

(1968) 02 CAL CK 0029
In the Calcutta High Court
Case No : Criminal Misc. Case No. 407 of 1967

Kamakshya Mukherjee

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 13-02-1968

Acts Referred:

Preventive Detention Act, 1950 — Section 3(2)

Citation : AIR 1968 Cal 596 : (1969) 1 CALLT 210 : (1968) CriLJ 1541 : 73 CWN 42

Hon'ble Judges : R.N. Dutt, J; N.C. Talukdar, J

Bench : Division Bench

Advocate : Manindra Mohan Sinha and Rabindra Narayan Chakraborty, for the Appellant; Dilip Kumar Dutt, for the Respondent

Judgement

N.C. Talukdar, J.—This Rule was issued upon an application u/s 491 of the Code of Criminal Procedure, filed on behalf of the detenu, Kamakshya Mukherjee, praying for a writ and/or direction in the nature of habeas corpus against the State of West Bengal, the District Magistrate, Jalpaiguri and the Superintendent of Jail, Jalpaiguri.

2. The applicant before us has been detained u/s 3(2) (a) of the Preventive Detention Act 1950 (Act IV of 1950) by an order, being order No. 16-P.D.A. dated 9-8-67 passed by Shri S. P. Mallick District Magistrate, Jalpaiguri. By a further order No. 16A-P.D.A of 1967, bearing the same date, the petitioner was directed by the said District Magistrate to be detained in the Jalpaiguri Jail.

3. The order of detention, a copy whereof has been annexed to the petition moved in this court and marked as annexure "A", is in these terms:

"Group. "A"

Government of West Bengal Office of the District Magistrate, Jalpaiguri,

ORDER

No. 16 P. D. A.

Dated 9-8-67

Whereas I am satisfied with respect to the person known as Shri Kamakshya Mukherjee alias Haru son of Shri Jiten- dra Nath Mukherjee of Ukilpara, P. S. Kotwali, District Jalpaiguri, that with a view to preventing him from acting in a manner prejudicial to the maintenance of public order it is necessary so to do.

Now, therefore, in exercise of the powers conferred by Section 3(2)(a) of the Preventive Detention Act, 1950 (Act IV of 1950), I make this order directing that the said Shri Kamakshya Mukherjee alias Haru be detained.

Given under my hand and seal of office Sd. S. P. Mallick District Magistrate. Jalpaiguri"

Stamp of the Dist. Magistrate.

Jalpaiguri.

4. The grounds of detention, which are in Bengali, have been annexed in annexure "A2" to the petition and the same will be considered in the proper context.

5. Mr. Manindra Mohan Sinha, Advocate (with Mr. Rabindra Narayan Chakraborty, Advocate) appearing on behalf of the detenu has challenged the order of detention on a three-fold ground. The first contention of Mr. Sinha is that grounds Nos. 1 to 4 and 6 of the grounds of de-tention are vague, preventing the applicant from making an effective representation to the authorities. His further submission in this connection is that there is no reasonable "nexus" between the purpose of the detention and the grounds therefor, which are mala fide and do not establish the allegation that the detenu was acting in a manner prejudicial to the maintenance of public order. The next contention of Mr. Sinha is that ground No. 5 is clearly a non-existent one and contains apparently incorrect dates, namely, the 2nd July 1067 stated to be the date of theft and the 11th July 1967, stated to be the date of the intimidation given. The third and the last ground urged by Mr Sinha is a material one, going to the very root of the order of detention, and is that the order of detention having been passed while the petitioner was already in jail custody, is clearly invalid and the consequent detention on the basis thereof is not sustain-able in law.

6. Mr. Dilip Kumar Dutt, Advocate appearing on behalf of the Respondents has urged that grounds Nos. 1 to 4 and 6 are neither vague nor non-specific as alleged or at all and there is a reasonable "nexus" between the grounds of detention and the purpose of the same; that ground No. 5 is not incorrect on account of the purported mistake regarding the two dates as mentioned therein and is not therefore a non-existent one, because it will appear from the original grounds of detention, as produced in this court, that the said two dates have been correctly mentioned therein as the 17th July, 1967 and the 21st July 1967

respectively; and that the order of detention having been made served on the petitioner on 9-8-67 after the final report was filed and the order of discharge was passed on the same date by the learned Sub-divisional Magistrate. Jalpaiguri in the relative case, namely. Jalpaiguri Kotwali P. S. Case No. 24, dated 18-7-67 u/s 461/380 I. P. C. the impugned order of detention is clearly a valid one.

