, wherein at para 8 of the decision the Apex Court observed:

8. There appears to be a seeming overlap in consideration of the representation of the detainee and its effect on the orders by the authorities concerned. It is seen that under Sub-section (1) of Section 3 the State Government is empowered to pass an order of detention in which event it has to report to the Advisory Board as envisaged in Section 11. If an order of detention was made by the authorized officer, he shall report the same as early as possible without any delay and the State Government shall approve the same within 12 days from the date of its making. In other words, the effect would be that the authorized officer should report as early as possible from the date of the execution of the order of detention to the Government and the order remains valid and in force for 12 days from the date of execution. If the order is not approved by the State Government within 12 days, the order of detention shall stand lapsed. For

continuance after 12 days approval is mandatory and remains in force till it is approved by the Advisory Board. If the Board disapproves, the State Government shall release the detainee forthwith. It is a condition precedent. If the Board approves it then the State Government shall confirm it. However, its operation is for one year from the date of the execution u/s 3(3)(i). However, within three weeks from the date of detention the State Government shall report to the Advisory Board and within seven weeks from the date of detention the Board should give its opinion. The detaining authority has no express power under PASA to revoke the order of detention after the approval given by the State Government under Sub-section (3) of Section 3 of PASA. The power to rescind the detention order, therefore would be available to the authorized officer u/s 21 of the General Clauses Act only during its operation for 12 days from the date of execution of the detention order or approval by the State Government whichever is later. The general power of revocation was conferred only on the State Government, that too in writing for reasons to be recorded in that behalf. By necessary implication flowing from Section 3(3) concomitant result is that the authorised officer has no express power or general power u/s 21 of the General Clauses Act to revoke or rescind or modify the order after the State Government approved of it under Sub-section (3) of Section 3 read with Section 3(1). The State Government alone, thereafter has power to revoke or rescind the order of detention either on representation under Article 22(5) or u/s 15 of PASA. The representation should be disposed of accordingly. The reason is obvious that once the order of detention was approved by the State Government within the aforesaid 12 days period or confirmed by the Advisory Board within the period of seven weeks the exercise of power by the authorized officer would run counter to or in conflict thereof. The State Government has been expressly conferred with powers u/s 15 to revoke, rescind or modify the order of detention at any time during one year from the date of making the order of detention. Therefore, the right of representation guaranteed under Article 22(5) would, thereafter i.e. after approval u/s 3(3) be available to the detainee for consideration by the State Government.

32. Though in Jagdish Deberma (supra) the Court referred to the Constitution Bench decision in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, it surfaces, on a microscopic reading of the decision in Jagdish Deberma (supra) that while holding to the effect that not giving of approval within a period of 12 days from the date of execution of the detention order would render the order of detention non est this Court appears to have not taken note of a declaration of law made by the Constitution bench on this aspect of the matter. In Kamlesh Kumar Ishwardas Patel (supra) the Constitution bench at para 34, observed and held:

34. In the National Security Act there is an express provision (Section 3(4)) in respect of orders made by the District Magistrate or the Commissioner of Police u/s 3(3) and the District Magistrate or the Commissioner of Police who has made the order is required to forthwith report the fact to the State Government to

which he is subordinate. The said provision further prescribes that no such order shall remain in force for more than twelve days after the making thereof, unless, in the meantime, it has been approved by the State Government. This would show that it is the approval of the State Government which gives further life to the order which would otherwise die its natural death on the expiry of twelve days after its making.

33. From a careful reading of the above observations, it is perhaps not incorrect to infer that when an order of detention is passed by a District Magistrate under Sub-section (3) of Section 3 of the NS Act, it does not remain in force unless within a period of 12 days from the date of making of the order of detention, the State Government approves the order of detention.

34. The statement of law made in Jagdish Debberma (supra) to the effect that it is the detention of the Petitioner, which needs to be approved by the State Government and not the detention order and that such approval must be made within 12 days after execution of the order of detention may not therefore be a correct statement of law Section 3(4) specifies that such detention order shall not remain in force for more than 12 days after the making thereof unless in the meantime it has been approved by the State Government. Therefore it is the detention order which requires approval of the State Government to give further life to it which would otherwise, die its natural death on the expired of 12 days after its making. Secondly when a detention order is issued by an officer authorized u/s 3(2) of the National Security Act he continues to be the detaining authority until the order issued by him is approved by the State Government within a period of 12 days from the date of making thereof and consequently the detinue will have a right of representation to him so long as the detention order is not approved by the State Government but once the order is approved by the State Government within the aforesaid period, the effect is that from the date of such approval the detention is authorized by the order of State Government and the State Government becomes the detaining authority from the date of the order of approval. Thereafter the original detaining authority (authorized officer) will have no power to revoke, rescind or modify the detention order and the detinue will really have no right of representation before him.

35. In the face of the declaration of law by the Constitution Bench, in Kamlesh Kumar Ishwardas Patel (supra) that the order of detention made by the District Magistrate u/s 3(3) of the NS Act for its survival beyond the period of 12 days, needs approval of the State Government within 12 days from the date of making of the order is perhaps not illogical to infer that the earlier decision of the two-Judge Bench of the Apex Court in Navalshankar Ishwarlal Dave (supra) to the effect that the order of detention needs to be approved by the State Government within 12 days from the date of its execution would not really apply to a case of detention under the NS Act. particularly when the Constitution Bench in Kamlesh Kumar Ishwardas Patel (supra) has further observed that the effect of approval by the State Government within a period of 12 days from the date of making of

the order of detention would be that from the date of such approval detention is authorized by the State Government and the State Government becomes the detaining authority from the date of approval of the order of detention.

