(1973) 07 CAL CK 0016

Calcutta High Court

Case No: None

Madhusudan Mandal and Others		APPELLANT
	Vs	
State of West Bengal and Others		RESPONDENT

Date of Decision: July 26, 1973

Acts Referred:

- Constitution of India, 1950 - Article 21, 216, 22, 246, 32

Citation: 77 CWN 1002

Hon'ble Judges: Sudhamay Basu, J; S.K. Bhattacharyya, J

Bench: Division Bench

Advocate: A.K. Dutt, Balai Ch. Roy, N.N. Adhikari In 640|73, S.A.M. Habibullah, S. Mohey In 643 and 644|73, P.C. Ghosh, R.N. Chakraborty In 647|73, Somnath Chatterjee, N.N. Adhikari In 685|73 and A.P. Chatterjee, P.K. Das Gupta In 776|73, for the Appellant;G. Mitter, Advocate General, D. Gupta, Standing Counsel, S.G. Poddar, Bhaskar Sen In 640|73, S.G. Poddar, Uma Mishra Sanyal In 643 and 644|73, Chittaranjan Das, B.K. Bose In 677|73, G. Mitter, Advocate General P.R. Roy, B.N. Sur In 685|73 and G. Mitter, Advocate General, P.R. Roy, A. Qureshi In 776|73, for the Respondent

Final Decision: Dismissed

Judgement

Sudhamay Basu, J.

All these applications made u/s 491 of the Code of Criminal Procedure for the issue of a Writs in the nature of Habeas corpus, relate to detention orders made under the Maintenance of Internal Security Act, 1971. The petitioners had all been taken into custody pursuant to order passed by various detaining authorities in exercise of powers vested in them under sub-section (1) read with sub-section (2) of section 3 of the Maintenance of Internal Security Act, 1971 with a view to preventing them from acting a manner prejudicial to the maintenance of public order. After section 17A of the Maintenance of Internal Security Act, 1971 was struck down by the Supreme Court in the case of (1) Shambhunath Sarkar v. State of West Bengal and Ors. (Writ Petition No.266 of 1972) all the detenues were ordered to be released forthwith

"only because of the order of the SC". But as soon as they were released from jail they were all, again, taken into custody pursuant to orders made by detaining authorities but exactly on the same grounds as before. The validity of the second order of detention without fresh facts on identical grounds is the common question raised in all these petitions. Before the respective merits of the different applications are considered it will be convenient to deal with the common question involved at the outset.

2. The question is of some importance as cases of release from detention and re-arrest on identical grounds frequently come up before this Court. Its legal implication also merits serious consideration. The nature and source of the order of detention, the relation between section 3 and section 17A of the Maintenance of Internal Security Act, the scope of Article 22, 246 and Schedule VII of the Constitution, the consequences of section 17A being struck down by the Supreme Court and the nature of the provisions of the Maintenance of Internal Security Act particularly section 3 and section 14(1) were argued at length at the Bar in relation to the main question. Mr. Ajit Kumar Dutt, Mr. Somenath Chatterjee, Mr. A. P. Chatterjee and Mr. N. N. Guptoo appeared on behalf of different petitioners and the learned Advocate General appeared on behalf of the State to make submissions on the principles of law involved in these cases. The Court is indebted to all of them for their able assistance in the matter.

3. The contentions on behalf of the applicants may be brief summarized as follows: Mr. Ajit Kumar Dutt contended that the orders of detention were, in fact, made u/s 3 of the Maintenance of Internal Security Act, 1971 (hereinafter called the Act). The scheme of the Act and the nature of the provisions contained in section 3 would show that section 3 is complete in itself so far as making of the order of detention is concerned. It is not inter-linked with any other section and non-compliance with other sections such as sections 8, 10, 11 or 12 of the Act does not render an order made u/s 3 invalid or non est. He pointed out that section 17A of the Act more or less made applicable the provisions u/s 17 to citizens and foreigners alike in cases falling within 3 (1) (a) (i) and (ii) of the Act and altered the periods mentioned in sections 10, 11, 12 and 13. It does not govern or affect satisfaction which is dealt with u/s 3. Therefore, 17A being held bad or regarded as still born would not mean that the detention orders were also bad or stillborn. It was next argued that section 14(2) was applicable to the cases of the present detenues. A possible contention that section 17A being struck down section 3 itself should be held to have non-existent has no validity. Some of the Supreme Court decisions were relied on in this connection. Mr. Somenath Chatterjee emphasized that the detaining authorities expressly took recourse to section 3 in taking the detenues into custody, as the order, the grounds of detention served and the confirmation made by Government in each case reveal. Alternatively Mr. Chatterjee contended that even assuming that an order made u/s 3 as well as u/s 17A was composite in nature, striking down of 17A did not mean that the order was non-existent. It was merely inoperative and

devoid of any force or binding effect. If section 17A was non establishment how could it be employed along with section 3? He further argued that release of a detenu is nothing but revocation or expiry of the order within the meaning of section 14(2) of the Act which was the only section permitting redetention on fresh facts. It was also contended that redetention implied that there was no proper application of mind. Mr. A. P. Chatterjee argued that it was Article 246 and Schedule VII which provided the substantive provision of law for preventive detention. Article 22 only provided some safeguards or restrictions in this respect. He argued that conditions of exercise of power were not to the same as power itself which was provided by Article 246 and Schedule VII. The power of detention under the Maintenance of Internal Security Act was provided by section 3 which was not declared ultra vires. Procedural parts being held bad could not effect the substantive part of the Act which was concentrated in section 3 unless, of course, it could be said that one could not exist without the other. Such was not the case here. Mr. N. N. Guptoo after adopting the arguments of Mr. Dutt and Mr. S. Chatterjee further urged that section 3 was the empowering section for detention. Section 17A did not provide for any power of detention nor mentioned the authorities who could detain a person. For the same one has to look to section 3. Section 17A was a matter of procedure and applied from the stage of reference to the Advisory Board. He also argued that section 14 applied on the facts of these cases.

4. To put in perspective the disputed question between the parties, it may be convenient at this stage to advert to the submissions made by the learned Advocate General on behalf of the State specially as some of the contentions of the applicants were made in anticipation of the arguments of the latter. An examination of the argument of the learned Advocate General in some detail would, therefore, clarify the matter in controversy. After referring to the provisions of Articles 21, 22 and Article 246 of the Constitution the learned Advocate General stated that even Article 216 does not confer upon the Parliament any power to make law for preventive detention unless it was according to procedure established by law in terms of Article 21. With this preliminary remark the learned Advocate General proceeded to build up his propositions

(i) The Parliament according to him sought to acquire a new power under Article 22(7) of the Constitution by amending the Maintenance of Internal Security Act by the Defence of India Act, 1971. Before the amendment there was only one power all dealing with sections 3(1) (a) (i), (ii) and (iii).

(ii) After the amendment, the Parliament purported to confer a new power on the detaining authorities to keep a person in detention for two years without reference to the Advisory Board. A simple order passed u/s 3(1) (a) (i) or (ii) after amendment would be invested with the new power under Article 22(7). After Section 17A came into operation section 3 (1) (a) (i) and (ii) assumed a new character and a new dimension. After the amendment the moment an order of detention was passed it

authorized a detention for more than 3 months. Therefore, section 3(1) (a) (i) and (ii) in their application to cases involved in section 17A. They had no independent existence. By this provision Parliament wanted to keep people in preventive detention for more than 3 months upto 2 years without reference to Advisory Board in terms of Article 22(7).