7. We will now proceed to examine the grounds of detention and the relative affidavits filed to find out their bearings on the respective contentions as catalogued above. The first contention of Mr. Sinha appears to be more technical than real. Ground No. 1 relates to the incident dated the 25th January, 1967 at 10-30 P M involving one Bura Raikut of Raikutpara. It has been challenged on behalf of the petitioner in paragraph 7(1) of the petition as vague, there being no indication that any complaint was made either to the police or in Court relating to the alleged incident. In paragraph 6(i) of the Affidavit-in-opposition, affirmed by Shri Suhrid Pra,sanna Mallick District Magistrate, Jalpaiguri, it has been denied that the said ground is vague and it has been averred that the injured Bura alias Santu Raikut lodged an information with the police on 26-1-67 at 10-55 a m being G. D. Entry No 1243, dated 26-1-67 of Kotwali Police-station, Jalpaiguri, specifically mentioning the detenu as one of the assailants. The second ground relates to an incident dated the 6th February 1967 at 12-15 p m. when the detenu and his companions being armed with deadly weapons assembled together for assaulting Shri Bura Raikut but fled away on the appearance of the police. In paragraph 7(ii) of the petition, the said ground has been challenged as vague there being no details regarding the place where the purported offence was committed and there being no indication that any complaint was made either to the police or in court. The allegations were further challenged as false, imaginary and unreal. In paragraph 6(ii) of the Affidavit-in-opposition, the said allegations have been denied and it has been specifically mentioned that over the said incident an information was lodged with the Kotwali Police-station, being G D No 308, dated 6-2-67 by one Gobinda Roy by telephone. The third ground relates to a mutual fight between two groups on the 16th May, 1967 at 10 p.m. when the detenu and his companions being armed with deadly weapons sided with the Ukilpara group. This ground also was described in the petition as vague and lacking in details as to the place of occurrence. The District Magistrate in paragraph 6 (iii) of his Affidavit-in-opposition has averred that in connection with the said incident a telephonic message was sent to the Kotwali Police station and G. D. Entry No. 986, dated 16-5-67 was recorded at 7.46 p.m. whereupon the police rushed to the spot and found that the detenu was one of the miscreants and that an information was thereafter lodged, being G- D- Entry No. 994, dated 16-5-67, at 22,30 hrs. The fourth ground brings to light an incident dated the 8th June, 1967 at night when some iron beams were stolen from the compounds of the Sonaula School. A case was started over the same u/s 379 IPC against the detenu and his associates for having committed the said theft but during the enquiry, due to intimidation by the detenu and his associates, the witnesses were frightened and ultimately the petitioner could not be sent up for trial. This

