SYNOPSIS

The present special leave petition is being filed under Article 136 of the Constitution of India against the impugned common judgment and order dated 28.05.2020 passed by the Hon'ble High Court of Jammu and Kashmir in LPA No. 28/2020 and EMG-CM-5/2020, (hereinafter referred to as 'impugned judgement and order') wherein the Petitioner's challenge to his prolonged illegal detention under the J&K Public Safety Act in jails outside Jammu and Kashmir was rejected by the Hon'ble Court.

The Petitioner is a Senior Advocate with more than 40 years' standing at the Bar, having served as President of the J&K High Court Bar Association for many terms, including from 2014 till the present day. The Respondents are the Union Territory of Jammu and Kashmir, through its Home Department; the District Magistrate, Srinagar, who is the Detaining Authority under the Jammu and Kashmir Public Safety Act, 1978 (hereinafter referred to as 'PSA'); the Senior Superintendent of Police, Srinagar; and Jail Superintendents of Central Jails in Srinagar, Tihar and Agra.

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The Petitioner was detained on the intervening night of 4th and 5th August, 2019, under the provisions of Sections 107 r/w 151 Jammu and Kashmir Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.'). Thereafter, an order of detention under the PSA was passed against the detenu on 07.08.2019, and on 08.08.2019, the Petitioner was taken to Central Jail, Agra, Uttar Pradesh, without any prior notice of intimation, where he was kept in solitary confinement. This order of detention was challenged by the Petitioner in WP (Crl) 251/2019 before the J&K High Court, and the same was dismissed on 07.02.2020. Thereafter, LPA No. 28/2020 was filed impugning the order of 07.02.2020, and the same came to be dismissed on 28.05.2020.

The impugned common judgment and order dated 28.05.2020 is *ex facie* unsustainable in law as it is premised on stale, irrelevant, remote, vague, imprecise and deficient grounds of detention. The impugned judgment and order concluded that most of the grounds in the detention order "*are somewhat clumsy*" which implies that the

High Court too found them wanting. Placing reliance on the doctrine of severability as enunciated by this Hon'ble Court in *Gautam Jain v Union of India* (2017) 3 SCC 133, the High Court then proceeds to uphold the detention order solely on one ground. In Paras 23 and 28 of the impugned judgment, the High Court makes it abundantly clear that the detention order has been upheld solely on one ground - the four FIRs dating back to 2008 and 2010, as enumerated in the detention order. These FIRs are stale, irrelevant and have no proximate, pertinent or live link to the present, and are thus superfluous and extraneous to the satisfaction required in law qua the tendency or propensity to act in a manner prejudicial to public order. Pertinently, even in the said decade old 4 FIRs, the Petitioner was neither arrested, nor any chargesheet ever filed by the police against the Petitioner. Further, the Petitioner had already been detained in 2010 on the basis of the said FIRs under the PSA, and the said detention was subsequently revoked. Thus, the same FIRs cannot be used to pass another order of detention under the PSA, as held by this Hon'ble Court in *Chhagan Bhagwan Kahar v NL Kalna* (1989) 2 SCC 318.

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The impugned judgment and order is also unsustainable in law as it relies on material presented for the first time in appellate proceedings to justify the validity of the detention order. It is a matter of record that this new material was not relied upon by the Detaining Authority and it is undisputed that the same was not supplied to the detenu. The constitutional imperative of Article 22(5) of the Constitution requires that in addition to the grounds, all the facts and material on the basis of which a preventive detention order has been passed shall be supplied to the detenu. In the present case, the detenu/Petitioner was undisputedly supplied with only ten leaves, which included copies of PSA warrant, grounds of detention, the four FIRs of 2008 and 2010, and a letter addressed to the detenu. Thus, the Hon'ble High Court has seriously erred in traversing beyond the said documents to arrive at its own satisfaction *qua* the grounds of detention, substituting and supplementing the material upon which the satisfaction of the Detaining Authority was based, which is impermissible in law.

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The detention order passed against the Petitioner is also vitiated as some grounds, facts and materials which weighed on the Detaining Authority while arriving at its satisfaction to detain the Petitioner were not supplied to the Petitioner. This includes a Police Dossier, Case Diaries and newspaper reports. Further, the order of detention also relies on vague, imprecise and unsubstantiated grounds without any material particulars, and the same renders the order illegal and liable to be set aside, in view of the settled law of this Hon'ble Court in *Shalini Soni & Ors vs Union of India & Ors.* (1980) 4 SCC 544, *Thahira Haris v Government of Karnataka* (2009) 11 SCC 438, *Khudiram Das vs State of West Bengal* (1975) 2 SCC 81, *Ganga Ramchand Bharvani vs Under Secretary, Government of Maharashtra* (1980) 4 SCC 624, *Prabhu Dayal v District Magistrate* (1974) 1 SCC 103 and *Golam Mallick v. State of West Bengal* (1975) 2 SCC 4.

The impugned judgment, recognising the pitfalls inherent in the sole ground provided by the four stale and irrelevant FIRs, deploys the perceived ideology of the Petitioner to try and establish proximity,

pertinence and relevance to the FIRs to justify the detention order. In doing so, not only is the Hon'ble High Court supplementing the material upon which the satisfaction of the Detaining Authority was based, which is impermissible in law, but also embarking on a constitutionally barred exercise of sanctioning State induced thought policing, which violates the right to privacy and dignity of the Petitioner. The tenets of the Indian Constitution bar the state from acting as a thought police and endows a person with the right to privacy as a facet of the right to life and liberty, recognized by the judgment of nine judges of this Hon'ble Court in *KS Puttaswamy vs Union of India* (2017) 10 SCC 1.

The Petitioner is more than 70 years of age and is suffering from life threatening heart ailments showing blockade of artery to the extent of 55-60%, with uncontrolled blood sugar and is surviving on a single kidney which is further aggravated by a disease as of Urethra stricture. Furthermore, because of the bullet injury sustained in 1995, the detenu suffered cervical vertebral column injury and there is degeneration in cervical and limb spine for which the detenu is on

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medication. He also has a limb and continuous backache for which he requires continuous follow up treatment and physiotherapy. The detenu also suffers from stomach ailment and has been under the treatment of renowned Dr. M.S. Khuroo and for this too he requires continuous medication and monitoring. The Petitioner also suffers from bleeding piles for which he is continuously on medication and prescribed diet and food. In such conditions, the Petitioner is a high risk person vulnerable to Covid-19 due to several comorbid conditions. Yet, the impugned judgment and order rejects the request for transfer of the Petitioner to a jail closer to home in Srinagar conditional on grounds that are repugnant to the constitutional jurisprudence of Article 19 and 21, and cannot be sustained in law.

That constrained by the illegal, untenable and unconstitutional findings and observations made in the impugned judgment and order, the Petitioner has filed the present petition seeking special leave to appeal.

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List of Dates

Date	Event
1976	The Petitioner joined the legal profession and started practising before the J&K High Court.
1986 - present	The Petitioner was elected President of the J&K High Court Bar Association in 1986, and since then he has served as the President of the Bar Association for 21 terms, including from 2014 till date. In 1995, the Petitioner was shot in his abdomen, which damaged his kidney and spinal nerve. Due to the debilitating impact of the bullet injury on the Petitioner's health between 1995 and 2002, the Petitioner did not participate in the affairs of the Bar Association.
31.10.2008	FIR No. 74/2008, P.S. Kothibagh, Srinagar, came to be

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registered against the Petitioner and 50-60 lawyers under Sections 13 UL(P) Act and 132-B Ranbir Penal Code on allegations of taking out a procession and raising slogans. Pertinently, the Petitioner was not arrested nor was the charge sheet filed by the police pursuant to the said FIR

16.02.2010 FIR No. 15/2010, P.S. Maisuma, Srinagar, came to be registered against the Petitioner under Sections 505, 153 and 121 Ranbir Penal Code, on the basis of newspaper reports from Greater Kashmir and Rising Kashmir dailies which alleged that the High Court Bar Association held a meeting with the Hurriyat factions and passed resolutions terming the surrender policy as a human rights violation and also resolved that the Kashmir solution must be as per the UN resolution after complete demilitarization of the valley. It is pertinent to note that the Petitioner was never arrested nor any charge sheet filed by the police pursuant to the said FIR against the Petitioner.

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29.03.2010 FIR No. 27/2010, P.S. Kothibagh, Srinagar, came to be registered against the Petitioner and other lawyers under Sections 13 UL(P)A and 188 Ranbir Penal Code for allegedly raising anti national slogans and calling for boycott of courts. Once again, it is noteworthy that the Petitioner was neither arrested nor was a chargesheet filed by the police against the Petitioner.

24.06.2010 FIR No. 55/2010, P.S. Maisuma, Srinagar, came to be registered against the Petitioner and other lawyers under Sections 121A, 188 and 341 Ranbir Penal Code for allegedly taking out a procession and raising slogans. It is pertinent to note that the Petitioner was neither arrested nor any chargesheet filed against him pursuant to the said FIR.

Submission: The Petitioner was detained under the PSA in July, 2010, on the basis of the FIRs registered in P.S. Kothibagh and Maisuma against the Petitioner in 2008 and 2010. The

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order of detention was revoked on 16.09.2010, and a revised order of detention was issued on 18.09.2010. However, this detention order was quashed and set aside by the Hon'ble High Court of J&K on 27.11.2010. Thereafter, a fresh detention order was issued in February 2011, which was also challenged before the Hon'ble High Court. During pendency of proceedings, the said detention order was revoked and the detenu was released in April 2011 from custody. Documents pertaining to the detention of the Petitioner under PSA in 2010-11 were lost in the floods in Kashmir in 2014. However, the averment that the Petitioner was detained under PSA in 2010-11, and that the same was subsequently revoked; and that the grounds of detention were the FIRs registered against the Petitioner, has not been denied by the Respondents in the pleadings before the High Court and has been stated as proven/admitted facts in the impugned order and judgment.

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14.05.2011 The Petitioner, after being released from preventive detention moves the Sessions Court and is granted bail by the Principal Sessions Judge, Srinagar, in FIR No. 15/2010 and 55/2010, P.S. Maisuma, Srinagar, and FIR No. 27/2010 , P.S. Kothibagh, Srinagar, vide a common order. The Ld. Court held,

"*In all these cases no overt act of commission other than oral exhortation is attributed to petitioner. It is not alleged that the petitioner had planned, engaged in conspiracy, funded or joined an armed insurrection against lawful Govt or tried to over-throw the lawful Govt by unlawful means. It is not alleged that the petitioner had procured, handled, displayed or used any arms, ammunition, fire arms or explosives. It is also not alleged that the procession led by petitioner had indulged in arson, looting, stabbing or use of violence or force to achieve its object. All the three occurrences pertain to Ist half of 2010 and despite the petitioner then being available to investigating agency was not arrested for being associated*

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with investigation which is reportedly at the verge of conclusion in all the cases. Admittedly no recovery is to be effected from the petitioner. None of the offences alleged against the petitioner is punishable with sentence to which embargo imposed under section 497 Cr.PC is attracted. Petitioner has, after his release from detention under PSA, voluntarily surrendered before this court. I find no legal impediment in admitting the petitioner on bail in all the three cases pending conclusion of investigation."

[True copy of the bail order dated 14.05.2011 passed by the Principal Sessions Judge, Srinagar, is marked and annexed herein as **Annexure P-1** at pages ___112__to__114___ .]

Submission The Petitioner was never arrested by the police in relation to the four FIRs enumerated in the detention order. Further, the police did not chargesheet the Petitioner in any of the aforesaid FIRs. The FIRs against the Petitioner were registered more than a decade ago, yet no incriminating

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evidence has been brought on record against the Petitioner.

04.08.2019 - 05.08.2019 — On the intervening night of 04.08.2019 and 05.08.2019, the Petitioner was arrested under Section 107/151 J&K Cr.P.C., and lodged in Srinagar Central Jail.

07.08.2019 — The Detaining Authority under the J&K Public Safety Act (PSA) issued an order of detention No: DMS / OSA / 105/ 2019. [True copy of the Detaining Order DMS / OSA / 105 / 2019 along with a covering letter dated 07.08.2019 is marked and annexed herein as **Annexure P-2** at Pages 115to 119]

08.08.2019 — The Petitioner was provided with a letter addressed to him, a PSA warrant and grounds of detention, numbering in total to 10 leaves, and a receipt of the same was executed by the Executing Officer, Inspector Parvaiz Ahmad. Pertinently, on the same day the Petitioner without any intimation was taken from Srinagar, Kashmir, and lodged in Central Jail, Agra, Uttar Pradesh, and was denied any

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real and effective opportunity to make a representation against his illegal detention to the Detaining Authority. In Agra jail, the Petitioner was lodged in solitary confinement for a month and his health consistently deteriorated in jail, thereby depriving him of any effective and real opportunity to make a representation against his illegal detention.

[True copy of the receipt dated 08.08.2019 prepared for the handover of the material on the basis of which the Petitioner was detained, is marked and annexed here as **Annexure P-3** at Page 120 to 120]

20.08.2019 The Petitioner, through his wife, Asha Bano, filed a Writ Petition before the J&K High Court challenging his detention under the PSA. The petition was registered as WP (Crl) 251/2019.

23.10.2019 During the pendency of the Writ Petition the Government passed another order being Government Order No:

Home/PB V/2439 dated 23.10.2019 in terms of which the initial order of detention of three months was extended by another three months.

03.02.2020 The Hon'ble Single Judge of J&K High Court reserved orders in WP(Crl) 251/2019.

On the same day, the detention of the Petitioner was extended for a further period of three months till 02.05.2020 vide Government Order No: Home/PB-V/220 of 2020.

07.02.2020 That the Hon'ble Single Judge dismissed WP (Crl) 251/2019. [True copy of the judgment dated 07.02.2020 in WP (Crl) 251/2019 is marked and annexed as **Annexure P-4** at Pages 121 to 162]

13.02.2020 The Petitioner filed a Letters Patent Appeal [LPA No. 28/2020] against the judgment dated 07.02.2010 passed by the Ld. Single Judge in WP (Crl) 251/2019. No counter affidavit was filed by the Respondent State in the LPA as

it relied on its pleadings in the writ proceedings before the Single Judge. [True copy of the petition in LPA No. 28/2020 is marked and annexed herein as **Annexure P-5** at Pages163 to 190.]

01.05.2020 The detention of the Petitioner under the PSA was extended for another three months.

Submission: Following the outbreak of COVID 19 pandemic, due to the ailments from which the Petitioner was suffering and as these comorbidities posed a grave risk to his life, the Petitioner's wife, during pendency of the LPA No. 28/2020, filed Application numbered EMG-CM-5/2020 seeking directions to the High Powered Committee for the Petitioner's release from custody as per the directions passed by the Hon'ble Supreme Court of India in Suo Motu W.P. (C) No. 1/2020 on 23.03.2020. The Petitioner is more than 70 years of age and is suffering from life threatening heart ailments showing blockade of artery to

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the extent of 55-60%, with uncontrolled blood sugar and is surviving on a single kidney which is further aggravated by a disease as of Urethra stricture. Furthermore, because of the bullet injury sustained in 1995, the detenu suffered cervical vertebral column injury and there is degeneration in cervical and limb spine for which the detenu is on medication. He also has a limb and continuous backache for which he requires continuous follow up treatment and physiotherapy. The detenu also suffers from stomach ailment and has been under the treatment of renowned Dr. M.S. Khuroo and for this too he requires continuous medication and monitoring. The Petitioner also suffers from bleeding piles for which he is continuously on medication and prescribed diet and food. In such conditions, the Petitioner is a high risk person vulnerable to Covid-19 due to several comorbid conditions.

Submission: The medical documents of the Petitioner were part of the High Court proceedings, and the Respondent State has not

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contested that the Petitioner suffers from the aforesaid serious ailments and conditions. These may be treated as admitted facts, and the copies of such documents are not being annexed to the present Petition due to paucity of time in getting typed and legible copies prepared. The scans of the original documents shall be produced at the time of oral arguments, if so directed by this Hon'ble Court.

28.05.2020 LPA No. 28/2020 and EMG-CM-5/2020 was dismissed by the J&K High Court and the common impugned order and judgment came to be passed.

11.06.2020 The Petitioner has been wrongfully detained under the PSA for more than ten months, and the Hon'ble High Court has erred in holding that the detention was lawful, given that the order of detention suffers from the vice of vagueness and non application of mind; is premised on irrelevant, deficient and remote grounds; is an arbitrary

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and capricious exercise of power which makes serious inroads into the Petitioner's right to liberty; is vitiated by procedural illegalities violative of Articles 14, 21 and 22(5) of the Constitution of India; is an unreasonable restriction on the right to privacy and fundamental freedoms under Articles 21 and 19 of the Constitution. The Petitioner is a Senior Advocate with more than 40 years' standing at the Bar, having served as President of the J&K High Court Bar Association for 21 terms, including from 2014 till the present day. Hence, the present Special Leave Petition.

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HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

LPA No.28/2020 in [WP(Crl.) No.251/2019]
with connected CMs: CM(1414/2020), CM(1099/2020),
CM(1098/2020), CM(724/2020) & EMG-CM-05/2020.

Mian Abdul Qayoom

…Appellant

Through: Mr. Z. A. Shah, Sr. Advocate, with
M/s N. A. Ronga, and
Mian Tufail Ahmad, Advocates.

v.

Union Territory of J&K & ors.

…Respondent(s)

Through:
Mr. D. C. Raina, AG, assisted by
Mr. B. A. Dar, Sr. AAG, and
M/s Shah Aamir & Aseem Sawhney, AAGs.
Mr. Tahir Shamsi, ASG, for UOI.

Medium: Virtual Court Hearing

Coram:

Hon'ble Mr. Justice Ali Mohammad Magrey, Judge

Hon'ble Mr. Justice Vinod Chatterji Koul, Judge

Whether approved for reporting: **Yes**

ORDER

28.05.2020

Per Magrey, J:

1. This Letters Patent Appeal has been filed on behalf of the detenue against the judgment dated 07.02.2020 passed in WP(Crl) no.251/2019 whereby the learned Writ Court has dismissed the writ petition for habeas corpus seeking quashing of the detenue's detention order under Jammu and Kashmir Public Safety Act, 1978. A few relevant facts may be narrated.

