

Mushtaq Ahmad Bhat Vs State Of Jammu & Kashmir And Ors

Court: Jammu & Kashmir High Court (Srinagar Bench)

Date of Decision: June 3, 2019

Acts Referred: Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 " Section 3(3)
Unlawful Activities (Prevention) Act, 1967 " Section 13
Jammu And Kashmir Public Safety Act, 1978 " Section 8, 8(1)
Constitution Of India, 1950 " Article 21, 22, 22(5), 22(6)

Hon'ble Judges: Rashid Ali Dar, J

Bench: Single Bench

Advocate: Shafqat Nazi, Raja Mohammad Maqbool, Usman Gani

Judgement

1) By virtue of order bearing No.81/DMA/PSA/DET/2018 dated 12.03.2019, passed by respondent No.2-District Magistrate, Anantnag, in exercise of

powers under Section 8 of the J&K Public Safety Act, 1978, Mushtaq Ahmad Bhat son of Ali Mohammad Bhat resident of Veeri Bijbehara, has been

directed to be taken into preventive custody. Veracity and legality of the said order is assailed in the instant petition on various grounds, which include:

- (a) The detaining authority has not furnished material relevant to detenu.
- (b) There has been non-application of mind on the part of detaining authority while passing the impugned detention order.
- (c) The detaining authority has not stated as to what were the compelling reasons for issuing the impugned detention order.

2) The respondents, on notice, appeared and filed the counter affidavit wherein they have stated that the averments made in the petition are without

any merit. The detenu has been furnished all material so as to enable him to avail the remedy of filing representation against his detention but he has

not done so. The detenu instigated and provoked youth against integrity/sovereignty of State and promoted hatred to disturb the peaceful atmosphere

of District Anantnag. The detention grounds precise, proximate, pertinent and relevant. There is no vagueness or staleness in the grounds.

3) Heard learned counsel for the parties and also perused the record.

4) The learned counsel for the petitioner while being heard has reiterated grounds taken in the petition and in support of his judgment placed reliance

on various judgments and in particular placed reliance on the judgments of the Hon'ble Apex Court in "G.M. Shah v. State of J&K and Ors." "G.M. Shah v. State of J&K and Ors."

reported in SCC 1980 (1) 137 and *Surya Prakash v. State of UP and others* reported in AIR 1995 SCW 1841.

5) On the other hand the learned counsel for the respondents submitted that the detention order has been passed strictly in accordance with law. The

detenu has been furnished all the relevant material, which according to him, is evident from the record. It is also submitted that the activities referred

in the grounds of detention were found highly prejudicial to the security of the State.

6) Considered the rival arguments.

7) In the order impugned it is being stated that the activities of the detenu have found prejudicial to the maintenance of the public order. In the

grounds of detention the activities of the detenu are shown prejudicial to the maintenance of public order and security of State. The District Magistrate

has not been himself certain as to whether activities of the detenu are prejudicial to the "maintenance of public order" or "prejudicial to the

security of the State" which, in turn, shows non-application of mind. In this regard, it shall be relevant to quote Para 9 of the judgment *G. M.*

Shah Vs. State of J&K, reported in (1980) 1 SCC 132:

"As observed by Hidayatullah, J. (as he then was) in *Dr. Ram Manohar - Lohia v. State of Bihar & Ors.* one has to imagine three concentric

circles, in order to understand the meaning and import of the above expressions. 'Law and order' represents the largest circle within which is the next

circle representing "public order" and the smallest circle represents "security of State". It is then easy to see that an act may affect law and order but

not public order just as an act may affect public order but not security of State. It is in view of the above distinction, the Act defines the expressions

acting in any manner prejudicial to the security of the State" and "acting in any manner prejudicial to the maintenance of public order" separately. An

order of detention made either on the basis that the detaining authority is satisfied that the person against whom the order is being made is acting in

any manner prejudicial to the security of the State or on the basis that he is satisfied that such person is acting in any manner prejudicial to the

maintenance of public order but which is attempted to be supported by placing reliance on both the bases in the grounds furnished to the detenu has to

be held to be an illegal one vide decisions of this Court in *Bhupal Chandra Ghosh v. Arif Ali & Ors.*(2) and *Satya Brata Ghose v. Arif Ali & Ors.*(3).