(iii) By declaring section 17A as ultra vires the Supreme Court declared that the Parliament failed to acquire this new power under Article 22(7). Therefore, this pretended power sought to be acquired by section 3(1) (a) (i) and (ii) never materialized.

(iv) The effect of the Supreme Court judgment in declaring section 17A to be ultra vires is that section 17A is stillborn. It was void from the beginning and never existed which means that by the amendment no law was created to invest the power that was sought to be acquired under Article 22(7) the order made by the detaining authorities, however, the learned Advocate General emphasized, related to the power they were seeking to exercise. The detaining authorities were all the time thinking and acting on the basis that the power was there. It is true the learned Advocate General argued, that they purported to exercise a power that was non establishment but their action could not be attributed to anything else than the power they were seeking to exercise. What the detaining authorities were seeking to exercise and what, in fact, they acted upon was trying to keep a person in detention for two years without taking recourse to Advisory Board - a power which could be referable was that they had power only in terms of Article 22(7); although the correct legal position was they had power only in terms of Article 22(4). The satisfaction of the detaining authorities were also based on this consideration. The detaining authorities were considering the classes and circumstances etc. applicable in cases of persons in section 17A which was the same as in section 3(1) (a) (i) and (ii). The satisfaction in terms of Article 22(4) was different. It applied in the case of section 3(1) (a) (iii). As the power to make an order u/s 3(1)(a)(i) and (ii) in classes of cases mentioned in section 17A was never acquired there was no order. The purported orders were merely executive actions. The learned Advocate General took pains to emphasise that the fact that the order of detaining authorities might be attributed to section 3 of the Act simplicitor did not matter. The point to be noted was what the authorities were thinking and what action, in fact, took in coming to their subjective satisfaction. In this connection he referred to a decision reported in (1) Priyanath Gupta Vs. Lal Jhi Chowkidar , in which he said a conveyance of sale signed by a lady who thought that she was executing a mortgage was held not to be a sale.

(v) As the orders actually made were mere executive actions there was no revocation or expiry of any order. Therefore, section 14(2) of the Maintenance of Internal Security Act was not attracted. He emphasized over and over again that the power to make an order u/s 3(1) (a) (i) and (ii) in class of cases mentioned in section 17A

(which was in exercise of power under Article 22(7) was never acquired. As the power was not acquired there could be no order. The orders were executive fiats without authority. The subjective satisfaction which is condition precedent to the order was on different plane. The orders were not at all orders u/s 3(1) (a) (i) or (ii). After submitting that the order passed were null and void the learned Advocate General referred to the case of (3) Macfoy v. United Africa Company Limited, reported in AIR 1961 SC 1169, where Lord Denning stated, inter alia, at age 1172,

if an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the Court declare it be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to say there. It will collapse.

The learned Advocate General then sought to distinguish the case laws cited on behalf of the petitioner on section 14(2) of the Maintenance of Internal Security Act by saying that all these related to cases of invalid or defective orders and not to "non-existent orders". But that aspect may be dealt with more fully at a later stage.

5. At this stage it will be worth while to refer to the provisions of the Maintenance of Internal Security Act and some relevant provisions of the Defence of India Act, 1971 by which the former was amended. For a brief summary the following paragraphs from the judgment of Shelat, acting C.J. in the case of Sambhu Nath Sarkar Vs. The State of West Bengal and Others, may be quoted profitably.

The Act was passed on July 2, 1971. Its long title shows that it was passed to provide for detention for the purpose of maintenance of internal security and matters connected therewith. Sec. 3 (1) (a) empowers the Central and State Governments to make an order detaining a person, if satisfied with respect to such person that it is necessary to do so with a view to preventing him from acting in any manner prejudicial to; (i) the defence of India, the relations of India with foreign powers, the security of India, or (ii) the security of the State or the maintenance of public order, or (iii) the maintenance of supplies and services essential to the community. Sub-s. (2) authorises the exercise of the power of detention under sub-s. (1) (a) by certain officers named therein inter alia, district magistrate, with respect to matters set out in s. 3(1) (a) (ii) and (iii). Sec. 5 confers power on the appropriate government to remove a person detained under s. 3 from one place of detention to another whether within or outside the State. Sec. 6 provides that such an order shall not be invalid on the ground that the concerned person is detained in a Jail outside the jurisdiction of that Government or the officer making the order. Sec. 8 provides for the communication of grounds for detention to the detenu ordinarily within five days, and in exceptional cases within 15 days from the date of detention. Sec. 9 provides for the constitution of advisory boards. Sec. 10 provides that, save as otherwise provided for in the Act, the appropriate Government shall within 30 days from the date of detention refer every case to the advisory board.

Under s. 11, the advisory board has to give its report to the Government within ten weeks from the date of detention, Sub-s. (4) s. 11 disentitles the detenu to appear by any legal practitioner before the board and makes the proceedings before and the opinion of the board confidential. Sec. 12 provides that if the board is of opinion that there is sufficient reason for the detention, the Government may confirm the order and continue such detention for such period as it thinks fit. In case the opinion is that there is no such sufficient cause, the Government has to revoke the detention order. Sec. 13 provides that the maximum period of detention shall be 12 months from the date of detention. Sec. 17 provides that a foreigner, in respect of whom a detention order is passed, may be detained without obtaining the opinion of the advisory board for a longer period than three months, but not exceeding to years in any of the classes of cases, or under any of the circumstances thereinafter set out in sub-cls. (a) to (d) of sub-s. (1), namely, where a foreigner enters or attempts to enter India or is found with arms, ammunition or explosives, or where a foreigner enters or attempts to enter a notified area or is found therein in breach of s.3 of the Criminal Law Amendment Act, 1961, or where such a foreigner enters or attempts to enter in an area adjoining the borders of India specified under s. 139 of the Border Security Forces Act, 1968 without a travel document, or, where the Central Government has reason to believe that such a foreigner commits or is likely to commit an offence under the official Secrets Act, 1923. Ses. 17 thus lays down classes of cases in or circumstances under which foreigners can be detained for a period longer than three months without reference to an advisory board.

On December 3, 1971, the President issued a proclamation of emergency under Art. 352 of the Constitution. On December 4, 1971, Parliament enacted the Defence of India Act, 42 of 1971. The Act was passed in view of the grave emergency which then existed as proclaimed by the President, and to provide for special measures to ensure public safety and interest, the defence of India and civil defence, for trial of certain offences and for matters connected therewith. Sec. 2(3) of the Act provided that it would remain in force during the period of operation of the proclamation of emergency and for sic months thereafter. By sec. 6, the Act introduced amendments in several Acts, one amongst them being the Maintenance of Internal Security Act, 1971. Cl. (d) of s. 6 amended s. 13 of the Act by adding after the words therein "from the date of detention", the words and figures "or until the expiry of the Defence of India Act, 1971, whichever is later". By Cl. (e) of sub-s. (6) of s. 6, a new section s. 17A was inserted in the Act. The new section reads as follows:

''17A. (1) Notwithstanding anything contained in the foregoing provisions of this Act, during the period of operation of the Proclamation of Emergency issued on the 3rd day of December, 1971, any person (including a foreigner) in respect of whom an order of detention has been made under this Act, may be detained without obtained the opinion of the Advisory Board for a period longer than three months, but not exceeding two years from the date of his detention in any of the following classes of cases or under any of the following circumstances, namely: -

(a) where such person had been detained with a view to preventing him from acting in any manner prejudicial to the decree of India, relations of India with foreign powers or the security of India; or

(b) where such person had been detained with a view to preventing him from acting in any manner prejudicial to the security of the State or the maintenance of public order.