2. The appellant-petitioner filed WP(Crl) no.251/2019 challenging the detention of her husband, Mian Abdul Qayoom, a practicing Advocate of this Court, ordered by the District Magistrate, Srinagar, in exercise of the powers under Section 8 of the J&K Public Safety Act, 1978 (JK PSA), in terms of his Order no.DMS/PSA/105/2019 dated 07.08.2019. The said order is shown to have been passed by the detaining authority on being satisfied that, with a view to preventing the detenue from acting in any manner prejudicial to the maintenance of public order, it was necessary to detain him. The detention order so passed by the detaining authority was challenged by the appellant-petitioner, broadly, on the grounds: (i) that the detenue was not supplied the material documents on the basis of which the detaining authority had attained the requisite satisfaction; thereby the detenue was prevented from making an effective representation against his detention, violating the most precious right guaranteed to him; (ii) that the FIRs relied upon by the detaining authority to form his opinion pertain to the years 2008 and 2010, and that the allegations contained in these FIRs are stale in nature; therefore, the same could not form the basis for detaining the detenue, and that the detention order on that ground is vitiated; (iii) that the detenue was previously detained in the year 2010 and the very same FIRs and the allegations made therein were then relied upon for detaining the detenue, but that detention order was subsequently withdrawn; therefore, in view of the law laid down by the Supreme Court, these FIRs could not have been taken into account for detaining the detenue afresh, and that the detention order on that count is vitiated; (iv) that the grounds of detention are replica of the police dossier, and that the detaining authority has signed the order of detention and the grounds of detention without application of mind; therefore, the detention of the detenue suffers from non-application of mind on the part of the detaining

authority; (v) that the grounds of detention are vague, indefinite, uncertain and ambiguous; (vi) that the detaining authority has not shown his awareness in the grounds of detention about the present status of the 2008 and 2010 FIRs and whether the detenue had filed any application for bail therein; and (vii) that the detenue was taken into preventive custody under Sections 107/151 Cr. P. C. during the intervening night of 4/5th August, 2019 and the detaining authority has not shown any compelling reason for ordering his detention under the provisions of the Public Safety Act in face of the fact that the detenue was already in preventive custody.

3. The learned Writ Court, vide its judgment impugned in this appeal, dismissed the writ petition with the following concluding para:

> "21. To sum up, a law of preventive detention is not invalid because it prescribed no objective standard for ordering preventive detention, and leaves the matter to subjective satisfaction of the Executive. The reason for this view is that preventive detention is not punitive but preventive and is resorted to with a view to prevent a person from committing activities regarded as prejudicial to certain objects that the law of preventive detention seeks to prescribe. Preventive detention is thus, based on suspicion or anticipation and not on proof. The responsibility for security of State, or maintenance of public order, or essential services and supplies, rests on the Executive and it must, therefore, have necessary powers to order preventive detention. Having said that, subjective satisfaction of a detaining authority to detain a person or not, is not open to objective assessment by a Court. A Court is not a proper forum to scrutinise the merits of administrative decision to detain a person. The Court cannot substitute its own satisfaction for that of the authority concerned and decide whether its satisfaction was reasonable or proper, or whether in the circumstances of the matter, the person concerned should have been detained or not. It is often said and held that the Courts do not even go into the question whether the facts mentioned in grounds of detention are correct or false. The reason for the rule is that to decide this, evidence may have to be taken by the Courts and that is not

> the policy of law of preventive detention. This matter lies within the competence of Advisory Board. While saying so, this Court does not sit in appeal over decision of detaining authority and cannot substitute its own opinion over that of detaining authority when grounds of detention are precise, pertinent, proximate and relevant."
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> ***(Underlining supplied)***

4. At the hearing of this LPA, Mr. Z. A. Shah, learned senior counsel, appearing for the appellant, invited the attention of the Court to the Detention Order no. DMS/PSA/105/2019 dated 07.08/2019 and the grounds of detention served on the detenue. He submitted that in terms of the detention order, the detailing authority had gone through and perused the Police Dossier and other connected documents placed before him by the Sr. Superintendent of Police vide communication no. LGL/Det.3108/2019/6167-70 dated 06.08.2019; whereas in the grounds of detention the detaining authority stated that he had perused four FIRs, [viz. FIR no.74/2008 U/S 13 ULA (P) Act, 132 RP Act P/S Kothibagh; FIR no.27/2010 U/S 13 ULA (P) Act, 188 RPC P/S Kothibagh; FIR no.15/2010 U/S 505(II) RPC, 153, 121 RPC P/S Maisuma; and FIR no.55/2020 U/S 24-A 188, 341 RPC P/S Maisuma]; the Police Dossier submitted before him by the Sr. Superintendent of Police, Srinagar; the Case Diaries of the FIRs; the reports and the newspaper reports, besides referring to the proceedings initiated against the detenue under Sections 107/151 Cr. P. C. in connection with which he was in preventive custody on the date of passing of the detention order. Mr. Shah, further, inviting the attention of the Court to the endorsement contained in the detention order, submitted that while forwarding the detention order to the Senior Superintendent of Police, Srinagar, for execution, the detaining authority ordered that it shall be ensured that the entire material relied upon was supplied to the detenue, but while endorsing a copy of communication no.DMS/PSA/Jud/3866-68 dated 07.08.2019 to the Superintendent, the detaining authority mentioned

only grounds of detention, copy of FIR and the said letter to be served on the detenue. The detenue, according to the learned senior counsel, was, in fact, supplied only ten leaves comprising detention order (1 leaf), grounds of detention (3 leaves), FIR copies (05 leaves) and communication no.DMS/PSA/Jud/3866-68 dated 07.08.2019 informing the detenue that he had been detained in terms of the above order, and that he could make a representation to him and the Government. The learned senior counsel submitted that the detenue, thus, was not provided the other materials viz. the Police Dossier, Case Diaries, reports, newspaper reports and the proceedings under section 107/151 Cr. P. C. perused by the detaining authority and on the basis of which he had attained his subjective satisfaction that, with a view to preventing the detenue from acting in any manner prejudicial to the maintenance of public order, it was necessary to detain him under the provisions of the Public Safety Act. The learned counsel submitted that for lack of such material, the detenue was prevented from making an effective representation to the detaining authority and the Government against his detention, and was, thus, deprived of his most precious right of making the representation, guaranteed to him by law. The learned senior counsel submitted that because of such a failure, the detention of the detenue is rendered illegal; therefore, the detention order is liable to be quashed. The learned senior counsel submitted that the learned Single Judge has erred in holding that the contentions raised in this regard are meretricious. The learned counsel submitted that it has consistently been held by the Supreme Court that non-supply of all the materials, relied upon by the detaining authority to arrive at the requisite satisfaction, renders the detention order illegal and is a sufficient ground for quashing the order of detention. To buttress his submission, the learned counsel cited and relied upon the judgment of the Supreme Court in ***Thahira Haris v Govt. of Karnataka***, (2009) 11 SCC 438.

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5. It was next argued by the learned senior counsel for the appellant that the grounds of detention supplied to the detenue do not attribute any specific instance of activity to the detenue. Instead, these grounds give out that the detaining authority assumed the requisite satisfaction on the basis of the contents of the FIRs and other materials placed before and perused by him. The learned senior counsel submitted that, apart from the fact that the grounds of detention are wholly vague, since the FIRs, admittedly, pertain to the years 2008 and 2010, the allegations, whatever, levelled therein are stale, being 9 to 11 years old. The learned counsel submitted that it is settled law that past conduct of a detenue is not relevant and has no live and proximate link with immediate need to detain him preventively. According to the learned counsel, the detenue has been detained on stale grounds. Concomitantly, it was argued that since the detenue was already in preventive custody of the respondents on the date of his detention, the detaining authority has not shown any compelling reason that despite that fact, it was necessary to detain him under the provisions of Public Safety Act. To bring home these points, the learned senior counsel cited and relied upon the judgment of the Supreme Court in ***Sama Aruna v State of Telangana***, (2018) 12 SCC 150.

6. The learned counsel further submitted that the detenue was also taken into preventive detention under the provisions of JK PSA in 2010 and in the grounds of detention then served upon him the very same four FIRs registered in 2008 and 2010 were mentioned and taken into consideration to detain him. However, that detention order was subsequently withdrawn. It was submitted that this being the factual position, it was not open to the detaining authority to have relied on the very same FIRs and allegations contained therein to again detain the detenue 09 years later. According to the learned counsel when such is the

situation, the detention order is vitiated. In this regard, the learned counsel cited and relied upon the decision of the Supreme Court in ***Chhagan Bhagwan Kahar v N. L. Kalna***, (1989) 2 SCC 318.

7. Citing ***Rajesh Vashdev Adnani v State of Maharashtra***, (2005) 8 SCC 390, the learned senior counsel submitted that the grounds of detention are the reproduction of the Police Dossier verbatim, suggesting that the detaining authority did not apply his mind and, therefore, the detention order suffers from non-application of mind on the part of the detaining authority, and, hence, it is vitiated.

8. The learned senior counsel also submitted that the detention order is also vitiated on two other counts: first, that the detaining authority was obliged to convey to the detenue that he could make representation to him until the order was approved by the State Government within 12 days of its passing and, in this connection, the learned counsel relied upon the decision of the Supreme Court in **State of *Maharastra v Santosh Shankar Acharya***, AIR 2000 SC 2504; and second, relying on a judgment of the Allahabad High Court in ***Jitendra v. District Magistrate***, 2004 CriLJ 2967, that it was imperative upon the detaining authority to communicate to the detenue the time limit in which he could make a representation to him.

9. Further**,** inviting the attention of this Court to Sections 17 and 18 of the JK PSA, the learned senior counsel argued that there is no power vested in the Government to extend the period of detention of a detenue beyond the period it is ordered and continued after confirmation under sub-section (1) of Section 17 of the Act. The learned counsel submitted that the provision in the Act which governs revocation, modification or extension of an order of detention is sub-section (2) of Section 18. However, the extensions in respect of the detention of the detenue, admittedly, have not been ordered under the said provision, but have been ordered under clause

(a) of sub-section (1) of Section 18 of the Act, which does not relate to extensions. He further submitted that even the power of extension under sub-section (2) of Section 18 is relatable to foreigners, and that the detenue is not a foreigner. The sum and substance of the submission made is that the extensions granted in the detention of the detenue are not governed by the law and hence illegal.

10. The learned counsel also argued that the allegations contained in the FIRs against the detenue do not fall within the definition of the phrase 'acting in any manner prejudicial to the maintenance of public order' as given in Section 8(3)(b) of the Act. He submitted that the impugned order is, therefore, unfounded and vitiated.

11. We may summarise the principal arguments of Mr. Z. A. Shah, learned senior counsel, for the appellant. They are:

i) first, that the detenue was not supplied all the materials on the basis of which the detaining authority had derived the requisite satisfaction;

ii) second, that the FIRs and the allegations contained therein are stale – 9 to 11 years old – having no proximity to lend a suspicion to the detaining authority that the detenue may disturb public order;

iii) third, that since the detenue was detained in 2010 on the very same FIRs and allegations contained therein, he could not have been detained anew on the very same allegations and material and on the basis of his past conduct;

iv) fourth, that the grounds of detention are the reproduction of the Police Dossier verbatim, suggesting that the detaining authority did not apply his mind and, therefore, the detention

order suffers from non-application of mind and, hence, is vitiated;

iv) fifth, that since the detaining authority did not convey to the detenue that he could make representation to him until the order was approved by the State Government within 12 days of its passing, specifying the time limit for the said purpose, the detention order is vitiated;

vi) six, that the extensions accorded in the detention order of the detenue are not covered by the provisions of the Act; therefore, the same are illegal;

vii) seven, that the activities attributed to the detenue in the allegations contained in the FIRs against the detenue do not fall within the definition of the phrase 'acting in any manner prejudicial to the maintenance of public order'; hence the detention order is unfounded.

12. It may be mentioned here that on the earlier hearings of the case, the UT respondents were represented by Mr. B. A. Dar, Sr. AAG. However, today Mr. D. C. Raina, learned Advocate General, assisted by Mr. B. A. Dar, Sr. AAG, and M/s Shah Aamir & Aseem Sawhney, AAGs, appeared in the case. The learned Advocate General, apart from submitting that the points urged and argued by the learned counsel for the detenue have been already dealt with in detail by the learned Single Judge in the impugned judgment, raised a specific point *vis-à-vis* the grounds of detention in the instant case and made submissions in relation thereto. Mr. B. A. Dar, assisting the learned Advocate General, cited some judgments in support of their submissions. Before we come to the specific point raised by the

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learned Advocate General, we deem it appropriate to examine the judgments cited at the Bar on either side.

13. In ***Thahira Haris v Govt. of Karnataka*** (supra), cited by the learned senior counsel for the appellant, the main allegation against the detenue was that he was abetting smuggling of red sanders out of the country. The Supreme Court was considering the impact of non-supply of relied upon and relevant documents on the detention order. In doing so, the Supreme Court took note of and relied upon 15 of its earlier decisions, from *Ram Krishan Bhardwaj (Dr.) v State of Delhi*, 1953 SCR 708, to *District Collector, Ananthapur v V. Laxmanna*, (2005) 3 SCC 663, and laid down as under:

> "29. There were several grounds on which the detention of the detenue was challenged in these appeals but it is not necessary to refer to all the grounds since on the ground of not supplying the relied upon document, continued detention of the detenue becomes illegal and the detention order has to be quashed on that ground alone.
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> 30. Our Constitution provides adequate safeguards under clauses (5) and (6) of Article 22 to the detenue who has been detained in pursuance of the order made under any law providing for preventive detention. He has the right to be supplied with copies of all documents, statements and other materials relied upon in the grounds of detention without any delay. The predominant object of communicating the grounds of detention is to enable the detenue at the earliest opportunity to make effective and meaningful representation against his detention.
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> 31. On proper construction of clause (5) of Article 22 read with Section 3(3) of the COFEPOSA Act, it is imperative for valid continuance of detention that the detenue must be supplied with all documents, statements and other materials relied upon in the grounds of detention.
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> 32. In the instant case, admittedly, the relied upon documents, the detention order of Anil Kumar was not supplied to the detenue and the detenue was prevented from making effective

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> representation which has violated his constitutional right under clause (5) of Article 22 of the Constitution."

14. In the decisions referred to and quoted in the above judgment of the Supreme Court, it has been, *inter alia*, laid down that in terms of the mandate of Article 22 of the Constitution the grounds on which the detention order is passed must be communicated to the detenue as expeditiously as possible and proper opportunity of making representation against the detention order must be provided. The phrase proper opportunity has been further elaborated by laying down that where there is an express statutory obligation to communicate not merely the decision but the grounds on which the decision is founded, it is a necessary corollary that the grounds communicated, that is, the grounds so made known, should be seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went into making up the mind of the statutory functionary and not merely the inferential conclusions. What is meant is that the grounds of detention in their entirety must be furnished to the detenue. If there are any documents, statements or other materials relied upon in the grounds of detention, they must also be communicated to the detenue, because being incorporated in the grounds of detention, they form part of the grounds and the grounds furnished to the detenue cannot be said to be complete without them.

15. Above is the gist of what the Supreme Court has laid down on the point from time to time, as mentioned and quoted in the aforesaid decision viz. ***Thahira Haris v Govt. of Karnataka*** (supra).

16. In response to the above, Mr. B. A. Dar, relying on the judgment of the Supreme Court in ***Gautam Jain v Union of India***, (2017) 3 SCC 133, submitted that if there are a number of grounds mentioned in the grounds of detention, the detention can be sustained on a single solitary ground if

the materials mentioned therein have been supplied to the detenue. He, in this connection, invited the attention of the Court to the grounds of detention and submitted that there is one such ground mentioning the supply of FIRs to the detenue. The above judgment seems to be somewhat crucial in context of the first of the points raised by the learned counsel for the appellant, referred to hereinabove. In that case, viz. ***Gautam Jain v Union of India***, the appellant before the Supreme Court was detained pursuant to a detention order passed under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. He was served with the grounds of detention as well as copies of certain relied upon documents with translation thereof. He filed writ petition in the High Court of Delhi, *inter alia*, for issuance of writ of habeas corpus with direction to the respondents to set him to liberty and for quashing the detention order. According to the appellant, complete set of documents, which were relied upon by the respondent therein, were not supplied. He had made representation to the detaining authority requesting for revocation of the detention order or, in the alternative, supply of complete documents/information, which was followed by another representation. According to the detenue therein, the representations were not considered.

17. The High Court dismissed the writ petition. As reflected in para 3 of the Supreme Court judgment, the High Court accepted the plea of the detenue that there was failure on the part of the respondents to furnish certain documents qua one particular allegation in the detention order, but it still upheld the detention order invoking the principle of segregation of grounds enumerated in Section 5-A of the Act. The High Court had come to the conclusion that there were various grounds which formed the basis of the detention order and even if the documents pertaining to one

particular ground were not furnished, that ground could be ignored applying the principle of segregation and on remaining grounds, the detention order was still sustainable.

18. Before the Supreme Court, the plea taken by the appellant was that the principle of severability of grounds, which was enshrined in Section 5-A of the Act, was not applicable to the case as the detention order was passed on one ground only in support of which few instances were given in the grounds of detention annexed with the detention order which could not be treated as different grounds. It was argued that those instances, forming part of detention order, were only further particulars or subsidiary facts rather than the basic facts which were integral part of, and constituted the grounds of detention. It was this aspect of the matter which, the Supreme Court expressed, needed examination.

19. In that case, the grounds of detention, in support of the order of detention, ran into 46 pages which enumerated various activities in which the detenue was indulging in making and receiving hawala payments upon the instruments received from abroad by him; and the detenue was making such hawala payments from his business premises as well as residential premises. Searches were conducted at his business place as well as at his residential premises. Indian currency to the tune of huge amounts was recovered from both places and seizure of incriminating documents was made at both places. Searches were also conducted against one Pooran Chand Sharma. Statements of various persons were recorded, particulars whereof were given along with utterances by those persons in a nutshell. Grounds of detention also referred to the summons which was issued to the detenue pursuant to which his statement was recorded and gist of the said statement was incorporated in the grounds. Various admissions

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recording hawala transactions given by the appellant in his statement were also mentioned. Retraction of the statement was also taken note of.

20. Before the High Court, the plea taken to challenge the detention order was the failure on the part of the detaining authority to supply certain relied upon documents mentioned in the statement of one of the persons whose statements were recorded, namely, Pooran Chand Sharma. In the grounds of detention, statement of Pooran Chand Sharma was referred to from paras 37 to 41 wherein it was also mentioned that searches conducted against Pooran Chand Sharma had revealed that the appellant had continued to remain involved in prejudicial hawala dealings even in August 2009. According to the detenue, non-supply of these documents, which were very material, deprived him of his valuable right to make effective and purposeful representation.

