A.F.R.

Judgment reserved on 20.12.2022

Judgment delivered on 03.02.2023

Case :- HABEAS CORPUS WRIT PETITION No. - 472 of 2022
Petitioner :- Saud Akhtar and another
Respondent :- Union of India and 6 others
Counsel for Petitioner :- Malay Prasad,Ramesh Chandra Agrahari,Sr. Advocate
Counsel for Respondent :- A.S.G.I., Arvind Singh,G.A.
Hon'ble Mahesh Chandra Tripathi,J.
Hon'ble Nalin Kumar Srivastava,J.

(Per: Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Mr. Malay Prasad alongwith Ms. Saloni Mathur and Ms. Tanya Makker, learned counsel for the petitioners; Sri Arvind Singh, learned counsel for the Union of India and Sri A.N. Mullah & Sri S.A. Murtaza, learned A.G.A. for the State respondents.

2. Present Habeas Corpus Writ Petition under Article 226 of the Constitution of India is preferred seeking following reliefs:-

> "I. Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 31.03.2022 passed by respondent no.3 purportedly under Section 3 (2) of National Security Act, 1980 (Annexure No.1).
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> II. Issue a writ, order or direction in the nature of certiorari quashing the impugned Notification No.111/2/04/2022-C.X-6 Lucknow dated 07.04.2022 issued by respondent no.2 in exercise of the power under Section 3 (3) (4) of National Security Act, 1980 (Annexure No.2).
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> III. Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 11.04.2022 passed by respondent no.3, by which the representation of the petitioners has been rejected (Annexure No.3).
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> IV. Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 20.05.2022 passed by respondent No.5 (copy not provided to the petitioner).
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> V. Issue writ, order or direction in the nature of Habeas Corpus commanding and directing the respondents concerned to produce the petitioner no.1/detenue before this Hon'ble Court and set petitioner no.1 detenue at liberty forthwith, who is under illegal detention vide impugned detention order dated 31.03.2022 under Section 3 (2) of National Security Act, 1980 passed by respondent no.3.
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> VI. Issue a writ, order or direction to pay him compensation to be decided by this Hon'ble Court for his illegal detention.
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> VII. Issue a writ, order or direction which this Hon'ble Court may deem fit and proper under the fact and circumstances of the case.
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> VIII. Award the cost of the petition to the petitioners."

3. It appears from the record that on 31.3.2022 the District Magistrate, Kanpur Nagar has passed an order of detention under

Section 3 (2) of the National Security Act, 1980[1]. In passing the said detention order, the District Magistrate felt satisfied that since it was necessary to prevent the petitioner no.1 from acting in any manner prejudicial to the maintenance of public order, the passing of the order under NSA, 1980 was imperative. She based her satisfaction for invocation of proceedings under NSA, 1980 on the following grounds, which are reflected from the record:-

> (1) A first information report was lodged on 20.06.2020 registered as Case Crime No.425 of 2020 under Sections 147, 148, 149, 302/34 IPC & Section 7 of Criminal Law Amendment Act at Police Station Chakeri, District Kanpur Nagar by the complainant Dharmendra Singh Sengar with allegation that three years' ago the petitioner no.1 Saud Akhtar and co-accused Mohd. Asim @ Pappu made firing upon his brother Pintu Sengar with an intention to kill him, wherein his brother Pintu Sengar escaped and in this regard, a case was pending in the Court. Due to said previous enmity, the accused-petitioner Saud Akhtar alongwith other co-accused hatched conspiracy and called his brother for compromise whereon on 20.06.2020 at about 1:00 p.m. the complainant alongwith his brother Pintu Sengar and driver Rupesh were going to meet them by Innova Car but in the way, the accused-petitioner and other co-accused with common intention to kill him, made indiscriminate firing upon his brother due to which he received grievous injuries and fell down. The complainant and the driver by hiding saved themselves. The complainant took his brother to the hospital where he was declared dead. In aforesaid Case Crime No.425 of 2020 after investigation the investigating officer submitted charge sheet dated 20.11.2020 against the petitioner under Sections 147, 148, 149, 302, 307, 34, 120B IPC & Section 7 of Criminal Law Amendment Act. It is further averred that the print media and electronic media highlighted the said incident in their news reports in the newspapers for so many days. The postmortem report; the statement of the informant; statement of driver of the deceased and the statement of the family members of the deceased are referred and a supplementary charge sheet No.605-A dated 20.11.2020 has also been filed against the petitioner no.1/detenue with the added Section 120B IPC. In the said criminal case the petitioner no.1 has been granted bail by learned Single Judge of this Court vide order dated 15.2.2022 passed in Criminal Misc. Bail Application No.31658 of 2021 (Saud Akhtar vs. State of UP).
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> (2) The grounds of detention also refers a subsequent FIR dated 06.3.2021 lodged by the police under Section 3 (1) of U.P. Gangsters & Anti Social Activities (Prevention) Act, 1986 registered as Case Crime No.212 of 2021 at Police Station

1. NSA, 1980

Chakeri, District Kanpur Nagar and after investigation the charge sheet has been filed in the said case. The details of 34 criminal cases are also mentioned in the grounds of detention in caption of criminal history. There was immense possibility of release of the petitioner no.1 as his bail application in Case Crime No.212 of 2021 was pending before this Court. Ultimately, in the said Case the petitioner has been accorded bail by this Court vide order dated 30.3.2022 passed in Criminal Misc. Bail Application No.10417 of 2022 (Saud Akhtar vs. State of U.P.).