ground was also described to be vague by the petitioner in paragraph 7 (iv) of the petition inasmuch as no names of the witnesses so threatened or the time and place of the purported intimidation could be given therein. The District Magistrate in paragraph 6 (iv) of his Affidavit-in-opposition has stated that the detenu was not named in the FIR but in course of the investigation in Kotwali PS Case No. 23 dated 8-6-67 u/s 379 IPC and from the statements recorded in course thereof by the investigating officer, the name of the detenu did transpire as one of the cul-prits having committed the theft. It was further averred therein that the petitioner had intimidated some of the material witnesses who wanted to depose against him in the afternoon of the 8th June, 1967 and their names are Mahabir Jha and Amir Misra, Chowkidars of the Sonaula High School. The case ultimately ended in "final report "true" " and the same was accepted as such by the Sub-divisional Magistrate, Jalpaiguri and it was clearly mentioned in the said final report that the detenu was one of the suspects. Ground No. 6 relates to an incident dated the 27th July, 1967 when the brother of the detenu, namely, Bishu Mukherjee, struck two of the residents of the town with knife and injured them seriously. In the relative case started over that incident u/s 307/ 824 I. P. C., being case No. 32, dated 28-7-67 of the Kotwali Police-station, the detenu intimidated two witnesses on the 29th July, 1967 and the said persons became nervous and were reluctant to give evidence. The said ground further related to another incident of theft in the night of the same date when a theft was committed in the ration shop of one Anil Bose in Ukilpara. During the investigation of the case started over the said incident, it transpired that the detenu, his brother and some others were involved in the said offence and that witnesses had actually seen the stolen articles being taken away in a car, W.G.V. 1819, being driven by the detenu's brother, Sambhu Mukherjee. Due to intimidation of the said witnesses on 29-7-67 they got frightened and as such the said case ultimately could not be sent up for trial. This ground was also challenged as vague and improper in paragraph 7 (iv) of the petition because the names of the witnesses or the place where the witnesses were intimidated were not given. The allegation of theft at ration shop was denied and it was stated that the name of the detenu was not mentioned in the FIR, while the names of the witnesses to the occurrence have also not been given. In paragraph 6 (vi) of the Affidavit-in-opposition, it was averred that from the case diary of case No. 32, dated 28-7-67 u/s 324/307 I. P. C. and the history-sheets it appears that the detenu had actually threatened the witnesses with dire consequences if they deposed against his brother who was an accused in the said case. It was further stated that Makhan Ghosh, Abhoy Dam, Dulu Nag and others who were the witnesses to the occurrence of the case under reference were in fact threatened on the 28th and the 29th July, 1967 at or near the place of their respective residences at Naksalbari between 08-48 hrs. to 20.30 hrs. and 19-00 hrs. to 22-09 hrs. respectively. So far as the theft in the ration shop is concerned, it was stated in the said Affidavit-in-opposition that in course of the investigation of the Kotwali P.S. Case No. 38 dated 28-7-(sic) u/s 461/380 I. P. C., the name of the detenu transpired and many persons saw him moving suspiciously at the place of

occurrence and on the night in question witnesses Anil Chandra Bhau-mik, Bikash Chakraborty, Nripendra Chandra Guha had actually seen the detenu committing the alleged theft but being terrorised they did not depose and as such the case ended in "final report "true" ". The detenu was however named as one of the suspects in the said final report. It would appear therefore that there is a reasonable "nexus" between the purpose of detention and the grounds of detention, which are not mala fide as alleged or at all. The materials on record as traversed above, make out the allegation that the detenu was acting in a manner prejudicial to the maintenance of public order,

8. We will now consider if the ground are in any way vague. Mr Sinha has argued in this context that the detention of a person without a trial is a serious encroachment on his personal freedom and therefore each of the grounds is to be carefully sifted or there must be a strict compliance with the letter of the rule, as the case may be. This is undoubtedly so. We may refer in this connection to the case of Dr. Ram Krishan Bhardwaj Vs. The State of Delhi and Others, . Their Lordships have observed at p. 320 of the said judgment that "Preventive Detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watch-ed and enforced by the court.....

We are of opinion that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under Clause (6) of Article 22". Therefore, it is clear that if this be not done, the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of Article 21 of the Constitution of India. Their Lordships of the Supreme Court have again observed in the case of Dr. Ram Manohar Lohia Vs. State of Bihar and Others, that "If a man can be deprived of his liberty under a rule by the simple process of the mak-ing of a certain order, he can only be so deprived if the order is in terms of the rule Strict compliance with the letter of the rule is the essence of the matter. We are dealing with a statute which drastically interferes with the personal liberty of people, we are dealing with an order behind the face of which a court is prevented from going.....But it would be legitimate to require in such cases strict observance of the rules If there is any doubt whether the rules have been strictly observed, that doubt must be resolved in favour of the detenu." These are therefore the principles which are to be borne in mind as we approach the question for a proper determination thereof. Now, what is vagueness? The expression "vague" in relation to statements has been defined in the Oxford English Dictionary inter alia as "couched in general or indefinite terms" or "not precisely expressed". It is indeed a relative term and a mixed concept--partly objective and partly subjective. The say-ine that "language has been given to us to conceal our thoughts and not to express them" may be good as an epigram but bad in relation to grounds of detention served on the detenu. We may again for example talk much but say little This will not also do For determining vagueness, each case must ultimately depend on its own facts. Subject to that,

