N. Meera Rani

Vs

Government of Tamil Nadu and Another

Criminal Appeal No. 511 of 1989 and Writ Petition (Criminal) No. 205 of 1989

(S. Ranganathan, N. D. Ojha, J. S. Verma JJ)

22.08.1989

JUDGMENT

VERMA, J. –

1. Special leave granted.

2. The appellant-petitioner, Smt. N. Meera Rani, is the wife of Nallathambi who has been under the National Security Act, 1980 (Act 65 of 1980) (hereinafter referred to as "the Act "). An order dated September 7, 1988 was made by the Collector and District Magistrate, Madurai, under Section 3(2) of the Act directing that the detenu be kept in custody in the Central Prison, Madurai. Thereafter, the State Government by its order dated October 25, 1988 made under Section 12(1) of the Act has confirmed the order of detention agreeing with the opinion of the Advisory Board constituted under the Act and directed that the detenu be kept in detention for a period of 12 months from the date of his detention. This preventive detention of the detenu was challenged in the High court of Judicature at Madras by his wife, the appellant-petitioner, under Article 226 of the Constitution praying for issuance of a writ of habeas corpus. The High Court by its order dated March 6, 1989 has dismissed the writ petition. The appellant-petitioner has then challenged dismissed of the writ petition by the High Court by special leave under Article 136 of the Constitution of India in this Court. The appellant petitioner has as filed a writ petition under Article 32 of the Constitution of India for the same purpose in this court challenging directly her husband's preventive detention. The object of filing this writ petition directly in this Court, in addition to the appeal by special leave, is to raise some additional grounds to challenge the detenu's detention. Both these matters have been heard together and are being disposed of by this common judgment.

3. We may now state the arguments advanced to challenge the detenu's detention before mentioning the relevant facts which are material for deciding those points. Shri U. R. Lalit, learned counsel for the appellant-petitioner, has advanced three contentions. The first contention is that certain documents which have been referred to in some grounds of detention were not supplied to the detenu with the result that the detenu was not given a proper and reasonable opportunity for making an effective representation and, therefore, the order of detention is vitiated for this reason alone. The second contention is that some documents in the form of newspaper reports showing that the detenu was apprehended and detained even prior to August 21, 1988 when the detenu was shown to have been arrested in connection with an offence punishable under Section 397 IPC were not placed before the detaining authority when it formed the opinion mentioned in the detention order which has also vitiated the detention order. The last contention is that the fact of detenu's arrest in connection with an offence punishable under Section 397 IPC and of remand to custody by the Magistrate as well as the contents of the bail application dated August 22, 1988 which was rejected

by the Magistrate were not taken into account by the detaining authority before passing the order of detention dated September 7, 1988 which also renders the detention order invalid. On the other hand, Shri Chaudhary, learned counsel for the respondents contended that even assuming that same documents referred in the grounds of detention were material and were not supplied to the detenu the effect is not to invalidate the detention order for that reason alone in view of Section 5-A of the Act which has been inserted by Act 60 of 1984 with effect from June 21, 1984 since the detention order can be sustained even on the remaining grounds. In respect of the detenu's custody in connection with the offence under Section 397 IPC and rejection of his bail application, it was urged that this fact was considered by the detaining authority and, therefore, it does not result in any infirmity, Shri Lalit, on behalf of the appellant-petitioner, further contended that Section 5-A of the Act cannot be construed in the manner suggested by the learned counsel for the respondents since the guarantee to the detenu under Article 22(5) of the Constitution results in invalidating the entire detention order as claimed by him.