8) In the counter it is being stated that the material which was relied upon by the detaining authority while passing the impugned detention order has

been furnished to the detenu. Detention record, as produced, carries a copy of Execution Report, perusal of which reveals that only four leaves i.e.

copy of detention letter, letter addressed to the detenu and copy of grounds of detention have been furnished to the detenu, which in turn clearly

reveals that the entire material forming base of the detention order has not been supplied to the detenu. Thus the detaining authority has not discharged

the obligation as cast upon. Infringement of such right guaranteed under Article 22(5) of the Constitution would render the order of detention as

illegal.

9) The grounds under Article 22(5) means all the basic facts and materials which have been taken into account by the detaining authority in making

the order of detention and on which, therefore, the order of detention is based. Nothing less than all the basic facts and materials which influenced the

detaining authority in making the order of detention must be communicated to the detenu. Same is the plain requirement of the first safeguard in

Article 22(5) of the Constitution of India. The second safeguard in Article 22(5) requires that the detenu shall be afforded the earliest opportunity of

making representation against the order of detention. No avoidable delay, no shortfall in the materials communicated shall stand in the way of the

detenu in making an earlier, yet comprehensive and effective, representation in regard to all basic facts and materials which have influenced the

detaining authority in making the order of detention depriving him of his freedom. The detaining authority is required to communicate to the detenu:

(i) Grounds of detention;

(ii) All the documents referred to in the grounds of detention;

(iii) All the documents and materials which the detaining authority considers while framing his subjective satisfaction;

(iv) Detention order and also the police report or dossier, if any.

10) The word "grounds" used in clause (5) of Article 22 of the Constitution means not only the materials or conclusions of facts, but also all

materials on which those facts or conclusions which constitute grounds are based, such material has to be supplied to the detenu so as to enable him to

make an effective and meaningful representation. The detaining authority is obliged to mention in the grounds as to on which material he based his

satisfaction, failure to do so renders the detention illegal. To communicate the bare grounds of detention to the detenu will not be sufficient unless

grounds are accompanied by material which the detaining authority has considered and relied upon. For this, support can be had from the judgment

"Nazeer Ahmad Sheikh vs. Additional Chief Secretary Home" reported in 1999 S.L.J 241.

11) The right which detenu enjoys under Article 22(5) is of immense importance. In order to properly grasp submissions of petitioner avowed in

petition on hand, Article 22(5) is gainful to be reproduced hereunder:

Article 22(5). When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the

order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest

opportunity of making a representation against the order.

12) This Article of the Constitution can be broadly classified into two categories: (i) the grounds on which the detention order is passed must be

communicated to the detenu as expeditiously as possible; and (ii) proper opportunity of making representation against order of detention be provided.

13) The Constitution Bench of the Supreme Court, more than six decades ago, has interpreted Article 22(5) of the Constitution in *D r Ram Krishan*

Bhardwaj v. The State of Delhi and others, 1953 SCR 708, observed as under:

“.....Preventive detention is a serious invasion of personal liberty and such meager safeguards as the Constitution has provided against the

improper exercise of the power must be jealously watched and enforced by the Court. In this case, the petitioner has the right, under article 22(5), as

interpreted by this Court by majority, to be furnished with particulars of the grounds of his detention sufficient to enable him to make a

representation which on being considered may give relief to him. We are of opinion that this constitutional requirement must be satisfied with

respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under clause (6) of article 22. That not

having been done in regard to the ground mentioned in sub-paragraph (e) of paragraph 2 of the statement of grounds, the petitioner's detention cannot

be held to be in accordance with the procedure established by law within the meaning of article 21. The petitioner is therefore entitled to be released

and we accordingly direct him to be set at liberty forthwith.

