
(2008) 03 AHC CK 0094

In the Allahabad High Court

Case No : Habeas Corpus W.P. No. 47670 of 2007

Abdul Salman @ Salman

APPELLANT

Vs

State of U.P.and others

RESPONDENT

Date of Decision : 27-03-2008

Acts Referred:

National Security Act, 1980 — Section 3(2)

Citation : (2008) 03 AHC CK 0094

Hon'ble Judges : S.S.Kulshrestha, J and V.K.Verma, J

Final Decision : Dismissed

Judgement

S.S. Kulshrestha, J.—This petition under Article 226 of the Constitution of India is directed against the detention order dated 17.9.2007 of the petitioner under section 3(2) of the National Security Act, 1980 (which is herein after referred to as the "Act") passed by the District Magistrate, Allahabad. Simultaneously, the notification No. 111/1/1/80C.X.7 dated 1.7.2007 issued by the State Government in exercise of the powers under section 3(3) of the Act is desired to be quashed as being violative of Articles 21 and 22 of the Constitution of India. Compensation for the illegal detention of the petitioner has also been claimed.

2. It is contended by the petitioner that an ugly incident relating to the tearing of the pages of Holy Quran had taken place in Kaladanda Mosque, Allahabad for which some persons showed their anger on 31.8.2007 at 9.30 p.m. On it, first information report was lodged at P.S. Kareli, Allahabad against 15 named, including the petitioner, and a mob of 100150 unknown persons contending that they resorted to violence. That mob was being led by the petitioner. Such distortion was made by the Police of P.S. Kareli, though the petitioner, being the prominent member of a political party, was trying to pacify the agitating group. Even various newspapers have reacted against the lodging of the report as a result of political vendetta. For that the office bearers of the rival party are being harassed. The petitioner brought Criminal Misc. Writ Petition No. 13669 of 2007 before this Court for quashing the FIR. That writ petition was disposed of by this

Court vide the order dated 7.9.2007 for making expeditious disposal of the bail application of the petitioner. It was next contended that the petitioner surrendered in the Court of Judicial Magistrate and applied for bail which was rejected on that very day. However, on 17.9.2007 his bail application was pressed before the Incharge Sessions Judge, Allahabad but the learned .D.G.C (Crl.) misrepresented the facts before the Sessions Judge that this Court did not accord any such relief in Criminal Misc. Writ Petition No. 13669 of 2007. To the contrary the prayer of the petitioner was rejected. The State Counsel was asked by the learned Sessions Judge to file the certified copy of the order passed by this Court and the application for bail was directed to be listed for hearing on 18.9.2007 before the Addl. Sessions Judge. The S.H.O., Kareli on 12.9.2007 fabricated a version that the conduct of the petitioner is prejudicial to the maintenance of the public order. On such report the Senior Superintendent of Police, Allahabad recommended the matter for taking action under section 3(2) of the Act against the petitioner. On that premises the impugned order dated 17.9.2007 was passed by the District Magistrate without recording subjective satisfaction. It was a case of spontaneous reaction of certain persons against the police inaction in the matter of tearing of pages of Holy Quran in Kaladanda Mosque, Allahabad. There is no allegation that after attacking the police station, the agitators went in some other locality to spread communal. Such action of the District Magistrate is said to be arbitrary and without any material on record. It is further alleged that the State Government under section 3(3) of the National Security Ordinance, 1980 (which was subsequently replaced by Act No. 65 of 1980) issued first Notification No.111/1/1/80C.X6 dated 25.9.1980 in exercise of powers under section 3(3) of the Act. It was for a period of three months. Since then the State Government is extending the period from time to time in a casual and mechanical manner. There is nothing on record to show as to what was the necessity before the State Government for conferring such powers by continuous process of extending earlier notification time and again conferring powers to the District Magistrates. Extending the period of notification without recording satisfaction in a mechanical manner would virtually make the order of the detention passed by the District Magistrate under section 3(2) of the Act to be non est.