21. The above factual position was not disputed by the respondents. However, they argued that the documents were not material and, therefore, non-supply thereof did not act to the prejudice of the detenue.

22. The High Court negatived the above plea of the respondents, holding that the said assertion was contrary to specific words and statement made in paras 37, 38 and 41 of the detention order and could not, therefore, be accepted. The High Court found that Pooran Chand Sharma had been confronted with a specific document seized during the search operation and he had implicated the detenue. The High Court held that this was a relied upon document and even otherwise it was a relevant document and formed the basis of the assertions made in paras 37, 38 and 41 of the grounds of detention. Nonetheless, the High Court had taken the view that paragraphs relating to seizure details in case of Pooran Chand Sharma, implicating the detenue, constituted a separate ground, which was severable on the application of the principle of segregation, as the

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detention order was based on multiple grounds. The High Court also pointed out various grounds mentioned in the detention order, holding them to be different grounds.

23. It was argued before the Supreme Court that there was only one ground of detention on the basis of which the detention was passed, namely, ‘preventing the detenue from acting in any manner prejudicial to the conservation and augmentation of foreign exchange in future and the grounds of detention, which were given in support thereof, were, in fact, various instances to support the said ground. In other words, the submission was that the order was passed only on one ground viz. activities of the appellant were prejudicial to the conservation and augmentation of foreign exchange, and that the other grounds could only be those as mentioned in clauses (i) to (v) of sub-section (1) of Section 3 of the Act, like smuggling of goods, abetting the smuggling of goods etc. but none of those grounds was invoked. The Supreme Court, after considering its earlier decisions on the point, as cited at the Bar, in para 22 of the judgment, held as under:

> “22. From the above noted judgments, some guidance as to what constitutes 'grounds', forming the basis of detention order, can be easily discerned. In the first instance, it is to be mentioned that these grounds are the 'basic facts' on which conclusions are founded and these are different from subsidiary facts or further particulars of these basic facts. From the aforesaid, it is clear that each 'basic fact' would constitute a ground and particulars in support thereof or the details would be subsidiary facts or further particulars of the said basic facts which will be integral part of the 'grounds'. Section 3 of the Act does not use the term 'grounds'. No other provision in the Act defines 'grounds'. Section 3(3) deals with communication of the detention order and states that 'grounds' on which the order has been made shall be communicated to the detenue as soon as the order of detention is passed and fixes the time limit within which such detention order is to be

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> passed. It is here the expression 'grounds' is used and it is for this reason that detailed grounds on which the detention order is passed are supplied to the detenue. Various circumstances which are given under sub-section (1) of Section 3 of the Act, on the basis of which detention order can be passed, cannot be treated as 'grounds'. On the contrary, *Chamanlal Manjibhai Soni's* case clarifies that there is only one purpose of the Act, namely, preventing smuggling and all other grounds, whether there are one or more would be relatable to the various activities of smuggling. This shows that different instances would be treated as different 'grounds' as they constitute basic facts making them essentially factual constituents of the 'grounds' and the further particulars which are given in respect of those instances are the subsidiary details. This view of ours gets strengthened from the discussion in *Vakil Singh's* case where 'grounds' are referred to as 'materials on which the order of detention is primarily based'. The Court also pointed out that these 'grounds' must contain the pith and substance of primary facts but not subsidiary facts or evidential details.
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> ***(Underlining supplied)***

Applying the aforesaid test to the facts of that case, the Supreme Court agreed with the conclusion of the High Court that the order of detention was based on multiple grounds inasmuch as various different acts, which formed separate grounds, were mentioned, on the basis of which the detaining authority had formed the opinion that it was desirable to put the detenue under detention. Therein the High Court had dissected the order of detention, which the Supreme Court found was the correct exercise done by the High Court.

24. In the instant case, admittedly, the detenue has been detained on the satisfaction of the District Magistrate, Srinagar, that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, it was necessary to do so. This satisfaction of the District Magistrate is founded on the grounds of detention which read as under:

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"Sub: Grounds of detention under J&K Public Safety Act for detention of Miyan Abdul Qayoom S/o Miyan Abdul Rehman

Miyan Abdul Qayoom S/O Miyan Abdul Rehman aged approximately 76 years, R/O Bulbulbagh, District Srinagar is President of J&K High Court Bar Association (Srinagar Wing) since long and has adverse record in view of his active involvement in various cases registered against subject in District Srinagar under various laws.

Miyan Abdul Qayoom (hereinafter referred as the Subject) over a period of time has emerged as one of the most staunch advocates of secessionist ideology. His believe that Jammu and Kashmir is disputed territory and it has to be seceded from Union of Indian (*sic*) and to annex with Pakistan has been repeatedly articulated in public for a through (*sic*) his speeches, appeals and active participation in such activities. The role of subject has remained highly objectionable and he was indicted many times in past for secessionist activities which can be gauged from the fact that at least 04 criminal cases have been registered against him and his other associates for violating various laws whose sanctity they are supposed to uphold in highest esteem. I have examined the record produced *viz-a-viz* secessionist activities which include the FIRs and reports in the matter.

It has been in the past that subject used every occasion to propagate secessionist ideology and even allows known secessionist elements to use platform of Kashmir High Court Bar Association, besides, subject has gone to extent of even sponsoring strikes as President Bar Association, thus instigating general public to indulge in activities which are prejudicial to maintenance of public order, be it land row agitation of 2008 and Law and order situation arisen in Kashmir valley after the neutralization of terrorist Burhan Wani in 2016 which lead to violence of serious nature leaving many people dead, or any other agitation which has taken place in valley in general and Srinagar in particular, role of subject has been found highly objectionable to the maintenance of Law and order. The subject has been found indulging in activities which are aimed at propagating secessionist ideology and to lend support to terrorist and secessionist activities. The subject for achieving this objective has been misusing platform of Bar Association which is regarded with esteem as per the status given to it in

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the constitutional system. Investigation conducted in various cases registered against subject have indicated deep involvement of subject in instigating such activities in the state. A number of newspaper reports have also been presented before me substantiating the case made out by the District Police in the matter which clearly indicates the secessionist activities of the subject.

The details of the cases registered against the subject are mentioned as under:

FIR no.74/2008 U/S 13 ULA (P) Act, 132 RP Act P/S Kothibagh

FIR no.27/2010 U/S 13 ULA (P) Act, 188 RPC P/S Kothibagh

FIR no.15/2010 U/S 505(II) RPC, 153, 121 RPC P/S Maisuma

FIR no.55/2020 U/S 24-A 188, 341 RPC P/S Maisuma

The examination of cases registered against him reveals that despite holding a responsible position of Bar Association President he wilfully and actively indulged in unlawful activities and instigated the people for violence thereby disturbing the public order.

In view of various decisions taken by the Union Government on 05/08/2019, there is every likelihood / apprehension that subject will instigate general public to resort to violence which would disturb public peace and tranquillity and create circumstances which would disturb maintenance of public order.

Owing to the track record of the subject and agencies' inputs about his likely involvement to instigating the public he has been arrested in terms of 107/151 Cr. P. C. and is presently in custody. The matter of detention under the J&K Public Safety Act in case of person already in custody was considered in light of the judgments of Hon'ble High Court in this regard wherein it has been broadly underlined that the detaining authority has to show compelling reasons for directing preventive detention. There are sufficient compelling reasons for preventive detention of the accused in view of his active involvement in secessionist cases notwithstanding the legal position held by him as President of the JKHC Bar Association, and the detention under Sections

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107/151 Cr. P. C. is temporary in nature resorted to as an exigency by the local Executive Magistrate based on such police report.

The dossier submitted by the Sr. Superintendent of Police, Srinagar, was examined thoroughly along with the case diaries of the FIRs mentioned therein and present status of these cases. Given the gravity of criminal offences the subject indulged in it is evidently clear that his instigation in many cease (*sic*) and personally spearheading agitations especially with secessionist ideology and actions thereupon he, on several occasions, endangers public life and property by disturbing the peace and order. Based on such record as has been produced before me and examination of the FIRs registered against him over a period of time, I am of the firm view and strong opinion that the subject could not be prevented from his activities under ordinarily law.

In order to stop subject from indulging in activities prejudicial to maintenance of public order, peace and tranquillity, his detention under provisions of Public Safety Act- 1978 at this stage has become imperative.

In view of the contents of dossier submitted by the Sr. Superintendent of Police, Srinagar, case diaries / copies of FIR examined and material facts produced before me, I have concluded that there is every likelihood of the subject indulging in such activities of grave nature which may lead of disturbance of public order and tranquillity hence for maintenance of peace in the region his detention under the Section 8(1)(a) of the J&K Public Safety Act 1978 is required indispensably and all other options of preventing him from indulging in such activities stand exhausted as well as no other legal remedy or option is available at this stage to contain his activities to strongly prejudicial to maintenance of public order(*sic*)."

25. From a bare perusal of the aforesaid grounds of detention, it is clearly observable that most of them are somewhat clumsy, but the basic fact remains that the detaining authority is shown to have assumed his satisfaction on number of grounds and one such ground, separately and

distinctly stated is the one mentioning the details of the cases registered against the detenue which is the following para:

> "The details of the cases registered against the subject are mentioned as under:
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> FIR no.74/2008 U/S 13 ULA (P) Act, 132 RP Act P/S Kothibagh
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> FIR no.27/2010 U/S 13 ULA (P) Act, 188 RPC P/S Kothibagh
>
> FIR no.15/2010 U/S 505(II) RPC, 153, 121 RPC P/S Maisuma
>
> FIR no.55/2020 U/S 24-A 188, 341 RPC P/S Maisuma
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> The examination of cases registered against him reveals that despite holding a responsible position of Bar Association President he wilfully and actively indulged in unlawful activities and instigated the people for violence thereby disturbing the public order."

In this ground the detaining authority has exclusively considered these FIRs and no other document.

26. There is a provision in the Jammu and Kashmir Public Safety Act, 1978, (JK PSA) akin to the one contained in the enactment under which the detention of detenue in ***Gautam Jain v Union of India*** was passed. And that is Section 10-A which reads as under:

> "10-A. Grounds of detention severable. –
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> Where a person has been detained in pursuance of an order of detention under Section 8 which has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly –
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> (a) such order shall not be deemed to be invalid or inoperative merely because one of some of the grounds is or are –
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> (i) vague
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> (ii) non-existent,

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(iii) not relevant,

(iv) not connected or not proximately connected with such person, or

(v) invalid for any other reasons whatsoever, and it is not therefore, possible to hold that the Government or officer making such order would have been satisfied as provided in Section 8 with reference to the remaining ground or grounds and made the order of detention;

(b) the Government or officer making the order of detention shall be deemed to have made the order of detention under the said Section after being satisfied as provided in that Section with reference to the remaining ground or grounds."

27. Going by the aforesaid provision of the JK PSA, the grounds of detention are severable and, therefore, a detention order would sustain even on a solitary single ground contained in the grounds of detention, independent of the other grounds, in the event the necessary procedural safeguards *vis-à-vis* that ground have duly been adhered to by the detaining authority.

28. As mentioned above, in the instant case, in one of the grounds of detention, quoted separately hereinabove, the detaining authority has exclusively considered the four FIRs registered against the detenue, and expressed his satisfaction therein on the basis of such FIRs, independent of the other materials referred to by him in other grounds of detention. In that view of the matter, in terms of Section 10-A(a) of the JK PSA, the detaining authority shall be deemed to have made the impugned order of detention after being satisfied with reference to the aforesaid ground of detention. So the detention order on that ground would sustain.

29. It may, however, be mentioned here that Sub-section (a)(iv) of Section 10-A of the JK PSA further provides that such order shall not be

deemed to be invalid or inoperative merely because one of some of the grounds is or are not proximately connected with such person. The FIRs mentioned in the ground referred to by us hereinabove pertain to the years 2008 and 2010. So the question is if the detention order would be sustainable on the aforesaid ground exclusively relying on the FIRs, would it still be hit by reason of the fact that the FIRs are stale. This question would relate to the arguments advanced at the Bar by Mr. D. C. Raina, learned Advocate General and would be attended to later hereinbelow.

30. So, in view of the above discussion and the law laid down by the Supreme Court in ***Gautam Jain v Union of India***, as regards the first of the main arguments raised by Mr. Shah, learned senior counsel, that the detenue was not supplied all the materials on the basis of which the detaining authority had derived the requisite satisfaction, thus fails, since the detention order would be sustainable on the single solitary ground mentioned hereinabove.

31. Coming to the second point raised by the learned senior counsel for the appellant, in ***Sama Aruna v State of Telangana*** (supra), relied upon and cited by him at the Bar, the Supreme Court was dealing with a case where the point involved was stale grounds. Therein, the husband of the appellant had been charged for various offences of criminal conspiracy, cheating, kidnapping and extortion, which he had allegedly committed during the years 2002-2007 and four FIRs pertaining to land grabbing had been registered. In three of the FIRs he was enlarged on bail. To prevent him from seeking bail in the fourth FIR, while in judicial custody, he was detained under the provisions of the law providing for preventive detention. In fact, there were two other crimes registered against the detenue in the years 2013 and 2014, but the detaining authority had taken into account only four older crimes which pertained to the period 2002 to

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2007. The Supreme Court in para 12 of the judgment in this regard observed as under:

> "12. The four cases which are old and therefore, stale, pertain to the period from 2002 to 2007. They pertain to land grabbing and hence, we are not inclined to consider the impact of those cases on public order, etc. We are satisfied that they ought to have been excluded from consideration on the ground that they are stale and could not have been used to detain the detenue in the year 2016 under the 1986 Act which empowers the detaining authority to do so with a view to prevent a person from acting in any manner prejudicial to the maintenance of public order."

32. The Apex Court in para 22 of the judgment further said as under:

> "22. We are of the view, that the detention order in this case is vitiated by taking into account incidents so far back in the past as would have no bearing on the immediate need to detain him without a trial. The satisfaction of the authority is not in respect of the thing in regard to which it is required to be satisfied. Incidents which are stale, cease to have relevance to the subject matter of the enquiry and must be treated as extraneous to the scope of and purpose of the statute.

33. Concluding, the Supreme Court, in para 26 of the judgment, laid down as under:

> "26. The influence of the stale incidents in the detention order is too pernicious to be ignored, and the order must therefore go; both on account of being vitiated due to malice in law and for taking into account matters which ought not to have been taken into account."

34. It may be mentioned here that in the aforesaid judgment, the Supreme Court referred to and relied upon 21 earlier decisions, starting from *Queen on the Prosecution of Richard Westbrook v. Vestry of St. Pancras,* (1890) LR 24 QBD 371 (CA), to *G. Reddeiah v. State of A. P.*, (2012) 2 SCC 389. In one such decisions, namely, *Khudiram Das v. State*

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of W. B. (1975) 2 SCC 81, referred to and quoted in the judgment, it was held as under:

> "9… The grounds on which the satisfaction is based must be such as a rational human being can consider connected with the fact in respect of which the satisfaction is to be reached. They must be relevant to the subject-matter of the inquiry and must not be extraneous to the scope and purpose of the statute. If the authority has taken into account, it may even be with the best of intention, as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power or the manner or extent to which it should be exercised, the exercise of the power would be bad *Partap Singh v State of Punjab (AIR 1964 SC 72)*. If there are to be found in the statute expressly or by implication matters which the authority ought to have regard to, then, in exercising the power, the authority must have regard to those matters. The authority must call its attention to the matters which it is bound to consider."

35. So far as the third point raised by the learned senior counsel, referred to above, and the judgment of the Supreme Court in ***Chhagan Bhagwan Kahar v N. L. Kalna*** (supra) relied upon by him in that connection, is concerned, therein the detenue was detained to prevent him from acting in any manner prejudicial to maintenance of public order. The principal allegation against him was that he was illegally keeping in possession country liquor and openly selling the same, and was conducting a den (*adda*). The Supreme Court in this case dealt with and disposed of the petition on the sole contention raised that the detaining authority had taken into consideration the previous grounds of detention which had been the subject matter of an earlier petition filed before the High Court of Gujarat and wherein the High Court had quashed the order of detention. In the grounds of the fresh detention, the detaining authority had, in fact, made a reference to the previous order and the allegations made therein. The detenue challenged the fresh detention order on the ground that since his

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earlier detention order on the same grounds had been quashed by the High Court, fresh detention order on the very same grounds was vitiated. Referring to some of its earlier decisions, the Supreme Court in para 12 of the judgment laid down as under:

> "12. It emerges from the above authoritative judicial pronouncements that even if the order of detention comes to an end either by revocation or by expiry of the period of detention, there must be fresh facts for passing a subsequent order…".

36. In the above case, the detaining authority had made an explanatory statement in the counter saying that the earlier proceeding was considered only for limited purpose of taking note of the detenue's continued involvement in bootlegging activities, but the entire grounds of earlier detention as they were, were not considered. The Supreme Court, however, expressed its inability to accept this explanation because the detaining authority, in the counter, in clear terms had expressed that he had considered the earlier grounds of detention also and copy of the earlier grounds had also been supplied to the detenue alongwith the fresh grounds. The Apex court, in these circumstances, held that the order of detention was vitiated on the ground that the detaining authority had taken into consideration the grounds of the earlier detention order alongwith other materials for passing the fresh order.

37. Responding to the arguments of the learned senior counsel on the 2nd and the 3rd point raised by him, referred to hereinabove, the learned Advocate General, while strenuously defending not only the detention order, but also the impugned judgment, submitted that there is a distinction between the activities attributed to and alleged against the various detenues involved in the decisions cited at the Bar by the learned senior counsel, and the act(s) attributed to the detenue herein, in that, given the nature of

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the criminal activities attributed to the detenues in the above cases, there is great probability that the adverse effects and impacts of such activities on the maintenance of public order may vanish and lapse with the passage of time, unless repeated in the immediate past; whereas the act(s) or activities attributed to and alleged against the detenue herein, reflected in the FIRs, are not such acts as, if once committed, would be treated as acts done in the past, and finished. The learned Advocate General submitted that the FIRs and the grounds of detention depict and relate to the secessionist ideology of the detenue, entertained, developed, nourished and nurtured by him over decades, which subserves disturbance in public order by the fringe elements in the Society, particularly the immature youth, who are susceptible to excitements. Such ideology nourished and nurtured by the detenue is not and cannot be confined or limited to time to qualify it to be called stale or fresh or proximate, unless, of course, the person concerned declares and establishes by conduct and expression that he has shunned the ideology. According to the learned Advocate General, it is this subsistent ideology, specified in the FIRs, nourished and nurtured by the detenue, which is detrimental to the maintenance of public order and which is always pertinent and proximate, for, there is a suspicion that the detenue has the potential to use it any time to disturb the public order. The learned Advocate General submitted that such suspicion is not imaginary but is founded on the conduct of the detenue as delineated in the FIRs which have duly been supplied to him and which is established by the intelligence reports.