(2) In the case of any person to whom sub-section (1) applies, sections 10 to 13 shall have effect subject to the following modifications, namely,

(a) in section 10, for the words "shall, within thirty days", the words "may, at any time prior to but in no case later than three months before the expiration of two years" shall be substituted;

(b) in section 11, -

(i) in sub-section (1) for the words "from the date of detention", the words "from the date on which reference is made to it" shall be substituted;

(ii) in sub-section (2), for the words "the detention of the person concerned" the continued detention of the person concerned'' shall be substituted;

(c) in section 12, for the words "for the detention", in both the places where they occur, the words "for the continued detention shall be substituted;

(d) in section 12, for the words "twelve months", the words "three years" shall be substituted".

6. As the rival arguments noted above make it clear - the question for decision before this Court is whether a second order of detention on identical grounds, without fresh facts, is hit by section 14(2) of the Act in case where section 17A applied. But a solution to the said question is connected with yet another contention raised by the learned Advocate General that forms the foundation of his entire argument. The crux of it lies in the submission that the earlier orders of detention although made u/s 3 were inextricably mixed up with section 17A. The satisfaction of the detaining authorities according to this view, was invariably influenced by consideration of the possible period of detention applicable in cases u/s 17A. "The potentiality" of a detention u/s 3 and "action" of the detaining authority were inseparable from section 17A of the Maintenance of Internal Security Act. When an order for detention was made it was taken into consideration that it would continue till the maximum period laid down in section 13. As amended by section 17A the power of detention could not be exercised in vacuum without thinking of the consequences. The two were inextricably mixed up. Whenever the satisfaction of the detaining authority was arrived at, it inevitably took note of the consequence that might follow in terms of section 17A. The potentiality and consequence of the satisfaction were always present in the mind of the detaining authority. The purpose

of the order, the order itself and its effect were all co-related. When the order was made upon subjective satisfaction it could not be said that detention alone was taken note of. It may be that the State might put an end to the detention in its discretion but that did not take away from the character of the order made. The satisfaction u/s 3 would include the period of detention though the same may not be mentioned specifically at that time. Giving an extreme example the learned Advocate General stated that if the period of detention provided for was only for 24 hours, then there could be no satisfaction in terms of section 3(1) (a) (i) or (ii). The period of detention could not be taken note of while entering into satisfaction.

7. Mr. Ajit Kumar Dutt pointed out that it was a fallacy in the argument of the learned Advocate General that before that before 17A came into play the provisions of Article 22(7) were not adhered to in the Maintenance of Internal Security Act. He pointed out that the powers of legislation were derived by the Parliament from Article 246 of the Constitution read with item 3 list 1 in Schedule VII. Neither Article 22(4) nor Article 22(7) conferred any power on the Parliament to legislate a proposition to which the learned Advocate General also agreed. Mr. Dutt submitted that Article 22(4) itself refers to Article 22(7) and as such it could not be said that before 17A came into play there was only power in terms of Article 22(4) and not in terms of Article 22(7). Mr. Dutt also argued that speaking of satisfaction and taking action involving period of detention was fallacious because the making of the order of detention and actually detaining a person for two years without reference to Advisory Board were altogether different. Such a mix up could never be conceived inasmuch as a reference to the Advisory Board was obligatory. Nobody could think in advance what would be the opinion of the Advisory Board.

8. Mr. Dutt next commented on the scheme of the Act and the nature of the provisions in section 3. The definition section, 2(b), he pointed out, states specifically that "detention order means an order made u/s 3". Section 3 itself showed that it conferred the power to make orders detaining certain persons. Sub-section (1) (a) empowered the Central or the State Government to make the detention order only if the satisfaction was there. There was no other condition. Section 3(1)(b) relates to foreigners. Section 3(2) empowers certain officers to exercise the power of detention on behalf of the State Government. Section 3(3) enjoins the officers mentioned in sub-section (2), to forthwith report the fact of making the order to the State Government with particulars and such orders were to remain in force for not more than 12 days unless approved. The proviso requires that the grounds of detention should be communicated within 5 days (ordinarily) of the making of the order. Section 3(4) provides for report to the Central Government in cases where the State Government approves of the detention order. Mr. Dutt in the circumstances contended that section 3 by itself was complete and it does not show by itself that it is necessarily inter-linked with any other section.

9. We find substance in this argument. Making of an order for detention and keeping a person in detention are not to be confused. They did not mean the same thing. Even non-compliance with section 3(4) or for the matter of that sections 5, 8, 10, 11 or 12 of the Act does not render an order of detention u/s 3 invalid or non est. Section 17A, thus, could hardly be an integral part of section 3. Section 17A itself provides that "notwithstanding anything contained in the foregoing provisions... any person (including a foreigner) in respect of whom an order of detention has been made under... may be detained....". Therefore, section 17A clearly shows that the provisions made therein become operative only after the order of detention is made, neither before nor simultaneously. Moreover, even a person who was detained under 3(1) (a) (i) or (ii) at a time when 17A was not struck down would not necessarily be kept in detention for more than 3 months. The case of a detenu has to be sent to the Advisory Board on the basis of whose report further continuation of the detention depends. It was only after the Advisory Board gave its opinion about the sufficiency of detention that the appropriate Government could confirm the detention. It is only at this stage that the question of continuation of detention or its period arises.

10. Moreover, it appears that the Supreme Court has held in various cases that fixing of the period of detention in the initial order itself is contrary to the scheme of the Act and cannot be supported. In the case of (4) Makhan Singh Tarsikka Vs. The State of Punjab, , the Supreme Court upheld the aforesaid proposition and added that

it is only after the Advisory Board to which the case has been referred, reports that the detention is justified, that the Government should determine what the period of detention should be and not before". (Para 4). In the case of (5) Boppanna Venkateswaraloo and Others Vs. Superintendent, Central Jail, Hyderabad State, , Mahajan, J. quoted with approval the decision in Makhan Singh Tarsikka''s case and reiterated that the fixing of the period of detention in an initial order of detention is contrary to the scheme of the Act and cannot be supported as it tends to prejudice a fair consideration of the petitioner''s case when it is placed before the Advisory Board. (Para. 8) In the case of (6) Puranlal Lakhanpal Vs. Union of India (UOI), , S. K. Das, J. also quoted (para. 12) with approval a passage from the judgment of Mukherjea, J. in the case of (7) D. Moreswar v. The State of Bombay, reported in AIR S.C. 181.

it is now settled by a pronouncement of this Court that not only it is not necessary for the detaining authority to mention the period of detention when passing the original order u/s 3(1) of the Preventive Detention Act but that the order would be bad and illegal if any period is specified, as it might prejudice the case of the detenu when it goes up for consideration before he Advisory Board. The Advisory Board again has no express its opinion only on the point as to whether there is sufficient cause for detention of the person concerned... In my opinion the word "for such

period as it thinks fit" are suppose and imply that after receipt of the report of the Advisory Board the detaining authority has to make up its mind as to whether the original order of detention should be confirmed and if so for what further period the detention is to continue".

11. Reference may in this connection be made to the case of (8) Shri Ujjal Mandal Vs. The State of West Bengal, which held that a detention for 3 months does not require confirmation. The Court held

it would not be necessary to confirm the order of detention even after the receipt of the report of the Board by the Government if the Government only wants to continue detention for the period of 3 months from the date of detention, as the initial order of detention would authorize the continuance of detention for that period without any confirmation".

