Gulab Mehra vs State Of U.P. & Ors on 15 September, 1987

Equivalent citations: 1987 AIR 2332, 1988 SCR (1) 126, 1988 CRI. L. J. 168, 1987 (4) SCC 302 (1987) 3 JT 559 (SC), (1987) 3 JT 559 (SC), AIR 1987 SUPREME COURT 2332, 1987 (4) JT 559, 1987 (3) IJR (SC) 617, 1987 SCC(CRI) 721, (1987) 2 RECCRIR 416, (1987) ALLCRIC 520, (1987) 3 CRIMES 405

Author: B.C. Ray

Bench: B.C. Ray, A.P. Sen

PETITIONER:
GULAB MEHRA

Vs.

RESPONDENT:
STATE OF U.P. & ORS.

DATE OF JUDGMENT15/09/1987

BENCH:
RAY, B.C. (J)
BENCH:
RAY, B.C. (J)
SEN, A.P. (J)

CITATION:
1987 AIR 2332 1988 SCR (1) 126
1987 SCC (4) 302 JT 1987 (3) 559
1987 SCALE (2)561
CITATOR INFO :
APL 1988 SC 74 (9)
RF 1988 SC 208 (12)
R 1989 SC 764 (13)
R 1990 SC1361 (14)

ACT:
National Security Act, 1980 -order of detention under section 3(2) of-Challenged.
%
The appellant was in jail on October 10, 1986, as an under-trial prisoner, when an order of detention issued in respect of him by the District Magistrate, respondent No. 2, under section 3(2) of the National Security Act, 1980 was clamped on him, and on the same day, the grounds of detention were served on him. The appellant made a

representation against the grounds of detention before the authorities concerned, but the same was rejected and the order of detention, confirmed. He then challenged the order of detention, as illegal and bad by a Habeas Corpus Writ Petition before the High Court on various grounds, including the ground that the grounds of detention were absolutely vague and there was complete non-application of mind by the detaining authority in coming to the subjective satisfaction, and that the order of detention passed on him while he was in custody was wholly arbitrary and unwarranted. The High Court dismissed the Writ Petition, holding that the order of detention passed while the appellant was in jail could not be held to be illegal. The appellant moved this Court by special leave for relief against the judgment and order of the High Court.

Allowing the Appeal, the Court,

HEADNOTE:

HELD: The order of detention was passed by the respondent No. 2. District Magistrate, on the basis of two Criminal Cases in respect of two incidents which had occurred on October 2 and 3, 1986. So far as the case being G.D. No. 38 was concerned, the report of this incident was made by the picket employed at police station, Kydganj. It appeared from this report that there were no particulars about the shopkeepers who had been terrorised and threatened for payment of money, as alleged in the grounds of detention, nor were mentioned at all the names of any of the witnesses in whose presence the threat or terror was used and money was demanded. The report was absolutely vague and it was not possible for the detenu to give an effective representation

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against the ground, which is one of the Constitutional requirements enjoined in Article 22(5) of the Constitution of India. The second ground, which led to crime case No. 248/86 under section 307, I.P.C., and crime case no. 249/86 under section 4/5 of the Explosives Act and which occurred on October 3, 1986, registered on the complaint of Sub/Inspector Yatendra Singh through special court, Allahabad, also did not disclose any particulars as to the shop-keepers in whose presence the bombs alleged were thrown by the appellant, and who were terrified and panic-stricken, etc., nor were mentioned the names of any witnesses in respect of the said incident. [133F, 134A-D]

The question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order, is a question of degree and the extent of the reach of the act upon the Society, as held by this Court in Kanu Biswos v. State of West Bengal, [1972] 3 S.C.C. 831, while determining the meaning of 'public

order'. Public order is what the French Call "order Publique" and is something more than ordinary maintenance of law and order. From the observations of this Court made in many cases, it is evident that whether an act amounts to a breach of law and order or a breach of public order, solely depends upon its extent and reach to the society. If the act is restricted to particular individuals or a group of individuals, it breaches the law and order problem, but if the effect and reach and potentiality of the act are so deep as to affect the community at large and/or the even tempo of the community, then, it becomes a breach of the public order. An act, which may not at all be objected to in certain situations is capable of totally disturbing the public tranquillity. When communal tension is high, an indiscreet act of no significance is likely to disturb or dislocate the even tempo of the life of the community. An order of detention made in such a situation has to take note of the potentiality of the act objected to. Thus, whether an act relates to law and order or the public order depends upon the impact of the act on the life of the community, or, in other words, the reach and effect and potentiality of the act, if so put as to disturb or dislocate the even tempo of the life of the community, it will be an act which will affect the public order . [134D-E,137A-B. 138B-D]