38. The learned Advocate General submitted that in light of the above, the judgments cited at the Bar are wholly distinguishable on facts and not attracted in the instant case, and that the conclusion arrived at by the learned Single Judge in its judgment, that the grounds of detention served

on the detenue are precise, pertinent, proximate and relevant, does not suffer from any illegality. The learned Advocate General further submitted that viewed in that context, once the ideology and the mannerism of activities resorted to by the detenue to subserve this ideology in the past are brought home to him through the grounds of detention and the FIRs, it would constitute a proper opportunity afforded to him, especially so given his professional background in law, and that nothing more than the contents of the FIRs and of the grounds of detention furnished to him could spell out to him his ideology and the activities resorted to by him in the past which have satisfied the detaining authority that with a view to preventing him from acting in any such manner prejudicial to the maintenance of public order, it was necessary to detain him. The learned Advocate General, in this regard, cited and relied upon the judgment of the Supreme Court in ***Union of India v. Simple Happy Dhakad***, AIR 2019 SC 3428, particularly paragraph 43 thereof.

39. Mr. Z. A. Shah, learned senior counsel for the appellant, on the other hand, submitted that being a secessionist or having a secessionist ideology is a ground relatable to the maintenance of security of the State. Such is not the case *vis-à-vis* the detenue herein; for, admittedly, he has been detained allegedly for activities prejudicial to the maintenance of public order. He submitted that the submission made is thus belied by the detention order itself. However, he submitted that assuming for a moment, without admitting it, that a person does entertain such an ideology, that ideology must have an outer manifestation, i.e., it must have some practical conduct on the part of the detenue and that practical conduct must result in violation of some law. Citing an example, he submitted that if a person forges, for instance, a court order, but does not use the same, it would not amount to any offence. The learned counsel submitted that even if it be

assumed that the detenue was holding such an ideology in 2010, he has not violated any law. He submitted that Article 19 of the Constitution gives the citizen a right of speech and a citizen can speak on whatever his ideology may be; he does not commit an offence as long as he does not violate any law. He further submitted that the fact that there is no case of any criminal nature registered against the detenue since 2010 is an incontrovertible proof of the fact that, though the detenue may been holding an ideology, but he has not violated any law. Consequently, his activities could not be said to be prejudicial to the maintenance of public order.

40. Before examining the judgment in ***Union of India v. Simple Happy Dhakad*** (supra), cited and relied upon by the learned Advocate General, we may observe that preventive detention is only preventive in nature, to prevent a person from acting in a particular manner which the competent authority may think is prejudicial to the maintenance of public order; it is not punitive for the commission of an offence. If a person forges a court order and keeps it in his pocket, there is always a suspicion that he may use it unless the forged order is discarded by him to the satisfaction of the competent authority. Until he discards it, there is always likelihood and apprehension that he may use it, and, with a view to preventing him from using it, the competent authority can take the measures under the preventive detention laws. So is the case with an ideology; one may not have violated any law in the immediate past, but if the detaining authority has suspicion that the person holding such an ideology has the potential to do so, he can take the measures permissible within the law to prevent him from doing so. The question only is whether past conduct or activities can lend succor to such a suspicion and whether such past conduct or activities

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emanating from an ideology can be said to be stale? Let us see if the judgments cited at the Bar lend an answer to this question.

41. In ***Union of India v. Simple Happy Dhakad*** (supra), the questions those arose for consideration before the Supreme Court were spelled out in para 11 of the judgment wherein it was observed as under:

> "11. … The following points arise for consideration in these appeals:
>
> (i) Whether the orders of detention were vitiated on the ground that relied upon documents were not served along with the orders of detention and grounds of detention? Whether there was sufficient compliance of the provisions of Article 22(5) of the Constitution of India and Section 3(3) of the COFEPOSA Act?
>
> (ii) Whether the High Court was right in quashing the detention orders merely on the ground that the detaining authority has not expressly satisfied itself about the imminent possibility of the detenues being released on bail?"

Obviously, the above two questions are not directly linked with the questions arising in the instant case. However, what was said by the Supreme Court in para 43 thereof assumes importance when it comes to the role of the High Court in dealing with a Habeas Corpus petition. Para 43 of the judgment is quoted hereunder:

> "43. The court must be conscious that the satisfaction of the detaining authority is "subjective" in nature and the court cannot substitute its opinion for the subjective satisfaction of the detaining authority and interfere with the order of detention. It does not mean that the subjective satisfaction of the detaining authority is immune from judicial reviewability. By various decisions, the Supreme Court has carved out areas within which the validity of subjective satisfaction can be tested. In the present case, huge volume of gold had been smuggled into the country unabatedly for the last three years and about 3396 kgs of the gold has been brought into India

> during the period from July 2018 to March, 2019 camouflaging it with brass metal scrap. The detaining authority recorded finding that this has serious impact on the economy of the nation. Detaining authority also satisfied that the detenues have propensity to indulge in the same act of smuggling and passed the order of preventive detention, which is a preventive measure. Based on the documents and the materials placed before the detaining authority and considering the individual role of the detenues, the detaining authority satisfied itself as to the detenues' continued propensity and their inclination to indulge in acts of smuggling in a planned manner to the detriment of the economic security of the country that there is a need to prevent the detenues from smuggling goods. The High Court erred in interfering with the satisfaction of the detaining authority and the impugned judgment cannot be sustained and is liable to be set aside."

As it becomes axiomatic from the above quoted paragraph of the judgment, the Supreme Court held that the Court must be conscious that the satisfaction of the detaining authority is 'subjective' in nature and that the Court cannot substitute its opinion for the subjective satisfaction of the detaining authority and interfere with the order of detention. In that case, the Supreme Court held that the detaining authority was satisfied that the detenues had the propensity to indulge in the same act and passed the detention order, which was preventive in nature.

42. Mr. Shah, learned senior counsel for the appellant, submitted that in the aforesaid case, the detenue had been found to have continuously smuggled gold inasmuch as 3396 Kgs had been smuggled in camouflaging with brass scarp. In the instant case, the fact is that the detenue has not participated in any such activity since 2010, inasmuch as no criminal case has been registered against him which is a proof of that fact. Therefore, the judgment is not relevant.

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43. The Supreme Court in the aforesaid paragraph of the judgment has used the words ‘continued propensity’. In the instant case, the detaining authority has mentioned that the detenue has been articulating in public through his speeches and appeals his ideology and has allowed using the platform of the Bar Association for propagating secessionist ideology which in turn has been working fundamentally prejudicial to the maintenance of public order. One or two of these FIRs also relate to the processions taken out by the members of the Srinagar Bar Association lead by the detenue alleging violation of the restrictions imposed by the District Authorities under Section 144 Cr. P. C. and forced march ahead despite an endeavour on the part of the Police on duty to stop them. The learned Advocate General has provided this Court with the English translation copies of the four FIRs. We have gone through the contents of these FIRs and we do not want to burden this judgment by quoting the contents of these FIRs. But we deem it apt to mention here that the FIRs do suggest the propensity of the detenue which has weighed with the detaining authority to arrive at the subjective satisfaction delineated in the impugned detention order. Mr. Shah on that score is not right as would be referred to hereinbelow.

44. As mentioned earlier, the appellant has repeatedly argued that the detenue was not provided the reports which the detaining authority in the grounds of detention has stated to have gone through. During the course of arguments, the learned Advocate General pleaded privilege about these reports in terms of Section 13(2) of the JK PSA, which provides that nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against public interest to disclose. However, with a view to satisfying itself, this Court called for the ‘reports’ in question for perusal. These reports were produced before us and we have gone through

the same. From a perusal thereof we find that there are a chain of reports depicting the activities of the detenue even after 24.06.2010, the date when the last of the aforesaid four FIRs was registered against the detenue, and we are satisfied about the continued propensity of the detenue which must have weighed with the detaining authority to arrive at the satisfaction recorded in the impugned detention order. There is thus a live link established between the alleged activities of the detenue and the detention order. We may observe here that this Court cannot quote the reports here. However, with a view to showing that there existed the spoken about live link, we deem it appropriate to mention the dates of the activities mentioned in the intelligence reports. The activities are reported to have been resorted by the detenue on 26.06.2010, 04.07.2010, 09.10.2015, 17.08.2016, 29.12.2016, 22.02.2017, 01.03.2017, 08.03.2017, 25.08.2017, 05.09.2017, 29.09.2017, 11.10.2017, 03.03.2018, 07.05.2018, 17.10.2018, 24.10.2018, 15.03.2019 and 15.05.2019. This also replies the argument of Mr. Shah, as referred to just hereinabove.

45. We have already made a detailed mention that there is a ground in the grounds of detention the materials relied wherein have duly been supplied to the detenue in relation thereto. At this stage, we may also refer to the judgment of the Supreme Court in ***Debu Mahato v State of W. B***., (1974) 4 SCC 135, cited on behalf of the respondents wherein the detention order was passed on a solitary ground of detention. The argument raised before the Supreme Court was that the single solitary ground of wagon breaking attributed to the detenue would not sustain the inference that he was acting in a manner prejudicial to the maintenance of supplies and services essential to the community. The Supreme Court was of the view that the solitary, isolated act of wagon breaking committed by the detenue could not possibly persuade any reasonable person to reach the satisfaction

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that unless he was detained, he would in all probability indulge in further acts of wagon breaking. But, at the same time, the Supreme Court laid down as under:

> "2…We must of course make it clear that it is not our view that in no case can a single solitary act attributed to a person form the basis for reaching a satisfaction that he might repeat such acts in future and in order to prevent him from doing so, it is necessary to detain him. The nature of the act and the attendant circumstances may in a given case be such as to reasonably justify an inference that the person concerned, if not detained, would be likely to indulge in commission of such acts in future. The order of detention is essentially a precautionary measure and it is based on a reasonable prognosis of the future behaviour of a person based on his past conduct judged in the light of the surrounding circumstances. Such past conduct may consist of one single act or of a series of acts. But whatever it be, it must be of such a nature that an inference can reasonably be drawn from it that the person concerned would be likely to repeat such acts so as to warrant his detention. It may be easier to draw such an inference where there is a series of acts evincing a course of conduct but even if there is a single act, such an inference may justifiably be drawn in a given case…".
>
> ***(Underlining supplied)***

In that case, however, the Supreme Court held that, that was not possible, and that the satisfaction of the District Magistrate recited in the order of detention was no satisfaction. In the instant case, however, as narrated and discussed by us above, there has been a live link between the alleged activities of the detenue and the satisfaction of the detaining authority.

46. In light of what has been discussed above, we are of the considered opinion that the FIRs and the allegations contained therein have a live link to the satisfaction arrived at by the detaining authority and they have the required proximity to have lend a suspicion to the detaining authority that, if not detained, the detenue may act in a manner as would be prejudicial to

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the maintenance of public order, especially so because of the 'surrounding circumstances' prevailing then. The judgment in ***Sama Aruna v State of Telangana*** (supra) cited by the learned senior counsel for the detenue is, therefore, distinguishable on facts.

47. Coming to the third point raised by the learned senior counsel for the appellant, that since the detenue was detained in 2010 on the very same FIRs and allegations contained therein, he could not have been detained anew on the very same allegations and material, in this context we, firstly, reiterate that it is not that the detenue has been detained only on the very same FIRs and the allegations contained therein. We have said above that we have gone through intelligence reports which contain materials after 2010 depicting the activities of the detenue on the basis of which as well the detaining authority has shown to have arrived at his satisfaction reflected in the impugned detention order. These reports could be well said to constitute new facts. Apart from that, in view of the submissions made by the learned Advocate General and the rebuttal thereto on behalf of the learned senior counsel for the appellant, even if it be assumed that there were no such intelligence reports as had been placed before the detaining authority and have been gone through by us, some very crucial questions arise in the matter, such as the following:

> i) Whether an ideology that has the effect and potential of nurturing a tendency of disturbance in public order alleged against a person on the prognosis based on his previous conduct, such as is reflected in the FIRs registered against the detenue in the instant case, and of which the detaining authority is reasonably satisfied, can be said to be different from a criminal act or acts done sometime in the past and, therefore, would always continue to be proximate in their

impact and consequence and, therefore, would not attract the judgments cited at the Bar, or the same must be treated as extraneous to the scope of and purpose of the statute?

(ii) Whether an ideology alleged against a person, such as the one reflected in the FIRs registered against the detenue in the instant case in 2008 and 2010, irrespective of the age and fate of these FIRs, and reiterated in the fresh grounds of detention, can be said to have gone stale by efflux of time and, therefore, could not form the basis for attaining the requisite subjective satisfaction by the detaining authority for detaining the detenue and that such past conduct of the detenue would not be relevant and would have no live and proximate link with immediate need to detain him preventively?

iii) Whether such an ideology alleged against a person, if mentioned in the earlier grounds of detention, would lose its proximity and, therefore, cannot be taken into account and used for detaining such person subsequently if the detaining authority is satisfied that such an ideology of the person has the potential to goad or instigate disturbance in public order, in a susceptible given situation?

48. Having considered the matter, we may say that an ideology of the nature reflected in the FIRs and alleged against the detenue herein is like a live volcano. The ideology has always an inclination, a natural tendency to behave in a particular way; It is often associated with an intense, natural inclination and preference of the person to behave in the way his ideology drives him to achieve his latent and expressed objectives and when he happens to head or leading a group, as the allegations contained in the FIRs

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suggest, his single point agenda remains that his ideology is imbued in all those whom he leads. Depending upon the nature of the ideology one has, he can have short term, continuous and long term objectives and strategies. So far as the ideology attributed in the FIRs is concerned, public disorder is its primary object and surviving factor. Taking out processions knowingly that such acts are likely to stoke public disorder, especially so when there are restrictions in position, raising provocative and antinational slogans of sorts, holding close door meetings within separatist leaders as being President of the Bar etc. etc. are such instances which point to only one thing that the ideology is not an act done by the detenue in the past, but it is his continuous inclination and preference. Generally, when a criminal act takes place, its impact may be felt within a small circle or its repercussions may be of bigger consequence, but with the passage of time the impact and the consequences generally subside or vanish. When it comes to propensity of an ideology of the nature reflected in the FIRs supported by the intelligence reports we have gone through, we are convinced that it subserves the latent motive to thrive on public disorder. In that context, we feel that most of the judgments of the Apex Court do not fit the facts and the given situation. Therefore, we are left with no option but to say that an ideology that has the effect and potential of nurturing a tendency of disturbance in public order, such as is reflected in the FIRs registered against the detenue in the instant case, and of which the detaining authority is reasonably satisfied, can be said to be different from a criminal act or acts done sometime in the past and, therefore, would always continue to be proximate in their impact and consequence and, therefore, would not attract the judgments cited at the Bar on the point. This is a unique tendency of its own kind, repercussion and detrimental outcome to the public order. Secondly, we are also of the view that the ideology alleged against a person, such as the one reflected in the FIRs

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registered against the detenue in the instant case in 2008 and 2010, irrespective of the age and fate of those FIRs, and reiterated in the fresh grounds of detention, cannot be said to have gone stale by efflux of time; therefore, they can form the basis for attaining the requisite subjective satisfaction by the detaining authority for detaining the detenue and that such past conduct of the detenue would be relevant and germane to the object of relevant provision of the Act. Furthermore, we are also of the view that such an ideology alleged against a person, if mentioned in the earlier grounds of detention, because of its nature of subsistence and propensity, would not lose its proximity and, therefore, can be taken into account and used for detaining such person subsequently if the detaining authority is satisfied that such an ideology of the person has the potential to goad or instigate disturbance in public order, in a susceptible given situation, like the one it was at the relevant point of time. The judgments cited at the Bar on these points by the learned senior counsel are wholly distinguishable on facts; therefore, render no help to the appellant.

49. Let us proceed to deal with the next point raised by the learned senior counsel for the appellant, that the grounds of detention are the reproduction of the Police Dossier verbatim, suggesting that the detaining authority did not apply his mind and, therefore, the detention order suffers from non-application of mind and, hence, is vitiated. It is true that in ***Rajesh Vashdev Adnani v State of Maharashtra*** (supra), the Supreme Court found that the proposal made by the sponsoring authority and the order of detention passed by the detaining authority showed that except substituting the word ‘he’ by you, no other change was effected in the detention order and that the Supreme Court held the detention order unsustainable on the ground of the non-application of mind. What is most

relevant in this judgment is contained in paras 7 and 8 thereof which are quoted hereunder:

> "7. Keeping in view the nature of the submissions made at the Bar, we have directed the State to produce the records before us. Pursuant to the said direction, the records have been produced.
>
> 8. From a perusal of the records produced before us, it appears that the second respondent directed obtaining of some documents when the proposal for detention of the detenue was submitted. She also sought for the statement made by the detenue before the Additional Chief Metropolitan Magistrate. She further took note of a purported pre-detention representation made by the detenue on 18-4-2004. Detention order was passed upon discussions made in that behalf by her with three officers including Shri PO. S. Goyal, Deputy Director. It further appears that the order of detention as well as grounds therefore were formulated and placed before her for approval. It appears that only small changes were made by some officers."
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> ***(Underlining supplied)***

As seen from the above quoted paras of the judgment, the Supreme Court on perusal of the record found the above said things and it had come out that the detention order and the grounds had been formulated by the officers and placed for approval before the detaining authority who had signed the same. In the instant case, we have also perused the original record as well as the intelligence reports. Such is not the case in the present case. True there is a resemblance in contents of the grounds of detention and the police dossier submitted before the detaining authority, but the detaining authority in the impugned order has clearly stated that after perusal of the records submitted by the Senior Superintendent of Police and after applying his mind carefully and having regard to the requirements of law, he was satisfied that with a view to preventing the detenue from acting in any manner prejudicial to the maintenance of public

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order, it was necessary to detain him under the J&K PSA. In the aforesaid case, the order of detention appears not to have recorded such a satisfaction. As per para 5 of the judgment, it is revealed that in the order of detention therein, it was alleged that the same was necessitated not only with a view to prevent the detenue from bringing in future smuggled goods but also as the detenue had been engaged in transporting or keeping smuggled goods. We are, therefore, of the view that the judgment cited is distinguishable.