the proper yard-stick according to us to find out vagueness is whether the said grounds as served on the detenu enable him to make an effective representation to the authority concerned. Anything short of that will be long off the mark and prejudice the detenu. In the case of *Durgadas v. Rex*, reported in AIR 1949 All 148 C. J. Malik, Mr. Justice Raghubar Dayal and Mr. Justice Wanchoo (as His Lordship then was) -- C. J. Malik delivering the judgment -- observed at p. 153 that ""The grounds and particulars must not be vague, indefinite or incomplete and must convey sufficient information to the detenu to enable him to make a representation that the detaining authority was wrong in its belief that his detention was necessary in the interest of public safety, etc." C. J. Kania who delivered the majority judgment in the case of *The State of Bombay Vs. Atma Ram Sridhar Vaidya*, observed at page 164 of the said judgment as follows; What is meant by vague? Vague can be considered as the antonym of "definite". If the ground which is supplied is incapable of being understood or defined with sufficient certainty it can be called vagueIt must vary according to the circumstances of each case". In the case of *Dr. Ram Krishan Bhardwaj Vs. The State of Delhi and Others*, , already referred to above, their Lordships considered the observations made in *The State of Bombay Vs. Atma Ram Sridhar Vaidya*, that "On this interpretation of Art. 22 (5) two questions arise for consideration; first, whether the ground mentioned in sub-para (e) is so vague as to render it difficult, if not impossible, for the petitioner to make an adequate representation to the appropriate authorities, and second, if it is vague, whether one vague ground among others which are clear and definite, would infringe the constitutional safeguard provided in Art 22 (5)". The point for consideration therefore is whether there is any such ground in the grounds of detention of this case as stated and discussed above, which can be called vague as alleged or at all. Having examined the said grounds, we are afraid that we are unable to agree with the contention of Mr. Sinha about the purported vagueness of the grounds served. In our view the sine qua non of a ground which is not vague or indefinite is not a mechanical cataloguing of all the details. In the case of *Thakur Prasad Bania and Others Vs. The State of Bihar*, . Mr. Justice Jagannadhadas considered the principles laid down in *Dr. Ram Krishan Bhardwaj Vs. The State of Delhi and Others*, and observed that "The obligation of the Government to furnish grounds which are not vague cannot be taken to mean that they must furnish every meticulous detail" In view of the principles laid down in the above-mentioned cases, there appears to be no vagueness about the meaning of the expression "vague". We are satisfied from the grounds of detention in this case that the detenu could have no possible grievance against the order of detention because of the vagueness of any one of such grounds and the first contention of Mr. Sinha therefore fails.

9. We will now consider the next contention of Mr. Sinha as to the purported incorrectness of ground No. 5 rendering it thereby to be a non-existent one. Mr. Sinha has contended that the date of theft as mentioned in the said ground, namely. 2-7-67 and the date of intimidation as given therein, being 11-7-67 are

clearly incorrect and that the names of the witnesses threatened have not also been given and the detenu was not also arrested between the said dates. In paragraph 6 (v) of the Affidavit-in-opposition the District Magistrate, Jalpaiguri has averred that the occurrence took place on the night of 17-7-67 and not on 2-7-67 as alleged and that the detenu had actually intimidated the witnesses Ram Ratan Mahato. Khagendra Chakraborty, Dhirendranath Dey. Sankardas Jadav and others on 21-7-67. It was further stated therein that because of the intimidation the witnesses were not willing to depose against the detenu and the case had to end in final report, which however contains the name of the detenu as one of the suspects. In support of his contention, Mr Sinha placed before the court the copy of the grounds of detention as served on his client, wherein the said two dates of theft and of intimidation undoubtedly appear to be somewhat illegible. Mr. Dilip Kumar Dutt. Advocate appearing on behalf of the respondent has however produced the original grounds of detention before us and having gone through the same we find that the said two dates have been clearly mentioned as 17-7-67 and 21-7-67 respectively. It cannot therefore be held that the said ground is incorrect and non-existent, vitiating the detention thereby. The satisfaction of the appropriate authority has been on the basis of these materials and it must be remembered that the sufficiency of the grounds in the sense whether they could give satisfaction to the authority is not a matter for examination by the courts As was observed by their Lordships of the Supreme Court in the case reported in Dr. Ram Manohar Lohia Vs. State of Bihar and Others, that "Courts are only entitled to look at the face of the order.....

