

(2009) 10 KL CK 0035

In the High Court Of Kerala

Case No : Writ Petition (Criminal) No. 368 of 2009 (S)

Sindhu K.

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 21-10-2009

Acts Referred:

Constitution of India, 1950 — Article 213, 357

Criminal Procedure Code, 1973 (CrPC) — Section 10(1), 20, 20(1), 20(2), 20(3)

Kerala Anti-Social Activities (Prevention) Act, 2007 — Section 10(4), 3, 3(1), 3(2), 3(3)

Citation : (2009) 3 KLJ 601

Hon'ble Judges : R. Basant, J; M.C. Hari Rani, J

Bench : Division Bench

Advocate : C. Rajendran, for the Appellant; K.K. Ravindranath (A.D.G.P.), for the Respondent

Final Decision : Allowed

Judgement

Basant, J.—Can an Additional District Magistrate pass an order u/s 3(2) of the Kerala Anti-Social Activities (Prevention) Act (hereinafter referred to as the KAAPA) even when he happens to be temporarily in charge of the office of the District Magistrate. This is the crucial question to be decided in this writ petition. To the vitally relevant and skeletal facts first: The petitioner is the wife of a detenu by name Ravi kumar, against whom the 3rd respondent. Deputy Collector (General) and Additional District Magistrate in charge has passed the impugned order of detention Ext. P1 u/s 3(2) of the KAAPA. A report was submitted to the 2nd respondent, District Magistrate, by the 4th respondent District Superintendent of Police. That report u/s 3(1) is dated 11/6/2009 (signed on 13/6/2009) and a copy of the same is produced as Ext.P3. That report is addressed to the District Magistrate, Kollam, the 2nd respondent. Long later, we find the 3rd respondent - Deputy Collector (General) and Additional District Magistrate in charge of the office of the District Collector and District Magistrate proceeded to pass Ext.PI order. The 2nd respondent, District Collector and District Magistrate, Kollam was temporarily absent from duty at the relevant

time, During the period 27/6/2009 to 09/08/2009, the District Magistrate was not available to perform his duties and he had left Kollam on the afternoon of 26/6/2009 handing over charge to the 3rd respondent herein. It is stated that the charge was handed over by the 2nd respondent to the 3rd respondent; but no documents are produced to prove such handing over of charge. The 3rd respondent, who thus started discharging duties as the District Magistrate in charge, had proceeded to pass the impugned order on 18-7-2009. The detenu was arrested on 30/7/2009. It is submitted that orders u/s 3(3) and 10(4) have all been passed subsequently,

2. Long later, by G.O (Rt) No.2777/2009/RD dated 10/08/2009, the Government had ratified the act of the 2nd respondent handing over charge to the 3rd respondent. The said order dated 10/08/2009 indicates that full additional charge had been handed over by the 2nd respondent to the 3rd respondent before he left Kollam on 26/6/2009. The 2nd respondent had left Kollam for attending the third phase of Mid Career Training programme, MCT for LA.S 2009 held at Mussoorie from 29/6/2009 to 21/08/2009.

3. Before us, the learned counsel for the petitioner and the learned Additional Director General Prosecutions have advanced their arguments. The learned counsel for the petitioner has raised various contention to assail the impugned order of detention and the consequent detention; but we feel, in the view which we propose to take, that it is necessary to consider only the challenge raised on the first ground, that is

the 3rd respondent does not have the legal and jurisdictional competence to pass any order u/s 3(2) of the KAAPA.

4. The Ground: It will be necessary and apposite for this court at the very outset to survey the relevant provisions of the statute. Section 3(1) and 3(2) of KAAPA read as follows:

3. Power to make orders for detaining known Goondas and known Rowdies:-

(1)The Government or an officer authorised under sub-section (2). may, if satisfied on information received from a Police Officer not below the rank of a Superintendent of Police with regard to the activities of any Known Goonda or Known Rowdy, that with a view to prevent such person from committing any anti-social activity within the State of Kerala in any manner, it is necessary so to do, make an order directing that such person be detained.

(2) If having regard to the circumstances prevailing, or likely to prevail in any area, the Government, if satisfied that it is necessary so to do, may, by order in writing, direct that during such period as may be specified in the said order, the District Magistrate having jurisdiction may exercise the powers under sub-section (1) in respect of such persons residing within his jurisdiction or in respect of such persons not so resident who have been indulging in or about to indulge in or abet any antisocial activities within such jurisdiction.