4. The material facts mentioned in the detention order and its annexure are now stated. A branch of the Bank of Madura is located in a rented accommodation in flat N. 634 K. K. Nagar in Madurai. On August 6, 1988, the Bank Manager and the staff of the Bank were attending to the business of the Bank which then had 443 packets containing valuable ornaments weighing about 20,576.150 grams valued at about Rs. 62 lakhs and cash amounting to Rs. 38,945. These gold ornaments were pledged with the Bank as security for loans advanced by the Bank to certain borrowers. At about 10.55 A.M. on August 6, 1988 the Bank was looted and these ornaments and cash were taken away by armed dacoits on the point of revolver after locking the Bank away by armed dacoits on the point of revolver after locking the Bank employees and customers in the strongroom. The dacoits escaped in an ambassador car with registration No. IDL 9683 and a motorcycle bearing registration No. TNK 6727. The dacoits are stated to be one Karuna and some other Sri Lanka nationals who were temporarily living in a nearby flat which was in the possession of the detenu. It is stated that the ambassador car used in the dacoity had been stolen on August 4, 1988 from Quilon in the State of Kerala by Karuna and his companies. It is further stated that the dacoity was committed in order to fund the militant organisation known as Tamil Nadu Makkal Viduthalai Eyakkam with which the detenu has been associated and that the detenu along with these Sri Lanka nationals belonging to the Sri Lanka militant organisation had entered into a criminal conspiracy to commit these cognisable offences. The object of these militant organisation is to achieve a separate Tamil Eelam in Sri. Lanka and to secure secession of Tamil Nadu from the Union of India by violent means. It is further stated that the detenu received from Karuna through Ajanth and Pinto a share of the booty comprising of gold ornaments weighing about 8325.150 grams valued at abut Rs. 25 lakhs and Rs. 15,000 in cash which was a part of the booty looted from the Bank on August 6, 1988 in addition to a box containing one revolver, 2 pistols, 3 grenades, 6 bombs and a knife. It is further stated that on august 9, 1988 the detenu took Karuna and Ajanth in his car bearing registration No. TNU 8500 to Madras along with Babu and Rajendran and subsequently on August 10, 1988 the detenu sent them to Nellore in Andhra Pradesh in his car to help them escape. It is also stated that a note was sent by the detenu to the news media in the name of Tamil Nadu Makkal Viduthalai Eyakkam owning responsibility for the dacoity and threatening the law enforcement agency and the government servants with dire consequences if they attempted to apprehend them. It is then said that on august 21, 1988 the detenu was arrested at Samayanallur while he was driving his car bearing registration No. TNU 8500 towards Madurai when he made a voluntary confession in the presence of witnesses. The car bearing registration No. TNU 8500 was seized at 1915 hours on August 21, 1988 in front of Samayanallur Police Station and the detenu's confession led to recovery of gold ornaments weighing about 7275.750 grams valued at Rs. 21,85,000 in 172 bags and 19 empty bags with Bank tags and

chits and a set of keys from the detenu's house on August 21, 1988 at 2015 hours. In pursuance of detenu's confession recovery was also made of a box containing one revolver, 2 pistols with ammunition, 3 grenades, 6 bombs and on knife from the house of Anandan, an employee of the detenu in Madurai. Further recovery of a bag containing gold ornaments weighing about 1015.600 grams valued at Rs. 3,05,000 was made from the shop of Vijayakumar in Madurai and Vijayakumar also made a confession pursuant to which the recovery was made of gold ornaments weighing about 25,900 grams from Gurumoorthy. Subsequently, these ornaments were identified as those which had been looted in the above mentioned dacoity on August 6, 1988. It is on these grounds that the impugned detention order dated September 7, 1988 was passed for the detenu's preventive detention under the Act.

5. The detention order as well as its annexure, containing the relevant ground of detention are quoted as under :

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> "ANNEXURE 'A' PROCEEDINGS OF THE COLLECTOR AND DISTRICT MAGISTRATE, MADURAIPRESENT; THIRU M. DEVARAJ, IASN.S.A. No. 73/88 Dated: September 7, 1988 DETENTION ORDER

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> WHEREAS, I, M. DEVARAJ, IAS, Collector and District Magistrate, Madurai, am satisfied with respect to the person known as Thiru Nallathambi alias Thambi, male, aged 30 years, s/o (late) Thiru S. Mathu, residing at Block No. 2, H.I.G. Colony, Anna Nagar, Madurai Town that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, it is necessary to make the following order.
>
> (2) Now, therefore, in exercise of the powers conferred by sub-section (2) of Section 3 of the National Security Act, 1980 (Central Act 65 of 1980) read with orders issued by the Government in G.O. Ms. No. 1169, Public (L&O-F) Department, dated August 3, 1988 under sub-section (3) of the said Act, I hereby direct that the said Thiru Nallathambi alias Thambi be detained and kept in custody in the Central Prison, Madurai.