In this case, so far as the first incident which occurred on 2.10.1986 was concerned, the ground was vague inasmuch as the names of the witnesses in whose presence the threat was given and the incident occurred, had not been mentioned. As regards the second incident which occurred on 3. 10.1986, the Crime Case No. 248/86 under section 307, I.P.C. and the Crime Case No. 249/86 under section 4/5 of the Explosive Act, were pending trial. [138E-F]

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A case crime No. 200 of 1985 under sections 323/504/506/426, l.P.C., read with section 2/3 of the U.P. Gangsters and Anti-Social Activities Act No. 4 of 1986 was registered against the appellant by the police. That case was challenged by an application under section 482 Cr.P.C. in the High Court. The said application was admitted on 2.6.1986 and had been pending. The High Court had, while admitting the case, granted stay of arrest of the appellant. The appellant had been taken into custody and was in jail as an undertrial prisoner on October 10, 1986, when the impugned order of detention was clamped upon him. The appellant stated in this Appeal that till date he had not applied for bail in case crime No. 248/86 and case crime No. 249/86 as well as the case registered in report No. 38 dated October 2, 1986 at the police station Kydganj. The question was whether there was a possibility of the detaining authority to be satisfied that the appellant was likely to indulge in activities prejudicial to the maintenance of public order as there was no likelihood of his being released from the jail custody immediately. There was

nothing in the case to show that in consideration of his previous conduct and acts, there was a likelihood of the appellant's indulging in activities prejudicial to the maintenance of public order if he was set free and/or released from custody. [138F-H, 139A-B, 140B-C]

The detaining authority District Magistrate-respondent No. 2, had not filed an affidavit stating whether he had taken into consideration the fact that the appellant had already been in the judicial custody and on considering his past activities he had been subjectively satisfied that if set free or released from jail custody on bail, there was a likelihood of his indulging in criminal activities endangering public order. On the other hand, the Station officer of Kydganj police station, had filed a counter stating that the District Magistrate had passed the impugned detention order when the appellant was already in jail, on the p apprehension that the appellant was likely to be released on bail in the near future and if he was bailed out, the public order would become worse. This clearly showed that the police officer had arrogated to himself the knowledge about the subjective satisfaction of the District Magistrate on whom the power is conferred by the Act. The affidavit filed by the station officer of police implied that he had access to the file of the District Magistrate or he influenced the decision of the District Magistrate for making the detention order. There was nothing to show that there was awareness in the mind of the District Magistrate, the detaining authority, of the fact that the appellant was in jail at the time of the clamping of the order of detention, and the detaining authority was satisfied, in considering his antecedents, that there was a likelihood of his indulging in criminal activities, jeopardising public order if he

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was released on bail and that there was every likelihood of his being A enlarged on bail within a short time. On this ground alone, the detention order was invalid. It might be said in this connection that the respondents could very well oppose the bail application when it came up for hearing, and if at all the appellant was released on bail, the respondents were not without a remedy. They could file an application for cancellation of the bail. In the circumstances, it could not but be held that the passing of the order of detention of the appellant who was already in custody was fully bad and invalid in law. The respondents could very well proceed with the criminal case under section 307, I.P.C., and get the appellant punished if the case was proved beyond doubt against him. The police officers, who witnessed the hurling of the bombs and the Sub-Inspector of police who recorded the F.I.R., could come forward to give evidence. In the circumstances, the open statement in the affidavit of the Sub-Inspector that the witnesses were afraid of disclosing their names and giving evidence, was

wholly incredulous and could not be accepted. [141G-H, 142A-G, 143G-144A]

The clamping of the order of detention was not in accordance with the provisions of the Act. The history-sheet did not at all link to the proximity of the two incidents on the basis of which the detention order had been passed. [144C-D]