3. This petition was resisted on behalf of the State with the averments that the State Government issued earlier Notification No. 111/1/1/80CX6 dated 25.9.1980 and thereafter number of notifications were issued and last being Notification No. 111//1/80C.X.7 dated 1.7.2007 under section 3(3) of the Act. There is no infirmity in extending the period when such a grave situation is prevailing in the district that the persons are likely to disturb the public order. Petitioner and his associates were highly agitated making an issue on tearing of the pages of Holy Quran on 31.8.2007. They started damaging public properties including police vehicles. In that incident several police personnels also sustained injuries. FIR of this incident was registered at the police station at case crime No. 163 of 2007. They were spreading rumours and exuberating panic so as to

disturb the communal harmony. However, administration had deployed additional police force for controlling the situation. There were compelling reasons for making the detention of the petitioner who was likely to be released on bail in case crime No. 163 of 2007.

4. We have heard Sri Ravi Kiran Jain, the learned Senior Counsel appearing for the petitioner and Sri A.K. Tripathi, learned A.G.A. for the State.

5. The learned Senior Counsel for the petitioner challenges the detention order on various grounds. The contention on behalf of the detinue is that the State Government had conferred the powers under section 3(3) of the Act to the District Magistrates in a most casual and mechanical manner without being satisfied about the existing circumstances in which it would authorise the various District Magistrates. Right from the year 1980 such powers are being extended time to time by the State Government without cogent reasons and the circumstances prevailing before it. It is opposed on behalf of the State Government by filing the affidavit of Sri Rohit, Under Secretary (Home), Civil Secretariat, U.P. Government, Lucknow, who stated that such conferment of powers vide the Notification No. 111/1/1/80C.X7 dated 13.7.2007 was given by the State Government in conformity with the provisions as contained under section 3(3) of the Act. Identical is also the reply in the counter affidavit filed by Sri A.K. Goel, District Magistrate, Allahabad.

6. Before considering the impugned notification dated 13.7.2007, it may be mentioned that under section 3(3) of the Act, it is primarily for the State Government to be satisfied about the existing circumstances in which it would authorise the various District Magistrates to exercise within their territorial jurisdiction the powers to make orders under section 3(3) of the Act. There is nothing on record to indicate that recitals made in the impugned notification are factually incorrect or the same have been made in a mechanical manner by the State Government without being satisfied from the prevailing and existing circumstances. In the absence of any such material on record, the recitals made in the impugned notification cannot be said to be violative of the Constitution. The question of conferment of power was dealt by the Apex Court in the case of A.K. Roy v. Union of India, AIR 1982 SC 710 that:

".....that the said power is conferred upon these officers only if the State Government is satisfied that having regard" to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of these officers, it is necessary to empower them to take action under subsection (2). The District Magistrate or the Commissioner, of Police can take action under subsection (2) during the period specified in the order of the State Government only. Another, safeguard provided is, that the period so specified in the order made by the State Government during which these officers can exercise the powers under subsection (2), cannot, in the first instance, exceed three months and can be extended only from time to time not exceeding three months at any one time. By subsection (4) of section 3, the District Magistrate or the

Commissioner of Police has to report forthwith the fact of detention to the State Government and no such order of detention can remain in force for more than 12 days after the making thereof unless, in the meantime, it has been approved by the State Government. In view of these inbuilt safeguards, it cannot be said that excessive of unreasonable power is conferred upon the District Magistrate or the Commissioner of Police to pass orders under subsection (2)."

