HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

D.B. Habeas Corpus Petition No. 3/2023

Mangi Kumari D/o Sona Ram, Aged About 31 Years, R/o Sodiyar, Barmer (Raj.).

----Petitioner

Versus

1. The State Of Rajasthan, Through Secretary, Department Of Home, Government Of Rajasthan, Secretariat, Jaipur (Raj.).
2. The District Magistrate, Barmer (Raj.).
3. Superintendent Of Police, Barmer (Raj.).
4. Station House Officer, Police Station, Chohtan, District Barmer (Raj.).

----Respondents

For Petitioner(s) : Mr. Gajendra Kumar Rinwa.
Mr. Aditya Sharma

For Respondent(s) : Mr. M.A. Siddiqui, G.A.-cum-AAG with
Mr. A.R. Malkani.

HON'BLE MR. JUSTICE ARUN BHANSALI
HON'BLE MR. JUSTICE RAJENDRA PRAKASH SONI
Judgment

Reportable

25/05/2023
(PER HON'BLE MR. ARUN BHANSALI, J.)

1. This writ petition in the nature of habeas corpus has been filed by the petitioner questioning the validity of order dated 13.07.2022 (Annex.2), whereby the District Magistrate, Barmer, while exercising the powers under Section 3 of the Rajasthan Prevention of Anti-Social Activities Act, 2006 ('the Act'), has ordered for preventive detention of detenue's brother Bhera Ram S/o Sona Ram subject to approval by the State Government & opinion of the Advisory Board and order dated 21.09.2022

(Annex.3) passed by the Joint Secretary, Department of Home, whereby based on the opinion dated 25.08.2022 of the Advisory Board regarding availability of sufficient cause for the detention of the detenue, order has been passed confirming the detention order dated 13.07.2022 and has ordered that the detenue be kept in detention till 13.07.2023.

2. It is, inter-alia, indicated in the petition that the Superintendent of Police, District Barmer filed a complaint on 13.07.2022 with reference to provisions of Section 2(b)(c) and Section 3 of the Act against Bhera Ram, inter-alia, indicating that conduct of Bhera Ram falls within the definition of 'dangerous person' as defined in the Act and as he is involved in disturbing the public order, for the purpose of putting effective restriction on his criminal activities, order be passed for keeping him under preventive detention under the Act.

3. Based on the said complaint on 13.07.2022 itself, the District Magistrate, Barmer came to the conclusion that Bhera Ram was a dangerous person under the provisions of Section 2(c) of the Act and there was sufficient reasons available for his preventive detention and consequently, exercising delegated powers under Section 3(2) of the Act, ordered for his preventive detention.

4. It appears that in terms of provisions of Section 3(3) of the Act, which requires approval of the State Government, in case, order of preventive detention is made by an officer authorized under Section 3(2) of the Act, the State Government approved the preventive detention by its order dated 21.07.2022 (Annex.A/2).

Whereafter, the matter was referred to the Advisory Board under Section 11 of the Act and the Advisory Board by its opinion dated 25.08.2022 came to the conclusion that there exists sufficient cause for detention of the detenue Bhera Ram and that the proposed detention may be confirmed by the State Government as per law, which led to passing of the order dated 21.9.2022 (Annex.3) by the State Government, as noticed herein-before, confirming the preventive detention of the detenue till 13.07.2023.

5. Learned counsel for the detenue made vehement submissions that exercise of power by the respondents in placing the detenue under preventive detention is ex-facie contrary to the settled law dealing with the preventive detention, inasmuch as, the procedural requirements as detailed in the Act have not at all been followed and the foundational requirements of the Act regarding the detenue being a dangerous person itself is not satisfied.

6. It was submitted that the provisions of Section 9(1) of the Act specifically provides affording of the earliest opportunity of making a representation against the order to the State Government, however, no such opportunity was afforded to the detenue.

7. It was submitted that the parameters for providing the opportunity have been laid down in *Omprakash @ Omi* v. *State of Rajasthan & Ors.* : D.B. Habeas Corpus Petition No.217/2022, decided on 01.12.2022 (At Jaipur Bench), however, the parameters laid down therein have been grossly flouted.

