

(2009) 10 RAJ CK 0078

In the Rajasthan High Court

Case No : Habeas Corpus (Writ) Petition No's. 12090, 13569, 14057 and 14402 of 2008 and 315, 660, 1606, 2555 and 5276 of 2009

Anil Nayak (Pilani)

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 05-10-2009

Acts Referred:

Constitution of India, 1950 — Article 226

National Security Act, 1980 — Section 3(2), 3(3)

Rajasthan Prevention of Anti-social Activities Act, 2006 — Section 3(1)

Citation : (2009) 10 RAJ CK 0078

Hon'ble Judges : Raghuendra Singh Rathore, J;Ajay Rastogi, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Ajay Rastogi, J.—These Habeas Corpus (Writ) petitions on joint request have been heard together, and are being disposed of by a common judgment since grounds urged are almost common & identical for assailing the orders though having been separately passed against the petitioners against whose detention writ of habeas corpus is being sought herein.

2. Contextual facts are being taken out of the Habeas Corpus Petition-13569/08 (Anil Nayak v. State), which has been filed through his brother Jitendra, relating to detention of the petitioner. Superintendent of Police, Jhunjhunu vide letter dt. 15.09.2008 submitted report to the District Magistrate Jhunjhunu for initiating action of detention against detenu-Anil u/s 3(1) of Rajasthan Prevention of Anti-social Activities Act, 2006 (Act No. 1 of 2008)("PASA Act"). In the report of Superintendent of Police, allegations imputed against detenu (Anil) were inter-alia that after opening history sheet of the detenu and despite having been in stringent supervision he was found being involved in criminal activities (e.g., to quarrel with police administration, murder, attempt to murder, keep unauthorised weapons, involved in excise cases/property disputes). Consequently, there being great fear in public and disturbing the peace in the area, inasmuch as due to his

threats, independent eye witnesses were afraid of giving evidence against him, as a result whereof, law & order situation was being adversely affected in the area. In the report, Superintendent of Police also observed that detenu (Anil) is involved in anti-social activities which being prejudicial to maintenance of public order, have necessitated to make order that he should be detained. Taking note of the report of Superintendent of Police and on being satisfied with material having been brought before him, the District Magistrate held that as per record submitted before him it is clear that detenu (Anil) is dangerous person as defined u/s 2(c) of PASA Act and accordingly passed an order u/s 3(1) of the PASA Act for detaining him in Central Jail Jaipur for a period of one year from the date of his detention vide order dt. 26.09.2008. He was taken in detention and sent to Central Jail, Jaipur where he was served with a notice dt.29.09.2008 alongwith order of detention, report of Superintendent of Police, besides supporting documents informing that against his detention he may file representation, through Superintendent Central Jail, Jaipur to the State Government.

3. However, vide order dt. 10.10.2008 Deputy Secretary (Security), Department of Home (Gr.IX) Government of Rajasthan, Jaipur conveyed approval of State Government as regards order dt. 26/09/08 of detention of the detenu (Anil) passed by District Magistrate, Jhunjhunu. Thereafter notice was also served upon detenu (Anil) vide letter dt.16.10.08 of District Magistrate, Jhunjhunu affording him an opportunity of personal hearing, if so desired against his detention, before the advisory committee. After taking note of opinion of advisory committee, his detention was confirmed by State Government vide order dt.11.11.2008 for a period of one year from 27.09.2008 to 26.09.2009.

4. In all other cases, procedure as provided under PASA Act was followed by District Magistrates as having been adopted in the case of Anil (detenu) and after reports having been furnished by the Superintendent of Police the orders of detention were passed by District Magistrate concerned on being satisfied in accordance with provisions u/s 3(1) of PASA Act, which was also approved by State Government u/s 3(3) and after taking note of the opinion of advisory Board, the orders of detention were confirmed and continued the detention for a period of one year from the date of taking in detention, as is evident from chart ad infra-

5. Counsels for the petitioners had jointly challenged the orders of detention passed in case of each detenu on manifold grounds. One of the grounds which prevailed upon us and being common in these petitions, is the challenge made to the conferment of powers upon District Magistrates or the authority delegated by the State Government purporting to be in exercise of powers u/s 3(2) of PASA Act to pass order of detention against a detenu, vide notification dt.18.08.2008. The said delegation is arbitrary, without due application of mind and in noncompliance of Sub-section (2) of Section 3 of PASA Act. Counsels have further submitted that without being satisfied as to whether there were prevailing circumstances or likely to prevail in any area within the jurisdiction of

a District Magistrate, State Government had issued a general notification on 18.08.2008 delegating powers to all District Magistrates, in the entire State to exercise powers conferred u/s 3(1) of PASA Act for detaining a person with a view to prevent him from acting prejudicial to the maintenance of public order.