It indicated clearly that for a valid order of detention compliance with the other procedures was not necessary. That being the position it becomes impermissive to contend that an order made u/s 3 would be made in compliance with or on consideration of the provisions in section 17A. Thus, not only an analysis of the scheme of the Act but the decisions of the Supreme Court make it amply clear that fixing a period while making an order u/s 3 is not legitimate or in consonance with the scheme of the Act.

We, therefore, find no escape from the conclusion that the period of detention was at all material times an irrelevant consideration at the stage of satisfaction u/s 3. The detaining authority, as the scheme of the Act makes it manifest cannot and is not required to consider in advance, that irrespective of the Advisory Board"s opinion, a person will be detained for the maximum period contemplated by section 17A. To think otherwise would be to misread the scheme of the Act and trying to graft procedural provisions into section 3 where they do not exist. There is no ambiguity in the section which is clearly expressed and it requires no interpretation to make its meaning explicit with reference to anything extraneous.

12. The learned Advocate General cited the case of Priyanath Gupta Vs. Lal Jhi Chowkidar . In this case a deed of gift was found to be void and inoperative - in that the donor signed the deed believing, owing to the fraud and misrepresentation of the donee, that it was only a power of attorney. It was held that 3 years limitation provided by Articles 95 and 91 of the suit as the deed being void ab initio did not require to be set aside or cancelled. It is not clear how this case may be of assistance to the State. It is not a case where mere intention changed the character of the deed. It is a case of a deed being void for misrepresentation and fraud.

13. We receive further assurance in our decision from the observation of Chagla, C.J. in the case of (9) P. K. Atre v. Commissioner of Police, Bombay & Another reported in ILR 1956 Bom 715. While countering an argument that a mere instigation to observe Hartal in order to bring about the complete stoppage of work and business and

transport services in greater Bombay cannot possibly be germane to the question of the maintenance of public order, he observed, inter alia, (page 728)

.... The satisfaction of the detaining authority has to be arrived at on the date on which the order is made and he must base his satisfaction upon grounds which are within the ambit of the Act or within the ambit of the exercise of a particular power which he is exercising. The law shorn of its technicalities is that to that satisfaction of the mind which the Act requires no extraneous, no foreign, no irrelevant factor must contribute.....".

Consideration of period, in our view, is such an extraneous, foreign and irrelevant factor at the time of arriving at satisfaction by the detaining authority. It may be noted in passing that section 3 of the Preventive Detention Act which Chagla C.J. was considering is similar in language to section 3 of the Maintenance of Internal Security Act.

It requires to be made clear that all the order of detention under consideration by us are made by officers mentioned in sub-section (2) of section 3 of the Act. The nature and scope of the power of these officers are not in all respects the same as those of the Central or the State Government.

14. Supplementing the arguments of Mr. Dutt, Mr. Somenath Chatterjee drew the attention of the Court to the actual detention orders that were made in these cases under consideration of this Court. The detention orders all show that the detaining authorities were passing the orders under sub-section (1) read with sub-section (2) of section 3 of the Act. The grounds served u/s 8(1) also made reference to order of detention "made u/s 3". Confirmation of the order also, in fact, referred to orders made u/s 3. Thus not only the orders of detention orders referred to section 3 only. It is only at the stage of confirmation that reference is made to detention for 3 years which means detention in terms of section 17A. Section 17A is, therefore, involved only at the time of confirmation. Thus supplementing the theoretical exposition made by Mr. Dutt, Mr. Chatterjee pointed out that in fact the orders were also made u/s 3. Mr. Dutt in this connection, also, challenged the learned Advocate General''s right to contend that the satisfaction of the detaining authorities was in fact made under any provision other than section 3. The Government treated the detention orders made u/s 3 as factually existent. All steps due to be taken were taken on the basis of the same. The orders were approved on that basis. It was not a mere question of law. Each detaining authority made a solemn order that he was satisfied in terms of section 3 without any further reference to the procedure u/s 17A. In this respect Mr. Dutt submitted with some force that in the absence of any affidavit-in-opposition by any of the detaining authorities on this question of fact the submission of the learned Advocate General was unwarranted.

15. Before concluding consideration of this question, two more aspects may be taken note of. It may conceivably be argued - as indeed it cropped up in course of

discussion - that when some acts or incidents are of such nature that they may give rise to satisfaction either u/s 3(1) (a) (i), (ii) or (iii), would not the detaining authorities in arriving at their satisfaction in terms of one or the other category take into consideration the possible period of detention? The answer would clearly be in the negative. Consideration of the period of detention at that stage would not be pertinent. Secondly, our attention has been drawn to some orders where it is stated in the grounds of detention served to the detenues, that the case of the detenues concerned may be referred to the Advisory Board at any time prior to but in no case later than 3 months before the expiration of two years. These cases seem to indicate, prima facie that the detaining authorities were thinking of applying section 17A. But such thinking seems to be wrong. For one thing the order itself might not be approved by State Government u/s 3(3) of later on confirmed u/s 12 after a reference is made to the Advisory Board. Again, if the Advisory Board''s opinion is against detention the appropriate Government has to release the person. But even if the Advisory Board reports that there is sufficient cause for the detention the appropriate Government may not confirm the detention. It is only after the Government decides to confirm the detention order that the question of continuing the same and fixing a period arises. It cannot be said that when an order of detention u/s 3(1) (a) (i) or (ii) is made it may be envisaged that the detenu concerned must be detained for a period of two years without reference to Advisory Board. That is the outside possibility which may happen in some cases. But contemplation of that remote contingency by the detaining officers could hardly stamp their orders as an indissoluble amalgam of section 3 and section 17A. As it is not legitimate and within the powers of a detaining authority, at the time he is making an order of detention simplicitor, to impose any period of detention in terms of section 17A, the application of which comes into play at a later stage, we are unable to hold that an extraneous consideration not warranted by the provisions of section 3 would or could change the nature and character of the said order.

16. The important question now to decide is if section 14(2) applied to the present cases which involve release and re-arrest on identical grounds. Section 14(2) reads as follows: -

The revocation or expiry of a detention order shall not bar the making of a fresh detention order u/s 3 against the same person in any case whether fresh facts have arisen after the date of revocation or expiry on which the Central or a State Government or an officer, as the case may be, is satisfied that such an order should be made.

The learned lawyers appearing on behalf of the applicants relied on a number of Supreme Court decisions in this connection. In the case of (10) Hadibandhu Das Vs. District Magistrate and Another, , the District Magistrate, Cuttack served an order of detention on the 15th of December, 1969 directing detention of the detenu. On 18.1.68 the District Magistrate, Cuttack supplied to the detenu an Oriya translation

of the order and the grounds which had earlier been served on him in English but which the detenu could not understand. On January 28, 1968 the State of Orissa revoked the order and issued a fresh one on identical grounds. When the validity of the fresh order was challenged u/s 13(2) of the Preventive Detention Act, 1950 (the provisions of which is the same as in section 14(2) of the Maintenance of Internal Security Act) Counsel for the State of Orissa contended that the original order which was illegal or become illegal (because the grounds were not served in time) was not required to be revoked, for it had no legal existence and a formal order of revocation of a previous order which had no legal existence does not apply within the terms of section 13(2). It was, however, held by the Supreme Court that

the power of the detaining authority must be determined by the reference to the language used in the statute and not by reference to any predilection about the legislative intent. There is nothing in section 13(2) of the Preventive Detention Act, 1950 which indicates that the expression "revocation" means only revocation of an order which is otherwise valid ad operative; apparently it includes cancellation of all orders invalid as well as valid. The act authorizes the executive to put severe restrictions upon the personal liberty of citizens without even the semblance of a trial and make the subjective satisfaction of an executive authority in the first instance the sole test of competent exercise of power... but we would be loath to attribute the plain words used by the Parliament a restricted meaning so as to make the power more harsh and its operation more stringent... The word "revocation" is not capable of a restricted interpretation without any indication by the Parliament of such at intention".