Given under my hand and seal of office, this the 7th day of September, 1988.

Sd/-

Collector and District Magistrate : Madurai

To,

Thiru Nallathambi alias Thambi,

s/o (Late) Thiru S. Mathu,

Block No. 2 H.I.G. Colony,

Anna Nagar,Madurai - 20.

(Now in Central Prison, Madurai as remand prisoner)

Through:Thiru V.S. Ganapathy,

Deputy Superintendent of Police,

Tirupparakundram, Madurai City

for service under acknowledgment."

"ANNEXURE 'B'N.S.A. No. 73/88

Dated: September 7, 1988

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Sub :- National Security Act, 1980 (Central Act 65 of 1980) -detention of Thiru Nallathambi alias. Thambi, male, aged 30 years, s/o (Late) S. Mathu, 2, H.I.G. Colony, Anna Nagar, Madurai u/s 3(2) of the National Security Act, 1980 - Grounds of detention.

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A detention order under Section 392) of the National Security Act (Central Act 65 of 1980) has been made on Thiru Nallathambi alias Thambi, male, aged 30 years, s/o (Late) S. Mathu 2, H.I.G. Colony, Anna Nagar Madurai vide order NSA No. 73/88 dated September 7, 1988.

(2) The grounds on which the said detention has been made are as follows :

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(9) In furtherance of the conspiracy Thiru Nallathambi sent a note to the news media in the name of Tamil Nadu Makkal Viduthalai Eyakkam owning responsibility for the dacoity and threatening the law enforcement agency and government servants with dire consequences if they dare to apprehend them.

(10) On august 21, 1988 at 1400 hours, Thiru Nallathambi, was arrested at Samayanallur while he was driving his car TNU 8500 towards Madurai. He gave a voluntary confession which was recorded in the presence of witness (1) Kulanthani Anandan, Village Administrative Officer, Sathamngalam and (2) Pannerselvam, Village Administrative Officer, Thiruppalai. The car TNU 8500 was seized at 1915 hours on august 21, 1988 in front of Samayanallur Police Station, In pursuance of his confession gold jewels weighing about 7275.750 grams valued at Rs. 21,85,000 in 172 bags and 19 empty bags with bank tags and chits and a set of keys were recovered from his house on August 21, 1988 at 2015 hours. Further in pursuance of his confession a box containing 1 revolver, 2 pistols with ammunition, 3 grenades, 6 bombs, 1 knife was recovered from the house of accused Thiru Anand located in 27,

Lakshimipuram, 6th Street, Madurai who is also an employee under Thiru Nallathambi. Further pursuant to his confession a bag containing gold jewels weighing about 1015.600 grams valued Rs. 3,05,000 was recovered from the moulding workshop of accused Thiru Vijayakumar located in 10-A. Bharatiar Main Street, K. Pudur, Madurai. Pursuant to the confession of Thiru Vijayakumar gold jewels weighing about 25,900 grams was recovered from the accused Thiru Gurumoorthy. The above jewels recovered were identified to be stolen from the Bank of Madura on august 6, 1988.

(11) The chance prints developed from the scene of occurrence in Bank of Madura, K.K. Nagar Branch, Madurai tallied with the fingerprints of accused Thiru Karuna.

(12) The chance prints developed from the ambassador car TDL 9683 which was abandoned at new Mahali Party Street, Madurai after the commission of armed dacoity tallied with the fingerprints of accused Thiru Karuna.