50. As regards the fifth point, that since the detaining authority did not convey to the detenue that he could make representation to him until the order was approved by the State Government within 12 days of its passing, specifying the time limit for the said purpose, the detention order is vitiated, we have gone through the two judgments cited at the Bar in **State of *Maharastra v Santosh Shankar Acharya***, AIR 2000 SC 2504, and ***Jitendra v. District Magistrate***, 2004 CriLJ 2967. Before referring to the judgments cited at the Bar, we deem it imperative to quote hereunder the communication no.DMS/PSA/Jud/3866-68 dated 07.08.2019 addressed by the detaining authority to the detenue which he has duly received. It reads thus:

> "Shri Miyan Abdul Qayoom
> S/O Miyan Abdul Rehman,
> R/O Bulbulbagh, District Srinagar.
>
> Upon perusal of record provided by Senior Superintendent of Police, Srinagar and after carefully examining the said record the undersigned issued detention Order No.DMS/PSA/105/2019 dated 07.08.2019 under Section 8 of the J&K Public Safety Act 1978.
>
> Now, theefore, in pursuance of sub Section (1) of Section 13 of the said Act, you are hereby informed that your detention was ordered on the grounds specified in the annexure to this letter. You may also inform the Home

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> Department if you would like to be heard in person by the Advisory Board.
>
> You may make a representation against the order of detention mentioned above to the undersigned and to the Government, if you so desire."

It is thus seen that the detenue had been duly intimated that he could make representations against the order of detention to the detaining authority as well as to the Government, if he wished. Obviously, the detenue has not wished so, inasmuch as he has also not opted to be heard in person by the Advisory Board. Now the question is whether by not mentioning the time within which the detenue could make the representations to the detaining authority and/or to the Government the detention order in the instant case *vis-à-vis* the detenue would vitiate, we have reason to say no, not at all. We shall spell out the reason a bit later. First we would examine the judgments cited at the Bar to canvass the point.

51. In **State of *Maharastra v Santosh Shankar Acharya*** (supra), the question that had been referred to the Full Bench of the Bombay High Court (Nagpur Bench) for being answered was, whether in case of an order of detention by an officer under sub-section (2) of Section 3 of Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drugs Offenders and Dangerous Persons Act, 1981, non-communication to the detenue that he had a right of making a representation to the detaining authority constituted an infraction of a valuable right of the detenue under Article 22(5) of the Constitution, and as such, vitiated the order of detention. There, while communicating the grounds of detention to the detenue, it had not been indicated therein that he had a right to make a representation to the detaining authority, though in the said communication it was mentioned that he could make a representation to the State Government. The Division Bench of Bombay

High Court on this aspect had taken inconsistent views and, therefore, the matter had been referred to the Full Bench. The Full Bench came to the conclusion that an order issued under sub-section (2) of Section 3 of the said Act could not remain valid for more than 12 days unless the same was approved by the State Government, and that, until the order was approved by the State Government in exercise of its power under sub-section (3) of Section 3, the detaining authority, who had issued the order of detention under sub-section (2), retained the power of entertaining a representation and annul, revoke or modify the same as provided under Section 14(1) of the Act read with Section 21 of the Bombay General Clauses Act. It had been further held that failure on the part of the detaining authority, in a case where order of detention is issued under sub-section (2) of Section 3, to communicate to the detenue that he had a right to make a representation constituted an infraction of the rights guaranteed under Article 22(5), and as such, the detention had become invalid on that score. Following the opinion on the question of law referred, the Division Bench of the High Court having set aside the order of detention the State Government was in appeal before the Supreme Court on the very same point. We need not mention here what the Supreme Court ultimately held, since in the instant case, as seen above, the detenue was duly communicated that he could make the representation to the detaining authority. However, we may hasten to add that such communication to the detenue was inconsequential and purposeless, since the Government had approved the detention order on the date of its issue itself viz. on 07.08.2019. Therefore, the judgment is not attracted herein.

52. So far as the judgment of Allahabad High Court in ***Jitendra v. District Magistrate*** (supra) is concerned, therein the substance of the averments was that since the detenue was not apprised of the time limit in

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which he could make a representation to the detaining authority, he was deprived of his right to make a representation to him and the impugned detention order was, therefore, rendered violative of Article 22(5) of the Constitution. The argument raised before the High Court was that since the Supreme Court in **State of *Maharastra v Santosh Shankar Acharya*** (supra), had held that till a detention order is approved by the State Government, the detenue has a right to make a representation to the detaining authority and the failure to communicate to him the said right vitiated the detention order as being violative of Article 22(5) of the Constitution, it follows as a logical imperative that in the grounds of detention, the detenue should be communicated that his right to make a representation to the detaining authority was only available to him, till approval of the detention order by the State Government. The High Court held that since the detenue's right to make a representation to the detaining authority was only available to him till the approval of the detention order by the Government, it followed as a logical imperative that the detaining authority should have communicated to him in the grounds of detention the time limit in which he could make a representation to him, i.e., till the approval of the detention order by the State Government. There was a startling factor attendant to that case, in context of which the High Court made the said direction. Therein the order of detention was dated 02.09.2002. It and the grounds of detention were served on the detenue on 04.09.2002. The detention order was approved by the Government on 11.09.2002. The detenue made his representation to the detaining authority on 20.09.2002, i.e., 09 days after the detaining authority had become *functus officio*. Obviously, this fact by itself suggests that the detenue had been totally oblivious of the provisions of the relevant law and ignorant of the fact that he could make a representation to the detaining authority within 12 days only till the detention order was approved by the

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Government. Naturally, therefore, the detenue was prejudiced and prevented from making his representation to the detaining authority within time. In the instant case, such could not even remotely be conceived of. Here the detenue is a practicing lawyer, as per the appellant-petitioner, having more than 40 years of impressive standing and practice at the Bar and President of the Bar Association since long. It could not be comprehended that he was oblivious of the period within which he could make a representation to the detaining authority, if such an occasion would have arisen. When the detenue happens to be of the stature and knowledge of the likeness of the detenue herein, and he does not make a representation, legally an inference is available that he had deliberately not done so, to claim violation of his right in this behalf in his habeas corpus petition**.** Such tactics cannot be allowed to be played. In any case, the judgment cited and relied upon is wholly distinguishable on facts. The detenue cannot claim violation of the right in this regard.

53. Notwithstanding the above, we reiterate that in view of the fact that the detention order dated 07.08.2019 was approved by the Government on the very same date viz. 07.08.2019 and the order was, in fact, executed after it had been approved by the Government, the detenue cannot claim violation of any of his right on account of non-communication of time within which he could make a representation to the detaining authority.

54. So far as the contention of the learned senior counsel that the extensions accorded in the detention order of the detenue from time to time are not covered by the provisions of the Act; therefore, the same are illegal, the learned counsel referred to Sections 17 and 18 of the Act. Before reproducing the argument raised by the learned counsel in this behalf, we deem it advantageous to reiterate that the detenue was detained in terms of order dated 07.08.2019. This order was executed on 08.08.2019. The order

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was approved by the Government on 07.08.2019 i.e., the date of issue itself. On receipt of the opinion from the Advisory Board, the Government confirmed the detention order on 03.09.2019 and directed that the detenue be detained for a period of three months in the first instance. By a subsequent order dated 23.10.2019, the Government in exercise of the powers conferred by Section 8(1)(a)(i) read with clause (a) of sub-section (1) of Section 18 o the JK PSA directed that period of detention of the detenue be extended for a further period of three months. Similar orders were issued on 03.02.2020 and 01.05.2020.

55. Section 8(1)(a)(i), Section 17 and Section 18(1)(a) of the JK PSA are extracted / quoted hereunder:

> "8. Detention of certain persons.
>
> (1) The Government may
>
> (a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to. –
>
> (i) the security of the State or the maintenance of the public order; or
>
> (ii) …
>
> …
>
> it is necessary so to do, make an order directing that such person be detained."

> "17, Action upon report of Advisory Board. –
>
> (1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.
>
> (2) …"
>
> 18. Maximum period of Detention. –
>
> (1) The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under Section 17, shall be –

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> (a) twelve months from the date of detention in the case of persons acting in any manner prejudicial to the maintenance of public order or indulging in smuggling of timber; and
>
> (b)…
>
> (2) Nothing contained in this Section shall affect the powers of the Government to revoke or modify the detention order at any earlier time, or to extend the period of detention of a foreigner in case his expulsion from the State has not been made possible."

The learned senior counsel submitted that on receipt of the opinion of the Advisory Board, the Government has the power to detain a person for such period as it may think fit, upto a maximum of twelve months from the date of detention in the case of persons acting in any manner prejudicial to the maintenance of public order. He submitted that once such detention is ordered for a period less than twelve months, the power to extend the period of detention is exercisable only under sub-section (2) of Section 18, not under Section 18(1)(a) and, as becomes obvious from a plain reading of the language of sub-section (2) of Section 18, the power to extend is exercisable only *vis-à-vis* a foreigner, not a citizen of the UT. The learned counsel submitted that on this count, the extension orders accorded to detain the detenue have no backing of law. He further submitted that sub-section (2) of Section 18 comprises of two parts, the first part provides for revocation and modification of a detention order, and the second part provides for extension of detention period of a foreigner, but none of the two parts provide for extension of a citizen.

56. In this regard, the learned Advocate General submitted that the two parts of sub-section (2) of Section 18 the Act, read exclusively by the learned senior counsel, are actually inclusive in nature and relate to foreigners, not the citizens. He submitted that extensions in the period of detention in respect of the detenue have been ordered under Section

18(1)(a) which provides twelve months' maximum detention in the case of persons acting in any manner prejudicial to the maintenance of public order.

57. We have considered the rival submissions. The initial detention order passed after the receipt of the opinion of the Advisory Board specifically mentioned that the detenue be detained for a period of three months 'in the first instance'. The phrase 'ín the first instance' means 'as the first thing in a series of actions'; meaning thereby, the Government had reserved to itself the power to pass a series of such orders under Section 18(1)(a) to make the total period of detention twelve months, if it so desired. The orders of extension make it clear that the same have been passed in exercise of the powers under Section 18(1)(a), not under Section 18(2). Reference to sub-section (2) of Section 18 by the learned senior counsel is misplaced. The learned senior counsel also seems to ignore the cardinal principle of law that one who has power to do a thing, has the power to modify, alter or revoke it.

58. The learned counsel for the appellant further submitted that the detenue was not supplied the materials which were considered by the Government to arrive at the subjective satisfaction to extend the term of detention beyond the original fixed term. He, in this connection, referred to the judgment of the Division Bench of this Court, of which one of us (Magrey J) was a member in ***Tariq Ahmad Sofi v State of J&K***, 2017 (1) S.L.J. 21 (HC). In that case, the habeas corpus petition of the detenue had been dismissed by the learned Single Judge holding that since the order according extension in the detention period of the detenue had not been brought on record, no effective relief could be granted to the petitioner. The question before the Division Bench was whether it was incumbent on the detenue to challenge the various steps taken

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by the Government under the provisions of the Act, including extension granted in his period of detention, after the detenue files the habeas corpus petition and challenges his detention. The Division Bench in context of the issue involved therein held that after the detention order is challenged, the respondents have to satisfy the Court about every step they take in accordance with the provisions of the Act, and that the detenue was not required to challenge the same. In the instant case, the extension orders have been placed before the Court. We have perused the same and we are satisfied that the Government has acted in accordance with law. It may be observed here that the Government is not required to consider any fresh material to accord extension in the order of detention upto the maximum period provided under Section 18 of the Act, nor is it required to indicate attainment of a fresh subjective satisfaction. The learned senior counsel seems to be labouring under some confusion or misconception.

59. The last argument advanced by the learned senior counsel for the petitioner is that the activities attributed to the detenue in the allegations contained in the FIRs against the detenue do not fall within the definition of the phrase 'acting in any manner prejudicial to the maintenance of public order'; hence the detention order is unfounded. To bolster this argument, the learned senior counsel referred to the definition of the expression "acting in any manner prejudicial to the maintenance of public order" given in Clause (b) of Sub-section (3) of Section 8 of the JK PSA. With a view to pinpointing the argument raised by the learned senior counsel, the aforesaid provision of the Act needs to be extracted. It is extracted hereinbelow:

> "(3) For the purpose of sub-section (1),
>
> (a)…

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> (b) 'acting in any manner prejudicial to the maintenance of public order' means. –
>
> (i) promoting, propagating, or attempting to create, feelings of enmity or hatred or disharmony on ground of religion, race, caste, community, or region;
>
> (ii) making preparations for using, or attempting to use, or using, or instigating, inciting, provoking or otherwise abetting the use of force where such preparation, using, attempting, instigating, inciting, provoking or abetting, disturbs, or is likely to disturb public order;
>
> …
>
> …"

The learned counsel submitted that there is no activity like promoting, propagating, or attempting to create, feelings of enmity or hatred or disharmony on ground of religion, race, caste, community, or region attributed to or alleged against the detenue. Therefore, the sub-clause (i) of Clause (b) is not applicable to the detenue. So far as sub-clause (ii) of Clause (b) is concerned, the learned senior counsel submitted that the stress laid therein is on 'use of force', and that it is not alleged against the detenue that he had at any time used force to achieve the objectives mentioned in the said provision of law. In that view, the learned counsel submitted that the allegation that the activities of the detenue are or were in any manner prejudicial to the maintenance of public order is not made out in terms of the definition of the expression; consequently, the satisfaction recorded by the detaining authority suffers from non-application of mind. It is vitiated and the detention of the detenue is rendered illegal.

60. The learned senior counsel seems to be forgetting that there is an unambiguous allegation contained in the FIRs that he had lead processions of angry mobs of lawyers, least minding about imposition of restrictions

under Section 144 Cr. P. C. It has been more than 59 years now that a five Hon'ble Judge Bench of the Supreme Court, headed by the then Chief Justice, in ***Babulal Parate v State of Maharashtra***, AIR 1961 SC 884, held that an order passed under Section 144 Cr. P. C. is in the interest of maintenance of public order. If that be so and as it is, if a person intentionally, wilfully, deliberately and purposefully breaks and violates such a restriction, it would connote nothing less than using force and acting in a manner prejudicial to the interests of maintenance of public order. In that view of the matter, the argument of the learned senior counsel fails.

61. Mr. B. A. Dar, Sr. AAG, assisting the learned Advocate General, also cited the following judgments in the case:

i) ***Borjahan Gorey v. The State of West Bengal***, (1972) 2 SCC 550;

ii) ***Sasti v. State of W. B.***, (1972) 3 SCC 826;

iii) ***Haradhan Saha v. State of W. B.***, (1975) 3 SCC 198;

iv) ***State of U. P. v. Durga Prasad***, (1975) 3 SCC 210;

v) ***Wasiuddin Ahmed v. D. M., Aligarh***, (1981) 4 SCC 521;

vi) ***Ashok Kumar v Delhi Administration***, (1982) 2 SCC 403;

vii) ***State of Maharashtra v. Bhaurao Punjabrao Gawande***, (2008) 3 SCC 613;

Let us chronologically take up and examine these judgments.

62. In ***Borjahan Gorey v. The State of West Bengal***, (1972) 2 SCC 550, only two arguments were raised before the Supreme Court: first, that the facts disclosed by the grounds squarely fell within the purview of Sections 109 and 110 of the Code of Criminal Procedure and, therefore, the detenue should have been appropriately proceeded against under these sections rather than detaining him under Section 3 of the MISA, 1971; second, that the allegations levelled in the grounds of detention were untrue, the

detenue having pleaded alibi. The judgment is thus not even remotely relatable to the points involved in this case.

63. In ***Sasti v. State of W. B.***, (1972) 3 SCC 826, the point raised was that as the act attributed to the detenue in the grounds of detention constituted an offence under IPC, he could only be tried in a court of law for the offence and no order for his detention on that score could be made. A further point raised was that there was a difference between the concept of public order and law and order. Again, this judgment has nothing to do with the points raised in the appeal.

64. In ***Haradhan Saha v. State of W. B.***, (1975) 3 SCC 198, the constitutional validity of the Maintenance of Internal Security Act, 1971 was under challenge. It was contended before the Supreme Court that the Act did not provide for an objective determination of the facts which were the foundation of a decision for detention; that opportunity to make a representation could not be reasonable if the order did not disclose the material on the basis of which the detaining authority arrived at a conclusion that grounds for detention existed; that the representation could not be reasonable if the detenue had no opportunity to test the truth of the materials relied on for detention; and that the Act did not define or lay down the standards for objective assessment of the grounds for detention. This judgment, so far as the challenge to the Act was concerned, is not attracted herein. As far the argument concerning the opportunity of making representation was concerned, the Supreme Court in para 23 observed that it was an established rule of the Court that a detenue has a right to be apprised of all the materials on which the order of detention is based or approved. This rule, however, is subject to the subsequent judgments of the Supreme Court. In any case, this judgment is not attracted to the points involved in this LPA.

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65. The judgment in ***State of U. P. v. Durga Prasad***, (1975) 3 SCC 210, does not relate to preventive detentions and, in any case, to the questions under consideration in this LPA. It seems to have been wrongly cited.

66. In ***Wasiuddin Ahmed v. D. M., Aligarh***, (1981) 4 SCC 521, there were several issues taken up and involved in the case. Two of the issues which are relevant in context of the arguments raised in the instant case are whether the detaining authority was bound to disclose and supply to the detenue the intelligence report or history sheet, relied upon by him in passing the detention order, and whether past prejudicial conduct or antecedent history of detenue could be considered by the detaining authority. It was held that under Article 22(6) of the Constitution, the District Magistrate was not bound to disclose the intelligence reports and it was also not necessary for him to supply the history sheet, if any. So far as reliance on past prejudicial conduct or antecedent history of detenue was concerned, it was held as under:

> "25. The past conduct or antecedent history of a person can appropriately be taken into account in making a detention order. It is indeed usually from prior events showing tendencies or inclination of a man that an inference is drawn whether he is likely in the future to act in a manner prejudicial to the maintenance of public order. Of course, such prejudicial conduct or antecedent history should ordinarily be proximate in point of time and should have a rational connection with the conclusion that the detention of the person is necessary."