14) In *Shalini Soni (Smt.) & Others v. Union of India and Others* (1980) 4 SCC 54,4 it was aptly observed that the accused must have proper

opportunity of making an effective representation. The Court observed thus:

“...Communication of the grounds presupposes the formulation of the grounds and formulation of the grounds requires and ensures the application

of the mind of the detaining authority to the facts and materials before it, that is to say to pertinent and proximate matters in regard to each individual

case and excludes the elements of arbitrariness and automatism (if one may be permitted to use the word to describe a mechanical reaction without a

conscious application of the mind). It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is

entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters

only eschewing the irrelevant and the remote. Where there is further an express statutory obligation to communicate not merely the decision but the

grounds on which the decision is founded, It is a necessary corollary that the grounds communicated, that is, the grounds so made known, should be

seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went in to make up the mind of the

statutory functionary and not merely the inferential conclusions. Now, the decision to detain a person depends on the subjective satisfaction of the

detaining authority. The Constitution and the statute cast a duty on the detaining authority to communicate the grounds of detention to the detenu.

From what we have said above, it follows that the grounds communicated to the detenu must reveal the whole of the factual material considered by

the detaining authority and not merely the inferences of fact arrived at by the detaining authority. The matter may also be looked at from the point of

view of the second facet of Article 22(5). An opportunity to make a representation against the order of detention necessarily implies that the detenu is

informed of all that has been taken into account against him in arriving at the decision to detain him. It means that the detenu is to be informed not

merely, as we said, of the inferences of fact but of all the factual material which have led to the inferences of fact. If the detenu is not to be so

informed the opportunity so solemnly guaranteed by the Constitution becomes reduced to an exercise in futility. Whatever angle from which the

question is looked at, it is dear that "grounds" in Article 22(5) do not mean mere factual inferences but mean factual inferences plus factual

material which led to such factual inferences. The 'grounds' must be self-sufficient and self-explanatory. In our view copies of documents to which

reference is made in the 'grounds' must be supplied to the detenu as part of the 'grounds'.

15) In *Ichchu Devi Choraria (Smt.) v. Union of India and others* (1980) 4 SCC 53,1 the Supreme Court dealt with in great detail significance of clause

(5) of Article 22 and subsection 3 of Section 3 of COFEPOSA Act. The court observed:

"Now it is obvious that when Clause (5) of Article 22 and Sub-section (3) of Section 3 of the COFEPOSA Act provide that the grounds of

detention should be communicated to the detenu within five or fifteen days, as the case may be, what is meant is that the grounds of detention in their

entirety must be furnished to the detenu. If there are any documents, statements or other materials relied upon in the grounds of detention, they must

also be communicated to the detenu, because being incorporated, in the grounds of detention, they form part of the grounds and the grounds furnished

to the detenu cannot be said to be complete without them. It would not therefore be sufficient to communicate to the detenu a bare recital of the

grounds of detention, but copies of the documents, statements and other materials relied upon in the grounds of detention must also be furnished to the

detenu within the prescribed time subject of course to Clause (6) of Article 22 in order to constitute compliance with Clause (5) of Article 22 and

Section 3, Sub-section (3) of the COFEPOSA Act. One of the primary objects of communicating the grounds of detention to the detenu is to enable

the detenu, at the earliest opportunity, to make a representation against his detention and it is difficult to see how the detenu can possibly make an

effective representation unless he is also furnished copies of the documents, statements and other materials relied upon in the grounds of detention.

There can therefore be no doubt that on a proper construction of Clause (5) of Article 22 read with Section 3, Sub-section (3) of the COFEPOSA

Act, it is necessary for the valid continuance of detention that subject to Clause (6) of Article 22 copies of the documents, statements and other

materials relied upon in the grounds of detention should be furnished to the detenu along with the grounds of detention or in any event not later than

five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days from the date of detention. If this

requirement of Clause (5) of Article 22 read with Section 3, Sub-section (3) is not satisfied, the continued detention of the detenu would be illegal and

void.