7. In the notification it has been mentioned by the State Government that "an instance of violence in certain districts of U.P. and as a reaction thereto similar instances have occurred in other parts of the State and are likely to occur in other parts of the State also" would itself show the compelling circumstances necessitating the issuance of the notification for conferring the powers under section 3(3) of the Act to the District Magistrates. But merely because this language was repeated time to time would not itself invalidate the notification. We, therefore, affirm the validity of that impugned notification. Further the exercise of such power by the District Magistrate is made subject to the supervisory control of the State Government by the provision that the order of detention must be approved by the State Government within a period of twelve days from the making of the order of detention. The conferment of such power on the District Magistrate cannot in the circumstances be regarded as an unreasonable restriction on the right of personal liberty of a citizen under Article 19. The point was also concluded by a decision given by the Apex Court in the case of *John Martin v. State of W.B.*, AIR 1975 SC 775. It may further be added that the impugned notification is not an executive order but is a piece of subordinate legislation made by the State Government under section 3(3) of the Act. It appears to have been passed by the Secretary authorised for the purpose. It is well settled that in considering the vires of the subordinate legislation one should start with the presumption that it is intravires and if it is open to two constructions, one of which would make it valid and other invalid, the Court must adopt that construction which makes it valid and the Legislation can also be read down to avoid its being declared ultravires. Reliance may also be placed on the cases of (i) *Registrar Cooperative Societies v. K. Kunjabmer*, AIR 1980 SC 350 (ii) *State of Nagaland v. Ratan Singh*, AIR 1967 SC 212 and (iii) *St. Johns Teachers Training Institute v. Regional Director, National Council for Teacher Education and another.*, AIR 2003 SC 1533. It shall also be presumed that the State Government after being satisfied from the prevailing circumstances conferred such powers time and again to the District Magistrates for exercising such powers under section 3(3) of the Act. In the case of *State of Bihar and others v. Bihar Distillery Ltd.*, AIR 1997 SC 1511, the Apex Court indicated the approach to which the Court should adopt while examining the validity/constitutionality of a subordinate legislation. It would be useful to remind ourselves of the principle laid down by the Apex Court in the case of *Public Services Tribunal Bar Association v. State of U.P.*, 2003 (96) FLR 1048 (SC) = AIR 2003 SC 1115, which reads as under :

"The approach of the Court, while examining the challenge to the

constitutionality of an enactment, is to start with the presumption of constitutionality. The Court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The Court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the Legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application."

8. The next contention urged on behalf of the petitioner was that the order of detention was invalid, since the District Magistrate had not stated in the order that petitioner would be likely to indulge in prejudicial acts in future and hence it was necessary to detain him. It shall be useful to refer the grounds of detention which are as under:

1. In regard to the incident dated 31.8.2007 on tearing of the pages of Holy Quran in Kaladanda Mosque, he along with certain named and unnamed persons armed with country made pistols surrounded P.S. Kareli, Allahabad. He was leading the mob. That mob also opened fire and pelted stones at the police station.

2. He and his associates made a call attracting the people turning up from various lanes armed with brickbats and country made pistols. They started pelting stones causing damage to the public vehicles and also opened fire resultantly causing injuries to the police personnels.

3. He and his associates tried to be persuaded for not indulging in such activities but they did not refrain and continued to fire and pelted stones.

4. He was arrested in the case registered at crime No. 163 of 2007 under sections 143/332/352/504/506/427 IPC and 7 Criminal Law Amendment Act, P.S. Kareli, Allahabad and subsequently the offences under sections 147/148/149/307/337 IPC and 3 Public Properties Damages Act were also added against him. That case is still pending.

5. This act was done by him for fomenting communal passion and riots. It was disturbing public tranquillity.

6. Bail application was already moved on his behalf and there was every possibility of his being released on bail and there was positive apprehension that after having been released on bail he would indulge in activities prejudicial to the maintenance of public order.

9. The order of detention (Annexure1) starts with the recital that the District Magistrate was satisfied with respect to the petitioner that "with a view to

preventing him from acting in any manner prejudicial to the maintenance of public order, it was necessary to detention." This recital if read in the context of the grounds of detention, it is clear that the District Magistrate was satisfied that the petitioner would be likely to act in a manner prejudicial to the maintenance of public order. Such satisfaction of the District Magistrate is grounded on a reasonable prognoses of the future behaviour of the petitioner based on the past conduct, namely leading a mob, surrounding the police station, damaging public properties and causing injuries to police personnels.