The impugned order of detention was illegal and invalid. [144G] E

Kanu Biswas v. State of West Bengal, [1972] 3 S.C.C. 831; Haradhan Saha v. The State of West Bengal and Anr. [1975] 3 S.C.C. 198; Kanchanlal Maneklal Chokshi v. State of Gujarat & ors., [1979] 4 S.C.C. 14; Dr. Ram Manohar Lohia v. State of Bihar & ors., [1966] 1 S.C.R. 709; Arun Ghosh v. State of West Bengal, [1970] 3 S.C.R. 283; Nagendra Nath Mondal v. State of West Bengal, 11972] 1 S.C.C. 498; Nand Lal Roy alias Nonda Dulal Roy v. State of West Bengal, [1972] 2 S.C.C. 524; S.K. Kedar v. State of West Bengal, [1972] 2 S.C.C. 816; Ashok Kumar v. Delhi Administration, [1982] 2 S.C.C. 403; State of U.P. v. Hari Shankar Tewari, [1987] 2 S.C.C 490; Masood Alam v. Union of India, A.I.R. 1973 S.C. 897; Rameshwar Shaw v. District Magistrate Burdwan JUDGMENT:

State of Andhra Pradesh & ors., [1983] 1 S.C.R. 635; Ramesh Yadav v. District Magistrate, Etah and others, A.I.R. 1986 S.C. 315; Abdul Gaffer v. State of West Bengal, A.I.R. 1975 S.C. 1496 and Sudhir Kumar Saha v. Commissioner of Police, Calcutta, [1970] 3 S.C.R. 360, referred to. H & CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 450 of 1987 From the Judgment and order dated 26.3.1987 of the Allahabad High Court in Habeas Corpus Petition No. 17849 of 1986.

D.K. Garg for the Appellant.

Dalveer Bhandari for the Respondents.

The Judgment of the Court was delivered by B.C. RAY, J. Special leave granted. Arguments heard. This appeal by special leave is directed against the judgment and order of the High Court of Allahabad dated 26th March, 1987 in Habeas Corpus Petition No. 17849 of 1986 dismissing the writ petition and confirming the order of detention passed against the appellant by the District Magistrate, Allahabad.

The respondent No. 2, District Magistrate, Allahabad clamped upon the appellant an order of detention under section 3(2) of the National Security Act, 1980 and the appellant was detained at Central Jail, Naini on October 10, 1986. On the same day the grounds of detention were served on the appellant. Two grounds of detention mentioned in the grounds of detention are stated hereinbelow:-

> (1) That the appellant on 2.10.1986 threatened the shopkeepers of Khalasi Line locality in order to extort money anc} was saying that appellant could not come for

> the last auction because the police were present on that occasion and that the shopkeepers bad not given the appellant the money received in the above auction. Further that the shopkeepers should collect money and give it to the appellant or else the appellant would shoot all of them. As a result of this the place was terror-stricken and the shops and houses closed down. A report of this incident was made by the picket employed at police station Kydganj, i.e. report No. 38 time 20. 10 dated 2. 10.86. This was investigated by Dev Shankar, S.I. Of police station Kydganj and the details written in report No. 2 time 00.30 dated 3. 10.86 in the general diary as Case crime No. 248/86, Section 307 I.P.C.

and case crime No.249/86, Section 4/5 Explosives Act, Police Station, Kydganj, Allahabad.

(2) On 3. 10. 1986, the appellant armed with illegal bombs went towards Uttam Talkies. Kydganj, Allahabad with the intention of committing serious offence. On information being received, the police went to arrest the appellant. That the appellant with the intention to kill lobbed a bomb but the police party escaped it by a hair's breadth and the bomb exploded. As a result of this there was a stampede in the public, the doors and windows of the houses and shops closed down, the traffic stopped and the people were terror-stricken. The police arrested appellant on the spot and recovered 3 illegal bombs from the appellant. The appellant has also been supplied with a copy of a confidential letter written by the Superintendent of Police, Allahabad to District Magistrate, Allahabad dated 9.10.1986. The said letter was written by the Superintendent of Police on the recommendation of the Station officer, Kydganj, Allahabad on 5. 10. 1986. The appellant has also been supplied with the copy of the report No. 38 in which it is alleged that the appellant threatened the shopkeepers of Khalasi Line in an attempt to extort money. He was also supplied with the copy of the report which was registered as case crime No. 248 of 1986 under section 307 I.P.C. and case crime No. 249 of 1986 under section 4/5 of the Explosives Act. The appellant made representation against the grounds of detention before the authorities concerned but his representation was rejected and the order of detention was confirmed. E The appellant challenged the order of detention by a writ of Habeas Corpus before the High Court of Allahabad on the ground inter alia that the grounds of detention are absolutely vague and there is complete non-application of mind by the detaining authority in coming to the subjective satisfaction, that the order of detention passed on the appelant while he was in custody is wholly arbitrary and unwarranted and the two cases disclosed in the grounds of detention relate to law and order problem and not to the disturbance of public order. The criminal proceedings pending in respect of the case should not have been by-passed by taking recourse to the order of detention of the appellant who is already in custody and there was no likelihood nor any possibility of his indulging in activities prejudicial to the maintenance of public order as the appellant has not made any application for bail in the said case. The detention order has, therefore, been assailed as illegal and bad and so the same is invalid in law.