(3) Meanwhile, the concerned Station House Officer submitted a report dated 30.3.2022 to the Assistant Commissioner of Police for initiating proceedings against the petitioner under NSA, 1980. The Assistant Commissioner of Police forwarded the same to the Deputy Commissioner of Police on 31.3.2022. It was further forwarded to the Commissioner of Police, Kanpur Nagar and on the same day, the Commissioner of Police has sent his report to the District Magistrate, Kanpur Nagar. After going through the entire material available on record the District Magistrate was satisfied that the petitioner no.1 should be detained so that he may be prevented from acting in any manner prejudicial to the maintenance of public order, breach of which is rather imminent and consequently, he has passed the impugned detention order on 31.3.2022. In the grounds of detention, the District Magistrate has also referred a beat information of the Mobile Constables regarding release of the petitioner on bail and to repeat the offences disturbing the public order. It has been finally concluded by the District Magistrate in the grounds of detention after considering the column of criminal history also that it is necessary to pass the detention order against the petitioner.

4. The petitioner no.1 was confined in the District Jail, Kanpur Nagar since 20.10.2020 after his arrest in pursuance of the FIR dated 20.5.2020. The detention order dated 31.3.2022 alongwith grounds of the detention and other relevant materials were served to the petitioner on the same day through the jail authorities to afford him opportunity for making an effective representation. The detention order alognwith grounds of detention was sent to the State Government on 01.4.2022 through special messenger. Finally, the State Government vide order dated 07.4.2022 granted approval to the detention order. The petitioner no.1 made representations dated 04/08.04.2022 for being forwarded to the Advisory Board, State Government as also to the Central Government. However, there was an intervening period of two days on 09.4.2022 and 10.4.2022 being second Saturday and Sunday and

therefore, the District Magistrate has rejected the representation on 11.4.2022. It was communicated to the petitioner on the same day through jail authorities. The rejection of the representation was also communicated to the State Government & Central Government on 11.4.2022 through special messenger. Having received the comments, the State Government forwarded the report on his representation to the Central Government. The State Government has rejected the representation of the petitioner on 26.4.2022 and the Central Government rejected his representation on 27.4.2022. Both the rejection orders were also communicated to the petitioner through jail authorities on the same day. The Advisory Board also heard the petitioner on 09.5.2022. After receiving report of the Advisory Board, the said detention order was confirmed by the State Government vide order dated 20.5.2022 initially for a period of three months from the date of detention i.e. 31.3.2022, which has been challenged in the petition.

5. Feeling aggrieved by the aforesaid, the detenue/petitioner has filed the instant habeas corpus petition through his next friend/son Nawaz Akhtar (petitioner no.2) with the prayer, as mentioned in paragraph-2 herein-above. During pendency of the instant habeas corpus petition, the State Government vide order dated 14.6.2022, extended the period of detention for a further period of three months and then on 22.9.2022 the State Government extended the period of detention for nine months from the date of detention i.e. 31.3.2022, but it transpires from the record that the extension orders dated 14.6.2022 and 22.9.2022 have not been challenged by the detenue/petitioner in the instant habeas corpus petition.

6. This petition was initially presented in this Court on 01.7.2022 when the opposite parties were granted time to file counter affidavit. The State Government, the District Magistrate and the Superintendent of District Jail have done so. Rejoinder affidavit has also been filed by the petitioner on 09.9.2022. Thereafter, the matter was taken up on 12.9.2022 and on the said date, it was directed to be listed on 21.9.2022. Meanwhile, the petitioner had filed Special Leave to Appeal (Crl.)

No(s).10091/2022 (**Saud Akhtar & another vs. Union of India & ors**) arising out of the order passed by this Court dated 12.9.2022 and Hon'ble Supreme Court vide order dated 14.11.2022 has proceeded to dispose of the said SLP with following observations:-

> "1. While considering Habeas Corpus Writ Petition No.472 of 2022, a Division Bench of the High Court of Judicature at Allahabad, by its order dated 12 September 2022, directed that the proceedings should be listed on 21 September 2022. The Special Leave Petition before this Court was instituted on 14 October, 2022. Ordinarily, we would not have entertained the Special Leave Petition having regard to the fact that the Habeas Corpus Petition was only directed to stand over by a period of ten days. However, Mr. Sidharth Luthra, senior counsel appearing on behalf of the petitioners, with Mr. Rohit Amit Sthalekar, submits that thereafter the petition has been adjourned on 21 September 2022, 28 September 2022, 12 October 2022, 19 October 2022, 2 November 2022 and 14 November 2022 and has not been taken up for hearing.
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> 2. Having due regard to the fact that the petition seeks to challenge an order of detention passed under Section 3 (2) of the National Security Act, 1980, we request the High Court to take up the petition with all reasonable dispatch and make an endeavour to dispose it of expeditiously, preferably within a period of two months from the date of receipt of a certified copy of this order.
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> 3. Subject to the aforesaid, the Special Leave Petition is disposed of.
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> 4. Pending application, if any, stands disposed of."

7. In this backdrop, learned counsel for the petitioner vehemently submitted that in this writ petition, the validity of the detention of the petitioner no.1 has been challenged. The petitioner no.1 has been detained by the District Magistrate, Kanpur Nagar by an order dated 31.3.2022 (Annexure No.1 to the writ petition) made under Section 3 (2) of the NSA, 1980. The State Government vide order dated 07.4.2022 after receipt of the opinion of the Advisory Board has approved the detention order as required under Section 3 (4) of the NSA, 1980. The grounds of detention contain a recital that aforesaid incident had resulted in spread of fear and terror amongst general public of District Kanpur Nagar. The public order and the tempo of life was totally disturbed. The aforesaid incidents were given wide coverage by the media in various national and local level newspapers. A person already arrested can still be detained under the NSA Act, but for exercising that power, the authorities have to fulfill certain requirements. The necessary ingredients for recording a valid

"subjective satisfaction" of Competent Authority is absent in the impugned order dated 31.3.2022.