(Emphasis supplied)

5. Section 3(1) confers power on the Government to pass an order of detention. Section 3(1) also states that an officer authorised by the Government u/s 3(2) can also pass an order subject of course to approval by the Government u/s 3(3). Section 3(2) speaks of the power of the Government to authorise the District Magistrate having jurisdiction to exercise the powers under sub Section (1). There can be no perpetual delegation to anyone. The same can be only for such specified periods. In exercise of the powers u/s 3(2), the Government had issued notification from time to time and the relevant notification in force on the date of the impugned order reads as follows;

S.R.O.No. 312/2009: In exercise of the powers conferred by sub-section (2) of Section 3 of the Kerala Anti-Social Activities (Prevention) Act, 2007 (Act 34 of 2007) the Government of Kerala, having regard to the circumstances prevailing in all the districts in the State are satisfied that it is necessary so to do, hereby direct the District Magistrate of all the districts to exercise the powers under sub-section (1) of Section 3 of the said Act in respect of persons residing within their jurisdiction or in respect of persons who have been indulging in or about to indulge in or abet any anti-social activities within such jurisdiction for a period of one year with effect on and from 21st April, 2009.

Explanatory Note: (This does not form part of the order, but is intended to indicate its general purport)

As per sub-section (2) of Section 3 of the Kerala Anti-Social Activities (Prevention) Act, 2007 (Act 34 of 2007), Government of Kerala had directed the District Magistrates of all the districts in the state to exercise the powers under sub-section (1) of Section 3 of the said act in respect of persons residing within their jurisdiction or in respect of persons who have been indulging in or about to indulge in or abet any antisocial activities within such jurisdiction for a period of one year vide Order No.17589/SSA5/2008/Home dated the 9th April, 2008, published as S.R.ONo. 372/2008 in the Kerala Gazette Extraordinary No.740 dated 10th April, 2008. The said period will expire on 20th April, 2009. Government have decided to authorise the District Magistrates in all the districts of the State under sub-section (2) of Section 3 of the said Act for a farther period of one year on and from 21st April 2009.

The order is intended to achieve the above object.

(Emphasis supplied)

It may be relevant to note that the notification clothes "the District Magistrates of all Districts" only and not the officials holding charge of the District Magistrate from time to time.

6. The District Magistrate is not defined under the KAAPA. To ascertain who a District Magistrate u/s 3(2) is, one has to take the assistance of the Code of Criminal Procedure (the Code hereafter). Section 20 of the Code speaks of

appointment of the Executive Magistrates including the District Magistrates-Sections 20 (1) to 20(3) appear to be relevant for our purpose. We extract Sections 20(1) to (3) of the Code.,

20. Executive magistrates: (1) In every district and in every metropolitan area, the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.

(2) The State Government may appoint any Executive Magistrate to be an Additional District Magistrate, and such Magistrate shall have [such] of the powers of a District Magistrate under this Code or under any other law for the time being in force [as may be directed by the State Government].

(3) Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the executive administration of the district, such officer shall, pending the orders of the State Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

(Emphasis supplied)

7. A District Magistrate can be appointed only by the State Government. To be a District Magistrate, the incumbent has to show his appointment u/s 20(1) of the Code.

8. The Code contemplates the appointment of Additional District Magistrates. Section 20(2) deals with appointment of Additional District Magistrates. An Additional District Magistrate does not, ipso facto, have powers of the District Magistrate. Section 20(2) makes it clear that such Additional District Magistrate shall have such of the powers of the District Magistrate under the Code or under any other law for the time being in force "as may be directed by the State Government". We may at once note that there is no contention that there has been any notification or direction by the Government specifically conferring on Additional District Magistrates like the 3rd respondent powers u/s 3 of the KAAPA.

9. Section 20(3) deals with temporary vacancies in the office of the District Magistrates. It declares that an incumbent succeeding temporarily to the executive administration of the district shall have all the powers and perform all the duties respectively conferred and imposed "by this code" on the District Magistrate..