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(18) I am aware that Thiru Nallathambi is in remand and would be proceeded with under normal law. Though the name of Thiru Nallathambi does not find a place in the FIR and though he has not physically participated in the commission of the armed dacoity, a reading of the records and the statement clearly disclosed the facts that Thiru Nallathambi was an active participant in the said conspiracy to loot the K.K. Nagar branch of the Bank of Madura. IN furtherance of the conspiracy Thiru Nallathambi had made preparation for the commission of the armed dacoity as discussed in para 4 above. Further Thiru Nallathambi had received a portion of booty of gold jewels weighing about 8325.150 grams valued Rs. 25 lakhs and cash Rs. 15,000 from the stolen jewels and cash robbed from the abovesaid Bank and received a box containing 1 revolver, 2 pistols, 3 grenades, 6 bombs and a knife used in the commission of offence. Subsequently, the said jewels, firearms and bombs mentioned above were recovered in pursuance of the confession of Thiru Nallathambi. Further Thiru Nallathambi sent a notice to the news media in the name of "Tamil Nadu Makkal Viduthalai Eyakkam" owning responsibility for the armed dacoity and threatening the law enforcement agency and government servants with dire consequences if they date to apprehend them. Therefore, as a detaining authority I am satisfied that there is compelling necessity warranting the detention of Thiru Nallambi under the National Security Act and if Thiru Nallathambi is allowed to remain at large it will not be possible to prevent him from indulging in activities prejudicial to the maintenance of public order.

(19) I am also satisfied on the materials mentioned above that if Thiru Nallathambi is allowed to remain at large, he will indulge in further activities prejudicial to the maintenance of public order and further the recourse to normal law would not have their desired effect of effectively preventing him from including in activities prejudicial to the maintenance of public order and, therefore, I consider that it is necessary to detain him in custody with a view to preventing him from acting in any manner prejudicial to the maintenance of public order.

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6. The first argument of the learned counsel for the appellant-petitioner is based on the above quoted grounds in paras 11, 12 and 13 relating to the chance prints developed from the scene of occurrence in the Bank, the ambassador cars TDL 9683, TDL 1919 and TDT 3699 which tallied with the fingerprints of Karuna, an accused in the Bank dacoity case. It was argued that the report of the fingerprints expert who gave this opinion was not supplied to the detenu even though it was a material document to enable the detenu to make an effective representation in respect of these grounds of detention. Another similar document relates to ground No. 9 which mentions a note sent by the detenu to the newspaper media in the name of Tamil Nadu Makkal Viduthalai Eyakkam owning responsibility for the Bank dacoity and threatening the law enforcement agency and government servants with dire consequences if they dare to apprehend them. It was argued that the non-supply of these documents on which the grounds of detention Nos. 9,11,12 and 13 are based has deprived the detenu of his legitimate right of effective representation against the same which is guaranteed under Article 22(5) of the Constitution of India and this defect results in invalidating the entire detention order. The reply of learned counsel for the respondents is that Section 5-A of the Act is a complete answer to this argument inasmuch as this defect at best requires only the exclusion of these grounds of detention no more. It was urged by learned counsel for respondents that the remaining grounds of detention were sufficient to sustain the detention order by virtue of Section 5-A of the Act. Learned counsel for the appellant-petitioner also contended that such a result is not envisaged by Section 5-A of the Act which did not apply to such a situation and the guarantee under Article 22(5) of the Constitution rendered the defect fatal to the detention order.

7. Section 5-A of the Act clearly provides that the detention order under Section 3 of the Act which has been made on two or more grounds, shall be deemed to have been made separately on each of such grounds and accordingly such order shall not be deemed to be invalid merely because one or some of the grounds is or are invalid for any reason whatsoever. It further says that the detaining authority shall be deemed to have made a detention order after being satisfied as provided in Section 3 with reference to the remaining grounds or ground. In other words, a ground of detention which is rendered invalid for any reason whatsoever, shall be treated as non-existent and the surviving grounds which remain after excluding the invalid grounds shall be deemed to be the foundation of the detention order. Section 5-A was inserted in the Act with effect from June 21, 1984 to overcome the effect of the decisions which had held that where one or more of the grounds of detention is found to be invalid, the entire detention order must fall since it would not be possible to hold that the detaining authority making such order would have been satisfied as provided in Section 3 with reference to the remaining ground or grounds. It is, therefore, doubtful whether the construction of Section 5-A suggested by learned counsel for the appellant-petitioner can be accepted. However, in the present case, it is not necessary for us to express any concluded opinion on this point since we have reached the conclusion that the detention order must be quashed on one of the other contentions to which we shall advert later.

8. The second argument of learned counsel for the respondents may also be considered before we deal with the last contention on which we propose to quash the detention order. The second contention is that the detenu's arrest in connection with the Bank dacoity case is shown as August 21, 1988 when he was actually arrested much earlier in connection with the Bank dacoity as appeared in some local newspapers but those newspaper reports are not shown to have been placed before the detaining authority. On this basis, it was argued that the satisfaction reached by the detaining authority has been vitiated.