8. It was submitted that initially the material showing affording opportunity in this regard was not even produced before the Court, however, after sufficient prodding by the Court, document dated 13.07.2022 was produced before the Court during course of arguments on 02.05.2023 indicating purported grant of opportunity to make a representation, however, the indications made in the said document / communication falls short of a fair opportunity to make a representation, rather the same is contrary to the provisions of Section 9(1) of the Act.

9. Further submissions have been made that the State Government while granting approval under Section 3(3) of the Act, has to apply its mind to the facts of the case and it cannot pass a mechanical order granting approval to the order of preventive detention and on account of non-application of mind by the State Government while passing the order dated 21.07.2022 (Annex.A/2), the same stands vitiated and consequently, the detention becomes illegal.

10. Submissions were also made that no material was produced before the Court indicating communication of the order dated 21.09.2022 (Annex.A/2) to the detenue though an endorsement requiring such communication has been made on the order requiring the authorities to serve a copy of the order on the detenue and for non-supply of the said order also, the detention stands vitiated.

11. Learned counsel further emphasized that the provisions of the Act requires passing of the order of preventive detention, in case, the detenue is acting in any manner prejudicial to the

maintenance of 'public order'. Submissions have been made that the grounds indicated for ordering of preventive detention of the detenue, are mere cases pertaining to the maintenance of 'law & order' and therefore, as the requirement of prejudice to the maintenance of public order itself has not been fulfilled, the order of detention is illegal.

12. It was emphasized that only because 22 cases have been registered against the detenue between the period 2014 to 2022, in which 20 cases pertain to period between 2014 to 2020 and 01 case each in the year 2021 & 2022, cannot be a reason enough for placing the detenue under preventive detention, which essentially is a case of maintaining law & order and has nothing to do the public order and on that count also, the action of the respondents in ordering for preventive detention of the detenue deserves to be quashed and set-aside.

13. Reliance was placed on *Mallada K Sri Ram* v. *State of Telangana & Ors.* : Cr. Appeal No.561/2022, decided on 04.04.2022 by the Hon'ble Supreme Court; *Chandrashekhar* v. *State of Rajasthan & Ors.* : D.B. Habeas Corpus No.50/2017, decided on 22.05.2017; *Icchu Devi Choraria* v. *Union of India* : AIR 1980 SC 1983; *Rajesh Sharma @ Raju Pandit* v. *State of Rajasthan & Ors.*: D.B. Habeas Corpus Writ Petition No.235/2016, decided on 31.03.2017 (At Jaipur Bench) and *Ankit Ashok Jalan* v. *Union of India & Ors.* : Writ Petition (Criminal) No.362/2019, decided on 04.03.2020 by the Hon'ble Supreme Court.

14. Learned AAG vehemently opposed the submissions made. It was submitted with reference to the provisions of

Section 2(c) of the Act that the detenue squarely falls within the definition of 'dangerous person', inasmuch as, out of the cases pending against him, 13 cases pertains to offences punishable under Chaper-XVI or Chapter-XVII of the IPC and 06 cases pertain to offences punishable under Chapter-V of the Arms Act and as such, the submissions made to the contrary, have no substance.

15. It was submitted that the word 'public order' has been assigned the same meaning as under sub-section (4) of Section 3, which is a deeming provision and provides that it would be deemed that the person is acting in a manner prejudicial to the maintenance of public order when such person is engaged in or is making preparation for engaging in any activities, inter-alia, as dangerous person and the explanation provides that if the activities directly or indirectly are causing or likely to cause any harm, danger or alarm or feeling of insecurity among the public at large or any section thereof, the public order shall be deemed to have been affected adversely and therefore, the plea in this regard has no substance. It was emphasized that merely because matters are pending and the detenue has so far not been convicted cannot by itself be a reason to hold that the detenue is not a dangerous person in view of express definition in this regard.

16. Further submissions were made that the communication dated 13.07.2022 filed on 02.05.2023 clearly shows that the detenue was afforded the earliest opportunity of making a representation against the order to the State Government, receipt of which communication is clearly reflected on the said

communication and therefore, the plea raised regarding non-compliance of provision of Section 9(1) of the Act has no substance.

17. Further submissions were made that admittedly, no representation was made by the detenue against the order dated 13.07.2022 and as such, in the order passed by the State Government approving the order dated 21.07.2022 (Annex.A/2), there was no necessity to make any reference regarding fling / non-filing of the representation.