It was further commented that

negligence or inaptitude of the detaining authority in making defective orders or in failing to comply with mandatory provisions of the Act may in some cases ensure for the benefit of the detenu to which he is not entitled". In the case of (11) Kshetra Gogoi Vs. The State of Assam, it was held by the Supreme Court that a fresh order of detention u/s 13(2) of the Preventive Detention Act can be made on the revocation or expiry of a previous detention order only in cases where fresh facts have arisen after the date of revocation or expiry. The case of Hadi Bandhu Das v. State of Orissa was followed. In this case the additional allegation about the detenu maintaining links with associates while he was in detention was no considered sufficient to come within the expression "fresh facts". Those facts arose during the period of detention and not afterwards. In the case of (12) Masood Alam etc. Vs. Union of India (UOI) and Others, , the Supreme Court held that the earlier order of detention which was either revoked or had expired could not be replaced by another detention order unless the same is based on fresh facts arisen after the expiry or revocation of the earlier order. This was a case under the Maintenance of Internal Security Act, 1971 and section 14(2) was construed therein. The earlier cases of Hadi Bandhu Das and Kshetra Gogoi were followed in this case.

17. Relying on the aforesaid cases it was contended on behalf of the applicants that the initial order of detention in these cases had either become invalid or they had expired. Thereafter subsequent orders of detention on identical grounds were impermissible under the Act except on fresh facts. In the instant cases the detenues admittedly were inside jail and as soon as they were released from detention they were again taken into custody before any fresh facts occurred. Clearly, therefore, the fresh detention orders were hit by section 14(2) and bad.

18. By consent of parties a copy of the release order issued in the case of each of the detenues was placed before the Court. The same read as follows: -

Government of West Bengal

Home Department

ORDER

No. 4986HS.,

dated Calcutta, the 23rd April, 1973

The under signed is directed by order of the Governor to say that the Governor to say that the Governor has been pleased to direct that the persons mentioned in the schedule annexed who are now in detention under MISA 1971 in pursuance of orders made by the D.M. Hooghly be released forthwith only because of the order of Supreme Court in Writ Petition No.266 of 1972 - Sambhu Nath Sarkar v. State of West Bengal.

Schedule

Name

1. Ajit Bhowmick

Detention order No. and date.

1816 - JM/Mis dt. 12.1.72

By order of the Governor

Sd/- Illegible.

Asstt. Secy. to the Govt. of

West Bengal.

19. The learned Advocate General contended that section 14(2) had no application in these cases as there was no revocation or expiry of any earlier order. According to him the actions of the detaining authority were referable to purported exercise of power in conformity with the conditions of Article 2(7) although the correct legal position is that they never possessed the said power. After the introduction of

section 17A, section 3(1) (a) (i) and (ii) were inextricably mixed up with section 17A. The two could not exist independently. Section 3 after the coming into existence of section 17A could not stand in isolation. The moment an action was taken u/s 3 (1) (a) (i) or (ii), section 17A was attracted and the subjective satisfaction was arrived at on a different plane. But after the Supreme Court declared section 17A to be bad it was clear that the power the detaining authorities were seeking to exercise was not there. All the same their action, is only referable to the power which they did not have. Therefore, all the orders made u/s 3(1) (a) (i) and (ii) must be deemed to be non-existent in the eye of law. The orders are nullities. The learned Advocate General, as noted earlier, referred to the case of Macfoy v. United Africa Company Ltd. and quoting Lord Denning said "you cannot put something on nothing". The power to make order u/s 3 (1) (a) (i) and (ii) in classes of cases mentioned in section 17A was never acquired. If the power was not acquired there could never be any order and there was no order. The orders that were made were the executive actions without authority. In this state of things the learned Advocate General submitted that the cases of Hadi Bandhu Das, Kshetra Gogoi or Masood Alam had no application. Section 14(2) of the Maintenance of Internal Security Act only applied ii the case of fresh detention orders u/s 3. As there was no order existing in the eye of law it could not be said that there was revocation of any order not to speak of an order under the Act. The propositions laid down by the Supreme Court cases were not at all disputed. But it was said that valid or invalid an order had to be there u/s 3 in order to attract section 14(2). But in these cases there was no order in existence.

20. We are unable to accept the contention of the learned Advocate General of the learned Advocate General. An analysis of the scheme of the Act and the nature of section 3 under which orders of detention are passed as well as a review of some of the decisions of the Supreme Court has already induced us to negative the contention that there could be an inextricable mixture of section 3 and section 17A, so that section 17A being held bad orders passed u/s 3 (1) (a) (i) and (ii) should also be held bad. That being the position orders made u/s 3 (1) (a) (i) and (ii) cannot be held to be non-existent or nullities in the eye of law. What the Supreme Court, in fact, held in the case of Shambhunath Sarkar was that the provisions of section 17A were ultra vires the Constitution and, therefore, bad. As there was an application of section 17A in the case of Shambhunath Sarkar he was ordered to be released. It may be noted that the order of detention made u/s 3 in that case was not challenged nor was it declared to be invalid by the Supreme Court. Although section 17A was applied in that case it was never contended or held by the Supreme Court that because of the application of section 17A the nature and character of the order u/s 3 was so changed that section 17A being void automatically rendered the order u/s 3 also to be void.

21. Another lacuna seems to inhere in the argument advanced on behalf of the State. If section 17A is to be treated as nullity, for all purpose, at any rate, for the purpose of section 14(2), how can it be deemed to exist to transform the nature and

character of section 3? According to the arguments advanced on behalf of the State an erroneous thinking that section 17A was being applied in all orders, made section 3 inseparable from the provisions of section 17A with the consequence that when section 17A was declared to be bad, orders u/s 3 (1) (a) (i) and (ii) also become had and nullities. The position seems to be logically incongruous. If section 17A is to be treated as a nullity since its inception it cannot be credited with a potency to transform the character of orders made u/s 3. If it is non est it could not be employed along with any other section.

22. We also take note of the submission Mr. Somenath Chatterjee made with some force in this connection. He pointed out that the State admits that the detentions were under the Maintenance of Internal Security Act. Even the order of release mentions the same. There are only two circumstances mentioned in the Act under which a detenu can be "released". One is u/s 12(2) and the other section 15. Except for temporary ''release'' and release under circumstances mentioned in section 12(2) all other release must be either on revocation or expiry of order. The word "release", according to him; had no magic. Mere choice of a word cannot circumvent the operation of law. He pleaded strongly that playing upon words to thwart personal liberty should not be countenanced by a Court. The case of Hadi Bhandhu Das v. State of Orissa clearly laid down that when validity of an order of detention or the period of detention expired a detenu could not be again detained except on fresh facts. Section 14(2) of the Act does apply in either case. The word "revocation" was not capable of a restricted interpretation. We are inclined to accept the latter contention of Mr. Chatterjee. It was pointed out in the case of Hadi Bandhu that section 14(2) applied in all cases of cancellation of orders valid or invalid. Accordingly, even if the orders made u/s 3 were invalid the present cases would prima facie be covered by section 14(2) of the Act. As orders are held to be valid there is no manner of doubt that the said section would apply in the instant cases. Besides one has to bear in mid that the maximum period fixed under the Act would be liable to be defeated if re-detention without any restraint on identical grounds were to be permitted. What cannot be done directly cannot be done indirectly. Section 14(2) requires two things. Firstly there must occur fresh facts and secondly the said facts must occur after the date of revocation or expiry. Both impose fetters on the power of the detaining authorities. A construction of the section which would do away with these restriction is not to be easily adopted unless the same is imperative. The orders of release issued in the instant cases were served on the detenues when the detention although based on orders valid in inception, were found to be wrong in view of the application of section 17. The effect of the release, in these circumstances, in our view cannot but involve either expiry or revocation of the earlier order within the meaning of section 14(2).