8. Learned counsel for the petitioner contended that as per Section 3 (2) of NSA, 1980 an order of detention can be passed with the view to prevent a person from acting in any manner prejudicial to the security of the State or to the maintenance of the Public Order. The present case mainly falls under the category of disturbance to “law and order” and not “public order”. Public Order was said to embrace more of the community than law and order. Public Order is the even tempo of the life of the community taking the country as a whole or even a specified locality. The 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. Therefore, the question, whether a man has 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.

9. It is submitted that in the instant case the alleged acts of assault by firearms are directed against the individual and are not subversive of Public Order. Therefore, the detention order on the ostensible ground of preventing him in any manner prejudicial to the public order was not justified. It is an act infringing law and order and the reach and effect of the act is not so extensive as to affect a considerable member of the Society. In other words, the alleged act of the petitioner does not disturb the public tranquility nor does it create any terror or panic in the minds of the people of the locality nor does it affect the even tempo of the life of the community. This criminal act emanates from alleged personal animosity between the detenus and the complainant and therefore, such an act cannot be the basis for subjective satisfaction of the detaining authority to pass an order of detention on the ground that the act purports to public order i.e., the even tempo of the life of the

community which is the sole basis of the clamping the order of detention.

10. It is contended that in the present case, the allegation against the petitioner is that he hired professional shooters to execute the murder of the deceased namely Pintu Sengar in broad day-light at J.K. Colony, Kanpur. The incident is said to have disrupted the public tranquility which has been conveyed as the major ground for the detention of the petitioner. He has placed reliance on the Naksha Nazri from the case diary of the said case, which is appended as Annexure SA-1 to the supplementary affidavit, wherein the incident took place not in a very densely populated area so as to disturb or affect public at large. The spot of incident is merely surrounded by empty plots at both ends and there is only one general store at a distance of 50 meters from the spot of the incident. Many people were not present at the spot of the incident. The CCTV footage of the incident, which was recovered during the course of the investigation, does not identify the petitioner as an assailant. Infact, the presence of the petitioner has also not been captured in the CCTV footage.

11. It is further submitted that the detention order is passed without there being any cogent material. A stale incident of 2020 became the reason for passing the order of detention. In the said case, the petitioner has already been accorded bail by this Court vide order dated 15.2.2022. The past record must have a live and proximate link with the reason of detention. Otherwise, such stale material/case cannot be a basis for passing the detention order. In the present detention order, the media clippings have been made as the sole proof of disruption of public order and there are no eye-witnesses to the incident on record. As per Indian Evidence Act, 1972, newspaper reports by themselves are not evidence of the contents thereof. As such, the District Magistrate, Kanpur Nagar has not applied her mind to the facts of the case and the material on record and she has passed the impugned order in a routine manner on the report submitted to her by the police authorities. The detaining authority has failed to record any satisfaction in the impugned

order that there was real possibility of the petitioner, who was already in judicial custody, being released on bail. Further the material before the detaining authority was not sufficient to satisfy her that after being released on bail the petitioner shall again indulge in activities prejudicial to the public order and hence, the impugned order, which is per-se illegal, may be set aside and the petitioner be set at liberty forthwith. In support of his submission, he has placed reliance on the judgments of Apex Court in **Quamarul Islam vs. S.K. Kanta and ors** [2] as well as the judgment of this Court in **Naval Kishore Sharma vs. State of UP and another**[3].

12. It is submitted that the detaining authority did not apply its mind before passing the order of detention and failed to strike a balance between the constitutional and the legal obligation charged on the petitioner before passing the order and the manner in which the power of detention has been exercised. It does not appear to have been exercised rationally. The District Magistrate has placed reliance on the criminal list of 34 cases out of which the petitioner has been acquitted in 10 criminal cases; final report has been submitted in 9 cases; 4 cases are not related to the petitioner and proceeding of two criminal cases have been quashed. Further the District Magistrate has failed to create a nexus between alleged offences and the order of detention. The details of criminal cases have been given in paragraph-36 of the writ petition. It is submitted that preventive detention is not to punish a person for something he has done but to prevent him from doing it. Therefore, since the detention order has been passed on the allegation of involvement of the detenu in a number of criminal cases without disclosing any material in the report of the Superintendent of Police or materials available before the detaining authority that there is likely to be a breach of public order, the detention order cannot be sustained. In this regard, he has placed reliance on the judgement of Apex Court in

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2. 1994 (1) SCR 210 (paras 39 and 40)

3. Matter U/A 227 No.6178 of 2022 decided on 30.9.2022 (paras 20 and 26)

Yumman Ongbi Lembi Leima vs. State of Manipur & ors[4] as well as the judgment of Orissa High Court in **S.K. Mabud vs. State of Odisha and another**[5]. He further submitted that the incident took place on 20.6.2020 and it is a stale incident, which is not proximate to the time when the detention order was passed on 31.3.2022. After a long delay of about two years, the invocation of the provisions of NSA, 1980 was neither warranted nor justified and the delay was not satisfactorily explained by the detaining authority. He has placed reliance on the judgment of this Court in **Abhayraj Gupta vs. Superintendent, Jail, Bareilly**[6].