The High Court after hearing the appellant, by its judgment and H order dated 26th March, 1987 dismissed the writ petition No. 17849 of 1986 holding that the order of detention passed by the detaining authority while the appellant was in jail could not be held to be illegal in the facts and circumstances of the case.

Aggrieved by the said order the instant appeal by special leave was filed in this court.

An affidavit in counter verified by one O.P. Ojha, Station officer, Police Station, Kydganj, Allahabad has been filed. It has been stated in paragraph 4(iii) of the counter affidavit that the appellant's history starts from 1955 and he involved himself in a large number of criminal cases. His name in the history sheet was included by the police. It has been further stated that out of fear the shopkeepers of the village dare not disclose their names and the people of Khalasi Line dare not depose against the appellant since he is a goonda of the locality and people are afraid of him. It has been further stated that this is the reason for non- appearance of the shopkeepers and others as witnesses. The first incident dated October 2, 1986 was registered in G.D. No. 38 of the said date and the second incident which occurred on October 3, 1986 was registered as case crime No. 368 of 1986 under section 302/307/120-B, I.P.C. It has been further stated that these two incidents created terror to the shopkeepers and the people of the locality. This resulted in a great problem of public order. It has been stated further that after being convinced of the gravity of the situation created by the appellant and his accomplice, the District Magistrate after fully satisfying himself about the state of affairs, passed the order of detention of the appellant. It has also been stated that the detention order was passed mainly on the basis of two criminal acts committed by the appellant on October 2 and 3, 1986. Before passing the detention order the District Magistrate fully satisfied himself of all the conditions for passing a detention order under the National Security Act. It has also been stated that it is wrong that the allegations made in the reports dated October 2 and 3, 1986 are false. The District Magistrate fully satisfied himself after perusing all the records before he passed the order of detention against the appellant. The cases which have been reported on October 2 and 3, 1986 are pending trial before the Court. It has also been stated that the order of detention was passed by the District Magistrate on the basis of the information gathered by him from the reports submitted by the police. It has also been stated that the appellant has already applied for bail in crime case No. 248/86 under section 307 I.P.C. and crime case No. 249/86 under section 4/5 of Explosives Act. Notices of bail applications in connection with these two cases were served on the State Government prior to the passing of the detention order by the District Magistrate. The District Magistrate passed the detention order dated October 10, 1986 when the appellant was already in jail on the apprehension that the appellant is likely to be released on bail in the near future and that if the appellant is bailed out, the public order problem will become worse. The detention order was passed with the object of preventing the appellant from acting in a manner prejudicial to the maintenance of public order. Hence the detention order is legal in all respects. The history sheet of crime cases against the appellant has been annexed to the said affidavit.

Before proceeding to consider the case on merits it is relevant to quote the provisions of Section 3 sub-section (2) of National security Act, 1980.

Sec. 3(2):The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State. Or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

On a plain reading of Section 3(2) of the said Act it becomes clear that the Central Government or the State Government or the District Magistrate authorised by the State Government in writing may pass an order of detention against a person on being satisfied that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, it is necessary to make an order directing that such person be detained.