18. Further submissions were made that the timelines as provided under the Act regarding approval by the State Government, referring the matter to the Advisory Board and passing of the order by the Advisory Board have been specifically adhered to and therefore, no case is made out for any kind of violation of provisions of the Act so as to provide any ground to the detenue to seek its quashing by this Court and therefore, the petition deserves dismissal.

19. Submissions were also made that the plea raised pertaining to the cases against the detenue being that of maintenance of law & order and not prejudicial to public order has no substance in view of the express provisions and the judgments relied on behalf of the detenue have no application to the facts of the present case. It was prayed that the petition be dismissed.

20. We have considered the submissions made by learned counsel for the parties and have perused the material available on record.

21. At the outset, it would be appropriate to notice the observations made by the Hon'ble Supreme Court in *Pramod Singla* v. *Union of India & Ors.* : Criminal Appeal No.1051/2023, decided on 10.04.2023, which reads as under:-

> "21. Before we deal with the issues framed, we find it important to note that preventive detention laws in India are a colonial legacy, and have a great potential to be abused and misused. Laws that have the ability to confer arbitrary powers to the state, must in all circumstances, be very critically examined, and must be used only in the rarest of rare cases. In cases of preventive detention, where the detenue is held in arrest not for a crime he has committed, but for a potential crime he may commit, the Courts must always give every benefit of doubt in favour of the detenue, and even the slightest of errors in procedural compliances must result in favour of the detenue."

22. In view of the above settled position, the present matter needs to be examined. It would be appropriate to notice few provisions of the Act, which reads as under :-

> "2. Definitions.- In this Act, unless the context otherwise requires :-
> …… …… …… …… …… …… ……
> (c) ***"dangerous Person"*** means a person, who either by himself or as member or leader of a gang, habitually commits, or a attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter XVII of the Indian Penal Code, 1860 or any of the offences punishable under Chapter V of the Arms Act, 1959 or any of the offences punishable under first proviso to sub-section (1), and sub-section (1A), of section 51 of the Wild life (Protection) Act, 1972 or any offence punishable under section 67 of the Information Technology Act, 2000.
> …… …… …… …… …… …… ……
> (j) ***"public order"*** shall have the same meaning as assigned to it under sub-section (4) of section 3.
>
> 3. **Power to make orders detaining certain persons.**- (1) The State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, it is
> necessary so to do, make an order directing that such person be detained.
> (2) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct that the District Magistrate, may also, if

satisfied as provided in sub-section (1), exercise the powers conferred by the said sub-section.

(3) When any order is made under this section by an authorized officer he shall forthwith report the fact to the State Government together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof, unless, in the meantime, it has been approved by the State Government.

(4) For the purpose of this section, a person shall be deemed to be "acting in any manner prejudicial to the maintenance of public order" when such person is engaged in or is making preparation for engaging in any activities whether as a boot-legger or dangerous person or drug offender or immoral traffic offender or property grabber, which affect adversely or are likely to affect adversely the maintenance of public order.

Explanation. - For the purpose of this sub-section Public order shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely *inter alia* if any of the activities of any person referred to in this sub-section directly or indirectly, is causing or is likely to cause any harm,
danger or alarm or feeling of insecurity among the public at large or any section thereof or a grave or widespread danger to life, property or public health.

9. **Grounds of order of detention to be disclosed to detenu.**- (1) When a person is detained in pursuance of a detention order the authority making the order shall, as soon as may be, but not later than three days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the State 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."

23. A perusal of the provisions of Section 3 reveals that if the State Government is satisfied with respect to any person that for preventing him from acting in any manner prejudicial to the maintenance of public order, it is necessary to do so, it can make an order directing that such person be detained.

24. Sub-Section (2) of Section 3 of the Act provides for delegation of power to the District Magistrate.

25. Sub-Section (3) of Section 3 of the Act provides that if an order is made under Section 3(2), the authorized officer shall forthwith report the fact to the State Government together with the grounds and that no such order shall remain in force for more than twelve days after the making thereof, unless, in the meanwhile, it has been approved by the State Government.

26. For the purpose of grant of approval by the State Government, Section 9 of the Act provides that when a person is detained in pursuance of an order passed under Section 3(2) of the Act, the authority making the order shall as soon as may be but not later than three days from the date of detention communicate to the detenue the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the State Government. The provision is clear and unambiguous requiring the authority to afford the detenue the earliest opportunity of making a representation against the order to the State Government.