13. Lastly, it is submitted that in Case Crime No.425 of 2020 the petitioner has been accorded bail by this Court vide order dated 15.2.2022 passed in Criminal Misc. Bail Application No.31658 of 2021, prior to passing the detention order. The bail application contained the grounds for bail including the ground that he was falsely implicated in the said case. The informant was said to be an unreliable witness as he changed his statements on several occasions. There was material inconsistency in the prosecution version set out in the FIR and the subsequent statements given by the informant from time to time before the investigating officer. Some of the offenders named in the FIR as principal offenders were not even chargesheeted. The CCTV footage of the incident on record does not show the presence of the petitioner. The criminal history of the petitioner was duly explained. There were sufficient materials which could have reasonably influenced the decision of the detaining authority but the detaining authority has not considered them. However, if the authorities were not satisfied with the release of the petitioner on bail, the same could have been challenged before the higher Court. When there was an option available to the respondents then imposing of the detention of the petitioner under NSA,

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4. Criminal Appeal No.26 of 2012 decided on 04.1.2012

5. Writ Petition (Crl) No.82 of 2020 decided on 03.08.202

6. Habeas Corpus Writ Petition No.362 of 2021 decided on 23.12.2021

1980 was unjust and violative of Article 21 of the Constitution of India. It is submitted that if the ordinary law of the land can deal with the situation, then recourse to a preventive detention law will be illegal.

14. Per contra, learned A.G.A. and learned counsel for the Union of India made their submissions in support of impugned order and submitted that due to the aforesaid incident, the public order and tranquility of the locality was disturbed. There was immense possibility of release of the petitioner as his bail application in Case Crime No.212 of 2021 was pending before this Court, therefore, the Station House Officer submitted his report dated 30.3.2022 to the Assistant Commissioner of Police for initiating the proceedings against the petitioner under NSA, 1980. The report of Assistant Commissioner of Police shows that the likelihood of involvement of petitioner in similar acts was not ruled out. This report became basis for passing of detention order. After going through the entire material available on record and the report of the sponsoring authority, the detaining authority has passed the impugned order after being fully satisfied on the basis of the material produced before her that on being released on bail the petitioner may again indulge in activities prejudicial to the public order and the same does not suffer from any illegality or infirmity, hence the present habeas corpus writ petition is liable to be dismissed.

15. It was submitted that the detention order was communicated to the petitioner and it was approved by State Government on 07.4.2022 i.e. within statutory limit. As per judgment of Apex Court in **Konungjao Singh vs. State of Manipur & Ors.**[7], the petitioner was entitled to receive an information regarding grounds of detention and was further entitled to get an opportunity to represent against it. Both the requirements were taken care of and hence, no interference is required by this Court. It is submitted that the representations of the petitioner dated 04.4.2022 and 08.4.2022 were duly considered and rejected by the State Government and Central Government on

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7(2012) 7 SCC 181

26.4.2022 and 27.4.2022 and accordingly, the detenu alongwith authorities concerned were informed.

16. After having very carefully examined the submissions made by learned counsel for the parties and perused the impugned order as well as the other material brought on record, we find that the issue involved in this writ petition is that whether the failure of the District Magistrate to record in the impugned order, that there was strong possibility of the petitioner, who was already in judicial custody on account of his being accused in Case Crime No.212 of 2021 of being released on bail, has vitiated the impugned order and whether the subsequent recording of her satisfaction that on being released on bail there was possibility of the petitioner indulging in similar activities which were prejudicial to the public order would validate the impugned order.

17. In the instant case, it transpires that the allegation against the Corpus was that he hired professional shooters to execute the murder of the deceased namely Pintu Sengar in broad day-light at J.K. Colony, Kanpur. The stand of Corpus is that he has been falsely trapped and implicated in Case Crime No.425 of 2020 in which he has been granted bail by this Court vide order dated 15.2.2022 passed Criminal Misc. Bail Application No.31658 of 2021. In subsequent Case Crime No.212 of 2021 under Section 3 (1) of U.P. Gangsters & Anti Social Activities (Prevention) Act, 1986 the corpus has also been accorded bail by this Court vide order dated 30.3.2022 passed in Criminal Misc. Bail Application No.10417 of 2022. Meanwhile, the concerned Station House Officer submitted his report dated 30.3.2022 to the Assistant Commissioner of Police for initiating the proceedings under NSA, 1980 against the petitioner. Finally, the District Magistrate has formed her opinion on the basis of a media trial and imposed the NSA, 1980 against the petitioner on 31.3.2022. The detention order refers an old case of the year 2020 in which he has been accorded bail by this Court on 15.2.2022. There is no live nexus between the incident of 2020 and action for which detention order is passed. The order of detention indicated cases relating to law and order situation and had nothing to do

with maintenance of public order and was stale to be considered relevant for the purpose of detention.

18. Section 3 (2) of NSA, 1980 contemplates that a citizen can be detailed under the NSA - (i) for preventing him from acting in any manner prejudicial to the security of the State; (ii) for preventing him from acting in any manner prejudicial to the maintenance of public order; (iii) for preventing him from acting in any manner prejudicial to the maintenance of supplies and services to the community. The 'explanation' to Section 3 (2) deals with contingency (iii) only. The preventive law can be invoked to prevent somebody from acting in a manner prejudicial to the security of State, public order or to maintain supplies and services essential to the communities. There was no material to show that the alleged acts of the detenu disturbed the even tempo of life. Since the Corpus is facing a criminal case, we are not inclined to give any finding on this aspect, which may have a bearing on the trial. In view of aforesaid three requirements, we are only inclined to observe that there was no material before the learned District Magistrate to believe that the Corpus will again indulge in similar activity of hiring professional shooters.