9. The question of the date on which the detenu was taken into custody in connection with the Bank dacoity is material for the last contention which we shall consider hereafter but the same has no

relevance in this connection. Contents of the newspaper reports except for the fact of earlier arrest which was known to the detaining authority were not relevant for the satisfaction needed to justify making of the detention order. The detaining authority's satisfaction was to be formed on the basis of material relevant to show the detenu's activities requiring his preventive detention with a view to prevent him from acting in a manner prejudicial to the maintenance of the public order. The newspaper reports indicating that the detenu was already in custody could at best be relevant only to show the fact that he was already in detention prior to the making of the detention order. We have already mentioned that this fact of the detenu's custody before the making of the order of detention on September 7, 1988 was known to the detaining authority and its effect is a separate point considered later. The other contents of the newspaper reports had no other relevant for this purpose. This contention of learned counsel for the appellant-petitioner is, therefore, rejected.

10. The last contention of learned counsel is based on the fact that the detenu was already in custody in connection with the Bank dacoity when the order of detention was made on September 7, 1988. It is also clear that on August 22, 1988 the detenu had moved a bail application which had been rejected and he had been remanded to custody. It is significant that the detention order itself describes the detenu as a person in custody in the Central Prison at Madurai and the order was served on him through the Superintendent of the Prison. The question now is of the effect of the detenu's earlier custody on the validity of the detention order.

11. The contents of the detention order and its accompanying annexure clearly show that the detaining authority was aware and conscious of the fact that the detenu was already in custody in connection with the Bank dacoity at the time of making the detention order. The fact that the detenu's application for grant of bail in the dacoity case had been rejected on August 22, 1988 and he was remanded to custody for the offence of bank dacoity punishable under Section 397 IPC is also evident from the record. The detention order came to be made on September 7, 1988 on the above grounds in these circumstances. In the detention order the detaining authority recorded its satisfaction that the detenu's preventive detention was necessary to prevent him from indulging in activities prejudicial to maintenance of public order in with he would indulge if he was allowed to remain at large. The above quoted paragraph 18 and 19 of the Annexure to the detention order clearly disclose the factual position. However, it may be pointed out that the detention order read along with its annexure nowhere indicates that the detaining authority apprehended the likelihood of the detenu being released on bail in the dacoity case and, therefore, considered the detention order necessary. On the contrary, its contents, particularly those of the above quoted paragraph 18 clearly mention that the detenu had been remanded to custody for being proceeded against in due course and even though his name was not mentioned in the FIR as one of the dacoits who participated in the commission of the armed Bank dacoity yet the documents clearly revealed that the detenu was an active participant in the conspiracy to loot the bank in furtherance of which the dacoity was committed, and that considerable booty of that crime including weapons, bombs and hand grenades were recovered from his possession pursuant to the detenu's confession made after his arrest. These averments in the detention order indicate the satisfaction of the detaining authority that in its view there was ample material to prove the detenu's active participation in the crime and sharing the booty for which offence he had already been taken into custody. This view of the detaining authority negatives the impression of likelihood of detenu being released on bail.

12. The real question, therefore, is : whether after the above satisfaction reached by the detaining authority and when the detenu was already in custody being arrested in connection with the Bank dacoity, could there be any reasonable basis for making the detention order and serving it on the detenu during his custody ?

13. We may now refer to the decision on the basis of which this point is to be decided. The starting point is the decision of a Constitution Bench in Rameshwar Shaw v. District Magistrate, Burdwan. ((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257). All subsequent decision which are cited have to be read in the light of this Constitution Bench decision since they are decision by benches comprised of lesser number of judges. It is obvious that none of these subsequent decisions could have intended taking a view contrary to that of the Constitution Bench in Rameshwar Shaw Case. ((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257).