23. Indeed the view we adopt of section 14(2) is in accordance with the principles laid down by the Supreme Court, the provisions of the Maintenance of Internal Security Act and the spirit of our Constitution. The collective wisdom of our nation

while providing for detention without trial even in normal times also laid down safeguards in our Constitution to ensure that this extraordinary power may not be abused. The Parliament has engrafted several provisions in the Maintenance of Internal Security Act, of which section 14(2) is one, in conformity with the aforesaid principle. In this context the Courts will be loath in the words of Shah, J.

to attribute to the plain words used by the Parliament a restricted meaning so as to make the power more harsh and its operation more stringent".

Even some of our academic jurists while noting the handicaps suffered by the detenues sounded caution that

not only is it the low water mark of the civil liberties placed so high in the scheme of the Constitution, but it also indicates the sensitive and vulnerable spot that may prove the Achilles heel for the entire scheme of civil liberties in the Constitution". (Dr. P. K. Tripathi ''Spotlights on Constitutional Interpretation'' (1972) page 189-90).

While our democracy requires protection against forces of subvertion it also needs safeguards against uncontrolled and excessive authority in the hands of the executive. It is in that spirit that the Constitution has framed safeguards which are reflected in the Maintenance of Internal Security Act itself and in that perspective section 14(1) has to be construed. Justice Vivian Bose pointed out long ago in the case of (13) Ram Singh and Others Vs. The State of Delhi and Another, , that "it is the rights which are fundamental and not the limitations". The decision arrived at by this Court is in respectful consonance with the principles which the highest Tribunal of this land has uniformly held viz. that a guarantee of personal liberty is not to imperiled beyond what the Constitution and the laws strictly provided.

24. (i) In view of our finding that section 3 could not be deemed to have been inextricably mixed up with section 17A and that orders made u/s 3 did not become nullities because section 17A was applied, we need not examine some of the other arguments advanced at the Bar. Mr. Somenath Chatterjee in course of an alternative argument, submitted that even assuming that a order could be passed u/s 3 and section 17A in a composite form it cannot be argued that they never existed. He then dwelt on the doctrine of non est factum which is an old form of pleading in England primarily concerned will deeds. He quoted Halsbury''s Laws of England, 3rd Edition, Vo. 11, Article 586, Burrow''s Words and Phrases Vol. 3 page 502, Judicial Dictionary by Stroud 3rd Edition Vol. 3 page 1914 to point out what the doctrine really means. The learned Advocate General, however, made it clear that he did not invoke the said doctrine. It was also never his contention that the order never existed physically. The matter, therefore, need not be pursued further.

(ii) Mr. Chatterjee next contended in this connection that there is distinction between a statute becoming bad for legislative incompetence and a statute becoming void on account of its unconstitutionality. He referred to the case of (14) M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another, and the

case of (15) C.R.H. Readymoney Ltd. and Another Vs. State of Bombay, , for this purpose. According to him the decision of Sundararamier''s case was followed by the Supreme Court in the recent case of (16) Hari Singh v. Military Estate Officer, Delhi, reported in AIR 1972 S.C. 2206, Sundararamier''s case relates to the Sales Tax Las Validation Act of 1956 which removed prohibition upon State legislation affection inter-State Commerce in regard to inter-State sales within certain periods specified in that Act. Venkatarama Aiyer, J. after reviewing the American and other authorities summed up in that case at page 491 (page 47).

where an enactment is unconstitutional in part but valid as to the rest, assuming of course that the two provisions are severable, it cannot be held to have been wiped out of the statute book as it admittedly must remain there for the purpose of enforcement of the valid portion thereof, and being on the statute book, even that portion which is unenforceable on the ground that it is unconstitutional will operate proprio vigore when the constitutional bar is removed, and there is no need for a fresh legislation to give effect thereto.

As against the submission of Mr. Chatterjee, the learned Advocate General pointed out that the distinction as regards invalidity arising on account of legislative incompetence and Constitutional repugnancy was not approved by the Supreme Court in a number of later cases. He referred to the case of (17) Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, , in this connection and stated that Sundararamier''s case was followed only on other points. It may be noted that some of the judgments of the Supreme Court such as (18) Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another, , (19) Deep Chand Vs. The State of Uttar Pradesh and Others, and Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, , lay down proposition which are contradictory to what is held in Sundararamier''s case but there was no reference to the latter case in any of the former which are, therefore, regarded as judgments per incuriam. (See H. M. Seervai''s Constitutional Law of India (1968 Edition) page 117).

However, as this Court has already held that section 3 did not become void on account of its association with section 17A this aspect of the controversy also need not merit further consideration.

25. It seems necessary to advert to another important aspect of these cases. The petitioners before us were incarcerated and deprived of their freedom for varying periods, in some cases even exceeding one year. There is no suggestion in any affidavit made before us that during the period when the petitioners were behind the prison bars they indulged in any prejudicial activity or the earlier detention failed to serve its purpose. When the second and subsequent orders of detention are made the materials taken note of by the detaining authorities are, prima facie, the materials relating to the activities of the petitioners in the past. Is that enough? The detaining authorities must be satisfied afresh that it is still necessary to detain the petitioners to prevent them from indulging in prejudicial activity. It seems,

therefore, necessary that the detaining authority should examine the materials afresh including the time spent by the detenues in the jail. It is no doubt difficult to lay down any inflexible period after which the previous activities of a person cease to be relevant to the subsequent order of detention but the point to emphasize is that these must have some nexus to the situation when the latter is made. What law requires is the satisfaction at the time when the order of detention is made. It is not open to the detaining authorities simply to fall back mechanically upon the satisfaction made in the past without any relation to the present context. (For some useful discussion on this aspect reference may be made to the case In Re: S.V. Ghate,).

26. To sum up we hold that the orders of detention were passed u/s 3 of the Maintenance of Internal Security Act, that application of section 17A never made section 3 and section 17A inextricable and that when section 17A was held to be bad by the Supreme Court the orders u/s 3 (1) (a) (i) and (ii) did not thereby become void or non est. We further hold that section 14(2) of the Maintenance of Internal Security Act has application in cases of re-detention on identical grounds where in the earlier orders of detention section 17A was applied. The result is that the petitioners succeed and are entitled to be released forthwith.