27. The communication made to the detenue on 13.07.2022, which communication has been produced by the respondents, as submitted by learned counsel for the detenue, after much prodding by the Court, during course of hearing, inter-alia, reads as under :-

"न्यायालय जिला मजिस्ट्रेट, बाड़मेर

क्रमांकः वाचक/2022/946 दिनांक : 13.7.22

वास्ते :–

भैराराम पुत्र सोनाराम
जाति जाट निवासी सोडियार
पुलिस थाना चौहटन जिला बाड़मेर

विषय : राजस्थान समाज विरोधी क्रियाकलाप निवारण अधिनियम 2006 की धारा 3(2) के तहत निरूद्ध करने के संबंध में।

इस न्यायालय के आदेश दिनांक 13.07.2022 के द्वारा आपको राजस्थान समाज विरोधी क्रियाकलाप निवारण अधिनियम, 2006 की धारा 3(2) के तहत निरूद्ध किया जाकर केन्द्रीय कारागृह जोधपुर में रखे जाने का निर्णय लिया गया है। आपको निरूद्ध किये जाने के कारणों व आधार के दस्तावेज (परिवाद की प्रति) इस पत्र के संलग्न प्रेषित किये जा रहे है जिनको प्राप्त कर रसीद देवे। आप निरूद्ध किये जाने के विरूद्ध यदि कोई अभ्यावेदन राज्य सरकार/सलाहकार मण्डल/राजस्थान उच्च न्यायालय अथवा अधो हस्ताक्षरकर्ता को प्रस्तुत करना चाहे तो अधीक्षक केन्द्रीय कारागृह जोधपुर के माध्यम से प्रेषित कर सकते है।

संलग्न – उपर्युक्तानुसार

सही/–
(लोक बंधु)
जिला मजिस्ट्रेट, बाड़मेर

एक कॉपी प्राप्त की
सही/– भेराराम"

28. The communication bears receipt from the detenue. A perusal of the above communication reveals that the detenue has been told that against the detention, if he wants to make any representation to the State Government / Advisory Board / Rajasthan High Court or to the undersigned, he can send the same through the Superintendent, Central Jail, Jodhpur.

29. The indication made in the communication, apparently, is contrary to the requirements of Section 9(1) of the Act, which requires affording of the opportunity to make a representation against the order to the State Government. The indication made in the communication regarding making of representation, inter-alia, also to the Advisory Board / Rajasthan High Court and to the undersigned i.e. District Magistrate, Barmer, was absolutely contrary to the provisions of the Act and rather misplaced and likely to create confusion in the mind of the detenue, inasmuch as, at the stage when the communication was made i.e. on the date of detention itself, requiring the detenue to make a representation

to the Advisory Board / Rajasthan High Court and even to the District Magistrate, who himself had passed the order placing the detenue under detention, was wholly unnecessary. In fact, there was no occasion for the District Magistrate to indicate making of representation to the said authorities at the said stage because unless the detention was approved by the State Government in terms of Section 3(3) of the Act, there was no question of the detenue making a representation to the Advisory Board. Further at no stage the Rajasthan High Court comes into picture, so as to require the detenue to make a representation to the High Court.

30. The parameters for compliance of provisions of Section 9(1) of the Act regarding making of the representation to the State Government have been laid down in the case of Omprakash @ Omi (supra), wherein after referring to provisions of Section 9, it has been laid down as under :-

> "The bare perusal of the provisions show that when a person is detained in pursuance of the detention order, the authority making the order shall, as soon as may be, but not a later than three days from the date of detention, communicate to the detenue the grounds on which the order has been made. But that is not the only requirement of Section 9. The provision further clearly states that the authority shall afford detenue, earliest opportunity of making representation against the order to the State Government. This provision on its rational, fair and logical interpretation would mean that the authority passing the order of the detention is obliged under the law to clearly inform in writing to the detenue that he has right to prefer a representation at the earliest occasion, to the State Government. This is so because the order passed by the District Magistrate, unless approved by the State Government, will come to an end after twelve days. This is clear from provisions contained in Section 3(3) of the Act of 2006 which reads as below:-
>
> > "When any order is made under this section by an authorized officer he shall forthwith report the fact to the State Government together with the grounds on which the order has been made and such other particulars as, in his opinion, have a
> > bearing on the matter, and no such order shall remain in force for more than twelve days after the

making thereof, unless, in the meantime, it has been approved by the State Government."