The satisfaction of the Government which justifies an order under the rule is a subjective satisfaction. A court cannot enquire whether grounds existed which would have created that satisfaction on which alone the order could have been made in the mind of a reasonable person. We therefore hold that the said ground is neither incorrect nor non-existent and accordingly the second contention of Mr Sinha also fails.

10. The last contention of Mr. Sinha is of some importance and is a point which has compelled consideration in various cases. Mr. Sinha has urged that the order of detention has been passed while the detenu was in jail custody and as such the said order is per se illegal and invalid and the consequent detention is bad. We must point out however that there cannot be any such absolute or general proposition of law and consequently an absolute and unqualified answer thereto. The point involved has got different facets and has to be considered against the back-drop of the facts and circumstances of each case. The question in fact resolves itself into three different aspects. In the first instance we will have to consider the case where the petitioner was already detained in jail custody as a detenu when the impugned order of detention was served on him. In the second place we will have to consider the case where the petitioner was being detained as an under-trial or as a convicted person when the order of detention was made. Thirdly we will have to consider a case where the petitioner was being detained as an under-trial or a convicted person, when the order of detention

was served on him.

11. To ascertain the correct position with regard to cases where the petitioner was already detained in jail custody as a detenu when the subsequent order of detention was served under the Preventive Detention Act 1950 or under the Defence of India Act and Rules, 1962, it would be pertinent to consider the relevant decisions on the point. We may refer in this connection to the case of AIR 1945 18 (Federal Court) where the original order of detention dated the 19th March, 1942 passed under the Defence of India Rules was cancelled by a fresh order of detention dated the 3rd July, 1944 Chief Justice Zafrulla Khan, held therein that this "will not justify any inference of fraud or abuse of power" and observed at page 20 that "But where the earlier order of detention is held defective merely on formal grounds, there is nothing to preclude a proper order of detention being based on the pre-existing grounds themselves, especially in cases in which the sufficiency of the grounds is not examinable by the courts. There is equally no force in the contention that no order of detention can be passed against a person who is already under detention." In a subsequent case, namely Godavari Shamrao Parulekar Vs. State of Maharashtra and Others, wherein the appellants were first detained on November 7, 1962 under Preventive Detention Act, 1950 but that order was revoked by the Government and after the appellants were released and rearrested under Rule 30 of the Defence of India Rules, the orders of detention were served on the appellants in jail. Their Lordships held that the orders of detention so passed by the State Government and their service on the appellants in jail were perfectly valid and did not make the detention illegal. The appellants according to their Lordships "were detained not as under-trials or as convicted persons but as detenues and hence the case of Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, and Makhan Singh Tarsikka Vs. The State of Punjab, did not apply in the present case." The next case is the recent decision of the Supreme Court, which is not yet reported, in Writ Petns. Nos. 68, 70, 79, 89 and 92 of 1967 (now reported in AIR 1967 SC 1797) Avtar Singh v. State of Jammu and Kashmir dated the 9th June, 1967. Their Lordships while considering therein the question raised as to whether the order of detention was illegal inasmuch as it was served on the detenues while they were in jail, approved of the principles laid down in the case of Godavari Shamrao Parulekar Vs. State of Maharashtra and Others, but held that in the special circumstances of the case before their Lordships it was distinguishable from the two cases viz. those of Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, and Makhan Singh Tarsikka Vs. The State of Punjab, and that "on 12th May, a fresh order of detention on identical grounds, on which the earlier order dated 11th March 1966 had been made, could not be passed justifiably, because that earlier order dated 11th March, 1966 was a valid order and had already taken full effect." In the case of A.K. Gopalan Vs. The Government of India, , their Lordships referred to the case of Godavari Shamrao Parulekar Vs. State of Maharashtra and Others, and held at p. 819 that in that case "it was not necessary to carry out the empty formality of release from Jail