10. We may pause and look at the scheme of Section 2G(1) to (3). A District Magistrate can be appointed only u/s 20(1).. An Additional District Magistrate can be appointed u/s 20(2). He does not, ipso facto, on such appointment have all the powers of the District Magistrate; but he can exercise only such powers under the Code or any other law as may be directed by the State Government. An Additional District Magistrate is an Executive Magistrate. His powers to function as a District Magistrate under the Code or any other law must be traced to his appointment as such u/s 20(2) and a further direction from the State

Government of the nature of functions that he can perform under the code or under any other law.

11. Section 20(3) takes note of the possibility of temporary vacancies. An officer who succeeds temporarily to the executive administration of the District can exercise the powers of the District Magistrate. But Section 20(3) makes it crystal clear that only such powers under the Cr.P.C can be exercised. Reading of Section 20(2) in contra distinction with Sec. 20(3) makes it crystal clear that powers under the other laws (KAAPA is one such other law) cannot be exercised by a successor who temporarily discharges the duties of a District Magistrate in his absence. Even the Government cannot confer such powers on a temporary occupant in terms of Section. 20(3). To enable him to exercise such powers the Government must appoint him as District Magistrate u/s 20(1) or confer on him such powers to act under other laws u/s 20(2) of the Code.

12. The crucial question that we are called upon to decide is whether the 3rd respondent is a District Magistrate and he can exercise the powers u/s 3(2) in such capacity as District Magistrate or the successor temporarily discharging the duties of the 2nd respondent in his absence.

13. No one has a case that the 3rd respondent is a District Magistrate, He has admittedly not been appointed as one u/s 20(1) of the Code.

14. A District Magistrate gets authority to pass an order u/s 3(2) not under the KAAPA; but on the basis of a notification issued by the Government u/s 3(2) of the KAAPA. The instrument under which the District Magistrate gets powers under the KAAPA is the notification u/s 3(2). In fact, a District Magistrate derives his powers to pass an order u/s 3(2) not under the Act; but on the basis of a notification issued under the Act. The notification is to remain in force only for such period as may be specified in the notification.. It is brought to our notice that SRO No.363/07 was initially issued and the same was extended from time to time. It is thus that the notification dated 15/4/2009 extracted above was issued- The Government alone can pass the order u/s 3 of the KAAPA ordinarily. It can if circumstances warrant delegate its powers u/s 3(2). Such delegation must be by notification. Such delegation can be only to a District Magistrate. All District Magistrate are not reckoned as worthy of exercising such powers. They must be District Magistrates and they must be reckoned as worthy of such delegation by the Government Only then can they exercise delegated authority u/s 3(2). There cannot be blanket delegation. Circumstances must warrant delegation.. To specified District Magistrates for specified periods such delegation can be made by the Government u/s 3(2).

15. It will be apposite at this juncture to take note of the scheme of Section 3 and the enormity of the powers vested in the Government as also its delegate, the District Magistrate u/s 3 of the KAAPA. Freedom and liberty are the values most cherished under the Constitution. In a case of preventive detention intrusion is made into that sacra sancta right of liberty and freedom of the

individual A person is deprived of his liberty under the KAAPA not punitively for the contumacious and culpable acts committed by him; but only to prevent the possibility of commission of anti social activities in future. All precedents declare that the law of preventive detention is an unwelcome intrusion into the freedom and liberty of an individual; but that bitter pill has to be accepted and swallowed in the interest of societal safety and security. The Constitution, the legislatures and the courts have always been looking for checks and safeguards to ensure that unjust intrusions are not made into this paramount domain of individual freedom and liberty, it is unnecessary for us to refer to such safeguards and stipulations available under the constitution, the statutes and the precedents. Suffice it to say that it has always been zealously insisted that such powers must be exercised by superior, sublime, experienced and unbiased authorities competent to exercise such functions. An examination of the provisions of the KAAPA shows that the law insists that the sponsoring for detention can be done only by a police officer not below the rank of a Superintendent of Police. Even the duty of sponsoring is exclusively entrusted in the hands of very-high police functionaries - evidently to prevent and eliminate the possibility its misuse against the interests of the citizen.