27. We may now proceed to consider the cases individually on merit.

(i) In Misc. Case No. 640 of 1973 the detenu Madhu Mondal was taken into custody on and from the 4th of May, 1973 under a second order of detention passed by the District Magistrate, Burdwan dated the 28th of April, 1973 in exercise of the power conferred on him by sub-section (1) read with sub-section (2) of section 3 of the Maintenance of Internal Security Act with a view to prevent him from acting in a manner prejudicial to the maintenance of public order. The grounds of detention which were served on the detenu are as follows: -

On 24.9.71 at about 14.20 hr. you stabbed Badal Ram an employee of Burdwan Zilla Parishad and snatched away his bag containing Rs.23,488.07 paise near the Zilla Parishad office, Burdwan while he was proceeding to his office after encashing the said amount from the State Bank, Burdwan. You were chased by a police petrol and arrested in close vicinity of the place of occurrence. Your act in the Court compound committed in broad daylight produced a general sense of insecurity amidst the people who visits the local Government administrative offices and also endangered public peace thereby:

(ii) The first objection against the petitioner''s detention raised by Shri Balai Roy, the learned Advocate appearing in support of the Writ petition is that the order of detention has no relevance to the maintenance of public order. He referred in this connection to the case of Dipak Bose alias Naripada Vs. State of West Bengal, and Manu Bhusan Roy Prodhan Vs. State of West Bengal and Others, . In the former-case there were two separate incidents where the detenu and his associates were alleged

to be armed with bomb, choppers etc. They kidnapped and killed two persons on a public road. It was also alleged in the grounds that the detenu thereby created panic and terror I the locality and disturbed public order. The Supreme Court, however, held that the two incidents pertained to specific individuals and, therefore, related to and fell within the area of law and order. Every assault in a public place like a public road and terminating in the death of a victim is likely to cause horror and even panic and terror in those who are the spectators. But that does not mean that all of such incidents necessarily cause disturbance or dislocation of the community life of the localities in which they are committed. It was held that none of the grounds was of that kind and gravity which would jeopardize the maintenance of public order.

In the case of Manu Bhusan Roy one of the allegations was that the detenu along with othes committed a murderous assault on a person on the road in front of the office of the Mahila Samity, Dhupguri Police Station causing severe injuries on his person. It was alleged that as a result people of the locality became terrorized and public peace was disturbed. It was held that the said ground only refers to an assault on an individual which prima-facie appears to raise only a law and order problem. It was held that "this kind of a solitary assault on one individual, which may well be equated with an ordinary murder which is not an uncommon occurrence, can hardly be said to disturb public peace or place public order in jeopardy, so as to bring the case within the purview of the Act." (page 298).

(iii) In our view the principles laid down in the case of Dipak Basu and Manu Bhusand Roy applies to the present case where a person having some money was attacked. There is nothing to show that the Bank stopped its operation or that the Zilla Parishad was closed. Here the attack was on an individual and the impact of the incident on the people also was limited.

(iv) The second objection raised was one of malafides. Non-application of mind and service of the order when the petitioner was in custody. To appreciate the same it will be necessary to refer to some dates which appear from the petition and the affidavits affirmed in this case. It appears that the petitioner was first arrested o 24.9.71 in connection with Burdwan P.S Case No. 54(9)/71. The learned Magistrate ordered the petitioner to be released on bail on 27.11.71. The petitioner was, however, unable to furnish bail bond until 8th of May, 1972. Meanwhile, on 31.1.71 the investing officer completed his investigation and made a report in final form. On 8th of May, 1972 the petitioner furnished requisites for a bail bond and on the next day, that is the 9th of May, 1972 before the petitioner could come out of the jail he was served with an order of detention dated the 12th February, 1972. The ground served on him was the same as in the second order dated the 28th of April, 1973 noted above. On the 8th of July, 1972 the learned Sub-Divisional Magistrate accepted the final report submitted by the Police. On 12.1.73 the High Court was moved and a Rule was obtained in Criminal Misc. Case No.1144 of 1972 against the

said order of detention dated the 12th of February, 1972 but the same was ultimately discharged. After the judgment of the Supreme Court in Shambhunath Sarkar''s case which was passed on 19.4.73 the detenu was ordered to be released on 27.4.73 and then the present impugned order of detention dated the 28th of April, 1973 was passed. The case of the detenu is that on 4.5.73 he was taken to the Kotwali Thana when he was served with the impugned order and again taken into custody.

On the basis of the aforesaid facts it was urged on behalf of the petitioner that the State Government was actuated by an ulterior motive to keep the petitioner in detention by any means. Although the investigation was completed in the police case as early as 31st of January, 1972 he was not released. Even the first order of detention dated the 12th February, 1972 was not executed till he was ready to come out on bail on the 9th of May, 1972. Mr. Roy submitted that the manner of execution of the detention order shows absence of good faith. Then again after the Supreme Court''s judgment was delivered there was absolutely to reason to detain him from 19th of April till the 27th when the order or release was made. Apparently as soon as the detaining authority came to know of the order of release he passed the second order of detention dated the 28th of April, 1973. Thus, the detenu was never out of the jail from 24.9.71 i.e. for about one year and seven months. The detenu was never served with the order of release dated the 27th of April, 1973. He was neither a detenu nor a prisoner from the 19th of April, 1973 or in any event from the 27th of April, 1973 till the 4th of May, 1973. Yet he was in custody. Mr. Roy argued that the object and the content of satisfaction, even if subjective, of the detaining authority is that if a person is not detained he may act prejudicially. But before that decision can be arrived at there must be some opportunity to observe the person''s movement. There is nothing no material whatsoever to show that there was "still a need to detain" the petitioner. The case of (20) Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, was cited in this connection. In that case the petitioner Rameswar Shaw was in jail custody when the order of detention was passed on him. It was held that the detention of the petitioner was not justified by section 3 (1) (a) of the Preventive Detention Act which is similar to the provision of section 3 of the Maintenance of Internal Security Act. It was held that the satisfaction which was necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner was the basis of the order u/s 3 (1) (a) and that basis was clearly absent in the case of the petitioner. It was further held (page 337) "that the detenu... may challenge the validity of his detention on the ground of malafides and in support of the said plea urge that along with other facts which show malafides the Court may also consider his grievance that the grounds served on him cannot possibly or rationally support the conclusion drawn against him by the detaining authority".

(v) Mr. Poddar appearing on behalf of the State stated that there was no malafide involved in this case. With regard to the detention even after the order of release

dated the 27th of April, 1973 was passed he said that administrative difficulties stood in the way of the Government who had to deal with the cases of hundreds of detenues after the judgment of the Supreme Court was delivered. He could not, however, satisfy the court how administrative convenience could override Constitutional safeguards.

(vi) On a consideration of the facts and circumstances of the case and in view of the decision in Rameswar Shaw''s case, we find substance also in the second contention raised on behalf of the petitioner. The petitioner is, therefore, entitled to be released on this ground as well.

28. (i) Misc. Case No.776 of 1973 (Sanjoy Banerjee v. State of West Bengal & 2 others). In this case the detenu Sanjoy Banerjee who had been taken into custody pursuant to an earlier order of detention on and from the 25th of June, 1972 was again served with a fresh order of detention dated the 27th of April, 1973 by the District Magistrate, 24-Parganas in exercise of the powers conferred on him by sub-section (1) read with sub-section (2) of section 3 of the Maintenance of Internal Security Act, 1971 on the ground that he has been acting in a manner prejudicial to the maintenance of public order. According to the petitioner he was served with the fresh grounds of detention when he was in detention. An affidavit by one Khagendra Nath Banerjee, an Inspector of Police affirmed on the 4th of July, 1973 also states that the officer served the order of detention on the detenu in presence of Deputy Jailor, Dum Dum Central Jail with the grounds which were as follows: -

(1) On 3.5.71 at about 07.30 hrs. you and some of your associates being armed with bombs etc. attacked one Naranarayan Nag near Arakpur Post Office, Bejoygarh. The said Naranarayan Nag received bomb injuries on his head and removed to Hospital where he succumbed to his injuries. You thereby created much panic and terror in the locality and disturbed the public order.

(2) On 18.12.71 at about 15.00 hrs. you and some of your associates being armed with pipe-guns etc. attacked and killed one Dilip Bhattacharya near the crossing of Netajinagar and Azadgarh Colony. You thereby created much panic and terror in the locality and disturbed the public order.