This judgment lends support to our view taken hereinabove.

67. In ***Ashok Kumar v Delhi Administration***, (1982) 2 SCC 403, as reflected in para 3 of the judgment four points were canvassed before the Supreme Court: first, that there was unexplained delay of two days in furnishing the grounds of detention; second, that period of detention had

not been mentioned while making the order of detention, therefore, the order suffered from non-application of mind; third, the grounds of detention were not connected with maintenance of public order; fourth, that the facts set out in the grounds of detention did not furnish sufficient nexus for forming the subjective satisfaction of the detaining authority and that the same were vague, irrelevant and lacking in particulars. None of these points is relevant to the questions involved herein.

68. The case, ***State of Maharashtra v. Bhaurao Punjabrao Gawande***, (2008) 3 SCC 613, fundamentally involved the question about permissibility of judicial review of a detention order at pre-execution / pre-arrest stage. There the detenue had evaded his arrest and challenged the detention order before the High Court of Bombay (Nagpur Bench) prior to its execution seeking quashing of the detention order and some other reliefs. The High Court held that the detenue was not entitled to know the grounds on which the order of detention had been passed, unless he surrendered. On perusal of the record made available to it, the High Court concluded that the writ petition could be entertained at the pre-execution stage. On merits it held that on consideration of the cases instituted against the detenue, it could not be said that the detaining authority could not have reached the subjective satisfaction and as such the order could not be challenged. However, the Court also held that the case was covered by one of the exceptions laid down in *Addl. Secy. to the Govt. of India vs. Alka Subhash Gadia*, 1992 Supp (1) SCC 496, and, hence, the petition was maintainable and the detenue was entitled to relief. The High Court had, accordingly, set aside the order of detention. On appeal by the State of Maharashtra, the Supreme Court held that the High Court exceeded its jurisdiction in entertaining the writ petition and in quashing and setting aside the order of detention at pre-execution stage. The Supreme Court in

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its judgment observed that it was true that such order must be preventive and not punitive in nature, but the Court must be conscious and mindful that the satisfaction of the detaining authority is subjective in nature and the Court cannot substitute its objective opinion for the subjective satisfaction of the detaining authority for coming to the conclusion whether the activities of the detenue were or were not prejudicial to the maintenance of supplies of essential commodities to the society. Holding so, the Supreme Court thought it appropriate to consider the concept of and relevant principles governing preventive detention which it dealt with under different headings, namely, personal liberty: precious right; Habeas corpus: first security of civil liberty; preventive detention: meaning and concept; preventive detention: necessary evil; subjective satisfaction: scope of judicial review; ground of challenge; and challenge to the detention order prior to execution.

69. Principally saying, we have taken note of the judgments of the Supreme Court cited at the Bar and endeavoured to abide by what the Courts are ordained to do and we have already discussed and reached definite conclusions on the numerous points on the basis of the settled law etc., cited at the Bar and referred to hereinabove.

70. No other substantial point was raised before us on behalf of the appellant-petitioner.

71. For all what has been discussed above, we do not find any merit in this LPA. It is, accordingly, dismissed and the detention of the detenue is upheld, however, for our own reasons recorded hereinabove.

72. This shall govern all connected CMs, except EMG-CM 5/2020 originally filed in WP(C) PIL No.4/2020 with respect to which we are making a separate order hereinbelow:

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EMG-CM 5/2020:

73. The direction issued by the Division Bench, headed by the Chief Justice, directing that this application shall be placed on the record of LPA no.28/2020 and separately registered as an application in this appeal seems not to have been adhered to. If it is so, as it appears to be, Registry to take note of this lapse.

74. This application had been filed by the wife of the detenue, the appellant herein, before the PIL Bench headed by Lord Chief Justice, hearing the popularly known Covid-19 PIL. The prayer made in the application is quoted hereunder:

> "It is therefore most respectfully prayed that this Hon'ble Court may be graciously pleased to accept the present application and direct the high powered committee [constituted under the directions dated 23.03.2020 of the Supreme Court comprising (i) Chairman of the State Legal Services Committee, (ii) the Principal Secretary (Home/Prison) by whatever designation known, (iii) Director General of Prison(s)] to direct release of detenue Mian Abdul Qayoom detained under PSA, presently lodged in Jail no.3, Tihar Jail Complex New Delhi; and or pass any other direction in alternative, ..."

75. The principal ground taken in the application is the health condition of the detenue because of underlying ailments suffered and numerous surgeries undergone by him.

76. The PIL Bench, headed by Lord Chief Justice appears to have made certain directions and obtained reports from various concerned agencies concerning the detenue on this application. Objections from the UT respondents have also been invited.

77. In their objections, the respondents have, *inter alia*, stated as under:

> "12. That, it is submitted that High Powered Committee headed by the Hon'ble Judge of the High Court, has not specifically referred the representation of the detenue to the Govt. However, the observation of the High Powered Committee in its meeting held on 31.03.2020 in respect of PSA detenues is as under:
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> > 'In context of the representation referred by the Hon'ble Chief Justice, High Court of J&K, who is patron-in-Chief, JK SLSA, for release of PSA detenue, the HPC noted that release of prisoners detained under PSA is not in terms of the guidelines issued by the Hon'ble Supreme Court. Hence, the request cannot be considered by it. **However, considering the present situation the authorities may re-consider these cases on merits**.'."
>
> ***(Highlighting supplied)***

78. Ostensibly, faced with the above situation, the PIL Bench, headed by Lord Chief Justice ordered as under:

> "102. It needs no elaboration that in the present proceedings this Court is concerned with public interest issues and not with any issue involving an individual case. It was only because of the apprehension expressed about the fragile medical condition of the husband of the applicant, the imminence of Ramzan, the risk on account of COVID-19, the delay, which would have resulted in diverting the matter at that stage to the other Wing and the difficulty of Mr. Dar for want of the official records and instructions in Srinagar, that the above three issues were taken up as an exception. Therefore, it is not open to this Court to examine the objections pressed by Mr. Z. A. Qureshi to the correctness of orders passed against the applicant. It is open to the applicants to raise these issues in appropriate legal proceedings.
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> 103. At this stage, Mr. Z. A. Qureshi submits that inasmuch as the respondents have filed replies to this application, keeping in view interests of expediency, the restrictions on movement, internet and procedural difficulties on account of the lockdown, this application along with reply filed by the

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> respondents may be electronically transferred for consideration of the fourth and last issue to the record of LPA No.28/2020 which is listed on 4th May, 2020.
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> 104. It is therefore directed that copies of this application, replies /status reports filed by Mr. B. A. Dar, Sr. AAG, Mr. T. M. Shamsi, ASGI and the Superintendent, Tihar Jail No.3, Delhi shall be electronically sent by the Registrar Judicial, Jammu to Registrar Judicial, Srinagar for registration of the application and placing on the record of LPA No.28/2020 and listing on 4th May 2020.
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> 105. It is further directed that this application shall be placed in the record of LPA No.28/2020. It shall be separately registered as an application in that appeal and listed along with the main appeal on the 4th of May, 2020.
>
> 106. Apprehension is expressed by Mr. Z. A. Qureshi, Sr. Advocate that the hearing in the appeal would be delayed by the respondents by non production of the record.
>
> 107. We are assured by Mr. B. A. Dar, Sr. AAG that the record necessary for hearing shall be positively produced before the Division Bench."

79. Mr. Z. A. Shah, learned senior counsel for the applicant-appellant reiterated his submissions based on the health condition of the detenue and submitted that the Government has got the power to revoke, amend or alter the detention order and even to release the detenues on parole. He prayed for such a direction. During the course of arguments, when this prayer was put to Mr. D. C. Raina, learned Advocate General, he submitted that the prayer of the applicant stands already considered and rejected.

80. Keeping in view the fact that this application has been referred to this Bench by the PIL Bench headed by lord Chief Justice and bearing in mind the judicial hierarchy, its judicial decorum and judicial discipline, we think that there is some magnitude of judicial sanctity attached to such reference; otherwise nothing would stop that Bench, headed by lord Chief

Justice, to dismiss the same. At the same time, this Court, having dismissed the LPA, and even otherwise, is conscious that in these proceedings it cannot make any direction of the nature sought for by the appellant- petitioner. However, the Court would not be debarred in making some legally permissible order in this application on the admitted facts of this case as we proceed to mention hereunder.

81. As mentioned in para 37 of this judgment, while addressing his arguments on the ideology nourished and nurtured by the detenue, the learned Advocate General submitted that such ideology cannot be confined or limited to time to qualify it to be called stale or fresh or proximate, unless, of course, the person concerned declares and establishes by conduct and expression that he has shunned the ideology ***(emphasis supplied)***.

82. In light of the above legally rightful and sound argument taken by the learned Advocate General, we leave it to the detenue to decide whether he would wish to take advantage of the stand of the learned Advocate General and make a representation to the concerned authorities to abide by it. Simultaneously, we also leave it to the discretion of the Government and of the concerned/competent authority(ies) to take a decision in terms of the relevant provision(s) of the JK PSA on any such representation, if made, by the detenue. It is made clear that an adverse order on any such application, if made, shall not entail any legal proceedings, whatsoever.

83. The Registry shall send a certified copy of this judgment to the Principal, Secretary, Home, by any available mode in this regard.

84. The application is, accordingly, disposed of.

85. Records submitted by Mr. B.A Dar, Sr. AAG, shall stand returned to him.

(Vinod Chatterji Koul)
Judge

(Ali Mohammad Magrey)
Judge

Srinagar,
28.05.2020
Syed Ayaz, Secretary

i) Whether the judgment is speaking : Yes/No
ii) Whether the judgment is non-speaking: Yes/No.

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IN THE SUPREME COURT OF INDIA

[S.C.R. Order XXII Rule 2(1)]

CRIMINAL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CRL)NO. _____OF 2020

(Under Article 136 of the Constitution of India)

[Arising from the final judgment and order dated 28.05.2020 passed by the Hon'ble High Court of Jammu and Kashmir at Srinagar in LPA No. 28/2020 and EMG-CM-5/2020]

(With Prayer for Interim Relief)

[In LPA No. 28/2020

And EMG-CM-5/2020]

Between	**High Court**	**This Hon'ble Court**
1. Mian Abdul Qayoom, aged about 76 years,	Appellant	Petitioner

VERSUS

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Between	High Court	This Hon'ble Court
1. Union Territory of Jammu and Kashmir Through its Principal Secretary, Home Department, Government of Jammu and Kashmir	Respondent No.1	Respondent No.1
2. District Magistrate, 1st Floor DC Office, Amar Niwas Complex, Tankipora, Srinagar – 190001	Respondent No.2	Respondent No.2
3.Sr. Superintendent of Police, Police Headquarters, Peer Bagh, Srinagar, Jammu and Kashmir - 190014	Respondent No.3	Respondent No.3
4. Superintendent, Central Jail near CMO OFFICE, Sector 4, Halwai Ki Baggichi, Lohamandi, Agra, Uttar Pradesh 282002	Respondent No.4	Respondent No.4
5. Superintendent, Central Jail, Near Mohalla Hathi Khan, Kathidarwara, Srinagar , Jammu and Kashmir-190014	Respondent No.5	Respondent No.5

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6. Superintendent,
Central Jail, Tihar,
Jail Road, Hari Nagar,
Delhi - 110064 Respondent No.6 Respondent No.6

Note-Parties are common in both the numbers.
All Respondents are contesting Respondents.

TO,

THE HON'BLE CHIEF JUSTICE OF INDIA

AND HIS COMPANION JUSTICES OF THE

HON'BLE SUPREME COURT OF INDIA,

THE HUMBLE PETITION OF

THE PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHEWETH:-

1. That the present special leave petition is being filed under Article 136 of the Constitution of India against the impugned common judgment and order dated 28.05.2020 passed by the Hon'ble High Court of Jammu and Kashmir at Srinagar in LPA No. 28/2020 and EMG-CM-5/2020, wherein the Petitioner's challenge to his prolonged illegal detention under the J&K Public Safety Act in jails outside Jammu and Kashmir was rejected by the Hon'ble High Court.

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QUESTIONS OF LAW

2. The present petition raises the following questions of law for the consideration of this Hon'ble Court:

A. Whether the Hon'ble High Court has not erred in dismissing the Petitioner's LPA given that the grounds in the detention order are vitiated by vagueness, non application of mind, irrelevance and remoteness?

B. Whether the Hon'ble High Court has not erred in allowing the detention of the Petitioner to continue despite coming to a finding and concluding that "*most of the grounds of detention are somewhat clumsy*"?

C. Whether the Hon'ble High Court has not erred in relying on material other than what was supplied to the detenu to justify the order of detention, in direct breach of the constitutional imperative of the first facet of Article 22(5) of the Constitution of India?

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D. Whether the Hon'ble High Court in the impugned order has not erred in holding that there is a proximate and live link between the satisfaction of the Detaining Authority and the allegations made against the Petitioner in FIRs registered more than a decade ago in 2008 and 2010?

E. Whether the Hon'ble High Court has not erred in upholding the order of detention dated 7th August, 2019, of the Petitioner which is largely based on stale, irrelevant grounds dating back to 2008 and 2010? Consequently, whether the Hon'ble High Court in the impugned order has failed to appreciate and implement the ratio in the judgment of this Hon'ble Court in *Chhagan Bhagwan Kahar v NL Kalna* (1989) 2 SCC 318?

F. Whether the Hon'ble High Court has not erred in placing reliance on intelligence reports, given that they were not placed before and the Detaining Authority and are thus new and extraneous material which cannot be brought in at the appellate stage to justify the legality of the detention order dated 07.08.2019?

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G. Whether the Hon'ble High Court has not erred, in so far as it strayed beyond the grounds and material provided to the Petitioner and upheld the detention order by placing reliance upon intelligence reports that were not mentioned either in the detaining order or in the pleadings filed by the Respondent to the writ petition, and the said grounds and materials were only included in the impugned judgment on the basis of oral submissions advanced across the Bar during the LPA?

H. Whether the Hon'ble High Court has failed to note that the Detaining Authority's satisfaction must be borne out from the grounds, facts and material provided to the Petitioner, and no other ground or material may later be added or supplemented to defend the legality of the detaining order?

I. Whether the Hon'ble High Court has not erred in placing reliance on intelligence reports handed over across the Bar by the Respondent State at the appellate stage for the first time?

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J. Whether the Hon'ble High Court has not erred in allowing the Respondent State to claim privilege over certain documents at the time of oral arguments, without any affidavit filed in support of such claim, in compliance with the mandate of the Constitution Bench judgment of this Hon'ble Court in *Amar Chand Butail vs Union of India* AIR 1964 SC 1658?

K. Whether the Hon'ble High Court has not erred in so far as it fails to hold that speech and conduct that is not barred under Article 19(2) is permissible and protected under Article 19(1), and the same can never form legitimate grounds for preventive detention under any statute, as such detention would fall foul of the rights under Article 19(1) and also under Article 14 of the Constitution of India, for unreasonableness and arbitrariness?

L. Whether the Hon'ble High Court has not erred in holding a person's thoughts and beliefs as sufficient grounds for warranting preventive detention, despite no tendency to disrupt public order borne out from one's actions and no commission of an illegal or unlawful act?

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M. Whether the Hon'ble High Court has not erred in accepting the State's argument that the Petitioner holds a particular kind of ideology merely on grounds of allegations in F.I.Rs dating back to 2008 and 2010 wherein the investigation did not even lead to the filing of a chargesheet against the Petitioner?

N. Whether the Hon'ble High Court has not erred in concluding that the ideology of the Petitioner is like a "live volcano", despite the Petitioner having never been charged for any offence?

O. Whether the Hon'ble High Court has not erred in so far as it props up the satisfaction of the detaining authority with its own wisdom at the appellate stage, by making observations about the Petitioner's ideology which travel far beyond the satisfaction of the Detaining Authority as expressed in the detention order?

P. Whether the Hon'ble High Court has not erred in so far as it fails to balance the rights of the Petitioner under Articles 19 and 21 *vis-a-vis* State's power of preventive detention under Article 22?

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Q. Whether the Hon'ble High Court has not erred in so far as it allows perpetuation of the Petitioner's detention which is mechanically extended every three months without any additional facts placed on record?

R. Whether the Hon'ble High Court has not erred in holding that the Petitioner must make a declaration qua his thoughts and beliefs, as a precondition to allowing his request for relocation on medical grounds, as such conditions are violative of the right to human dignity and privacy, as enunciated by this Hon'ble Court in *KS Puttaswamy vs Union of India* (2017) 10 SCC 1 ?

S. Whether the Hon'ble High Court has not erred in making the relief prayed for by the Petitioner on medical grounds conditional on his waiver of his right to privacy over his thoughts, beliefs and ideas?

T. Whether the Hon'ble High Court has not erred in failing to consider the advanced age and serious health ailments of the Petitioner while

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dismissing EMG CM 5/2020 filed by the Petitioner seeking transfer to a Jail closer to his home?

U. Whether the Hon'ble High Court has not erred in failing to appreciate that the Petitioner is a Senior Advocate of many years' standing at the Bar, and is being motivatedly and wrongly incarcerated by blatant misuse of the J&K Public Safety Act, 1978?

V. Whether the Hon'ble High Court has not erred in so far as it fails to determine whether there were any compelling reasons for the detention of the Petitioner under the J&K PSA, especially since the Petitioner was already under detention u/Sections 107/151 Cr.P.C. and thus could not have acted in a manner prejudicial to public order, peace and tranquility?

W. Whether the Hon'ble High Court has not erred in upholding the validity of the detention order given that it was vitiated by the denial of an effective right to make a representation under Article 22(5) of the Constitution of India?

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3. DECLARATION IN TERMS OF RULE 2(1):

The Petitioner states that no other petition seeking leave to appeal has been filed against the impugned judgment and order dated 28.05.2020 passed by the Hon'ble High Court of Jammu and Kashmir at Srinagar in LPA No. 28 of 2020 and EMG-CM-5 of 2020.

4. DECLARATION IN TERMS OF RULE 4:

The Annexure P-1 to P-5 produced along with the Special Leave Petition are true copies of the orders/ documents which formed part of the records of the case in the court below against whose orders the leave to appeal is sought for in this petition.