16. It is in this context that we have to note that the power u/s 3 is primarily vested in the State Government and not on any other individual or functionary. However, considering the exigencies of such public duty, the Government is clothed with authority to delegate such power that too only for specified period to executive officials. The legislature, in its anxiety, appears to have trusted only District Magistrates when they chose to confer on the Government the power to delegate such authority. A District Magistrate is the highest executive functionary in a district. Ordinarily, the District Magistrate is an experienced person from the higher administrative service. The legislature, it appears to us, had granted permission to the Government to delegate such onerous responsibility only to a District Magistrate taking into account the high office which such District Magistrate occupies under the scheme of executive administration. The scheme of the Act therefore, it appears to us, is to insist that only the 14 specified officials who head the district administration, considering the high and responsible office which they hold, should alone be conferred with delegated authority to deny freedom and liberty of a citizen on suspicion. The law of preventive detention, it has often been described, is the jurisprudence of suspicion. The authority which is competent to deprive a citizen of his freedom and liberty must be of such height and sublimity that he will be able to deal with this jurisdiction with the requisite care, caution and circumspection. That appears to be the rationale of the legislature conferring the power on the Government, and if necessary for specified period, permitting delegation of such authority to the District Magistrates. Not every District Magistrate but only such District Magistrates who the Government feels can safely handle the sublime jurisdiction can be permitted to exercise such delegated authority that too for specified periods only.

17. In the instant case, the 3rd respondent is not a District Magistrate.. He is only an Additional District Magistrate. As an Additional District Magistrate, without dispute, the powers under the KAAPA have not been delegated to him u/s 20(2) of the Code. Needless to say, there can be no delegation u/s 3 of the KAAPA of any such powers to the 3rd respondent who is only an Additional District Magistrate and not a District Magistrate.

18. How then can the respondent justify the order passed by the 3rd respondent u/s 3 of the KAAPA. The learned A.D.G.P relies heavily on Section 13(2) of the Kerala Interpretation and General Clauses Act (hereinafter referred to as the "GC Act). We extract Section 13(2) below.;

13(2): Where, an Act confers a power or imposes a duty, on the holder of an office as such, then, unless the contrary intention appears the power may be exercised and the duty shall be performed by the holder of the office for the time being or by a person duly appointed to act for him or to be in charge of powers and duties of that office.

(Emphasis supplied)

19. The learned A.D.G.P contends that the District Magistrate u/s 3(2) and under the notification is not a persona designate, The powers are conferred u/s 3(2) only on the District Magistrate and not on any incumbent holding office of the District Magistrate. That being so, anyone who is the District Magistrate under law and who is competent to discharge the duties of a District Magistrate under law must be held to be the District Magistrate for the purpose of Section 3(2) and the notification and consequently it must be held that the 3rd respondent was the "District Magistrate having jurisdiction" referred to in Section 3(2) and in the notification and consequently the order passed by him is justified and is within his powers.

20. This calls for careful scrutiny of Section 3(2) as also the notification and Section 13(2) of the GC Act. A reading of Section 3(2) of the KAAPA shows that it is the District Magistrate having jurisdiction to whom the powers can be delegated by the Government An argument is advanced that the "District. Magistrate having jurisdiction" must include the District Magistrate legally competent to exercise the functions of the District Magistrate under law. He need not necessarily be a District Magistrate appointed u/s 20(1) contends the learned A.D.G.P.

21. We are unable to agree. The expression "District Magistrate having jurisdiction" appearing in Section 3(2) must be understood in the light of the expressions "his jurisdiction" and "such jurisdiction" appearing later in Section 3(2). They deal with territorial jurisdiction. There are 14 districts in the State and 14 District Magistrates. Each one can exercise jurisdiction only within the territory of his district. The expression "District Magistrate having jurisdiction" read in the context and in the light of the expressions "his jurisdiction" and "such jurisdiction" appearing later in Section 3(2) must definitely be held to mean the

District Magistrate having territorial jurisdiction and not any person occupying the seat of the District Magistrate temporarily to meet administrative exigencies. At any rate, the language of Section 3(2) cannot enable us to construe that any incumbent holding the office of the District Magistrate temporarily will also be competent to pass an order u/s 3(2) in exercise of the delegated authority.

22. The notification issued u/s 3(2) which we have already extracted above also refers only to the District Magistrates of the 14 districts and certainly the expression "District Magistrate" in the notification is not elastic enough to accommodate within it persons temporarily discharging the duties of the District Magistrate.