(ii) Besides malafides both the grounds of detention were assailed on the ground that they were irrelevant to the object of detention. It was argued that the attacks involved in the two grounds concerned individuals and they did not in any manner affected public order. The decision in the case of Dipak Basu v. State of West Bengal was relied on.

On behalf of the State it was pointed out that in the incidents involved in the case of Dipak Basu there was no explosion of bombs as in the first ground in the instant case. It was also urged that even if the second ground came within the ambit of the decision of Dipak Basu as the grounds were considered separately and collectively they would not entitle the detenu to be released. It, however, appears that unlike

the previous grounds of detention dated the 22.6.72 the grounds dated the 27th of April, 1973, although identical in all respects, do not contain the words "taken separately and collectively". This argument, therefore, is not available to the learned Advocate appearing of detention obviously relates to law and order according to the principles laid down in the case of Dipak Basu discussed earlier. It can hardly be said to have disturbed public so as to ring the case within the mischief of the section. The detenu in our view is, therefore, entitled to be released on this ground.

29. Misc. Case No. 647 of 1973 (Panchanon Bhattacharjee v. State of West Bengal & 2 others). In this case the detenu Gopal Bhattacharjee was taken into custody for the second time on identical grounds. The impugned order dated the 28th of April, 1973 was passed by the District Magistrate, 24-Parganas in exercise of the powers conferred upon him by sub-section (1) read with sub-section (2) of section 3 of the Maintenance of Internal Security Act, 1971. The grounds of detention which was served on the detenu are as follows: -

On 25.8.72 at about 22.00 hrs. you accompanied by Sukdev Das @ Gonda Das and others raided a fair at Jhulantala, P.S. Baranagar by exploding bombs followed by firing from pipe guns. As a result, the ladies and children who congregated there sustained severe injuries and ran for shelter being panicky. You act created a panic and sacre in the locality which disturbed public order.

On behalf of the detenu it was contended that the ground suffered from vagueness. No particular was given as to "others" who accompanied the detenu at the alleged raid. It is not at all clear who were the persons who sustained injuries. The expression "ladies and children" are vague. Who were the ladies and who were the children? No name or address is given nor any particulars furnished about the alleged injuries suffered by them. If anybody sustained severe injuries no particular is furnished as to the injured persons or whether they were sent to Hospital or given first aid. It was alleged that lack of particulars prevented the detenu from making an effective representation. We find substance in the contention of the learned Advocate for the petitioner and hold that the petitioner is entitled to be released on that account as well.

30. Misc. Case No.685 of 1973 (Ajit Bhowmick v. Superintendent, Hooghly Jail & 2 others). This is also a case of re-detention on identical grounds. The impugned order of detention is dated the 24th of April, 1973 passed by the Additional District Magistrate, Hooghly in exercise of the powers conferred on him by sub-section (1) read with sub-section (2) of section 3 of the Maintenance of Internal Security Act, 1971 on the ground that the detenu has been acting in a manner prejudicial to the maintenance of public order. The grounds which were served on the detenu after he was brought out of the Presidency Jail are as follows: -

1. That on 3.12.71 night in between 20.00 hrs. and 21.00 hrs. you along with your associates, being armed with deadly weapons, stopped the 1st Katw Up Train (K-I

UP) at Jirat Rly. Station and forcibly dru8gged out and kidnapped one Bhola Sengupta and some others of Kalna from the Railway compartment of the above train, took them to Jirat Station approach road with a view to take their lives and assaulted them mercilessly. When you and your associates were going to finish them, they anyhow managed to escape. You and your associates exploded bombs there at Jirat Station Road and thereby the public peace was completely disturbed in the area before which law and order was restored there.

2. That on 8.1.72 at about 17.00 hours you with your associates attacked one Samir Das of Guptipara at Ayads Road and threw hand bombs towards him with a view to take his life or to cause grievous hurt to him. On hearing his hue and cry and sound of explosion local people came and you were caught red-handed there while your associates managed to escape. Thus the public peace was completely disturbed there before which law and order was restored there in the area.

(ii) The learned Counsel appearing on behalf of the petitioner stated at the outset that the detenu had earlier moved this Court in relation to the first order of detention and obtained a Rule which was ultimately discharged. Thereafter he moved the Supreme Court under Article 32 of the Constitution. But while the said case was pending the petitioner was discharged and again re-arrested by virtue of the aforesaid order. But the petition before this Court does not disclose that an earlier Rule obtained in relation to the previous order from this Court was discharged. There is, however, reference to the petition before the Hon''ble Supreme Court. On behalf of the State Mr. Roy, the learned Advocate, contended that the omission to mention the aforesaid facts amounted to suppression of facts and for the same the application must be visited with the punishment of dismissal in limine. The learned Advocate for the petitioner submitted that the main contention before this Court being redetention on identical ground, the discharge of an earlier Rule was not considered to be material and as such the same was not mentioned. He urged that when the omission was not material for the relief sought the same really made no change in the colour of the case. On a consideration of the facts and circumstances of the case and keeping in view that this is a petition relating to a case of Habeas Corpus made from Jail we do not consider that the application should be dismissed in limine.

(iii) On merits Mr. Adhikary raised mainly two objections. He firstly contended that the first ground suffered from vagueness. The names of the associates were not given, the weapons were not mentioned and the names of persons who are described as "some others" have been withheld.

Mr. Adhikary secondly contended that both the grounds were irrelevant to the object. None of them was affecting public order. He submitted that the grounds were covered by the case of Dipak Basu.

(iv) We are unable to hold that the grounds were so vague as to prevent the detenu from making an effective representation. We are also unable to accept that the ground No.1 is irrelevant. The same does not come within the principle laid down in the Dipak Basu''s case. The incident took place in a train out of which some people were forcibly brought down and assaulted. This cannot be said to concern only private individuals without any disturbance caused to the even tempo of life. With regard to the second ground, however, we are inclined to accept the argument of the learned Advocate. This relates to an attack on an individual. Although bombs were exploded people do not seem to have been scared thereby. On the ''other hand, it is stated in the ground itself that sound of explosion of bombs induced people to come there and apprehend the detenu red handed. This incident does not seem to have prejudiced the maintenance of public order. It was a temporary disturbance of law and order and the same is mentioned in the ground itself. Since it cannot be predicated how much a ground which is held to be bad contributed to the satisfaction of the detaining authority, the order itself must be held to be bad. The petitioner, therefore, succeeds in this respect.

31. Misc. Case No. 643 of 1973 (Bablu Seikh @ Bajlu Seikh v. D. M. Burdwan and 2 others) and Misc. Case No. 644 of 1973 (Madan Seikh 2 Md. Nasarat Seikh v. D. M. Burdwan and 2 others). In these two cases involving detention under successive order on identical grounds the District Magistrate, Burdwan was the detaining authority who passed both the impugned orders of detention on 23.5.73 in exercise of the powers conferred upon him by sub-section (1) read with sub-section (2) of section 3 of the Maintenance of Internal Security Act, 1971. The incidents mentioned in the two grounds which were furnished to the detenues are identical in both the cases and, for reasons stated below, they need not be quoted.

32. Mr. Habibullah, the learned lawyer appearing on behalf of both the petitioner at first contended that the grounds were bad on account of proximity. But after proceeding for sometimes he did not press them further but relied mainly on the ground of re-detention on identical grounds without any fresh facts. As we have already held that point in favour of the petitioner both these petitioners are entitled to be released on that account. These two cases do not merit any further consideration.

The result is that the Rules are made absolute. The detenues concerned be released from custody forthwith.

S.K. Bhattacharyya, J.

33. I agree.