36. The fallout of the above discussion is that the conclusion of this Court in *Jagdish Debberma* (supra) to the extent that it lays down that if the State Government does not approve an order of detention within a period of 12 days from the date of execution of the detention order, the order becomes non est, being prima facie contrary to what the law laid down by the Constitution Bench, in *Kamlesh Kumar Ishwardas Patel* (supra) is this Courts decision in *jagdish Debberma* (supra) needs to perhaps have a re-look by a larger Bench of this Court.

37. What emerges from the above discussion is that the detention of the present Petitioner is not sustainable on the ground that while making the order, no material was available before the detaining authority and no ground existed to take the view by the detaining authority that there was likelihood of the Petitioner being released on bail. This apart as already discussed above there was really no necessity of passing of the order of detention on 26.03.2005 for the order of detention on account of some unexplained reasons was not executed or served until 12.05.2005 indicating thereby the absence of compelling reasons for passing of the order of detention on 26.03.2005. For these two lapses on the part of the Respondents, further detention of the Petitioner cannot be permitted.

38. While considering the decision in *Jagdish Debberma* (supra) it needs to be borne in mind that to err is human" and the Judges being human beings are not infallible. It is therefore not impossible that while interpreting law, a court may err. In such circumstances remaining stuck to an incorrect view of law in order to maintain consistency is not a virtue. Observed Jackson, J. while giving his dissenting opinion in *Massachusetts v. United States* reported in 333 US 611, "I see no reason why should be consciously wrong today because I was unconsciously wrong yesterday." Even Lord Denning expressed similar views when he observed in *Ostime v. Australian Mutual Provident Society* reported in (1960) AC 459 "The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff".

39. Deriving strength from the above observations made by J Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others, speaking through PN Bhagawati, J. (as his Lordship then was) observed "It is almost as important that the law should be settled permanently as that it should be settled correctly. But there may be circumstances, where public interest demands that the previous decision be reviewed and reconsidered. The doctrine of stare decisis should not deter the Court from overruling an earlier decision, if it is satisfied that such decision is manifestly wrong or proceeds upon a mistaken assumption in regard to the existence or continuance of a statutory provision or is contrary to another decision of the Court."

40. Confronted with a situation similar in nature as the one that we have at hand when correctness of an earlier view expressed by the Court, in *Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another*, was doubted S. Ranganathan, J. who was a part to the decision in *Goodyear India Ltd.* (supra) observed in his concurrent decision in *Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc.*, thus:

12. I am quite conscious that the conclusion I have expressed here as to the vires of the provision impugned is contrary to the conclusion I reached in *Goodyear* on somewhat analogous provisions. I need not for the purposes of the present cases, express any final conclusion as to whether the conclusion in *Goodyear* was rightly reached in the context of the provisions of the statutes there considered or would need a second look and fresh consideration in the context of what has been said here. But, I should not I think, hesitate to accept the point of view now presented to us which appeals to me as more realistic, appropriate and preferable, particularly when I see that the view one way or the other would affect the validity of a large number of similar legislations all over India, merely because it may not be consistent with the view I took in *Goodyear*. Consistency, for the mere sake of it is no virtue. If precedent is needed to justify my change of mind, I may quote Bhagawati, J. (as he then was) in *Distributors (Baroda) P. Ltd. v. Union of India*, "We have given our most anxious consideration to this question, particularly since one of us, namely PN Bhagawati, J. was a party to the decision *Cloth Traders (P) Ltd. Vs. Additional Commissioner of Income Tax , Gujarat-I*, But having regard to the various considerations to which we shall advert in detail when we examine the arguments advanced on behalf of the parties, we are compelled to reach the conclusion that *Cloth Traders* case must be regarded as wrongly decided. The view taken in that case in regard to the construction of Section 80M must be held to be erroneous and it must be corrected. To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this we derive comfort and strength from the wise and inspiring words of Justice Bronson in *Pierce v. Delameter* AMY p. 18 a Judge ought to be wise enough to know that he is fallible and therefore ever ready to learn great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead and courageous enough to acknowledge his errors.

41. In the present case, when we notice that it is likely that this Court had erred in *Jagdish Debberma* (supra) in laying down the law that if the State Government does not approve an order of detention within a period of 12 days from the date of execution of the order, the order becomes non-est, we would have, but for the reasons that we indicate hereinbelow, refer the matter to a larger Bench for consideration.

42. In view of the fact that the present one is a case of preventive detention the detenu has been in custody for a fairly long time and when we are satisfied, for the reasons that we have already assigned, that the Petitioner's further

detention in custody is not permissible, we are not inclined to refer to a larger Bench examination of the correctness of the decision rendered in Jagdish Debbarma (supra), particularly, when we find that even without entering into this controversial aspect of the case, the present writ petition can be effectively disposed of. The question as regards the correctness of the position of law laid down in Jagdish Debbarma (supra) may, therefore, be examined in an appropriate case.

43. In the result and for the reasons discussed above, this writ petition succeeds. The impugned orders, dated 26.03.2005 and 10.06.2005, are hereby set aside and quashed. The Petitioner is hereby directed to be released from custody forthwith unless he is required to be detained in connection with any other case.

44. With the above observations and directions, this writ petition shall stand disposed of.

45. No order as to costs.