23. That takes us to Section 13(2) of the GC Act. We have already extracted Section 13(2). First of all, it must be noted that Section 13(2) can apply only where powers are conferred under an "Act". In this case the Act does not confer any power.

24. The Act only enables conferment of power by delegation and does not itself confer power on any District Magistrate- Conferment of power is under the notification issued u/s 3(2). Section 13(2), the language of the provision? makes it very clear can apply only where conferment of power is under an "Act". The expression "Act" is also defined in the GC Act and we extract below Section 2(3) of the GC Act.

2(3); "Act" shall mean a Proclamation or Act of Travancore or Cochin, an Act or Ordinance of Travancore Cochin, an Act passed by the Legislature of the State of Kerala, an Ordinance promulgated by the Governor under Article 213 of the Constitution or, where with respect to the State of Travancore-Cochin or Kerala the power to make laws is vested in the President or other authority under sub-clause (a) of Clause (1) of Article 357 of the Constitution, any law made in exercise of such power.

25. We have no hesitation to agree that the expression "law" will include Acts, rules and notifications in a generic sense; but the language of Section 13(2) clearly shows that the conferment of the power must be under an Act to attract Section 13(2) and the Act as defined u/s 2(3) does not at all refer to any notification. Though the expression "law" may include such notifications under the Act, in this case conferment of power must be held to be under the notification and not under the Act- For that reason, it appears to us that Section 13(2) may not specifically apply to a District Magistrate in charge like the 3rd respondent herein who is really only an Additional District Magistrate.

26. Moreover, it must also be seen that a contrary intention excludes the application of Section 13(2) of the Act.- Is there a contrary intention expressed in the KAAPA or under the Code to make Section 13(2) inapplicable to an Additional District Magistrate in charge and forbidding him from exercising powers u/s 3(2)? That is the next question to be considered. Contrary intention u/s 13(2) of the GC Act may be express or implied. There is nothing in the language of

Section 13(2) that insists on an express statement of the contrary intention in the statutes. We have already adverted to the fact that the Government delegates the powers only to a District Magistrate and to strictly come within the definition of District Magistrate, there must be a notification u/s 20(1) appointing the incumbent as a District Magistrate. The scheme of the KAAPA shows that delegated authority to exercise the onerous and sublime function of preventive detention is entrusted by the Government only to chosen and specified District Magistrates, Section 3(1) which insists that even the sponsoring must be by an authority of and above the rank of a Superintendent of Police does again persuade us to hold that only a District Magistrate *stricto sensu* can be clothed with jurisdiction to exercise the delegated authority u/s 3(2).

27. Thus considering the nature of the functions which a District Magistrate is to perform u/s 3(2), considering the language of the statutory provision in Section 3(1) and 3(2), considering the language of the notification issued u/s 3(2), considering the distinction between a District Magistrate who heads the District Executive and a subordinate Additional District Magistrate stepping into the shoes of a District Magistrate temporarily, considering the language of Section 13(2) of the GO Act and considering the language and the scheme of Sections 20(1) to (3) of the Code, we are of the opinion that only a District Magistrate notified u/s 20(1) can exercise the powers u/s 3(2) if there is a valid notification u/s 3(2). Exigencies of business may demand and warrant that the office of the District Magistrate does not fall vacant creating a vacuum. To meet the demands of other functions which the District Magistrate has to perform officially under the Code a subordinate may step into his shoes and function as such u/s 20(3) of the Code. In any view of the matter, we are unable to agree that any person called upon to discharge the duties of a District Magistrate temporarily can be held to be competent to exercise the powers u/s 3(2). Lower functionaries may be given charge of the District Collector District Magistrate in his absence depending upon the demands and the exigencies of business. In the absence of the District Collector/District Magistrate., they may have to discharge other less onerous, administrative statutory or financial functions. But all that cannot persuade this court to agree that the very solemn and responsible duty of choosing an appropriate case for preventive detention can be entrusted to such a lesser functionary in the district administration, temporarily stepping into the shoes of the District Magistrate to avoid the vacuum in Executive administration.