16) The Supreme Court in Khudiram Das v. State of West Bengal and others (1975) 2 SCC 81, observed that Article 22(5) insists that all basic facts

and particulars which influenced detaining authority in arriving at requisite satisfaction leading to passing of order of detention, must be communicated

to detenu. Para 13 of said judgment is reproduced hereunder:

“..... Section 8(1) of the Act, which merely re-enacts the constitutional requirements of Article 22 (5), insists that all basic facts and particulars

which influenced the detaining authority in arriving at the requisite satisfaction leading to the making of the order of detention must be communicated

to the detenu, so that the detenu may have an opportunity of making an effective representation against the order of detention. It is, therefore, not only

the right of the Court, but also its duty as well, to examine what are the basic facts and materials which actually and in fact weighed with the detaining

authority in reaching the requisite satisfaction. The judicial scrutiny cannot be foreclosed by a mere statement of the detaining authority that it has

taken into account only certain basic facts and materials and though other basic facts and materials were before it, it has not allowed them to influence

its satisfaction. The Court is entitled to examine the correctness of this statement and determine for itself whether there were any other basic facts or

materials, apart from those admitted by it, which could have reasonably influenced the decision of the detaining authority and for that purpose, the

Court can certainly require the detaining authority to produce and make available to the Court the entire record of the case which was before it. That

is the least the Court can do to ensure observance of the requirements of law by the detaining authority.

17) In *Ganga Ramchand Bharvani v. Under Secretary to the Government of Maharashtra and others* (1980) 4 SCC 62,4 the Supreme Court observed

at paragraph 16 in the following terms:

“The mere fact that the grounds of detention served on the detenu are elaborate, does not absolve the detaining authority from its constitutional

responsibility to supply all the basic facts and materials relied upon in the grounds to the detenu. In the instant case, the grounds contain only the

substance of the statements, while the detenu had asked for copies of the full text of those statements. It is submitted by the learned Counsel for the

petitioner that in the absence of the full texts of these statements which had been referred to and relied upon in the grounds 'of detention', the detenus

could not make an effective representation and there is disobedience of the second constitutional imperative pointed out in *Khudiram's* case. There is

merit in this submission.

18) In *S. Gurdip Singh v. Union of India and others* (1981) 1 SCC 419, The Supreme Court, while reiterating legal position, observed that failure to

furnish documents or materials which formed the basis of detention order along with grounds of detention and even on demand subsequently made by

detenu, would amount to failure to serve grounds of detention and, therefore, would vitiate detention order and make it void ab initio.

19) In *Khudiram Das's* case (supra), Article 22 has been succinctly analyzed. The Supreme Court observed that detaining authority cannot whisk

away a person and put him behind bar at its own sweet will. It must have grounds for doing so and those grounds must be communicated to detenu as

expeditiously as possible, so that he can make effective representation against order of detention. It was further observed that Article 22 provides

various safeguards calculated to protect personal liberty against arbitrary restraint without trial. These safeguards are essentially procedural in

character and their efficacy depends on the care and caution and the sense of responsibility with which they are regarded by the detaining authority.

These are barest minimum safeguards which must be strictly observed by an executive authority.

20) A four-Judge Bench of The Supreme Court in *Golam alias Golam Mallick v. State of West Bengal* (1975) 2 SCC 4, reiterated the legal position.

The Supreme Court observed as under:

“No doubt, Clause (5) of Article 22 of the Constitution and Section 8 of the Act do not, in terms, speak of 'particulars' or 'facts', but only of

'grounds' to be communicated to the detenu. But this requirement is to be read in conjunction with and subservient to the primary mandate: “and

shall afford him the earliest opportunity of making a representation against the order”, in the aforesaid Clause (5). Thus construed, it is clear that in

the context, 'grounds' does not merely mean a recital or reproduction of a ground of satisfaction of the authority in the language of Section 3 of the

Act; nor is its connotation restricted to a bare statement of conclusions of fact. It means something more. That 'something' is the factual constituent of

the 'grounds' on which the subjective satisfaction of the authority is based. All the basic facts and material particulars, therefore, which have

influenced the detaining authority in making the order of detention, will be covered by “grounds” within the contemplation of Article 22(5) and

Section 8, and are required to be communicated to the detenu unless their disclosure is considered by the authority to be against public interest.

21) In *Mohd. Alam v. State of West Bengal*, (1974) 4 SCC 463, the Supreme Court observed that the non-communication of material was violative of

Article 22(5) of the Constitution and the Act, inasmuch as it did not intimate to detenu full grounds or material to enable him to make an effective

representation.