5. GROUNDS

That the Leave to Appeal is sought for on the following, amongst other, grounds, and the Petitioner seeks leave to urge additional grounds at the stage of arguments:

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Grounds and material relied on by detaining authority not supplied to detenu violates the constitutional imperative of Article 22(5) of the Constitution and Section 13 of J&K PSA, 1978

A. Because the impugned judgment and order falls foul of the settled law that all the grounds, facts integral to the grounds and material which influenced and weighed with the Detaining Authority, must be provided to the detenu and failure to do so vitiates the order of detention for being vague and deficient.

B. Because in terms of the detention order, the detaining authority had examined and relied on the following documents which influenced and weighed in the formation of its satisfaction and decision. The order of the detaining authority arrives at the satisfaction for detention by stating,

"*The dossier submitted by the Sr. Superintendent of Police, Srinagar, was examined thoroughly along with the case diaries of the FIRs mentioned therein and present status of these cases. Given the gravity of criminal offences the subject indulged in it is evidently*

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clear that his instigation in many cease (sic) and personally spearheading agitations especially with secessionist ideology and actions thereupon he, on several occasions, endangers public life and property by disturbing the peace and order. Based on such record as has been produced before me and examination of the FIRs registered against him over a period of time, I am of the firm view and strong opinion that the subject could not be prevented from his activities under ordinarily law.

...

In view of the contents of dossier submitted by the Sr. Superintendent of Police, Srinagar, case diaries / copies of FIR examined and material facts produced before me, I have concluded that there is every likelihood of the subject indulging in such activities of grave nature which may lead of disturbance of public order and tranquillity hence for maintenance of peace in the region his detention under the Section 8(1)(a) of the J&K Public Safety Act 1978 is required indispensably and all other options of preventing him from indulging in such activities stand exhausted as well as no other legal remedy or option is available at this stage to contain his activities to strongly prejudicial to maintenance of public order."

A plain reading of the detention order makes it clear that the Police

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Dossier, FIRs, case diaries and news reports were the material and facts placed before and which influenced and weighed with the Detaining Authority in passing its order. In the grounds of detention the detaining authority states that he had perused four FIRs, [viz. FIR no.74/2008 U/S 13 ULA (P) Act, 132 RP Act P/S Kothibagh; FIR no.27/2010 U/S 13 ULA (P) Act, 188 RPC P/S Kothibagh; FIR no.15/2010 U/S 505(II) RPC, 153, 121 RPC P/S Maisuma; and FIR no.55/2020 U/S 24-A 188, 341 RPC P/S Maisuma]; the Police Dossier submitted before him by the Sr. Superintendent of Police, Srinagar; the Case Diaries of the FIRs; the newspaper reports, besides referring to the proceedings initiated against the detenu under Sections 107/151 Cr. P. C. in connection with which the Petitioner was in preventive custody on the date of passing of the detention order.

C. Because it is undisputed that the detenu was provided only ten leaves on 08.08.2020 by the Executing Officer in furtherance of the detention order dated 07.08.2019.

i) The receipt executed at the time of handing over the documents is at Annexure P-4 and it states,

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"*The contents of PSA warrant, grounds of detention, were read over and explained to the detenu in Urdu / Kashmiri languages, which he understood fully. Copies of PSA warrant, grounds of detention, letter addressed to the detenu, in total (10) ten leaves handed over to the detenu under proper receipt. The specimen signature of the detenu has been obtained below at Mark "A".*"

ii) The detenu was therefore not supplied the other materials viz. the Police Dossier, Case Diaries, newspaper reports and the record of proceedings under section 107/151 Cr. P. C. which weighed on the detaining authority and on the basis of which he attained his subjective satisfaction. Thus, the detention order is vitiated by the non supply of the aforesaid facts and material integral to the detention order.

iii) It is settled law that all the grounds, integral facts and material which have influenced and weighed on the Detaining Authority must be provided to the detenu, and the non supply of the same impinges on the fundamental right of the Petitioner under the first facet of Article 22(5). Thus for the purpose of testing the validity of the detention order, the relevant material must be confined to the said

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ten leaves and nothing more.

iv) In *Shalini Soni & Ors vs Union of India & Ors.* (1980) 4 SCC 544 this Hon'ble Court has held, "*Now, the decision to detain a person depends on the subjective satisfaction of the detaining authority. The Constitution and the statute cast a duty on the detaining authority to communicate the grounds of detention to the detenu. From what we have said above, it follows that the grounds communicated to the detenu must reveal the whole of the factual material considered by the detaining authority and not merely the inferences of fact arrived at by the detaining authority. The matter may also be looked at from the point of view of the second facet of Article 22(5). An opportunity to make a representation against the order of detention necessarily implies that the detenu is informed of all that has been taken into account against him in arriving at the decision to detain him. It means that the detenu is to be informed not merely, as we said, of the inferences of fact but of all the factual material which have led to the inferences of fact. If the detenu is not to be so informed the opportunity so solemnly guaranteed by the Constitution becomes reduced to an exercise in futility. Whatever angle from which the question is looked*

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at, it is clear that "grounds" in Article 22(5) do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences. The 'grounds' must be self-sufficient and self-explanatory. In our view copies of documents to which reference is made in the 'grounds' must be supplied to the detenu as part of the 'grounds'.

Reliance in this regard is also placed on the judgments of this Hon'ble Court in *Thahira Haris v Government of Karnataka* (2009) 11 SCC 438, *Khudiram Das vs State of West Bengal* (1975) 2 SCC 81, *Ram Baochan Dubey v. State of Maharashtra and Another* (1982) 3 SCC 383, *Sophia Gulam Mohd. Bham v. State of Maharashtra & Others* (1999) 6 SCC 593, *Ramchandra A. Kamat v. Union of India & Others* (1980) 2 SCC 270, *S. Gurdip Singh v. Union of India & Others* (1981) 1 SCC 419, and *District Collector, Ananthapur & Another v. V. Laxmanna* (2005) 3 SCC 663, etc.

D. Because non supply of all the grounds, integral facts and material on the basis of which the Petitioner has been detained erodes a guaranteed constitutional and legal right of the detenu under the first facet of Article 22(5) of the Constitution of India and under Section

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13 of the PSA.

i) Article 22(5) states,

"*22(5). When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.*"

ii) Section 13, PSA, states,

*"**Grounds of order of detention to be disclosed to persons affected by the order.**- (1) When a person is detained in pursuance of a detention order, the authority making the order shall,as soon as may be, [but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than ten days from the date of detention]communicate to him grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order to the Government.*

(2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose."

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Vague, imprecise, deficient and general allegations without material particulars do not constitute valid grounds for detention

E. Because the detention order refers to various bald, vague and unsubstantiated allegations, which cannot constitute grounds for preventive detention. For instance, the detention order states, "*The role of subject has remained highly objectionable and he was indicted many times in past for secessionist activities.*" The detention order also states, "*It has been in the past that subject used every occasion to propagate secessionist ideology and even allows known secessionist elements to use platform of Kashmir High Court Bar Association.*" Such allegations, with no material particulars or specificities do not constitute grounds, and are hit by the vice of vagueness and deficiency.

i) The detention order and the impugned judgment of the High Court have wrongly stated that the Petitioner has been "indicted" for secessionist activities. The word indict, as defined by Black's Law Dictionary, means, "*An accusation in writing found and presented*

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by a grand jury, legally convoked and sworn, to the court in which it impaneled, charging that a person named therein has done some act, or been guilty of some omission, which by law, is a public offense, punishable on indictment." The corresponding term in Indian jurisprudence would be "charge" as defined in the Cr.P.C. As stated earlier, the Petitioner was not even chargesheeted by the police, leave alone the possibility of being charged by a court of law. Thus, the word "indict" has been wrongly used by the detention order and by the impugned judgment to draw untenable inferences against the Petitioner, not borne out from the facts and material on record. This also reflects the non application of mind by the detaining authority on the present status of the decade old FIRs and Case Diaries, which would disclose that the Petitioner was never indicted for secessionist activities.

ii) In *Shalini Soni & Ors vs Union of India & Ors.* (1980) 4 SCC 544 this Hon'ble Court has held, "*Communication of the grounds presupposes the formulation of the grounds and formulation of the grounds requires and ensures the application of the mind of the detaining authority to the facts and materials before it, that is to say to pertinent and proximate matters*

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in regard to each individual case and excludes the elements of arbitrariness and automatism (if one may be permitted to use the word to describe a mechanical reaction without a conscious application of the mind). It is an unwritten rule of the law, constitutional and administrative, that whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only eschewing the irrelevant and the remote. Where there is further an express statutory obligation to communicate not merely the decision but the grounds on which the decision is founded, it is a necessary corollary that the grounds communicated, that is, the grounds so made known, should be seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went in to make up the mind of the statutory functionary and not merely the inferential conclusions. " (Emphasis supplied)

Reliance is also placed on *Ganga Ramchand Bharvani vs Under Secretary, Government of Maharashtra* (1980) 4 SCC 624, *Prabhu Dayal v District Magistrate* (1974) 1 SCC 103 and *Golam Mallick v. State of West Bengal* (1975) 2 SCC 4

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Non compliance with procedural safeguards in breach of constitutional rights

F. Because it is settled law that failure to strictly comply with the procedural safeguards inherent in Article 22(5) constitutes sufficient ground for quashing and setting aside the detention order. As preventive detention is a serious invasion of personal liberty, the constitutional safeguard against abuse of this power mandates that all relevant grounds, integral facts and material are supplied to the detenu, to enable him to exercise his right to make a representation. Further, it is stipulated that the detention order shall disclose all basic facts and material, and shall not be based on vague or general grounds. Failure to strictly comply with and uphold this basic constitutional safeguard would open the law of preventive detention to rampant abuse, as in the present case where the Petitioner has been incarcerated without any grounds to justify his detention.

G. Because the failure to comply with procedural safeguards under Article 22(5) of the Constitution and Section 13 of the PSA is not a mere irregularity which can be brushed aside, but goes to the root of the constitutional safeguard against abuse of legal process, and renders the detention order void ab initio. *In Abdul Latif Abdul*

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Wahab Sheikh v. B.K. Jha 1987 SCC (Cri) 244, this Hon'ble Court held,

"*... The procedural requirements are the only safeguards available to a detenu since the court is not expected to go behind the subjective satisfaction of the detaining authority. The procedural requirements are, therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard.*"

H. Because in *Rekha v State of Tamil Nadu* (Supra) this Hon'ble Court has held,

"*To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however, technical, is, in our opinion, mandatory and vital. It has been held that the history of liberty is the history of procedural safeguards. (See : Kamleshkumar Ishwardas Patel Vs. Union of India and others (1995) 4 SCC 51, vide para 49). These procedural safeguards are required to be jealously watched and enforced by the court and their rigour cannot be allowed to be diluted on the basis of the nature of the alleged activities of the detenu.* (Emphasis

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supplied)

Impugned Judgment finds that detention order is imprecise and based on "*clumsy grounds*"

I. Because the impugned judgment and order has concluded that most of the grounds in the detention order "are somewhat clumsy" which implies that the High Court too found them wanting. Placing reliance on the doctrine of severability as enunciated by this Hon'ble Court in *Gautam Jain v Union of India* (2017) 3 SCC 133, the High Court then proceeds to uphold the detention order solely on one ground. In Paras 23 and 28 of the impugned judgment, the High Court makes it abundantly clear that the detention order has been upheld solely on one ground - the four FIRs dating back to 2008 and 2010.

i) Para 23 of the impugned judgment states, "***From a bare perusal of the aforesaid grounds of detention, it is clearly observable that most of them are somewhat clumsy,*** *but the basic fact remains that the detaining authority is shown to have assumed his satisfaction on number of grounds and one such ground, separately and distinctly stated is the one mentioning the*

details of the cases registered against the detenu which is the following para:

"The details of the cases registered against the subject are mentioned as under:

FIR no.74/2008 U/S 13 ULA (P) Act, 132 RP Act P/S Kothibagh

FIR no.27/2010 U/S 13 ULA (P) Act, 188 RPC P/S Kothibagh

FIR no.15/2010 U/S 505(II) RPC, 153, 121 RPC P/S Maisuma

FIR no.55/2020 U/S 24-A 188, 341 RPC P/S Maisuma

The examination of cases registered against him reveals that despite holding a responsible position of Bar Association President he wilfully and actively indulged in unlawful activities and instigated the people for violence thereby disturbing the public order."

In this ground the detaining authority has exclusively considered these FIRs and no other document." (Emphasis supplied)

ii) Para 28 of the impugned judgment states, "*As mentioned above, in the instant case, in one of the grounds of detention, quoted separately hereinabove, the detaining authority has exclusively considered the four FIRs registered against the detenu, and expressed his satisfaction therein on the basis of such*

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FIRs, independent of the other materials referred to by him in other grounds of detention. In that view of the matter, in terms of Section 10-A(a) of the JK PSA, the detaining authority shall be deemed to have made the impugned order of detention after being satisfied with reference to the aforesaid ground of detention. So the detention order on that ground would sustain."

iii) It is submitted by the Petitioner that the Hon'ble High Court has made a finding that all the grounds, *sans* the ground on FIRs, are somewhat clumsy, and hence the other factors and materials fall short of constituting legitimate grounds to justify the detention of the Petitioner. In any event, grounds that merely state general allegations without any specific material particulars do not constitute grounds in law, and cannot withstand judicial scrutiny. Reference may be made here to the judgment of this Hon'ble Court in *Ganga Ramchand Bharvani* (Supra) wherein it has been held, "*The mere fact that the grounds of detention served on the detenu are elaborate, does not absolve the detaining authority from its constitutional responsibility to supply all the basic facts and materials relied upon in the grounds to the detenu. In the instant case, the grounds contain only the substance of the statements, while*

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the detenu had asked for copies of the full text of those statements. It is submitted by the learned Counsel for the petitioner that in the absence of the full texts of these statements which had been referred to and relied upon in the grounds 'of detention', the detenus could not make an effective representation and there is disobedience of the second constitutional imperative pointed out in Khudiram's case. There is merit in this submission."

iv) The references made in the detention order to incidents and protests, without any material particulars of their dates and the specific role of the Petitioner therein, are by their vague and general nature, unfit and extraneous, for purposes of testing the validity of the detention order.

Decade old stale FIRs have no proximate, pertinent or live link to the present and are irrelevant and remote for preventive detention

J. Because the grounds of detention mentioned in the Detention order dated 07.08.2019 are ‘stale’ and irrelevant, inasmuch as they are made on the basis of four FIRs mentioned therein, that were lodged around 10-12 years back and consequently have no proximate and

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pertinent link to detaining the Petitioner now. The grounds relied upon are based mainly on remote, irrelevant and hence extraneous material which have no bearing on any threat to public order. Staleness of a ground is assessed not only by reference to its vintage but also in terms of whether with the passage of time the effect of the ground has spent itself and whether the future has any link to such effect.

i) The detaining authority has failed to note that in the said four FIRs of 2008 and 2010, the Petitioner was never arrested and was granted bail by the Principal Sessions Judge, Srinagar, back in May 2011, stating,

"*In all these cases no overt act of commission other than oral exhortation is attributed to petitioner. It is not alleged that the petitioner had planned, engaged in conspiracy. funded or joined an armed insurrection against lawful Govt or tried to over-throw the lawful Govt by unlawful means. It is not alleged that the petitioner had procured, handled, displayed or used any arms, ammunition, fire arms or explosives. It is also not alleged that the procession led by petitioner had indulged in arson, looting, stabbing or use of violence or force to achieve its object. All the three occurrences*

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pertain to Ist half of 2010 and despite the petitioner then being available to investigating agency was not arrested for being associated with investigation which is reportedly at the verge of conclusion in all the cases. Admittedly no recovery is to be effected from the petitioner. None of the offences alleged against the petitioner is punishable with sentence to which embargo imposed under section 497 Cr.PC is attracted. Petitioner has, after his release from detention under PSA, voluntarily surrendered before this court. I find no legal impediment in admitting the petitioner on bail in all the three cases pending conclusion of investigation."

ii) That pursuant to investigation the Petitioner was not chargesheeted in any of the aforesaid four FIRs, which were registered way back in 2008 and 2010. Thus, in more than 10 years, the police did not find *prima facie* evidence to even chargesheet the Petitioner in the said FIRs, let alone prove that the Petitioner was actively involved in secessionist activity. There is thus no material before the detaining authority to show that the Petitioner is actively involved in secessionist activities, and the finding made by the detaining authority is repugnant to law and contrary to record.

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iii) The detention order states that the compelling reasons are borne out from the Petitioner's *"active involvement in secessionist cases"*. Not only is such an inference blatantly false and contrary to record, but also demonstrates a complete non application of mind and a predilection on behalf of the detaining authority.

K. Because this Hon'ble Court in *Khaja Bilal Ahmed vs. State of Telangana and Ors.* (2019) SCC Online 1657 held that the satisfaction to be arrived at by the detaining authority must not be based on stale, irrelevant or invalid grounds. This Hon'ble Court held,

"*It must be arrived at on the basis of relevant material; material which is not stale and has a live link with the satisfaction of the detaining authority. The order of detention may refer to the previous criminal antecedents only if they have a direct nexus or link with the immediate need to detain an individual. If the previous criminal activities of the Appellant could indicate his tendency or inclination to act in a manner prejudicial to the maintenance of public order, then it may have a bearing on the subjective satisfaction of the detaining authority.* ***However, in the absence of a clear indication***

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***of a causal connection, a mere reference to the pending criminal cases cannot account for the requirements of Section 3. It is not open to the detaining authority to simply refer to stale incidents and hold them as the basis of an order of detention. Such stale material will have no bearing on the probability of the detenu engaging in prejudicial activities in the future.*" (emphasis supplied)**

Additional and extraneous material relied on by impugned judgment renders it unsustainable in law

L. Because the Hon'ble High Court, having held that the grounds of detention are clumsy, but can be sustained on the solitary ground of the pending FIRs registered against the detenu, could not have relied on material other than the said four FIRs to arrive at its judgment on whether the satisfaction of the detaining authority was valid or not.

i) The impugned judgment in Para 27 states, "*Going by the aforesaid provision of the JK PSA, the grounds of detention are severable and, therefore, a detention order would sustain even on a solitary single ground contained in the grounds of*

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detention, independent of the other grounds, in the event the necessary procedural safeguards vis-à-vis that ground have duly been adhered to by the detaining authority." (Emphasis supplied)

ii) The impugned judgment in Para 28 states, "*As mentioned above, in the instant case, in one of the grounds of detention, quoted separately hereinabove, the detaining authority has exclusively considered the four FIRs registered against the detenue and expressed his satisfaction therein on the basis of such FIRs, independent of the other materials referred to by him in other grounds of detention*." (Emphasis supplied)

iii) That from Paras 27 and 28 of the impugned judgment, it is abundantly clear that the Hon'ble High Court has held that the satisfaction of the detaining authority is formed wholly on the basis of the said FIRs, independent of and to the exclusion of any other material or facts before the detaining authority. Having come to this conclusion, the Hon'ble High Court was required to determine whether the FIRs, being a decade old, are stale, irrelevant and spent and cannot form the basis of a detention order in the present time.