28. The learned A.D.G.P argues that the relevant stipulations of the Kerala Service Rules permit an officer to hold substantively or to officiate any two or more independent posts at a time. He relies on Rule 53 of Chapter 6 part (1) of the K.S.R. He relies on Government decision No.2 in G.O.P 319/72/finance dated 31/7/1972 to contend that when an officer is appointed to hold full additional charge of a post, he is competent to perform all the administrative, financial and statutory functions and duties in respect of that post The learned Government Pleader consequently contends that the 3rd respondent, who was given full additional charge by the second respondent and which decision of the 2nd

respondent was later on ratified by the Government by the order dated 10/08/2009 has requisite authority to act u/s 3(2).

29. We are unable to agree. Even assuming that subsequent ratification would justify the contention that on the basis of an order of the second respondent (which is not produced) full additional charge had been given to the 3rd respondent by the second respondent, it must be held that such handing over of the charge cannot clothe the 3rd respondent with requisite authority and competence to pass an order u/s 3(2) considering the nature of the powers and responsibilities which the incumbent has to perform u/s 3(2) of the KAAPA.

30. The learned A.D.G.P contends that if such a view were taken, a vacuum may be created in the temporary absence of the District Magistrate, The operation of the KAAPA would then come to a grinding halt if the office of the District Magistrate falls vacant temporarily, contends the learned A.D.G.P.C We are unable to accept this contention- There is no question of any vacuum or gap creeping in. The Government which has the requisite powers u/s 3(1) can always invoke such powers u/s 3(1). It is not essential or invariable that there must be a delegation at all points of time. In fact, the language of Section 3(2) shows that the delegation is only optional and. not essential or incumbent. The argument that a gap/vacuum would result stultifying the operation of the KAAPA cannot hence be accepted.

31. The learned counsel were requested to research and they submit that the question of an incumbent in temporary charge of the District Magistrate exercising the power u/s 3(2) has not been considered under the KAAPA so far. They have brought to our attention, two decisions of the Supreme Court in which lucid discussions of identical questions are available. The learned counsel first of all relied on Ajaib Singh v. Gurbachan Singh [AIR 1965 SC 1619]. That was also a case where the powers of preventive detention under the Defence of India Act was exercised by an Additional District Magistrate. The Constitution Bench took the view that a functionary who is not appointed as District Magistrate u/s 10(1) of the Code of Criminal Procedure then in force (corresponding to 20(1) of the present code) cannot be held to be a District Magistrate competent to invoke powers of detention under the Defence of India Act. That decision appears to be squarely on the point and apposite to the situation. But a later decision of the Supreme court considered the question again in Hari Chand Aggarwal Vs. Batala Engineering Co. Ltd., . That was a case where requisitioning of property was done under the Defence of India Act by an Additional District Magistrate who, as in the instant case, was holding charge as the District Magistrate in his absence. The learned Judges in that decision referred to the earlier decision of the Constitution Bench in Ajaife Singh (Supra) and held that the said case would have been most apposite but for the clear distinction that delegation under the relevant Act could not be done at all to anyone lower in rank than a District Magistrate, The latter decision held that the former decision of the Constitution Bench proceeded on that fundamental stipulation wherein any official below the

rank of a District Magistrate could never have been clothed with powers to exercise delegated authority. However, the latter decision in Hari Chand (Supra) in paragraph 11 the learned Judges referring to the earlier decision in Ajaib Singh (Supra) took the view that

one rule, however, emerges and clearly which is even otherwise unexceptionable that unless a person has been appointed under 10(1) of the Code he cannot be called a District Magistrate and that an Additional District Magistrate is below the rank of a District Magistrate

32. In Hari Chand (Supra) also the court held that an Additional District Magistrate in charge of the District Magistrate temporarily cannot exercise the functions under the delegated authority under the Defence of India Act. The learned Judges referred to an earlier decision of the Nagpur High Court in AIR 1944 84 (Nagpur) . In identical situation as in the instant case, the Nagpur High court had taken the view that the incumbent in office temporarily cannot exercise the functions conferred on him under the Preventive Detention law. In paragraph 8 of Hari Chand (Supra) the contention which found acceptance with the Nagpur court is summarised by the Supreme Court as follows.

The second was that the Act and the Rules made thereunder were special laws enacted to meet an emergency and they conferred extraordinary and drastic powers on the executive and it was precisely for that reason that it was imperative that those powers must be exercised with due sense of responsibility and with circumspection by an officer or authority of a certain status and experience and, therefore, that power had been delegated to the District Magistrate.