In the instant case the order of detention has been made by respondent No. 2, District Magistrate, on the basis of two criminal cases in respect of two incidents which occurred on October 2 and 3, 1986. So far as the case being G.D. No. 38 is concerned, allegation was that the appellant was threatening the traders of Khalasi Line who participated in the auction at the fort and he was saying that he could not collect money from them on the last occasion because the police were posted there but in case they did not collect money and give it to him he would shoot all of them. Because of this terror the shopkeeprs closed the doors and windows of their shops and houses. The report of this incident was made by the picket employed at police station, Kydganj. It appears from this report that there are no particulars about the shopkeepers who have been terrorised and threatened for payment of money nor the names of any of the witnesses in whose presence the threat or terror was given and money was demanded, are mentioned at all. The report is absolutely vague and it is not possible for the detenu to give an effective representation against the aforesaid ground which is one of the constitutional requirement enjoined in Article 22(5) of the Constitution of India. The second ground which leads to crime case No. 248/86 under section 307 I.P.C. and case crime No. 249 under section 4/5 of Explosives Act and which occurred on October 3, 1986 at about 10 A.M. On the complaint of Sub-Inspector Yatendra Singh through special court, Allahabad also does not disclose any particulars as to the shopkeepers in whose presence the alleged bombs were thrown by the appellant and his associate and who were terrified and panic-stricken and put down their shutters, nor the names of any of the witnesses have been mentiond in respect of the said incident.

The meaning of the word 'public order' has been determined by this Court in the case of Kanu Biswas v. State of West Bengal. [1972] 3 SSC 83 1. In this case it has been held that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. Public order is what the French call "order publique" and is something more than ordinary maintenance of law and order.

In the case of Haradhan Saha v. The State of West Bengal and others, [19751 3 SCC 198 this Court has observed that the following principles emerge from the judicial decisions:-

> First: merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Act.
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> Second: the fact that the Police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the Code of Criminal Procedure and even

lodges a first information report may be no bar against the District Magistrate issuing an order under the preventive detention.

Third: where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or the public order. Fourth: the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the order.

Fifth: the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behaviour of a person based on his part conduct in the light of the surrounding circumstances.

This has been followed in Kanchanlal Meneklal Chokshi v. State of Gujarat and others, [1979] 4 SCC 14 wherein it has been observed that:

"The ordinary criminal process is not to be circumvented or short circuited by ready resort to preventive detention. But, the possibility of launching a criminal prosecution is not an absolute bar to an order of preventive detention. Nor is it correct to say that if such possibility is not present to the mind of the detaining authority the order of detention is necessarily bad. However, the failure of the detaining authority to consider the possibility of launching a criminal prosecution may, in the circumstances of a case, lead to the conclusion that the detaining authority had not applied its mind to the vital question whether it was necessary to make an order of preventive detention. Where an express allegation is made that the order of detention was issued in a mechanical fashion without keeping present to its mind the question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose, the detaining authority must satisfy the Court that question too was borne in mind before the order of detention was made. If the detaining authority fails to satisfy the Court that the detaining authority so bore the question in mind the Court would be justified in drawing the inference that there was no application of the mind by the detaining authority to the vital question whether it was necessary to preventively detain the detenu. "

In the case of Dr. Ram Manohar Lohia v. State of Bihar and others, [1966] l SCR 709 it has been observed by this Court that:

"The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. There are three concepts according to the learned Judge (Hidayatullah, J) i.e. ''law and order'', "public order" and "security of the State' . It has been observed that to appreciate the scope and extent of each of them, one should imagine three concentric circles. The

largest of them represented law and order, next represented public order and the smallest represented the security of the State. An act might affect law and order but not public order just as an act might affect public order but not the security of the State." As observed in the case of Arun Ghosh v. State of West Bengal, [1970] 3 SCR 288:

"Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different."

This has been followed in the case of Nagendra Nath Mondal v.

State of West Bengal, [1972] 1 SCC 498 and Nand Lal Roy alias Nonda Dulal Roy v. State of West Bengal, [1972] 2 SCC

524. Thus from these observations it is evident that an act whether amounts to a breach of law and order or a breach of public order solely depends on its extent and reach to the society. If the act is restricted to particular individuals or a group of individuals it breaches the law and order problem but if the effect and reach and potentiality of the act is so deep as to affect the community at large and or the even tempo of the community that it becomes a breach of the public order.

In the case of S.K. Kedar v. State of West Bengal, [1972] 3 SCC 816 this Court has observed that :-

"The question whether a person has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is one of degree and the extent of the reach of the act upon the society. An act by itself is not determinative of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. It is the degree of disturbance upon the life of the community which

> determines whether the disturbance amounts only to a breach of the law and order."