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iv) That the aforesaid four FIRs had already constituted grounds for earlier detention of the Petitioner under PSA in 2010-11, and thus could not constitute grounds for detention in 2019. In *Chhagan Bhagwan Kahar v NL Kalna* (1989) 2 SCC 318, the Supreme Court had held,

"*It emerges from the above authoritative judicial pronouncements that even if the order of detention comes to an end either by revocation or by expiry of the period of detention, there must be fresh facts for passing a subsequent order…*". (Emphasis supplied)

The detention order is thus hit by the ratio in *Chhagan Bhagwan* and was liable to be quashed and set aside, as the FIRs had formed the grounds of earlier detention of the Petitioner back in 2010-11, and thus do not constitute "fresh facts" for ordering detention in August 2019.

v) As the decade old FIRs failed to provide a justifiable ground for detention, much less a pertinent, proximate and direct one, to ignite the damp squib, the Hon'ble High Court, in an appellate hearing examined and placed reliance on intelligence reports, which constitute primary facts and thus a new ground for detention. The

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impugned judgment places extensive reliance upon these intelligence reports, which were handed over by the Respondent State in contravention of settled law, to buttress the stale and remote FIRs. The impugned judgment mischievously and illegally draws oxygen from these intelligence reports to hold that the FIRs continue to bear a proximate and live link as the case concerns the ideology of the detenu. In Para 48, the impugned judgment concedes the point, by stating,

"*We have said above that we have gone through intelligence reports which contain materials after 2010 depicting the activities of the detenue on the basis of which as well the detaining authority has shown to have arrived at his satisfaction reflected in the impugned detention order. <u>These reports could be well said to constitute new facts.</u>*"

Thus, the impugned judgment traverses beyond the scope of the sole ground on the basis of which the detention order has been sustained, and scrutinises and relies upon material other than the FIRs, while simultaneously holding that the detention order must sustain on the ground of FIRs alone. This inherent dichotomy in the reasoning of the impugned judgment renders it unsustainable in law. The Hon'ble High Court realising that the FIRs at best provide a weak and

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unsteady foundation for the detention order, sought to reinforce the same by drawing upon new and different grounds and material through the intelligence reports, cited with reference to dates in the impugned judgment (para 44) whereas the detention order is conspicuously silent about the intelligence reports and it is undisputed that the same were not provided to the Petitioner.

vi) Pertinently the intelligence reports upon which the impugned judgment rests find no mention in the grounds of detention enumerated in the detention order, nor were they provided to the detenu at the time of his detention. This renders such reports extraneous and superfluous to the scope of determining the legality of the detention order and renders the impugned judgment liable to be set aside.

vii) Even the privilege claimed over the intelligence reports, was done orally at the time of arguments in the LPA, and no claim of privilege was made either by the detaining authority under Section 13(2) of the PSA in the detention order, or by the Respondent No. 1 in a sworn affidavit in terms of the settled law as enunciated in the

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judgment of a Constitution Bench of this Hon'ble Court in *Amar Chand Butail v Union of India* AIR 1964 SC 1658.

viii) In the present case the detenu being a prominent lawyer and a President of the Srinagar High Court Bar Association, has spoken on a range of issues, and instances to further detain him arbitrarily and unlawfully are being raked up with no nexus to any public order issue today. The statements are in exercise of the fundamental right to free speech under Article 19(1)(a) of the Constitution, and do not fall foul of Article 19(2), as evidenced from the fact that the Petitioner has never been chargesheeted in any of the four FIRs mentioned in the detention order. Detention for merely exercising one's right to free speech is manifestly disproportionate and arbitrary, and amounts to an abuse of the due process of law.

M. Because the Hon'ble High Court in passing the impugned judgment ought to have considered that where the detaining authority takes into account stale incidents which have gone-by and have no proximate and pertinent link or nexus to the present, and are vague, unsubstantiated allegations, it is manifest that the satisfaction of the

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authority is not genuine or legally sustainable. Reliance is placed on *T.A. Abdul Rahman v. State of Kerala* (1989) 4 SCC 741.

Policing thought - contrary to right to privacy

N. Because the impugned judgment, recognising the pitfalls inherent in the sole ground provided by the four stale and irrelevant FIRs using the doctrine of severability, traverses beyond the scope of the detention order into intelligence reports, and further uses the perceived ideology of the Petitioner to try and establish proximity, pertinence and relevance to the FIRs to justify the detention order. In doing so, not only is the Hon'ble High Court supplementing the material upon which the satisfaction of the Detaining Authority was based, which is impermissible in law, but also embarking on a constitutionally barred exercise of sanctioning State induced thought policing, which violates the right to privacy and dignity of the Petitioner. The tenets of the Indian Constitution bar the state from acting as a thought police and endows a person with the right to privacy as a facet of the right to life and liberty, recognized by the judgment of nine judges of this Hon'ble Court in *KS Puttaswamy vs Union of India* (2017) 10 SCC 1.

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i) The impugned judgment holds in Para 48, "*Having considered the matter, we may say that an ideology of the nature reflected in the FIRs and alleged against the detenue herein is like a live volcano. The ideology has always an inclination, a natural tendency to behave in a particular way.*" The law does not allow any negative inference to be drawn against a person, in terms of their propensity to act in a manner prejudicial to public order, solely on the basis of their perceived thoughts, beliefs and ideology. Unless the Petitioner has acted in an unlawful manner, or shown a tendency to act in a manner prejudicial to public order, there could be no basis to deprive him of liberty for his alleged thoughts and beliefs, however unpalatable the same may be. While the law of preventive detention operates in the "*jurisdiction of suspicion*", however, there are inherent constitutional safeguards to restrict any arbitrary, colourable and unconstitutional abuse of power. Suspicion, when rooted in determination of a person on the basis of his thought, belief or ideology, and not actions, traverses beyond the jurisdiction of suspicion into the prohibited domain of criminal condemnation, as was manifest during colonial rule with the enactment of laws such as the Criminal Tribes Act, 1871. Such

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jurisprudence, as embarked upon by the impugned judgment to condemn the Petitioner and deny him liberty, has been confined to the bins of history and should find no place in the post *Maneka Gandhi* and *Puttaswamy* era of India's constitutional jurisprudence.

ii) As stated earlier, the Petitioner was granted bail in the 2010 FIRs by the Principal Sessions Judge, Srinagar, in 2011, and the said order was not challenged by the State before any court. Thus, even in 2011, the allegations in the 2010 FIRs were not found to be such that either the judiciary or the executive deemed it necessary to curtail the Petitioner's liberty under ordinary criminal law or the PSA, as he was not a threat to public order, peace or tranquility.

iii) Thus, there is no material basis to suggest that the FIRs and the allegations contained therein have a live link to the satisfaction arrived at by the detaining authority. Nor do the FIRs indicate that the Petitioner has any tendency or propensity to act in a manner as would be prejudicial to the maintenance of public order.

Unreasonable restrictions on Art. 19 rights not protected by Art. 22 of the Constitution - Detention order violates Art. 19 and 21

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O. Because a Constitution Bench of this Hon'ble Court in *AK Roy vs Union of India* (1982) 1 SCC 271 has held that Art. 22 of the Constitution is not a watertight compartment, and is subject to the limitations imposed by Part III of the Constitution of India. Thus, speech or expression that does not come under Article 19(2), is permissible and constitutionally sanctioned speech under Article 19(1)(a), and any order under Article 22 cannot curtail such speech or expression. In other words, a detention order passed on the basis of speech which is constitutionally protected, amounts to an unreasonable restriction and curtailment of the liberty of an individual, and is thus unconstitutional and liable to be quashed and set aside. Further, the detention order is also liable to be set aside as it fails to pass the test of fairness under Art. 21, given that the Petitioner has been detained on the basis of decade old cases which contain merely unsubstantiated allegations. In Para 36 of *AK Roy* (Supra) this Hon'ble Court has analysed the Constituent Assembly Debates and held,

" *In view of this background and in view of the fact that the Constitution, as originally conceived and enacted, recognizes preventive detention as a permissible means of abridging the liberties of the people though subject to the limitations imposed by*

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Part III, We must reject the contention that preventive detention is basically impermissible under the Indian Constitution." (Emphasis supplied)

Detention order is in effect an order of punishment without trial

P. Because the Hon'ble High Court in passing the impugned judgment ought to have considered that the detention order is effectively an order of punishment for a crime without trial, purporting to be a preventive detention order. It has been held in *Sama Aruna v. State of Telangana*, (2018) 12 SCC 150 that,

"*The detention order must be based on a reasonable prognosis of the future behaviour of a person based on his past conduct in light of the surrounding circumstances. The live and proximate link that must exist between the past conduct of a person and the imperative need to detain him must be taken to have been snapped in this case. A detention order which is founded on stale incidents, must be regarded as an order of punishment for a crime, passed without a trial, though purporting to be an order of preventive detention. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent*

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him from doing it. See G. Reddeiah v. State of A.P. [G. Reddeiah v. State of A.P., (2012) 2 SCC 389 : (2012) 1 SCC (Cri) 881] and P.U. Iqbal v. Union of India [P.U. Iqbal v. Union of India, (1992) 1 SCC 434 : 1992 SCC (Cri) 184]." (Emphasis supplied)

This Hon'ble Court further went on to observe, "*Incidents which are old and stale and in which the detenu has been granted bail, cannot be said to have any relevance for detaining a citizen and depriving him of his liberty without a trial.*" (Emphasis supplied)

It further quoted the ratio of this Hon'ble Court in *Khudiram Das v. State of W.B.*, (1975) 2 SCC 81 in approval, wherein it was held, "*9. ... The grounds on which the satisfaction is based must be such as a rational human being can consider connected with the fact in respect of which the satisfaction is to be reached. They must be relevant to the subject-matter of the inquiry and must not be extraneous to the scope and purpose of the statute. If the authority has taken into account, it may even be with the best of intention, as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power or the manner or extent to which it should be exercised, the exercise of the*

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power would be bad. (Partap Singh v. State of Punjab AIR 1964 SC 72). "

Reliance is further placed in this regard on *Lakshman Khatik vs State of WB* (1974) 4 SCC 1.

Colourable exercise of power

Q. Because the detention order is based on stale, vague, irrelevant, extraneous and deficient material, which renders the detention illegal, being a colourable exercise of power. This Hon'ble Court has held in *V. Shantha v. State of Telangana* (2017) 14 SCC 577 that,

"*An order of preventive detention, though based on the subjective satisfaction of the detaining authority, is nonetheless a serious matter, affecting the life and liberty of the citizen under Articles 14, 19, 21 and 22 of the Constitution. The power being statutory in nature, its exercise has to be within the limitations of the statute, and must be exercised for the purpose the power is conferred. <u>If the power is misused, or abused for collateral purposes, and is based on grounds beyond the statute, takes into consideration extraneous or irrelevant materials, it will stand vitiated as being in colourable exercise of power</u>."* (Emphasis supplied)

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Right to make a representation denied to the Petitioner

R. Because the second facet of Article 22(5) gives to every detenu the right to make a representation, and the Petitioner was denied an effective and real opportunity to make such a representation. The order of detention and its grounds were communicated to the Petitioner only on 08.08.2019, after they had already been approved by the State government. Further, the Petitioner was whisked away to Central Jail, Agra, on the same day and kept in solitary confinement for a month. At his advanced age, with numerous health problems, the Petitioner was treated with such cruelty that it rendered it impossible for him to make an effective representation, thus violating his right under Article 22(5) of the Constitution. Reliance is placed herein on the judgment of this Hon'ble Court in *Haradhan Sahu vs State of WB* (1975) 3 SCC 198.

S. Because the impugned judgment has wrongly held that since the detenu was a lawyer, the failure of the detaining authority to communicate the timeline within which a representation may be made by the detenu would not render the detention order illegal.

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Such an interpretation is based on an erroneous understanding of the constitutional safeguards which a detenu is entitled to, and the consequent duties cast on the Detaining Authority, under Article 22(5) of the Constitution.

i) The impugned judgment in Para 51 holds, "*However, we may hasten to add that such communication to the detenue was inconsequential and purposeless, since the Government had approved the detention order on the date of its issue itself viz. on 07.08.2019."* (Emphasis supplied)

ii) Further, in Para 52 the impugned judgment states, "*Here the detenue is a practicing lawyer, as per the appellant-petitioner, having more than 40 years of impressive standing and practice at the Bar and President of the Bar Association since long. It could not be comprehended that he was oblivious of the period within which he could make a representation to the detaining authority, if such an occasion would have arisen. When the detenue happens to be of the stature and knowledge of the likeness of the detenue herein, and he does not make a representation, legally an inference is available that he had deliberately not done so, to claim*

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violation of his right in this behalf in his habeas corpus petition. Such tactics cannot be allowed to be played." (Emphasis supplied)

iii) That the impugned judgment thus creates a different standard of constitutional safeguards available to persons on the basis of their "stature and knowledge" under Article 22(5), which is an interpretation that runs foul of Article 14 of the Constitution and cannot be sustained in law.

iv) The prejudice caused to the Petitioner is a question of law, and not of fact, and the non compliance with procedural requirements vitiates the detention order irrespective of its impact on the Petitioner. "*When an order of preventive detention is challenged on the ground that it contravenes Art. 22(5), the question for determination by the Court is not whether the Petitioner will in fact be prejudiced in the matter of securing his release by his representation, but whether his constitutional safeguard has been infringed.*" (See: *Durga Das Basu - Shorter Constitution of India*, Justice AK Patnaik, 2019, 15th Edition, Volume 1, Page 435, Para 4)

Reliance is also placed on the decision of this Hon'ble Court in

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Tsering Dalkar v Administrator, Union Territory of Delhi (1987) 2 SCC 69.

No compelling reason for detention under PSA as detenu already dealt with under ordinary criminal law

T. Because the detenu was already in detention under Section 107/151 Cr.P.C. from the intervening night of 4th-5th August, 2019, and no new fact/ground that merited preventive detention under the 1978 Act has been cited in the detention order to demonstrate the compelling reason for preventive detention orders against the detenu. Existence of fresh grounds necessitating his detention is *sine qua non* for ordering further detention of the detenu.

U. Because it is respectfully submitted that relying on the alleged ideology of the detenu without establishing any live link with any offence that has been or could have been committed, especially given that the detenu was never chargesheeted in any of the said 4 FIRs, is an egregious infringement of his right to personal liberty under the Constitution, and also vitiates the detention due to vagueness and devoid of merit or substance.

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V. Because this Hon'ble Court has held, *inter alia*, in *Rekha v. State of T.N.*, (2011) 5 SCC 244, that the detaining authority has to satisfy itself that the ordinary criminal process is not sufficient to deal with the detenu before invoking the powers of preventive detention. In *Rekha*, while setting aside the detention order therein, it was reasoned,

"*It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is: was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal.* " This Hon'ble Court went on to observe, "*...Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law.*" (Emphasis supplied)

Petitioner's detention in Tihar Jail is unwarranted and inhuman given his advanced age and medical condition

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W. Because the Petitioner who is more than 70 years of age is suffering from life threatening heart ailments showing blockade of artery to the extent of 55-60%, with uncontrolled blood sugar and is surviving on a single kidney which is further aggravated by a disease as of Urethra stricture. Furthermore, because of the bullet injury sustained in 1995, the detenu suffered cervical vertebral column injury and there is degeneration in cervical and limb spine for which the detenu is on medication. He also has a limb and continuous backache for which he requires continuous follow up treatment and physiotherapy. The detenu also suffers from stomach ailment and has been under the treatment of renowned doctor Mr M.S.Khuroo and for this too he requires continuous medication and monitoring. The Petitioner also suffers from bleeding piles for which he is continuously on medication and prescribed diet and food. In such conditions, the Petitioner is a high risk person vulnerable to Covid-19 due to several comorbid conditions. Thus, the Petitioner's detention ought to be set aside on medical grounds.

X. Because the Petitioner seeks leave to urge additional grounds at the stage of arguments.

6. GROUNDS FOR INTERIM RELIEF

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Because, as stated in Ground W under Para 5 above, the Petitioner is suffering from serious health ailments and is at a high risk vulnerability for Covid-19 due to his co-morbid conditions. The Petitioner has numerous serious medical conditions for which he has been receiving treatment for the last 25 years under the care and supervision of his doctors in Srinagar, Kashmir. The Petitioner is also dependent on his family for ensuring the regular and daily intake of medicines and regular injections. The grounds urged in Para 5 above may be read as part of the contents of the present Para, and the same are not being reproduced for the sake of brevity.

7. MAIN PRAYER

That in view of the facts and circumstances of the present case, the averments made and the grounds submitted in the present petition, it is most humbly prayed that this Hon'ble Court may be pleased to:

A. Grant Special Leave to appeal against the impugned common judgment and order dated 28.05.2020 passed by the Hon'ble High Court of Jammu and Kashmir in LPA No. 28/2020 and EMG-CM-5/2020; and

B. Pass any other order(s) as this Hon'ble Court may deem fit and necessary in the interest of justice.

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AND FOR THIS ACT OF KINDNESS THE PETITIONER SHALL AS IN DUTY BOUND FOREVER PRAY

8. INTERIM PRAYER

That in view of the facts and circumstances of the present case, the averments made and the grounds submitted in the present petition, it is most humbly prayed that this Hon'ble Court may be pleased to:

A. Direct the Respondent No. 1 to transfer the Petitioner to Central Jail, Srinagar, during the pendency of the present petition, ensuring that all necessary medical precautions are taken qua Covid-19; and

B. Pass any other order(s) as this Hon'ble Court may deem fit and necessary in the interest of justice.

AND FOR THIS ACT OF KINDNESS THE PETITIONER SHALL AS IN DUTY BOUND FOREVER PRAY

Settled by: Vrinda Grover, Adv.

Drafted by: Soutik Banerjee, Adv.
Ratna Appnender, Adv.

Filed by:

Aakarsh Kamra
Advocate for Petitioner

Date: 11.06.2020

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