under the order of cancellation and then to arrest the persons released immediately they came out of jail and to serve on them the new order of detention dated March 4, 1965." In another recent decision of the Supreme Court which is not yet reported, in Writ Petns. Nos. 69 and 71 of 1967 D/-14-8-1967, (now reported in Jagdev Singh Vs. State of Jammu and Kashmir,) Jagdev Singh v. State of Jammu and Kashmir their Lordships observed that "We are therefore of opinion that the view taken in Avtar Singh's case in so far as it says that no fresh order can be passed even to correct any defect in an order continuing detention under Rule 30-A (9) is not correct" and approving of the decisions in Ujagar Singh Vs. The State of The Punjab, and in Godavari Shamrao Parulekar Vs. State of Maharashtra and Others, ultimately held that "these cases certainly show that fresh order of detention can be passed on the same facts. If for any reason, the earlier order of detention has to be revoked by the Government." Accordingly, we hold that where the petitioner was detained not as an under-trial or a convicted person but as a detenu, the service of a fresh order of detention on him is not per se illegal.

12. We will now consider the second aspect of the question, viz., the cases where the petitioner is detained as an under-trial or convicted person, when the order of detention was made under the Preventive Detention Act, 1950, or the Defence of India Act and Rules, 1962 The principles laid down in the cases on this point are cogent and clear. In the case of Maledath Bharathan Malyali Vs. The Commissioner of Police, Chief Justice Chagla who delivered the judgment observed at p 205 that "But they cannot pursue both the rights at the same time, because, on the facts of this case, it is apparent that these two rights are inconsistent and cannot be exercised at the same time, they cannot detain the applicant under the Security Act and at the same time carry on the investigation without providing the applicant with the safeguards to which he is entitled under the law.....Therefore, in our opinion, when the detaining authority makes up his mind to detain a person who is alleged to have committed an offence, then the detaining authority has made his choice and it would not be permissible to him to investigate the offence while still keeping the person under detention and not complying with the provisions of the law with regard to investigation." The next decision on the point is by Chief Justice Thadani and Mr Justice Ram Labhaya of the Assam High Court in the case of Labaram Deka Barua and Another Vs. The State, wherein Mr. Justice Ram Labhaya has observed at p. 15 (of CWN) = (at p. 44 of AIR) "A man can act in a manner prejudicial to the maintenance of public order if he is at large.....When a person is already in detention, it is obvious that another order of detention is not necessary. He is not in a position to act in a manner prejudicial to the maintenance of public order. The detaining authority in these circumstances, cannot feel satisfied that an order of detention is necessary for any of the purposes mentioned in Section 3 of the Act" Chief Justice Thadani observed in the same case at page 17 that "it is not desirable that the detention of a person under a Detention Act should run concurrently with his detention in pursuance of his being accused of a non-bailable offence." In the case of Mohd.

Ishaq Ilmi Vs. The U.P. State and Others, , their Lordships found at p. 796 that -

"If the person is convicted and sentenced for alleged offences under the ordinary law the necessity for an order of detention under the Preventive Detention Act ceases to exist at least until he has served out his sentence. Even an order of detention passed shortly before the expiry of the sentence and in anticipation of the release would not, in our opinion, necessarily be wrong But to order detention under the Preventive Detention Act while the person is already under detention under the ordinary law awaiting his trial is, to say the least, "undesirable" even though it may not be wanting in good faith on the part of detaining authorities."

The Supreme Court recently considered the said point in two decisions. In the case of Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, , their Lordships observed at p 338 that

"As abstract proposition of law, there may not be any doubt that Section 3(1)(a) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail; but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail.....

In dealing with this question, again the considerations of proximity of time will not be irrelevant. On the other hand, if a person who is undergoing imprisonment, for a very short period, say for a month or two or so, and it is known that he would soon be released from jail, it may be possible for the authority to consider the antecedent history of the said person and decide whether the detention of the said person would be necessary after he is released from jail, and 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."