10. Thrust has also been laid by the learned Counsel for the petitioner that whatever the materials have been relied upon by the District Magistrate for making the subjective satisfaction would not show the likely involvement of the petitioner in such activities in future. The apprehension of the detaining authority itself is sufficient. In that regard observations made by the Apex Court in the case of *T. V. Saravanan alias S.A.R. Prasana Venkatachaariar Chaturuedi v. State Through Secretary and another*, AIR 2006 SC 1462 may be referred:

"10. The order of detention itself notices the fact that the appellant had moved an application for grant of bail before the Principal Sessions Court which was rejected on November 17, 2004. The appellant had moved another bail application before the High Court which was withdrawn on December 3, 2004. The detaining authority noticed that the appellant had not moved any bail application subsequently but it went on to state that there was imminent possibility of appellant's coming out on bail by filing another bail application before the Sessions Court or the High Court since in similar cases bails are granted by the Sessions Court after a lapse of time. The order of detention was passed on December 15, 2004 i.e. merely 12 days after the dismissal of the bail application by the High Court. There is nothing on record to show that the appellant had made any preparation for filing a bail application, or that another bail application had actually been filed by him which was likely to come up for hearing in due course."

11. A somewhat similar reasoning was adopted by the detaining authority in *Rajesh Gulati v. Government of NCT of Delhi and another*, 2002 AIR SCW 3563. This Court noticing the facts of the case observed :

"13. In this case, the detaining authority's satisfaction consisted of two parts one; that the appellant was likely to be released on bail and two; that after he was so released the appellant would indulge in smuggling activities. The detaining authority noted that the appellant was in custody when the order of detention was passed. But the detaining authority said that "bail is normally granted in such cases". When in fact the five applications filed by the appellant for bail had been rejected by the Courts (indicating that this was not a "normal" case), on what material did the detaining authority conclude that there was "imminent possibility" that the appellant would come out on bail? The fact that the appellant was subsequently released on bail by the High Court could not have been foretold. As matters in fact stood when the order of detention was passed,

the "normal" rule of release on bail had not been followed by the Courts and it could not have been relied on by the detaining authority to be satisfied that the appellant would be released on bail. (See: in this context *Ramesh Yadav v. District Magistrate*", 1985 (4) SCC 232 = AIR 1986 SC 315).

From the materials on record, it appears that the detaining authority was aware of the fact that the detenu was already in jail and there were compelling reasons justifying such detention.

11. It was next contended by the learned Senior Counsel for the petitioner that the petitioner was illegally detained in prison for about six months. His detention in prison is wholly unauthorised and so he is entitled for compensation and the Court ought to pass appropriate order for the payment of the compensation in this petition. Reliance has also been placed in the cases of *Rudul Sah v. State of Bihar* and another, 1984 (21) ACC 12 (SC) = AIR 1983 SC 1086 and *Bhim Singh, MLA v. State of J & K and others*, 1986 (23) ACC 356 (SC) = AIR 1986 SC 494. Since the order of detention was found to be valid, so there is no reason for granting compensation to the petitioner. Moreover the detaining authority is also protected under section 16 of the Act. This point also came up for consideration in the case of *AK Roy v. Union of India*, AIR 1982 SC 710 (with two other connected petitions), wherein it was held by Apex Court:

"80.....If the policy of a law is to protect honest acts, whether they are done with care or not, it cannot be said that the law is unreasonable. In fact, honest acts deserve the highest protection. Then again, the line which divides a dishonest act from a negligent act is often thin and, speaking generally, it is not easy for a defendant to justify his conduct as honest, if it is accompanied by a degree of negligence. The fact, therefore, that the definition contained in section 3 (22) of the General Clauses Act includes negligent acts in the category of acts done in good faith will not always make material difference to the proof of matters arising in proceedings under section 16 of the Act."

12. The attending circumstances of the case, themselves convey the honest and proper exercise of the powers by the District Magistrate for making the detention of the petitioner.

13. The petition, being devoid of merit, is hereby dismissed.