19. We further find that there is no indication in the detention order to the effect that the detaining authority was aware that the detenu was already in custody and that she has reason to believe on the basis of reliable material that there is a possibility of his being released on bail and that on being so released the detenu would in all probabilities indulge in prejudicial activities and for compelling reasons a preventive detention order need to be made. It is the settled position of law that the authorities are not precluded from passing an order of detention when the person concerned is in jail, but while passing the order of detention, they are required to apply their mind to the fact that the person concerned is already in jail and there are compelling reasons justifying such detention despite the fact that the detenu was already in detention. The expression “compelling reasons” in the context of making an order for detention of a person already in custody implies that there must be

cogent material before the detaining authority on the basis of which it may be satisfied that the detenu is likely to be released from custody in the near future or taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would probably indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.

20. The crucial issue is whether the activities of the detenu were prejudicial to public order. While the expression 'law and order' is wider in scope inasmuch as contravention of law always affects order. 'Public order' has a narrow ambit, and public order could be affected by only such contravention, which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specified locality. The distinction between the areas of 'law and order' and 'public order' is one of the degree and extent of the reach of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it could raise problem of law and order only. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps to distinguish it as an act affecting 'public order' from that concerning 'law and order'. The test to be adopted in determining whether an act affects law and order or public order, is : Does it lead to disturbance of the current life of the community so as to amount to disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? (Ref. **Kanu Biswas Vs. State of West Bengal**[8]).

21. "Public order" is synonymous with public safety and tranquility. Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt

8. (AIR 1972 SC 1656).

with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum, which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. (Ref. **Dr. Ram Manohar Lohia Vs. State of Bihar and Ors**.[9]).

22. 'Public Order', 'law and order' and the 'security of the State' fictionally draw three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the State. Every infraction of law must necessarily affect order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act may affect public order, but not necessarily the security of the State. The true test is not the kind, but the potentiality of the act in question. One act may affect only individuals while the other, though of a similar kind, may have such an impact that it would disturb the even tempo of the life of the community. This does not mean that there can be no overlapping, in the sense that an act cannot fall under two concepts at the same time. An act, for instance, affecting public order may have an impact that it would affect both public order and the security of the State (Ref. **Kishori Mohan Bera Vs. The State of West Bengal**[10].

23. Hon'ble Supreme Court in paragraph 35 of its judgment rendered in the case of **Haradhan Saha & Another vs The State Of West Bengal & Ors.**[11] observed that where the concerned person is actually in jail custody at the time when the order of detention is passed against him, and is not likely to be released for a fairly long 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 the

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9. (1966(1) SCR 709)

10. (1972(3) SCC 845)

11. (1975) 3 SCC 198

activities which would jeopardise the security of the State or the public order.

24. Hon'ble Supreme Court has laid down the principles as to when a detention order can be passed with regard to a person already in judicial custody in the case of **Kamarunnissa vs. Union of India and another**[12] and in paragraph 13 of the aforesaid case, Hon'ble Supreme Court has held as hereunder :-

> "13. From the catena of decisions referred to above, it seems clear to us that even in the case of a person in custody a detention order can validly be passed(1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him(a) that there is real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity; and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in his behalf, such an order can not be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question of before a higher Court."

25. Another leading authority on the same issue is the judgment of Apex Court rendered in the case of **Huidrom Konungjao Singh Vs. State of Manipur** (supra) wherein the Supreme Court has held that while detaining a person, who was already arrested, due care should be taken as under:

> "If the detention order, passed against a person who is already in custody in respect of criminal case is challenged the detaining authority has to satisfy the Court the following facts :
>
> 1. The authority was fully aware of the fact that the detenue was actually in custody.
>
> 2. There was reliable material before the said authority on the basis of which it could have reasons to believe that there was real possibility of his release on bail and further on being released he would probably indulge in activities which are prejudicial to public order.
>
> 3. In view of the above the authority felt it necessary to prevent him from indulging in such activities and therefore, detention order was necessary.
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> In case either of these facts does not exist, the detention order would stand vitiated and liable to be quashed.
>
> Merely because somebody else in similar cases had been granted bail, there could be no presumption that in the instant case had the detenue applied for bail, he could have been released on bail. If the said bail orders do not relate to the co-accused of the same case crime number, the accused released on bail in these cases of similar nature, having no concern with the present case, their

12. 1990(27) ACC 621 SC

> bail orders can not be a ground to presume that the detenue may also be released on bail.
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> The appeal succeeds and is allowed. The impugned detention order is set aside."

26. In **Dharmendra Suganchand Chelawat Vs. Union of India**[13] the Supreme Court has observed as under :-

> "21. .....an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that -
>
> 1.The detaining authority was aware of the fact that the detenue is already in detention.
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> 2.There were compelling reasons justifying such detention despite the fact that the detenue is already in detention.
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> The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that the detenu is likely to be released from custody in the near future and taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

27. In the decision of Apex Court in the case of **Arun Ghosh v. State of West Bengal**[14], the question was whether the grounds mentioned in the detention order could be construed to be breach of public order and as such, the detention order could be validly made. The appellant in the said case had molested two respectable young ladies threatened their father's life and assaulted two other individuals. He was detained under Section 3(2) of the Preventive Detention Act, 1950 in order to prevent him from acting prejudicially to the maintenance of public order. It was held by the Apex Court 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 society. The test is: does it lead to a disturbance of the even tempo of the life of the community so as to amount to a disturbance of the public order, or, does it affect merely an individual without affecting the tranquility of

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13. AIR 1990 SC 1196

14. 1970 (3) SCR 288

society. Therefore, it could not be said to amount to an apprehension or breach of public order, and hence, he was entitled to be released.