14. The detention order in Rameshwar Shaw case ((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257), was made and also served on the detenu while he was in jail custody. The detenu was then in jail where he had been kept as a result of the remand order passed by the competent court which had taken cognizance of a criminal complaint against him. The Constitution Bench considered the effect of the detenu's subsisting detention at the time making of the order of preventive detention and held that the effect thereof had to be decided on the facts of the case; and that this was a material factor to be considered by the detaining authority while reaching the satisfaction that an order of preventive detention was necessary to prevent the detenu from acting in a manner prejudicial to the maintenance of public order after his release. It was indicated that the detenu's subsisting custody did not by itself invalidate the detention order but facts and circumstances justifying the order of preventive detention notwithstanding his custody were necessary to sustain such an order.

15. The position of law was summarised by their Lordships as under : (SCR pp. 929-31)

> "As an abstract proposition of law, there may not be any doubt that Section 3(1)(a) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail; but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail. Take for instance, a case where a person has been sentenced to rigorous imprisonment for ten years. It cannot be seriously suggested that soon after the sentence of imprisonment is pronounced on the person, the detaining authority can make an order directing the detention of the said person after he is released from jail at the end of the period of the sentence imposed on him. In dealing with this question, again the considerations of proximity of time will not be irrelevant. On the other hand, if a person who is undergoing imprisonment, for a very short period, say for a month or two or so, and it is known that he would soon be released from jail, it may be possible for the authority to consider the antecedent history of the said person and decide whether the detention of the said person would be necessary after he is released from jail, and if the authority is bona fide satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released. The antecedent history and the past conduct on which the order of detention would be based would, in a such a case, be proximate in point of time and would have a rational connection with the conclusion drawn by the authority that the detention of the person after his release is necessary... Therefore, we are satisfied that the question as to whether an order of detention can be passed against a person, who is in detention or in jail, will always have to be determined in the circumstances of each case.
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> The question which still remain to be considered is : can a person in jail custody, like

> the petitioner, be served with an order of detention whilst he is in such custody ? .... We have already seen the logical process which must be followed by the authority in taking action under Section 3(1)(a). 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 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, he 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 prejudicial if he is not detained and that is a consideration on 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 actin in a prejudicial manner is thus the basis of the order under Section 3(1)(a), and this basis is clearly absent in the case of the petitioner. Therefore, we see no escape from the conclusion that the detention of the petitioner in the circumstances of this case, is not justified by Section 3(1)(a) and is outside its purview."

16. On the above principle the constitution Bench also explained the decision of the Assam High Court in Sahadat Ali v. State of Assam (AIR 1953 Ass 97 : 1953 Cri LJ 770 : ILR 1953 Ass 66). In Sahadat Ali case (AIR 1953 Ass 97 : 1953 Cri LJ 770 : ILR 1953 Ass 66), the Government had decided to abandon the pending prosecution in public interest and action for detenu's release was taken. In anticipation of his release, the order of detention was passed and it was served after he was actually released. In these circumstances the detention order and its service was held valid. The test indicated by the Constitution Bench was duly satisfied.

17. It is this principle and the test indicted therein which has to be applied in all such cases. Read in this manner the conclusion reached in each of the subsequent decisions satisfied this test.

18. In Kartic Chandra Guha v. State of West Bengal ((1975) 3 SCC 490 : 1975 SCC (Cri) 82), the order of preventive detention passed while the detenu was in custody was upheld since there was a likelihood of his release on bail and resuming his desperate criminal activities prejudicial to the maintenance of public order. The facts of that case, therefore, justified making the detention order according to the test laid down by the constitution Bench in Rameshwar Shaw case. (((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257). Ramakrishna Rawat v. District Magistrate, Jabalpur ((1975) 4 SCC 164 : 1975 SCC (Cri) 457), was a case in which the order of detention was passed while the detenu was in jail custody in a proceeding under Section 151 read with Section 117 CrPC. The detention order was upheld since the custody was obviously of a short duration and on the basis of the antecedent activities of the detenu in the proximate past, the detaining authority could reasonably reach its subjective satisfaction that the detenu had the tendency to Act in a manner prejudicial to the maintenance of public order after his release on the termination of the security proceedings under the code. In Vijay Kumar v. State of Jammu & Kashmir ((1982) 2 SCC 43 : 1982 SCC (Cri) 348), the detention order was quashed because it did not give the slightest indication that

the detaining authority was aware that the detenu was already in jail. The further question of the detaining authority's subjective satisfaction that it was necessary even then to make an order for preventing him from acting in a manner prejudicial to the security of the State did not, therefore, arise. While dealing with this aspect the correct position was reiterated as under : (SCC p. 48, para 10)