Conjoint reading of provisions contained in Section 3(3) of the Act of 2006 and Section 9 of the Act of 2006 makes it clear that in order that the detention order continues beyond period of twelve days, it is required to be approved by the State Government. The Act of approval by the State Government is not an empty formality. The representation, if any made by the detenue, would be required to be taken into consideration by the State Government. Therefore, the mandate of Section 9 of the Act of 2006 that the authority passing the order of detention shall afford the detenue the earliest opportunity of making a representation against the detention order to the State Government is mandatory and not a directory provisions.

We are of the view that this opportunity of making a representation at the earliest by the detenue has not been afforded.

Merely because one of the relatives of the detenue has preferred a representation to the State Government on 15.03.2021, cannot be treated as compliance of the mandate of Section 9 of the Act of 2006 because the right to prefer representation as conferred under Section 9 of the Act of 2006 is personal to the detenue. For this, it is absolutely mandatory that the authority passing the order detention must inform the detenue that he has right to prefer a representation. Moreover, the use of the word "earliest opportunity of making a representation" further signifies the legislative intent that the detenue has to be afforded the opportunity of making the representation as soon as the order of detention is passed.

The respondent, in their reply, have nowhere stated that after passing the order of the detention, the competent authority complied with the mandate of law by affording the detenue earliest opportunity of making a representation to the State Government. This, in our opinion, vitiates the proceedings.

The order of the State Government passed on 15.03.2022, shows that it has approved the detention passed by the District Magistrate on 07.03.2022 and there is no whisper with regard to representation, if any, placed before it. Thus, serious prejudice has been caused to the detenue on account of non-compliance of the mandatory provisions contained in Section 9 of the Act of 2006. The detenue was deprived of making a representation to the State Government and without such opportunity having been granted, the State Government approved the order of the detention and thus, it has resulted in continuance of detention beyond twelve days and rendered it illegal and unconstitutional."

31. The Division Bench even when the relatives of the detenue had made a representation to the State Government, on account of non-compliance of provisions of Section 9 of the Act came to the conclusion that serious prejudice was caused to the

detenue therein on account of non-compliance of the provisions rendering the detention as illegal and unconstitutional.

32. Further, in the present case the communication does not indicate the time within which the detenue was required to make a representation, if any, which was necessary as the State was required to pass an order within 12 days of passing of the order of detention, which non-indication also is a serious lapse.

33. As noticed herein-before, as the communication made to the detenue dated 13.07.2022 does not comply with the requirements of Section 9(1) of the Act and was likely to cause confusion and was beyond the scope of a fair opportunity of making representation at the stage when the detenue was called upon to make a representation, that also without indicating time within which the representation was to be made, it cannot be said that the provisions of Section 9(1) of the Act have been complied with in letter and spirit.

34. The order passed by the State Government dated 21.07.2022 (Annex.A/2), inter-alia, reads as under :-

"राजस्थान सरकार
गृह (ग्रुप–9) विभाग
क्रमांक : प.36(10)गृह–9/2022 जयपुर, दिनांक : 21 JUL. 2022
आदेश

जिला मजिस्ट्रेट बाड़मेर द्वारा राजस्थान समाज विरोधी क्रियाकलाप निवारण अधिनियम, 2006 (2008 का अधिनियम संख्या–1) की धारा 3 की उपधारा (1) के अधीन गैर सायल भैराराम पुत्र सोनाराम जाति जाट निवासी सोडियार पुलिस थाना चौहटन जिला बाड़मेर के विरूद्ध निरूद्धि आदेश क्रमांकः विविध फौजदारी प्रकरण सं. 02/2022 दिनांक 13–07–2022 पारित किया गया है।

राज्य सरकार का समाधान हो गया है कि गैर सायल भैराराम पुत्र सोनाराम जाति जाट निवासी सोडियार पुलिस थाना चौहटन जिला बाड़मेर के विरूद्ध निरूद्धि आदेश पारित करने के लिए पर्याप्त आधार है।

अतः राज्य सरकार द्वारा राजस्थान समाज विरोधी क्रियाकलाप निवारण अधिनियम, 2006 (2008 का अधिनियम संख्या–1) की धारा 3