28. In **Yumman Ongbi Lembi Leima v. State of Manipur and Ors**. (supra), the Hon'ble Supreme Court held that preventive detention is not to punish a person for something he has done but to prevent him from doing it. Only on the apprehension of the detaining authority that after being released on bail, the petitioner-detenu will indulge in similar activities, which will be prejudicial to public order, order under the Act should not ordinarily be passed. The personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part III thereof. The State has been granted the power to curb such rights under criminal laws as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order.

29. In the case of **Quamarul Islam v. S.K. Kanta** (supra), the Supreme Court has considered a case where the cassette containing a speech of a returned candidate was recorded by a police officer, which was tendered by the election petitioner in order to prove a corrupt practice against the returned candidate under Section 123 (2), 123 (3) and 123 (3A) of the Representation of the People Act, 1950. Relevant paragraph 48 of the judgment is reproduced herein below:-

> "48. Newspaper reports by themselves are not evidence of the contents thereof. Those reports are only hearsay evidence. These have to be proved and the manner of proving a newspaper report is well settled. Since, in this case, neither the reporter who heard the speech and sent the report was examined nor even his reports produced, the production of the newspaper by the Editor and Publisher, PW 4 by itself cannot amount to proving the contents of the newspaper reports. **Newspaper, is at the best secondary evidence of its contents and is not admissible in evidence without proper proof of the contents under the Indian Evidence Act.** The learned trial Judge could not treat the newspaper reports as duly 'proved' only by the production of the copies of the newspaper. The election petitioner also examined Abrar Razi, PW 5, who was the polling agent of the election petitioner and a resident of the locality in support of the correctness of the reports including advertisements and messages as published in the said

newspaper. We have carefully perused his testimony and find that his evidence also falls short of proving the contents of the reports of the alleged speeches or the messages and the advertisements, which appeared in different issues of the newspaper. Since, the maker of the report which formed(18) basis of the publications, did not appear in the court to depose about the facts as perceived by him, the facts contained in the published reports were clearly inadmissible. No evidence was led by the election petitioner to prove the contents of the messages and the advertisements as the original manuscript of the advertisements or the messages was not produced at the trial. No witness came forward to prove the receipt of the manuscript of any of the advertisements or the messages or the publication of the same in accordance with the manuscript. There is no satisfactory and reliable evidence on the record to even establish that the same were actually issued by IUML or MYL, ignoring for the time being, whether or not the appellant had any connection with IUML or MYL or that the same were published by him or with his consent by any other person or published by his election agent or by any other person with the consent of his election agent. The evidence of the election petitioner himself or of PW 4 and PW 5 to prove the contents of the messages and advertisements in the newspaper in our opinion was wrongly admitted and relied upon as evidence of the contents of the statement contained therein."

30. In the case of **Naval Kishor Sharma vs. State of U.P. and another** (supra) it has been held by this Court in paragraphs 20, 21 and 26 as under:-

"20. From the above judgements it is clear that newspaper report by itself does not constitute an evidence of the contents of it. The reports are only hearsay evidence. They have to be proved either by production of the reporter who heard the said statements and sent them for reporting or by production of report sent by such reporter and production of the Editor of the newspaper or it's publisher to prove the said report. It has been held by the Apex Court that newspaper reports are at best secondary evidence and not admissible in evidence without proper proof of its content under the Indian Evidence Act, 1872. It is thus clear that newspaper report is not a "legal evidence" which can be examined in support of the complainant.

21. It is trite law that there has to be legal evidence in support of the allegations levelled against a person. In the present case the only evidence relied upon is the newspaper reporting and nothing else. For what has been stated above and as per the settled legal position, a newspaper report is not a "legal evidence".

26. While dealing with the word "consequence" appearing in Section 179 of Cr.P.C., in the case of Ganeshi Lal Vs. Nand Kishore : 1912 SCC Online All 76 : 1912 (Vol. X) A.L.J.R. 45, it has been held as under:- "The word "consequence" in this section, in my opinion, means a consequence which forms a part and parcel of the offence. It does not mean a consequence which is not such a direct result of the act of the offender as to form no part of that offence. In Babu Lal Vs. Ghansham Dass : (1908) 5 A.L.J.R. 333, it is remarked: "it is contended that section 179 by reason of the words "contained in it' and "of any consequence which has ensued' gives the Magistrate at Aligarh in this case jurisdiction. But the only reasonable interpretation which can be put upon these words is that they are intended to embrace only such consequences as modify or complete the acts alleged to be an offence." The above remarks support the view I take."

31. In **Rivadeneyta Ricardo Agustin Vs. Government of the National Capital Territory of Delhi and others**[15], the Hon'ble Supreme Court has observed :

> "if there is no material before the detaining authority indicating that the detenue is likely to be released or such release is imminent, the detention order, passed without such satisfaction is liable to be quashed."

32. In **Vijay Narain Singh Vs. State of Bihar**[16], the Apex Court has observed that :

> "the law of preventive detention being a drastic and hard law, must be strictly construed and should not ordinarily be used for clipping the wings of an accused if, criminal prosecution would suffice."

33. In **Binod Singh Vs. District Magistrate, Dhanbad**[17], the Apex Court has emphasised that :

> "before passing a detention order in respect of a person who is in jail the concerned authority must satisfy himself and that satisfaction must be reached on the basis of cogent material that there is a real possibility of the detenu being released on bail and further if released on bail he will indulge in prejudicial activity if not detained."