22) In *Kirit Kumar Chaman Lal Kundaliya v. Union of India and others* (1981) 2 SCC 43,6 it was observed that once the documents are referred to in

the grounds of detention it becomes bounden duty of detaining authority to supply the same to detenu as part of grounds of detention. In the case of

Ramachandra A. Kamat v. Union of India and others (1980) 2 SCC 270, the Supreme Court clearly held that even the documents referred to in the

grounds of detention have to be furnished to the detenu.

23) In *Tusha Thakker (Shri) v. Union of India and others* (1980) 4 SCC 499, the Supreme Court mentioned that the detenu had a Constitutional right

under Article 22(5) to be furnished with copies of all the materials relied upon or referred to in the grounds of detention, with reasonable expedition.

24) In “*Ram Baochan Dubey v. State of Maharashtra and Another* (1982) 3 SCC 383, this Supreme Court reiterated the legal position and

observed that mere service of the grounds of detention is not a compliance of the mandatory provisions of Article 22(5) unless the grounds are

accompanied with the documents which are referred to or relied on in the grounds of detention. Any lapse would render the detention order void.

Further, non-supply of the relevant material/documents, from which detaining authority derived subjective, satisfaction, would amount of violation of

Article 22(5) of the Constitution of India, so deprivation of a valuable right.

25) The Hon'ble Apex Court in the judgment rendered in the case

"Sophia Gulam Mohd. Bham v. State of Maharashtra & Ors" (AIR 1999 SC 3051), wherein it has been held:

"The right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the

grounds are based flows from the right given to the detenu to make a representation against the order of detention. A representation can be made and

the order of detention can be assailed only when all the grounds on which the order is based are communicated to the detenu and the material on

which those grounds are based are also disclosed and copies thereof are supplied to the person detained, in his own language."

26) In para 27 and 28 of the judgment of the Hon'ble Apex Court in "Thahira Haris etc. etc. Vs. Government of Karnataka & Ors, reported in

AIR 2009 Supreme Court 2184, has held as under:

"27. There were several grounds on which the detention of the detenu was challenged in these appeals but it is not necessary to refer to all the

grounds since on the ground of not supplying the relied upon document, continued detention of the detenu becomes illegal and detention order has to be

quashed on that ground alone.

28. Our Constitution provides adequate safeguards under clauses (5) and (6) of Article 22 to the detenu who has been detained in pursuance of the

order made under any law providing for preventive detention. He has right to be supplied copies of all documents, statements and other materials

relied upon in the grounds of detention without any delay. The predominant object of communicating the grounds of detention is to enable the detenu at

the earliest opportunity to make effective and meaningful representation against his detention.

27) It is also quite apposite to quote para 10 of the judgment of the Hon'ble Apex Court in "Ibrahim Ahmad Bhatti alias Mohd. Akhtar Hussain

alias Kandar Ahmad Wagher alias Iqbal alias Gulam Vs. State of Gujarat and others" (1982) 3 SCC 440:

"10. Two propositions having a bearing on the points at issue in the case before us, clearly merge from the aforesaid resume of decided cases : (a)

all documents, statements and other materials incorporated in the grounds by reference and which have influenced the mind of the detaining authority

in arriving at the requisite subjective satisfaction must be furnished to the detenu along with the grounds or in any event not later than five days

ordinarily and in the exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of his detention and (b)

all such material must be furnished to him in a script or language which he understands and failure to do either of the two things would amount to a

breach of the two duties cast on the detaining authority under Article 22 (5) of the Constitution. Relying upon this legal position counsel for the

petitioner urged before us that in the instant case a breach of the mandate contained in Article 22 (5) read with Section 3 (3) of the COFEPOSA is

clearly involved because of three things that have happened, namely, (i) supply of Urdu translations of the bulk of documents and statements

incorporated in the grounds and relied upon by the detaining authority was delayed beyond the normal period of 5 days without any exceptional

circumstances obtaining in the matter, (ii) the alleged exceptional circumstances purporting to justify the delay and the fact that the reasons had been

recorded in writing were not communicated to the detenu which has prevented him from making effective representation against his continued

detention and (iii) Urdu translations of quite a few documents and statements incorporated in the grounds and relied upon by the detaining authority

have not been supplied to him at all. As regards the first two aspects counsel relied upon two decisions of the Patna High Court, namely, Bishwa