की उप धारा (3) के अन्तर्गत जिला मजिस्ट्रेट बाड़मेर द्वारा पारित किये गये आदेश दिनांक 13–07–2022 का अनुमोदन किया जाता है।

राज्यपाल की आज्ञा से,
सही/–
(मुकेश पारीक)
उप शासन सचिव

प्रतिलिपि –
1. जिला मजिस्ट्रेट, बाड़मेर।
2. अधीक्षक, केन्द्रीय कारागृह, जोधपुर को आदेश की तीन प्रतियां निष्पादन हेतु प्रेषित है। कृपया इस आदेश की प्रति निरूद्धि को दी जावे, आदेश की एक प्रति पर संबंधित व्यक्ति से प्राप्ति की रसीद लेकर उसे प्रमाणित की जाकर भिजवावें तथा तीसरी प्रति अपने कार्यालय अभिलेख में संलग्न करे।

सही/–
उप शासन सचिव"

35. As noticed herein-before, the provisions of Section 3(3) of the Act requires approval of the order passed under Section 3(2) of the Act by an authorised officer by the State Government within twelve days of making of the said order and as noticed Section 9(1) of the Act requires providing of an opportunity to the detenue to make a representation against the order to the State Government.

36. A perusal of the above order dated 21.07.2022 would reveal that the same has been passed within eight days of passing of the order of detention dated 13.07.2022. The order nowhere indicates that the authority passing the order was even aware of the right of the detenue to make a representation, inasmuch as, there is no reference worth the name in the above order regarding the fact of providing an opportunity to the detenue to make a representation under Section 9(1) of the Act and that the detenue had not made any representation. The aspect of passing the order within eight days, though the same could have been made within twelve days also assumes significance in a case where no time

limit in the communication was indicated and no representation has been made, inasmuch as, no time limit is fixed under the provisions of Section 9(1) of the Act to make a representation and therefore, the same could have been made within twelve days of passing of the order of detention and the authority was required to consider the said representation before approving the said order of detention.

37. Things would be different where the representation has been made by the detenue, then taking the same into consideration the order could be passed any time within the said period of twelve days, however, where no representation is made, the authority is required to wait and / or notice in its order that the detenue refused to make any representation, else the authority granting approval under Section 3(3) of the Act can very well pass the order within no time of passing of the order of detention, negating the very opportunity to the detenue to make a representation.

38. The very fact that the authority passing the order dated 21.07.2022 has not even noticed the requirement / grant of opportunity to the detenue and that no such representation has been made, clearly shows that the order dated 21.07.2022 (Annex.A/2) has been mechanically passed by the said authority oblivious of the requirements of provisions of Section 9(1) of the Act and as such, the order stands vitiated.

39. Though the order dated 21.07.2022 (Annex.A/2) passed by the State Government, bears an endorsement that copy of the order be supplied to the detenue and a receipt be taken from him

and be sent after attestation to the authority passing the order, and despite specific plea raised regarding non-service of the order dated 21.07.2022 (Annex.A/2) on the detenue and the detenue becoming aware of passing of the order dated 21.07.2022 only on passing of the order dated 21.09.2022 (Annex.3) under Section 13(1) of the Act after approval by the Advisory Board, nothing has been placed on record to indicate that the order dated 21.07.2022 had been served on the detenue.

40. The non-service of the order dated 21.07.2022 (Annex.A/2) on the detenue, also is fatal, inasmuch as, the same has deprived the detenue's legal right to question the validity of the said order dated 21.07.2022 at the relevant stage, which ultimately resulted in continuation of his detention beyond twelve days till the order under Section 13(1) of the Act was passed on 21.09.2022 (Annex.3).