34. Considering the aforesaid facts and circumstances, we had also proceeded to examine a few precedents in detail so as to ascertain whether the facts of the present case make out a case of disturbance to “public order” or it would merely fall under the category of a disturbance to “law and order”. The Division Bench of this Court in **Abhayraj Gupta vs. Superintendent, Central Jail, Bareilly** (supra), had considered said aspect of the matter in detail in paragraphs 54 to 61 and the same same are reproduced herein below:-

> “54. From a perusal of aforesaid pronouncements, it is clear that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is real possibility of his being released on bail and, and (b) that on being so released he would in all probability indulge in prejudicial activity; and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in his behalf, such an order cannot be struck down on the ground that the proper

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15. 1994 Supp. (1) SCC 597

16. (1984) 3 SCC 14

17. (1986) 4 SCC 416

course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question the same before a higher Court.

55. In Kamarunnissa (Supra), one of the accused persons had secreted diamonds and precious stones in his rectum while the other two detenus had swallowed 100 capsules each containing foreign currency notes. The detaining authority was ware of the fact that two of the accused persons had applied bail and in such cases courts ordinarily enlarge the accused on bail. He was also aware of the fact that one of the detenus had not applied for bail. Conscious of the fact that all the three detenus were in custody, he passed the impugned orders of detention as he had reason to believe that the detenus would in all probability secure bail and if they are at large, they would indulge in the same prejudicial activity since the manner in which the three detenus were in the process of smuggling diamonds and currency notes was itself indicative of they having received training in this behalf. The fact that one of them secreted diamonds and precious stones in two balloon rolls in his rectum and that the other two detenus had created cavities for secreting as many as 100 capsules each in their bodies was indicative of the fact that this was not to be a solitary instance. All the three detenus had prepared themselves for indulging in smuggling by creating cavities in their bodies after receiving training. In Baby Devassy Chully (Supra) also the Directorate of Revenue Intelligence had intercepted one sea-faring vessel by carrying diesel oil of foreign origin which was smuggled into India. The officers of the DRI seized the said diesel oil weighing about 770 MTs, worth Rs 2 crores, under the Customs Act, 1962, which was being delivered to the accused person. The accused had been granted bail but he had not availed the same. The Hon'ble Supreme Court had upheld the detention orders keeping in view the peculiar facts of the aforesaid cases that the accused persons were professional smugglers, on the ground that detention orders can validly be passed against detenus who are in jail, provided the officer passing the order is alive to the fact of the detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty.

56. While examining the applicability of the aforesaid decisions, it would be appropriate to have a look at the law regarding application of precedents, as explained by the Hon'ble Supreme Court in Roger Shashoua v. Mukesh Sharma19, in the following words: -

"55. ....It is well settled in law that the ratio decidendi of each case has to be correctly understood. In Regional Manager v. Pawan Kumar Dubey, a three-Judge Bench ruled: (SCC p. 338, para 7)

"7. ... It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts."

56. In Director of Settlements v. M.R. Apparao, another three-Judge Bench, dealing with the concept whether a decision is "declared law", observed: (SCC p. 650, para 7)

"7. ... But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. …"

57. In this context, a passage from CIT v. Sun Engg. Works (P) Ltd. would be absolutely apt: (SCC pp. 385-86, para 39)

"39. ... It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. …"

58. In this context, we recapitulate what the Court had said in Ambica Quarry Works v. State of Gujarat: (SCC p. 221, para 18)

"18. ... The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. (See Lord Halsbury in Quinn v. Leathem43.) …"

59. From the aforesaid authorities, it is quite vivid that a ratio of a judgment has the precedential value and it is obligatory on the part of the court to cogitate on the judgment regard being had to the facts exposited therein and the context in which the questions had arisen and the law has been declared. It is also necessary to read the judgment in entirety and if any principle has been laid down, it has to be considered keeping in view the questions that arose for consideration in the case. One is not expected to pick up a word or a sentence from a judgment dehors from the context and understand the ratio decidendi which has the precedential value. That apart, the court before whom an authority is cited is required to consider what has been decided therein but not what can be deduced by following a syllogistic process."

57. Keeping in view the aforesaid dictum of the Hon'ble Supreme Court, the aforesaid principles laid down in Kamarunnissa, Baby Devassy Chully, Ahmad Nassar and Pankaj (Supra) in view of the peculiar facts of those cases are not applicable to the facts of the present case.

58. Moreover, even in Baby Devassy Chully (Supra), the Hon'ble Supreme Court has held that if a person is in custody and there is no imminent possibility of his being released, the rule is that the power of preventive detention should not be exercised. The allegation against the petitioner is that he committed murder of a person, regarding whom the petitioner claims to have an old family animosity. He is not alleged to be a professional killer who would again start indulging in similar activities as soon as he comes out on bail. Moreover, a F.I.R. was lodged against the petitioner on the ground of the same incident, under Sections 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 as Case Crime No. 221/20 in Police Station Sadar Bazar, Shahjahanpur, in which the petitioner was in custody since 01-05-2020 and as on the date of passing of the detention order, he had not even filed an application for bail. The bail application in the aforesaid case was filed on 25-01-2021, although as per the submissions of Mr. Murtaza, a copy of the bail application had been served on 21-01-2021.

59. In a case under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 a bail order cannot be passed in a manner in which it is passed in case of any offence under the I.P.C. Section 19 of the aforesaid Act provides as follows: -

"19. Modified application of certain provisions of the Code. - (1) Notwithstanding anything contained in the Code every offence punishable under this Act or any rule made thereunder shall be deemed to be a cognizable offence within the meaning of clause (c) of Section 2 of the Code and cognizable case as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to case involving an offence punishable under this Act or any rule made thereunder subject to the modifications that-

(a) the reference in sub-section (1) thereof to "Judicial Magistrate" shall be construed as a reference to "Judicial Magistrate or Executive Magistrate";

(b) the references in sub-section (2) thereof to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "sixty days", "one year" and "one year", respectively;

(c) sub-section (2A) thereof shall be deemed to have been omitted.