This Court has further observed in the case of Ashok Kumar v. Delhi Administration, [1982] 2 SCC 403 while dealing with the distinction between 'public order' and 'law and order' to which one of us is a party that:-

> "The true distinction between the areas of 'public order and 'law and order' lies not in the nature of quality of the act, but in the degree and extent of its reach upon society. The distinction between the two concepts of 'law and order' and 'public order' is a fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order. The act by itself therefore is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order."

On a conspectus of all these decisions it has been observed by this Court in the case of State of U.P. v. Hari Shankar Tewari, [1987] 2 SCC 490 that conceptually there is difference between law and order and public order but what in a given situation may be a matter covered by law and order may really turn out to be one of public order. One has to turn to the facts of each case to ascertain whether the matter relates to the larger circle or the smaller circle. An act which may not at all be objected to in certain situations is capable of totally disturbing the public tranquility. When communal tension is high, an indiscreet act of no significance is likely to disturb or dislocate the even tempo of the life of the community. An order of detention made in such a situation has to take note of the potentiality of the act objected to. Thus whether an act relates to law and order or to public order depends upon the impact of the act on the life of the community or in other words the reach and effect and potentiality of the act if so put as to disturb or dislocate the even tempo of the life of the community, it will be an act which will affect public order.

In the present case so far as the first incident which occurred on 2. 10.1986 is concerned, the ground is vague in as much as neither the names of the witnesses in whose presence the threat was given and the incident occurred, have been mentioned. As regards the second incident which occurred on 3. 10.1986, case crime No. 248 86 under Section 307 I.P.C. and No. 249/86 under Section 4/5 Explosives Act respectively are pending trial.

It is also pertinent to remember in this connection that a case crime No. 200 of 1986 under section 323/504/506/426 I.P.C. read with section 2 3 of the U.P. Gangsters and Anti Social Activities Act No. 4 of 1986 by the police of the police station, Naini, a copy of which was annexed as annexure I to this appeal, was registered against the appellant. The said case was challenged by an application under section 482 Cr. P.C. in the High Court. The said application was admitted on 2.6.1986 and it is pending as Criminal Misc. Application No. 6638 of 1986. The High Court while admitting the case had granted stay of arrest of the appellant. Furthermore, the appellant was taken in custody and he was in jail as an under-trial prisoner on October 10. 1986 when the impugned order of detention was clamped upon him by the detaining authority, the respondent No. 2. The appellant has stated in his

appeal before this Court that till date he had not applied for bail in case crime No. 248 1986 under section 307 I.P.C. and case crime No. 249 1986 under section 4/5 of the Explosives Act as well as the case registered in report No. 38 dated October 2, 1986 at police station, Kydganj. The question is whether there is possibility of the detaining authority to be satisfied that the appellant is likely to indulge in activities prejudicial to the maintenance of public order as there is no likelihood of his being released from jail custody immediately. This specific question arose in the case of Masood Alam v. Union of India, AIR 1973 (SC) 897 wherein it has been observed that:

> "The order of detention served upon the detenu while he was in jail is not invalid rendering the petitioner's detention as void. There is no legal bar in serving an order of detention on a person who is in jail custody if he is likely to be released soon thereafter and there is relevant material on which the detaining authority is satisfied that if freed, the person concerned is likely to indulge in activities prejudicial to the security of the state or maintenance of public order."

In the case of Rameshwar Shaw v. District Magistrate, Burdwan & Anr., [1964] 4 SCR 92 1 it has been observed that:

> "The first stage in the process is to examine the material adduced against a person to show either from his conduct or his antecedent history that he has been acting in a prejudicial manner. If the said material appears satisfactory to the authority, then the authority has to consider whether it is likely that the said person would act in a prejudicial manner in future if he is not prevented from doing so by an order of detention. If this question is answered against the petitioner, then the detention order can be properly made. It is obvious that before an authority can legitimately come to the conclusion that the detention of the person is necessary to prevent him from acting in a prejudicial manner, the authority has to be satisfied that if the person is not detained, he would act in a prejudicial manner and that inevitably postulates freedom of action to the said person at the relevant time. If a person is already in jail custody, how can it rationally be postulated that if he is not detained, h would act in a prejudicial manner? At the point of time when an order of detention is going to be served on a person, it must be patent that the said person would act prejudicially if he is not detained and that is a consideration which would be absent when the authority is dealing with a person already in detention. The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus the basis of the order under s. 3(1)(a), and this basis is clearly absent in the case of the petitioner."