41. Coming to the aspect of placing the detenue under preventive detention, the complaint Annex.1, inter-alia, indicates the following for seeking the detention :

> "उक्त गैर सायल के विरूद्ध अन्य प्रचलित कानूनों व निरोधात्मक कार्यवाहियां करने पर भी उसकी अपराधिक गतिविधियों पर अंकुश रखा जाना संभव नहीं हो रहा है। गैर सायल भैराराम खतरनाक व्यक्ति है तथा वर्तमान में न्यायालय द्वारा जमानत पर है। उसके द्वारा न्यायिक अभिरक्षा से बाहर आकर पुनः पुर्व की भांति आपराधिक गतिविधियां कारित करने की पूर्ण संभावना है तथा यह शक्स बदला देने की भावना से लोगों को डरा धमका कर अपराध कारित करने का अभ्यस्ती है। उक्त गैर सायल की आपराधिक गतिविधियों को रोक पाना सामान्य कानून की परिधि में सम्भव नहीं है। ऐसी स्थिति में गैर सायल का स्वंच्छद रहना सामान्य लोक व्यवस्था व राज्य की आंतरिक सुरक्षा के लिये खतरनाक है। इसकी समाज विरोधी अपराधिक गतिविधियों पर रोक लगाने की नितान्त आवश्यकता है। ऐसी अवस्था में गैर सायल को अधिकाधिक अवधि के लिये अन्तर्गत धारा 2 (ख)(ग)/3 राजस्थान समाज विरोधी क्रिया–कलाप निवारण अधिनियम 2006 के तहत निरूद्ध रखना लोक व्यवस्था के लिए नितान्त आवश्यक है।"

42. A bare look at the complaint Annex.1 made by the Superintendent of Police, Barmer indicates that after referring to the various pending cases against the detenue, wherein it is indicated that in 19 cases challan has been filed, in 01 case he has been acquitted giving benefit of doubt and that he was on bail granted by the competent court it has been indicated that as preventing the criminal activities of the detenue within general law was not possible, the detention was sought.

43. The Hon'ble Supreme Court in *Vijay Narain* v. *State of Bihar* : 1984(3) SCC 14 indicated that when a person is enlarged on bail by a competent Court, great caution should be exercised in scrutinizing the validity of an order of preventive detention, which is based on the same charge, which is to be tried by the criminal Court and that the order does not refer to any application for cancellation of bail having been filed by the State authorities.

44. In *Shaik Nazeen* v. *State of Telangana & Ors.* : Criminal Appeal No.908 of 2022, decided on 22.06.2022, the Hon'ble Supreme Court made following observations :-

> "17. In any case, the State is not without a remedy, as in case the detenu is much a menace to the society as is being alleged, then the prosecution should seek for the cancellation of his bail and/or move an appeal to the Higher Court. But definitely seeking shelter under the preventive detention law is not the proper remedy under the facts and circumstances of the case.
>
> 18. In fact, in a recent decision of this Court, the Court had to make an observation regarding the routine and unjustified use of the Preventive Detention Law in the State of Telangana. This has been done in the case of Mallada K. Sri Ram Vs. The State of Telangana & Ors. 2022 6 SCALE 50, it was stated as under :
>
> > "17. It is also relevant to note, that in the last five years, this Court has quashed over five detention orders under the Telangana Act of 1986 for inter alia incorrectly applying the standard for maintenance of public order and relying on stale materials while passing the orders of detention. At

> least ten detention orders under the Telangana Act of 1986 have been set aside by the High Court of Telangana in the last one year itself. These numbers evince a callous exercise of the exceptional power of preventive detention by the detaining authorities and the respondent-state. We direct the respondents to take stock of challenges to detention orders pending before the Advisory Board, High Court and Supreme Court and evaluate the fairness of the detention order against lawful standards."
>
> (emphasis supplied)

45. Further the distinction between a disturbance to 'law and order' and a disturbance to 'public order' has been noticed by the Hon'ble Supreme Court in the case of Mallada K Sri Ram (supra) as under :-

> "15. A mere apprehension of a breach of law and order is not sufficient to meet the standard of adversely affecting the "maintenance of public order". In this case, the apprehension of a disturbance to public order owing to a crime that was reported over seven months prior to the detention order has no basis in fact. The apprehension of an adverse impact to public order is a mere surmise of the detaining authority, especially when there have been no reports of unrest since the detenu was released on bail on 8 January 2021 and detained with effect from 26 June 2021. The nature of the allegations against the detenu are grave. However, the personal liberty of an accused cannot be sacrificed on the altar of preventive detention merely because a person is implicated in a criminal proceeding. The powers of preventive detention are exceptional and even draconian. Tracing their origin to the colonial era, they have been continued with strict constitutional safeguards against abuse. Article 22 of the Constitution was specifically inserted and extensively debated in the Constituent Assembly to ensure that the exceptional powers of preventive detention do not devolve into a draconian and arbitrary exercise of state authority. The case at hand is a clear example of non-application of mind to material circumstances having a bearing on the subjective satisfaction of the detaining authority. The two FIRs which were registered against the detenu are capable of being dealt by the ordinary course of criminal law."