(3) Sections 366, 367, 368 and 371 of the Code shall apply in relation to a case involving an offence triable by a Special Court, subject to the modification that the reference to "Court of Session" wherever occurring herein, shall be construed as reference to "Special Court".

(4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless :

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(5) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code."

60. Keeping in view the fact that the petitioner was already in Jail in a case under Sections 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, that he had not filed an application for bail in the aforesaid case and that even when he would file an application for bail, he would not be released on bail unless (a) the Public Prosecutor is given an opportunity to oppose the application for such release, and (b) the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail, it cannot be accepted that there was any material for recording the satisfaction of the detaining authority that with a view to preventing the petitioner from acting in any manner prejudicial to the maintenance of public order it was necessary to detain the petitioner under the NSA, 1980. The satisfaction that it is necessary to detain the petitioner for the purpose of preventing him from acting in a manner prejudicial to the maintenance of public order is thus, the basis of the order under section 3 (2) of the NSA, 1980 and this basis is clearly absent in the present case. Therefore, the detention order dated 23-01-2021 is unsustainable in law on this ground also.

61. In view of the aforesaid discussion, the present Writ Petition is allowed. The impugned order dated 23-01-2021 passed by the District Magistrate, Shahjahanpur ordering detention of the petitioner Abhay Raj Gupta under Section 3 (3) of the NSA, 1980 is hereby quashed. The Respondents are commanded to release the petitioner from detention under the aforesaid order dated 23-01-2021 forthwith.”

35. In **S.K.Mabud @ Mamud vs. State of Odisha & another** (supra), a Division Bench of Orisa High Court held that while quashing order of preventive detention under the NSA, 1980 that the legal obligations in cases related to Detention under National Security Act needs to be discharged with great sense of responsibility. Relevant paragraphs 14 and 15 of the judgment are reproduced herein below:-

> "14. Preventive detention is an exception to the normal procedure and is sanctioned and authorized for very limited purpose under Article 22(3)(b) with good deal of safeguards. The exercise of that power of preventive detention must be with proper circumspection and due care. In a regime of constitutional governance, it requires the understanding between those who exercise power and the people over whom or in respect of whom such power is exercised. The legal obligation in this type of case, need to be discharged with great sense of responsibility even if the satisfaction to be derived is a subjective satisfaction such subjective satisfaction has to be based on objective facts. If the objective facts are missing for the purpose of coming to subjective satisfaction, in absence of objective facts the satisfaction leading to an order without due and proper application of mind will render the order unsustainable. In view of the above legal position, this Court has expected from the detaining authority that subjective satisfaction of the detaining authority should be based on objective facts.
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> 15. Similarly, in the instant case, the details of the alleged bail application have not been provided in the order of detention, ground of detention or in the application of the Superintendent of Police, Balasore. Further, no details have been given about the alleged similar cases in which bail was allegedly granted by the concerned Court. The only mention regarding bail is in the letter dated 26.12.2019 by the Superintendent of Police, Balasore wherein he had reported that it has come to his knowledge that the petitioner has arranged for his bail. However, this statement is entirely ambiguous and this Court cannot rely on the same. Considering the above submissions, we are of the view that this Court should not allow the petitioner-detenu to be kept in custody on the basis of order of detention which is illegal, bad in law hence amounts to illegal custody of the petitioner detenu."

36. The true distinction between the areas of law and order and public order lies not merely in the nature or quality of the act, but in the degree and extent of its reach upon society. 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 touches the problem of law and order only, while in another it might affect public order. The act by itself, therefore, is not determinant of its own gravity. In its quality it may not differ from other similar acts, but in its potentiality, that is, in its impact on society, it may be very different.

37. While passing the detention order impugned much emphasis is being placed on the stale incident of 2020 in which the petitioner no.1 was already accorded bail by this Court. The media clippings have been made as the proof of disruption of public order. The newspaper report by itself does not constitute an evidence of the contents. The reports are moreover hearsay evidence. The newspaper reports are at best secondary evidence and not admissible in evidence without proper proof of its content under the Indian Evidence Act, 1872. It is thus clear that newspaper report is not a "legal evidence" which can be examined in support of the complainant. It is trite law that there has to be legal evidence in support of the allegations levelled against a person. In the present case, the only evidence relied upon is the newspaper reporting and nothing else. For what has been stated above and as per the settled legal position, a newspaper report is not a "legal evidence".

38. In the present case, the detaining authority has merely mentioned in the grounds of detention that the petitioner has filed his bail application before this Court on 15.2.2022 and there was possibility of the petitioner indulging in similar activities prejudicial to the maintenance of public order on his coming out of jail. She has not recorded her satisfaction in the impugned order that there was real possibility of his being released on bail which omission in our opinion has totally vitiated the impugned order.

39. Therefore, in view of foregoing analysis, we are of the considered opinion that the detention of the detenu under the provisions of Section 3 (2) of the NSA, 1980 is unsustainable. In the result the impugned of order of detention dated 31.3.2022 and the consequential orders are hereby quashed.

40. The present Habeas Corpus Petition is allowed and the detenue/petitioner is ordered to be set at liberty by the respondents forthwith unless required in connection with any other case.

Order Date :- 03.02.2023
RKP/