In the instant case there is nothing to show that in consideration of his previous conduct and acts there. is a likelihood of the appellant indulging in activities prejudicial] to the maintenance of public order if he is set free and/or released from custody.

It has been observed in the case of Merugu Satyanarayana etc. etc. v. State of Andhra Pradesh and others, [1983] 1 SCR 635 by this Court that before making an order of detention in respect of a

person already confined to jail "it must be present to the mind of the detaining authority that keeping in view the fact the person is already indetention a preventive detention order is still necessary. The subjective satisfaction of the detaining authority must comprehend the very fact that the person sought to be detained is already in jail or under detention and yet a preventive detention order is a compelling necessity. If the subjective satisfaction is reached without the awareness of this very relevant fact the detention order is likely to be vitiated. But as stated by this Court it will depend on the facts and circumstances of each case.

It has further been observed as follows:-

> "We are completely at a loss to understand how a Sub Inspector of Police can arrogate to himself the knowledge about the subjective satisfaction of the District Magistrate on whom the power is conferred by the Act. If the power of preventive detention is to be conferred on an officer of the level and standing of a Sub-Inspector of Police, we would not be far from a Police State.
>
> Parliament has conferred power primarily on the Central Government and the State Government and in some specific cases if the conditions set out in sub-section (3) of section 3 are satisfied and the notification is issued by the State Government to that effect, this extra-ordinary power of directing preventive detention can be exercised by such highly placed officers as District Magistrate or Commissioner of Police. In this case the District Magistrate, the detaining authority has not chosen to file his affidavit. The affidavit in opposition is filed by a Sub- Inspector of Police. Would this imply that Sub- Inspector of Police had access to the file of the District Magistrate or was the Sub-Inspector the person who influenced the decision of the District Magistrate for making the detention order? From the very fact that the respondents sought to sustain the order by filing an affidavit of Sub- Inspector of Police, we have serious apprehension as to whether the District Magistrate completely abdicated his functions in favour of the Sub- Inspector of Police."

In a recent case of Ramesh Yadav v. District Magistrate, Etah and others, AIR 1986 (SC) 3 15 it has been observed that:

> "It is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu 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 undertrial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed. We are inclined to agree with counsel for the petitioner that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles indicated by this Court in series of cases relating to preventive detention. The impugned order, therefore, has to be quashed.

In the instant case the detaining authority, respondent No. 2 has not come forward to file an affidavit stating whether he has taken into consideration the fact that the appellant was already in judicial custody and on considering his past activities he was subjectively satisfied that if set free or released from jail custody on bail, there was likelihood of the appellant indulging in criminal activities endangering public order. On the other hand, the Station officer of the Police Station, Kydganj, Shri O.P. Ojha has filed a counter stating that the District Magistrate passed the impugned detention order when the appellant was already in jail on the apprehension that the appellant is likely to be released on bail in the near future and if the appellant is bailed out, the public order problem will become worse. This clearly goes to show that the Sub-Inspector has arrogated to himself the knowledge about the subjective satisfaction of the District Magistrate on whom the power is conferred by the Act. The District Magistrate, the detaining authority in this case has not chosen to file his affidavit. The affidavit-in-opposition filed by the Station officer of Police implies that he has access to the file of the District Magistrate or he influenced the decision of the District Magistrate for making the detention order. This is also clear from the confidential report submitted by the Senior Superintendent of Police, Allahabad to the District Magistrate, Allahabad as well as from the report of the Sub- Inspector of Police annexed with the said report wherein it has been specifically stated that it was apprehended that the appellant, Gulab Mehra who is at present in Naini jail and who has applied for bail, if enlarged on bail, public order will be disturbed. There is nothing to show that there was awareness in the mind of the District Magistrate, the detaining authority of the fact that the appellant was in jail at the time of clamping of the order of detention, and the detaining authority was satisfied in considering his antecedents and previous criminal acts, that there is likelihood of his indulging in criminal activities jeopardizing public order if he is enlarged on bail and that there is every likelihood that the appellant will be released on bail within a short time. On this ground alone, the order of detention is invalid. It may also be stated in this connection that the respondents can very well oppose the bail application when it comes for hearing and if at all the appellant is released on bail the respondents are not without any remedy. They can also file application in revision for cancellation of the bail application. In such circumstances, we cannot but hold that the passing of the order of detention of the appellant who is already in custody is fully bad and as such the same is invalid in law. We have already said hereinbefore that the respondents can very well proceed with the criminal case under section 307 of I.P.C., execute it against the appellant and can get him punished if the case is approved beyond doubt against the appellant. It is pertinent to mention in this connection the case of Abdul Gaffer v. State of West Bengal, AIR 1975 (SC) 1496 wherein the order of detention was passed in respect of three cases registered against the petitioner. These are as follows:-