Mohan Kumar Sinha v. State of Bihar and Ors.(1) and Bishwanath Prasad Keshari v. State of Bihar &Ors.(2) where the Patna High Court has taken

the view that not merely should the exceptional circumstances exist justifying the delayed supply of the grounds of detention but these should be

communicated to the detenu to enable him to make an effective representation. Counsel urged that because of the aforesaid failure the continued

detention of the petitioner must be held to be illegal. We find considerable force in these submissions made by the counsel for the petitioner. ¶

28) The detention order has also been challenged on the grounds that the detaining authority has failed to apply its mind to the fact whether the

preventive detention of the detenu was imperative notwithstanding the fact that he was already in custody in connection with case FIR No.168/2018

registered at Police Station, Bijbehara under Section 13 of Unlawful Activities (Prevention) Act. The arrest of the detenu in the said criminal cases at

the time of passing of the orders of detention has not been disputed which is substantiated from the perusal of grounds of detention, wherein it is stated

that ¶“you are presently in police custody¶. In the grounds of detention, it is also nowhere mentioned as to whether detenu, in connection with

criminal cases shown registered against him, had been admitted to bail or that he has filed any bail application, when it is the positive assertion made in

ground (L) of petition that ¶“the detenu has not applied for bail¶, which further exposes the non-application of the part of detaining authority. When

no application for grant of bail had been moved on behalf of the detenu before any court, there was no requirement of passing the order of detention.

No compelling reasons have been mentioned for passing the order of detention

29) Since the detainee was in the custody of the police at the time of passing of the order of detention, therefore, question arises for consideration

whether an order of detention could be passed on the face of such an eventuality? The answer to this question is emphatically "no", taking into

consideration the law laid down by the Hon'ble Apex Court in "Sama Aruna v. State of Telangana & Anr" (AIR 2017 SC 2662.) Para 24 of

the said judgment is apposite to be quoted herein below:

"24. There is another reason why the detention order is unjustified. It was passed when the accused was in jail in Crime No.221 of 2016. His

custody in jail for the said offence was converted into custody under the impugned detention order. The incident involved in this offence is sometime in

the year 2002-03. The detainee could not have been detained preventively by taking this stale incident into account, more so when he was in jail. In

Ramesh Yadav v. District Magistrate, Etah and ors, this Court observed as follows:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the

detaining authority was apprehensive that in case the detainee was released on bail he would again carry on his criminal activities in the area. If the

apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the

higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention

under the National Security Act should not ordinarily be passed."

30) The same view has been repeated and reiterated by the Hon'ble Supreme Court in the judgment delivered in the case of "V. Shantha v.

State of Telangana & Others" (AIR 2017 SC 2625). In this regard, Para 13 of the said judgment is relevant to be quoted as under:

"The order of preventive detention passed against the detainee states that his illegal activities were causing danger to poor and small farmers and

their safety and financial well-being. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent

the detainee from indulging in further prejudicial activities in the business of spurious seeds, affecting maintenance of public order and that there was

no other option except to invoke the provisions of the preventive detention Act as an extreme measure to insulate the society from his evil deeds. The

retorical incantation of the words "goonda" or "prejudicial to maintenance of public order" cannot be sufficient justification to invoke the

draconian powers of preventive detention. To classify the detainee as a "goonda" affecting public order because of inadequately yield from the

chilli seed sol by him and prevent him from moving for bail even is a gross abuse of the statutory power of preventive detention. The grounds of

detention are ex-facie extraneous to the Act.Ã¢â€

31) The HonÃ¢â€ble Apex Court in para 27 of the judgment Rekha Vs. State of Tamil Nadu and anrÃ¢â€ (2011) 5 SCC 244 has held as under:-

Ã¢â€27. In our opinion, there is a real possibility of release of a person on bail who is already in custody provided he has moved a bail application which

is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence

the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing

had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even

though no bail application of his is pending, since most courts normally grant bail on this ground.

However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believedÃ¢â€.

5. It shall also be quite apposite to quote Para 5, 6 and 7 of the judgment of the HonÃ¢â€ble Apex Court in Ã¢â€Surya Prakash Sharma v. State of U.