In the subsequent case of Makhan Singh Tarsikka Vs. The State of Punjab, Mr. Justice P. B. Gaiendragadkar (as His Lordship then was) who delivered the judgment observed at pp 1125 and 1126 as follows:

"In fact, as we have already pointed out in the case of Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, as an abstract proposition of law, this Court has held that an order of detention can be validly made against a person in jail custody. Whether or not the said making of the order is valid in a particular case may have to be determined in the light of the relevant and material facts.When a person is in jail custody and criminal proceedings are pending against him the appropriate authority may, in a given case, take the view that the criminal proceedings may end very soon and may terminate in his acquittal. In such case, it would be open to the appropriate authority to make an order of detention, if the requisite conditions of the Rule or the section are satisfied, and serve it on the person concerned if and after he is acquitted in the said criminal

proceedings."

It would appear therefore that there is no cloud on the point, and even if there was any, the same has been lifted by the principles enunciated in the above-mentioned decisions that when the petitioner is being detained as an under-trial or a convicted person, the order of detention can be made.

13. We may now pass on to consider the third aspect of question, as to whether in a case when the petitioner was already detained as an under-trial or as a convicted person, the subsequent order of detention can be served on him, before he is released. In this connection, it would be pertinent to consider as to what is meant by the expression "preventive". The word "preventive" is used in contradistinction to the word "punitive". The expression "preventive detention" therefore means that restraint whose object is to prevent, probable, and in some cases possible, activity on the part of a person which is deemed prejudicial and which is apprehended from him on the ground of his past conduct. Mr Justice Manohar Persad and Mr. Justice M. A Ansari have observed in the case of *M. A. Rahman v. Hyderabad State*, reported in AIR 1950 Hyd 66 at p. 67 that

"it is obvious that where such prejudicial conduct on the part of a person it impossible, e.g. when he is already in jail either undergoing a sentence of imprisonment passed by a court of law or is awaiting, without being on bail, any Investigation. enquiry or trial, the exercise of power under preventive detention would be meaningless and improper".

Therefore, so far as this aspect of the question is concerned we have no hesitation to hold, on the basis of all the decisions referred to above, that although in such cases, an order of detention can be made it cannot however be served on the detenu while he is still in jail custody and the said order, if so served, will be vitiated as the very purpose of the said, detention would be frustrated thereby. The position however in the present case is entirely different and the principles laid down in the above-mentioned cases would not apply to the facts of the present case in favour of the detenu. We may point out in this connection that Mr. Sinha had not taken this point in the body of the petition, although he had subsequently incorporated the same in the grounds, being ground No. (F). Accordingly, as was submitted by the learned Advocate appearing on behalf of the Respondents, it was not possible for the Slate to put any Affidavit-in-Opposition to the facts involved in the said issue. Mr. Sinna also in his fairness was conscious of this but submitted that detention without trial is a serious encroachment on the personal freedom of a person and as such it was just and fair that he should be allowed to argue the said point. We have allowed the said prayer of Mr. Sinha and have considered the said point in all its aspects *ex debito justitiae*. Mr. Dilip Kumar Dutt, Advocate appearing on behalf of the respondents, has placed before us the original records to show that in the relevant case, in connection whereof the detenu was arrested and kept in jail custody, namely the Jalpaiguri Kot-wali P. S. Case No. 24 dated 18-7-67, under S. 461/380 I. P. C., a final report was in fact submitted by the police on 7-8-67

and an order was passed by the sub-divisional Magistrate. Jalpaiguri on 9-8-67 accepting the said final report and discharging the detenu who was therefore no longer in jail custody. It was only thereafter that the present order of detention, a copy whereof has been annexed and marked as annexure "A" to the petition, was served on the petitioner. It cannot accordingly be said that the impugned order of detention in this case was served on the petitioner while in jail custody. The wind therefore is taken out of the sails if Mr. Sinha and the principles laid down in the cases referred to above with which we fully agree, do not enure to the benefit of the detenu. In the facts and circumstances of the present case. Accordingly, the third and the last contention of Mr. Sinha also fails.

14. In the result, we do not find any reason to interfere with the impugned order of detention and the relative Rule is hereby discharged.

R.N. Dutt, J.

15. I agree.