(1) The petitioner along with his associates on 18.7.1971 being armed with deadly weapons like daggers etc. committed thefts in respect of D.O. plates from the railway yard and on being challenged, pelted stones causing injury to the R.P.F. party. The

R.P.F. party had to open fire but the petitioner and his associates fled away. A (2) On 25.11.1971 the petitioner along with his associates being armed with deadly weapons committed theft in respect of batteries from empty rakes standing on the railway track. Being challenged by the R.P.F. party the petitioner and his associates pelted stones. The R.P.F. party fired two rounds whereby one of his associates was injured and arrested at the spot.

(3) On 20.2. 1972, at Howrah Goods Yard near Oriapara Quarters, the petitioner along with his associates being armed with deadly weapons viz. bombs, iron rods etc. committed theft of wheat bags from a wagon and on being challenged by the R.P.F. party the petitioner and his associates pelted stones and hurled bombs. As a result of this act train services on Howrah-Burdwan line was suspended for a considerable period.

Three cases were registered in respect of these offences and order of detention was made by the District Magistrate. The detaining authority, however, did not file an affidavit but his successor-in-office in response to Rule Nisi issued by the High Court filed the counter. It has been observed firstly that the detaining authority has not filed the counter affidavit and the return filed in his place by his successor-in-office does not satisfactorily explain why the prosecution of the petitioner for the substantive offence in respect of which he was arrested and named in the F.I.R. was not proceeded with. According to the counsel the so-called explanation given in the counter that the witnesses being afraid were not coming forward to give evidence was too ridiculous to be believed by any reasonable person. The Sub Inspector of Police who made the panchnama could certainly not be afraid of giving evidence. The other material witnesses who could give evidence were the members of the R.P.F. party. It is a para police organisation. The bald but sweeping allegation in the counter that these witnesses were also afraid of giving evidence in court against the petitioner is a version which is too incredulous to be swallowed even by an ultra credulous person without straining his credulity to the utmost. The order of detention was therefore held invalid.

In the instant case the police officers who withnessed the hurling of bombs and the Sub-Inspector of Police who recorded the F.I.R. can come forward to give the evidence. Therefore, in such circumstances, the open statement made in the affidavit of the Sub-Inspector of Police that the witnesses are afraid of disclosing their names and coming H forward to give evidence is wholly incredulous and it cannot be accepted. The prosecution of the appellant for the substantive offences can be properly proceeded with in this case In the case of Sudhir Kumar Saha v. Commissioner of Police, Calcutta & Anr., [1970] 3 SCR 360 the petitioner along with his associates committed various acts of crime on three occasions. On the first occasion he attacked the people of a locality with a knife and by hurling bottles at them. On the other two occasions he attacked the people of another locality, by hurling bomes at them. It was held that the incidents were not interlinked and could not have prejudiced the maintenance of public order.

On considering these decisions, we are constrained to hold that the clamping of the order of detention is not in accordance with the provision of the Act. Furthermore, the history-sheet does not at all link to the proximity of the two incidents on the basis of which the o order of detention was made. It has been vehemently urged before us by the learned counsel appearing for the appellant

that in none of the cases mentioned in the history-sheet the appellant has been convicted and moreover these cases related to a period much earlier than the period in which the two cases have occurred. It has also been submitted in this connection by the learned counsel for the appellant that the appellant had not been convicted in any of the cases and the submission of the Sub-Inspector of Police that the witnesses are afraid of disclosing their names and coming forward to give evidence is wholly incorrect and false in as much as witnesses in fact gave the evidence in a criminal case which ended in acquittal. It has also been submitted by the learned counsel that the shopkeepers of the locality where the alleged hurling of bombs took place have made an application in this case that no such incident occurred on the said dates.

In the premises, aforesaid, we hold that the impugned order of detention is illegal and invalid and we allow the appeal setting aside the judgment and order of the High Court without any order as to costs.

S.L. Appeal allowed.