46. In the case of Chandrashekhar (supra), a Division Bench of this Court noticing registration of 15 cases and 02 preventive proceedings under Sections 110 & 107 Cr.P.C., against the petitioner therein, came to the following conclusion :-

> "Upon perusal of the item no.1 to 7 it is obvious that in five cases detenue Abhimanyu @ Dhabiya was acquitted

from the charges levelled against him either on compromise or after facing and in two cases he was convicted in the year 2006-07 and he has served whatever punishment made against him. Admittedly, seven cases are pending against the detenue Abhimanyu @ Dhabiya and in one case investigation is going on. The cases pending against the detenue Abhimanyu @ Dhabiya are mostly relates to the offence under Sections 323, 325 and 341 IPC and in three cases, charge-sheet was filed under Section 307, 149/34 IPC and those cases are still pending in which detenue Abhimanyu @ Dhabiya has already been released on bail. We have perused the definition of "dangerous person" enumerated in the Act of 2006, so also, considered the facts of all the cases registered against the detenue Abhimanyu @ Dhabiya. In our opinion, seven cases pending against the detenue Abhimanyu @ Dhabiya are mostly for the offences under Sections 323, 325, 341 and 147 IPC and in three cases the charge-sheet has been filed under Section 307 IPC with the aid of Section 149 IPC in which the detenue Abhimanyu @ Dhabiya has already been released on bail, upon consideration of complaint submitted by the respondent no.4 before Police Commissioner, we are of the opinion that seriousness of the offences is required to be seen before passing any order of detention. In most of the pending cases are for bailable offences, three cases are registered for non-bailable offence in which the detenue Abhimanyu @ Dhabiya has already been released on bail and still facing trial, therefore, we are of the opinion that there is no valid justification for passing detention order against the detenue Abhimanyu @ Dhabiya for one year. In our opinion, at the time of judicial scrutiny right of liberty of a citizen is required to be seen as per facts, there is no dispute that out of 15 cases, 7 cases has already been decided upto the year 2012 and most of the pending cases are related with the bailable offences, therefore, it cannot be said that case of detenue Abhimanyu @ Dhabiya falls under the definition of "dangerous person" and become problem for the law and order situation.

The criminal activities upon which action has been taken cannot be based so as to consider detenue Abhimanyu @ Dhabiya as "dangerous person" at this stage. It is true that an accused granted bail cannot misuse the benefit of bail and required to maintain peace, at the same time, it cannot be said that number of cases of private quarrel registered against the detenue Abhimanyu @ Dhabiya can be considered for passing order of detention for one year. The seriousness of offense is required to be seen.

In the totality of the circumstances, we are of the firm opinion that order of detention is not based upon justified reasons so as to achieve the object to maintain peace."

47. In the present case, the fact that the detenue has been released on bail and the authorities, by indicating their helplessness in maintaining the law and order has sought the preventive detention of the detenue, which reason cannot form

basis for coming to the conclusion that the detention of the detenue was necessary with a view to preventing him from acting in any manner prejudicial to the maintenance of public order.

48. In view of above discussion, it is apparent that the detenue was not afforded adequate opportunity to make a representation as required under Section 9(1) of the Act, the order dated 21.07.2022 has been passed by the State Government in a mechanical manner, non-service of the said order on the detenue, was highly prejudicial to his interest preventing him from availing remedy against the said order, the basis for passing of the order as disclosed in the complaint (Annex.1) regarding release of the detenue on bail and helplessness of the authorities in maintaining the law and order cannot form a basis for ordering preventive detention, the orders impugned cannot be sustained.

49. Consequently, the writ petition filed by the petitioner is allowed. The order dated 13.07.2022 (Annex.2) passed by the District Magistrate, order dated 21.07.2022 (Annex.A/2) passed under Section 3(3) of the Act and order dated 21.09.2022 (Annex.3) passed by the State Government under Section 13(1) of the Act are quashed and set-aside. The detenue is ordered to be set at liberty forthwith, if not required in any other case.

50. No order as to costs.

(RAJENDRA PRAKASH SONI),J **(ARUN BHANSALI),J**

Rmathur/-