> "Preventive detention is resorted to, to thwart future action. If the detenu is already in jail charged with a serious offence, he is thereby prevented from acting in a manner prejudicial to the security of the state. May be, in a given case there yet may be the need to order preventive detention of a person already in jail. But in such a situation the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made. There is nothing to indicate the awareness of the detaining authority that detenu was already in jail and yet the impugned order is required to be made. This, in our opinion, clearly exhibits non-application of mind and would result in invalidation of the order."

It is obvious that in this decision also the test indicated by the Constitution Bench in Rameshwar Shaw case ((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257), was applied and the detention order was quashed on that basis.

19. In Alijan Mian v. District Magistrate, Dhanbad ((1983) 4 SCC 301 : 1983 SCC (Cri) 840 : (1983) 3 SCR 939), the detention order was upheld even though the detenu was in jail custody on the date of passing of the detention order because the detention order showed that the detaining authority was alive to the fact yet it was satisfied that if the detenu was enlarged on bail, which was quite likely, he would create problem of public order which necessitated his preventive detention. In Ramesh Yadav. v. District Magistrate, Etah ((1985) 4 SCC 232 : 1985 SCC (Cri) 514), the detention order was passed when the detenu was in jail on the mere apprehension of likelihood of grant of bail on the basis of some stale grounds and a ground in respect of which the detenu had already been acquitted. It is obvious that even with the likelihood of grant of bail, the grounds of detention being stale or non-existent on the ground of the detenu's acquittal, they did not satisfy the required test of the detention order being based on valid grounds showing detenu's activities proximate in point of tie to justify the detaining authority satisfaction as reasonable. It was observed in passing that if the apprehension of the detaining authority about the likelihood of grant of bail was correct then it was open to challenge the bail order in a higher forum. This observation has accordingly to be read in the context of the facts in which it was made. In Binod Singh v. District Magistrate, Dhanbad ((1986) 4 SCC 416 : 1986 SCC (Cri) 490), the detention order was held to be invalid because the jail custody of the detenu at the time of service of the order as also the prospect of his release were not considered while making the detention order. It was held that the detention order was invalid on the ground of non-application of mind to these relevant factors even if the detention was otherwise justified. The decision in Rameshwar Shaw case ((1964) 4 SCR 921 : AIR 1964 SC 334 (1964) 1 Cri LJ 257), was relied on and it was reiterated as under : (SCC pp. 420-21, para 7)

> "If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In the instant case when the actual order of detention was served upon the detenu, the detenu was in jail. There is no indication that this factor or the question that the said detenu might be released or that there was such a possibility of his release, was taken into consideration by the

detaining authority properly and seriously before the service of the order. A bald statements is a merely an ipse dixit of the officer. If there were cogent materials for thinking that the detenu might be released then these should have been made apparent."

In Poonam Lata v. M. L. Wadhawan ((1987) 4 SCC 48 : 1987 SCC (Cri) 685), it was reiterated that detenu being already in jail at the time of passing detention order does not by itself vitiate the detention if the detaining authority is aware of this fact but even then it is satisfied about the necessity of preventive detention. The Constitution Bench decision in Rameshwar Shaw case ((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257), and the other earlier decisions were referred to while reaching this conclusion. The correct position was reiterated and summarised as under : (SCC p. 58, para 9)

"It is thus clear that the fact that the detenu is already in detention does not take away the jurisdiction of the detaining authority in making an order of preventive detention. What is necessary in a case of that is to satisfy the court when detention is challenged on that ground that the detaining authority was aware of the fact that the detenu was already in custody and yet he was subjectively satisfied that his order of detention became necessary. In the facts of the present case, there is sufficient material to show that the detaining authority was aware of the fact that the petitioner was in custody when the order was made, yet he was satisfied that his preventive detention was necessary."