P. and others, 1994 SCC (Cri) 1691:

Ã¢â€5. The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in

custody has had been engaging the attention of this court since it state first came up for consideration before a Constitution Bench in Rameshwar

Shaw vs District Magistrate Burdwan to eschew prolixity we refrain from detailing all those cases except that of Dharmendra Sugan Chand Chelawat

v. Union of India wherein a three judge Bench after considering all the earlier relevant decisions including Rameshwar Shaw answered the question in

the following words:

Ã¢â€The decisions referred to above lead to the conclusion that an order for detection can be validly passed against a person in custody and for that

purpose it is necessary that the grounds of detention must show that (i) the detailing authority was aware of the fact that the detenu is already in

detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression

compelling reasons in the context of making an order for detention of a person already in custody implies that there must be cogent material before the

detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future and (b) taking

into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities

and it is necessary to detain him in order to prevent him from engaging in such activities.

6. When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be

sustained. Though the grounds of detention indicate the detaining authority's awareness of the fact that the detenu was in judicial custody at the

time of making the order of detention, the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support

of the averment made in the grounds of detention that if the aforesaid Surya Prakash Sharma is released on bail "he may again indulge in serious

offences causing threat to public order". (emphasis supplied) To put it differently, the satisfaction of the detaining authority that the detenu might

indulge in serious offences causing threat to public order, solely on the basis of a solitary murder, cannot be said to be proper and justified.

7. On the conclusions as above we quash the order of detention.

32) Testing the instant case on the touchstone of the law laid down above, the detenue could not have been detained after taking recourse to the

provisions of the Public Safety Act when he was already in the custody of the police authorities in the cases, the details whereof have been given in

the grounds of detention. His custody in police for the offences referred in the grounds of detention, has been converted into the custody under the

impugned detention order. May be the detaining authority might have been laboring under the belief that the detenue applies for bail, he may succeed

in seeking his release but this apprehension of the detaining authority could have been guarded against by resisting and opposing the bail application. In

the event of his release on bail, the State could have exercised its right to knock at the doors of higher forum. This single infraction knocks at the

bottom of the contention raised by the State that the detenue can be detained preventatively when he is already in custody and has not applied for bail.

It cuts the very root of the state act. The State could have taken recourse to the ordinary law of the land.

33) The Hon'ble Supreme Court in *Rekha v. State of Tami Nadu* AIR 2011 SCW 2262, while making reference to law laid down in *Kamleshwar*

Ishwar Prasad Patel v. Union of India and Others (1995) 2 SCC 5,1 observed that history of liberty is history of procedural safeguards. These

procedural safeguards are required to be zealously watched and enforced by the Court and their rigour cannot be allowed to be diluted on the basis of

nature of alleged activities of detenu. The Supreme Court quoted with approval the observation made in *Ratan Singh v. State of Punjab and others*

1981 (4) SCC 481, emphasising need to ensure that the Constitutional and Statutory safeguards available to a detenu were pursued in letter and spirit

observed: “But the laws of preventive detention afford only a modicum of safeguards to persons detained under them, and if freedom and liberty

are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenu.”

34) Procedural requirements are only safeguards available to a detenu, for the reason that the Court is not expected to go behind subjective

satisfaction of detaining authority. As laid down by the Supreme Court in “Abdul Latif Abdul Wahab Sheikh v. B. K. Jha and another” (1987) 2

SCC 22, procedural requirements are, therefore, to be strictly complied with, if any value is to be attached to the liberty of the subject and the

Constitutional rights guaranteed to him in that regard.

35) From the above overview of case law on the subject of preventive detention, the baseline, that emerges is that whenever preventive detention is

called in question in a court of law, first and foremost task before the Court is to see whether procedural safeguards guaranteed under Article 22(5) of

the Constitution of India and Preventive Detention Law pressed into service to slap the detention, are adhered to.

36) For what has been stated above, the order of detention impugned bearing No. 81/DMA/PSA/DET/2018 dated 12.03.2019, passed District

Magistrate, Anantnag, is not valid, as such, is quashed. Further custody of the detenu shall be regulated in accordance with the orders as shall be

passed by the court of competent jurisdiction in the criminal case registered against him

37) The record, as produced, be returned to the learned counsel for the respondents.