The learned Judges of the Supreme court accepted the conclusion of the Nagpur High Court on that second contention and stated thus later in paragraph 8.

We are of the opinion that most of the reasons given in support of the determination of the second point are clear and cogent and must be accepted as correct. These reasons may be summarised as follows:

- (i) Very wide, almost autocratic, powers are conferred on the Government in the matter of detention and therefore they must be exercised with a due sense of responsibility and circumspection by an officer of a certain status and experience;
- (ii) when the Government delegates its power to an officer or authority subordinate to it, it is not unreasonable to assume that it fully considers the fitness of the delegate before making the order in respect of delegation;
- (iii) the Additional District Magistrate who is invested with the powers of a District Magistrate does not thereby attain the status of a District Magistrate as there can be only one person in the district who can be a District Magistrate and
- (iv) the Government when it conferred the power on the District Magistrate conferred it on the officer actually holding the office of the District Magistrate and

no one else.

33. We take cue from the said reasons which were accepted by the Supreme Court. We take note of the nature of the function to be performed. Draconian powers of preventive detention conferred under the Act can be exercised only by the Government or its specified delegates. Persons temporarily in charge cannot be safely entrusted with the responsibility of discharging such onerous duties. It appears to us that the decision in Hari Chand (Supra) can safely help us to come to the conclusion that the power u/s 3(2) cannot be exercised by anyone other than a District Magistrate properly appointed u/s 20(1).

34. The learned A.D.G.P contends that before the Supreme Court in Hari Chand (Supra) a provision similar to Section 13(2) of the GC Act did not come up for consideration. The learned A.D.G.P contends that Section 13(2) of the GC Act must make the distinction in the instant case. We have already referred to Section 13(2) of the GC Act. We have chosen to take the view that Section 13(2) of the GC Act can apply only when conferment of the power is under the Act and not under a notification. We have also taken the view that in the nature of the general purpose, objects and scheme of the KAAPA a contrary intention -not to permit the functionary temporarily in office to invoke the powers u/s 3(2), is evident. We also took note of the nature of the provisions for appointment of the District Magistrate u/s 20 of the Code and the nature of duties that a temporary incumbent occupying office of the District Magistrate can perform u/s 20(3) that is to exercise the powers u/s 3(2) cannot be exercised by anyone other law. In that view of the matter also Section 13(2) cannot apply.

35. The above discussions lead us to the inevitable conclusion that an Additional District Magistrate like the 3rd respondent temporarily occupying the chair in the absence of a District Magistrate appointed u/s 20(1) cannot be permitted to exercise delegated jurisdiction u/s 3(2) of the KAAPA.

36. We reiterate our reasons below:

(a) The 3rd respondent is not a District Magistrate appointed u/s 20(1) of the Code.

(b) u/s 20(3), even when a subordinate is temporarily occupying the post of District Magistrate, he is not authorised to discharge the duties of the District Magistrate under other laws.

(c) Neither Section 3(2) nor the notification thereunder specifically permits the incumbent temporarily in occupation to exercise the powers u/s 3(2).

(d) The nature and quality of powers, which the delegate has to discharge u/s 3(2) are so onerous and sublime that it must be presumed that such a temporary occupant cannot lightly be assumed to be authorised to wield such delegated authority.

(e) Section 13(2) of the GC Act is not in terms applicable as the 2nd respondent

gets the powers not under the "Act" as defined but only under the notification.

(f) Though "contrary intention" referred to in "Section 13(2) of the GC Act is not expressly declared in the statute, by necessary implication the contrary intention is evident. Section 20(3) of the Code, the scheme of the KAAPA and the nature of the sublime duties oblige us to perceive the contrary intention which is eloquently though not expressly available.

37. We repeat that in the light of our findings on the above ground, we are not proceeding to consider the other grounds raised by the learned counsel for the petitioner. In the result,

a) This writ petition is allowed.

b) The impugned order is set aside on the ground that the 3rd respondent who is only a District Magistrate temporarily in charge has no legal competence to exercise delegated authority u/s 3(2) of the KAAPA,

c) The detent shall forthwith be released from custody if his farther detention is not necessary in connection with any other cases,

The Registry shall forthwith communicate the order to the Superintendent of the Central Prison, Thruvananthapurarn forth with.