20. A recent decision on the point is Shashi Aggarwal v. State of U.P. ((1988) 1 SCC 436 : 1988 SCC (Cri) 178) in which also the settled principle is reiterated and it is pointed out that the ultimate decision depends on the facts of a particular case, the test to be applied remaining the same, as indicated in Rameshwar Shaw case ((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257). It was also pointed out in this decision that the earlier decisions of the Supreme Court in Ramesh Yadav ((1985) 4 SCC 232 : 1985 SCC (Cri) 514), and Binod Singh ((1986) 4 SCC 416 : 1986 SCC (Cri) 490), do not run counter to the decision in Alijan Mian case ((1983) 4 SCC 301 : 1983 SCC (Cri) 840 : (1983) 3 SCR 939). In each of these cases the conclusion was reached on the facts of the particular case, the test applied being the same. Similarly, in this decision it was once again pointed out that the detenu being already in jail, the mere possibility of his release on bail was not enough for preventive detention unless there was material to justify the apprehension that the detenu would indulge in activities prejudicial to the maintenance of public order in case of his release on bail. The detention order in that case had been made merely on the ground that the detenu was trying to come out on bail and there was enough possibility of his being bailed out. It was, therefore, held that the mere possibility of his relese on bail and a bald statement that the detenu would repeat his criminal activities was a alone not sufficient to sustain the order of preventive detention in the absence of any material on the record to show that if released on bail he was likely to commit activities prejudicial to the maintenance of public order. The detention order in that case was quashed on the ground that the requisite material to entertain such an apprehension reasonably was not present. The conclusion reached therein, on the facts and circumstances of the case, is as under : (SCC p. 440, para 12)

"In the instant case, there was no material made apparent on record that the detenu, if released on bail, is likely to commit activities prejudicial to the maintenance of public order. The detention order appears to have been made merely on the ground that the detenu is trying to come out on bail and there is enough possibility of being

bailed out. We do not think that the order of detention could be justified only on that basis."

21. A review of the above decisions reaffirms the position which was settled by the decision of a Constitution Bench in Rameshwar Shaw case ((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257). The conclusion about validity of the detention order in each case was reached on the facts of the particular case and the observations made in each of them have to be read in the context in which they were made. None of the observation made in any subsequent case can be construed at variance with the principle indicated in Rameshwar Shaw case ((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257), for the obvious reason that all subsequent decisions were by benches comprised of lesser number of judges. We have dealt with this matter at some length because an attempt has been made for some time to construe some of the recent decisions as modifying the principle enunciated by the Constitution Bench in Rameshwar Shaw case ((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257).

22. We may summarise and reiterate the settled principle. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case; preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order etc. ordinarily it is not needed when the detenu is already in custody; the detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order; but even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of is release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validity made even in anticipation to operate on his release. This appears to us, to be the correct legal position.

23. Applying the above settled principle to the facts of the present case we have no doubt that the detention order, in the present case, must be quashed for this reason alone. The detention order read with its annexure indicates the detaining authority awareness of the fact of detenu's jail custody at the time of the making of the detention order. However, there is no indication therein that the detaining authority considered it likely that the detenu could be released on bail. In fact, the contents of the order, particularly, the above quoted para 18 show the satisfaction of the detaining authority that there was amply material to prove the detenu's complicity in the Bank dacoity including sharing of the booty in spite of absence of his name in the FIR as one of the dacoits. On these facts, the order of detention passed in the present case on September 7, 1988 and its confirmation by the State Government on October 25, 1988 is clearly invalid since the same was made when the detenu was already in jail custody for the offence of bank dacoity with no prospect of his release. It does not satisfy the test indicated by the Constitution Bench in Rameshwar Shaw case ((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257). We hold the detention order to be invalid for this reason alone and express no opinion on merits about the grounds of detention.

24. Consequently, the aforesaid order of detention dated September 7, 1988 passed by the Collector and District Magistrate, Madurai, and the order of confirmation dated October 25, 1988 by the Government of Tamil Nadu are quashed. The appeal and the writ petition are allowed. This, however, will not affect the detenu's custody in connection with the criminal case under Section 397 IPC. We may also clarify that in case the detenu is released in the aforesaid criminal case, the question of his preventive detention under the Act on the above material may be reconsidered by the appropriate authority in accordance with law and this judgment shall not be construed as an

impediment for that purpose. No costs.

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