6. Counsel further submitted that the expression, "circumstances prevailing" means the existing circumstances while expression "likely to prevail" means the circumstances which may prevail in future and even in a case where the State Government is satisfied that conferment of such power is necessary, there has to be a specific order as to whether as a result of "circumstances prevailing" or due to "circumstances likely to prevail" in future, such conferment of power under Sub-section (2) of Section 3 of PASA Act is necessary-which being silent in the cases at hand, as it is a general order passed by the State Government delegating powers to the District Magistrate of all 33 districts within the State of Rajasthan vide notification dt.18.08.2008. Therefore, the order of delegation is not in conformity of Sub-section (2) of Section 3 of PASA Act; and as such, the notification dt.18/08/08 being illegal & void, the action of the respective District Magistrates detaining the petitioners (detenu) is in violation of Scheme of PASA Act and the same deserves to be quashed & set aside. In support of their submissions, the Counsels jointly placed reliance upon a decision of this Court in the case of Aruna Bano v. State 2003 (3) R. Cr. Cas 1226.

7. Per contra, Government Counsel submitted that requirement of the statute has been complied with and the District Magistrates have exercised their powers u/s 3(1) of PASA Act duly delegated by State Government on being satisfied under Sub-section (2) of Section 3 of PASA Act and once procedure prescribed under law has been followed/complied with in its true spirit by the authorities, in absence of any prejudice being caused, notification dt.18.08.2008 issued by State Government being in conformity with the scheme of PASA Act, action of State Government & its authority cannot be said to be bad in law. On being satisfied with the material placed on record, the action to detain the detenu is not arbitrary so as to call for any interference by this Court.

8. Concept of personal liberty and individual freedom can be curtailed by preventive laws so as to consign an individual to the confines of jail without any trial being based on satisfaction arrived at by the detaining authority from the material placed before it. Courts though are empowered to issue prerogative writs but have to be extremely cautious in examining the manner in which detention order is passed against an individual, so that his right to personal liberty and freedom is not arbitrarily taken away, even temporarily, without following the procedure prescribed by law.

9. PASA Act (Act No. 1 of 2008) received assent of the President on 25.02.2008 and was published in Rajasthan Gazette dt.05.03.2008, the date from which it came into force. It was enacted to provide for preventive detention of boot-leggers, dangerous persons, drug offenders, immoral traffic offenders and property grabbers for preventing their anti-social and dangerous activities

prejudicial to the maintenance of public order.

10. Section 3 of PASA Act relates to the power to make orders detaining certain persons, ad infra:

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 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 authorised 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 be 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.

From a bare reading of Section 3 of PASA Act it clearly emerges that power to make an order of detention primarily vests with the State Govt., and on being satisfied that there are "circumstances prevailing" or likely to prevail in any area of within local limits of jurisdiction" of a District Magistrate, and that it is necessary for maintenance of public order, State Government may by order in writing, delegate its powers u/s 3(2) upon a District Magistrate to exercise powers u/s 3(1) of PASA Act, if satisfied with respect to any person that with a view to prevent him from acting in any manner prejudicial to the maintenance of public order, to make an order for detaining a person.

11. It is trite that in habeas corpus proceeding, it would not suffice to say that procedural requirements of the Constitution and State have been complied with; and the procedural requirements are only a safeguard being available to a detenu because the Court cannot go behind subjective satisfaction of the detaining authority and that being so, they are to be strictly followed, if any value is to be attached to the liberty of detenu.

12. Conferment of power upon all District Magistrates has been exercised by State Government while issuing notification dt.18.08.2008 (No. f.36(8)Home-9/95Pt.) ad infra:

Whereas having regard to the circumstances prevailing i.e., the anti-social activities in various part of the State are still persisting and certain undesirable elements are acting prejudicial to the maintenance of the public order and continuation of supplies and services, it is necessary to prevent in effective manner the activities of anti-social elements and persons acting prejudicial to public order, supplies and services essential to community and to put a decisive step to curb boot-leggers, activities of dangerous persons, drug-offenders, immoral traffic offenders and property grabbers which are still prevailing in the State of Rajasthan. Therefore, having regard to the circumstances prevailing in the State of Rajasthan the State Government is satisfied that it is necessary to authorise all the District Magistrates to exercise the powers under Sub-section (1) of Section 3 of the Rajasthan Prevention of Anti-social Activities Act, 2006 within their respective jurisdiction. Now, therefore, in exercise of the powers conferred under Sub-section (2) of Section 3 of the Rajasthan Prevention of Anti-social Activities Act, 2006 (Act No. 1 of 2008), the State Government hereby directs the District Magistrates of all the districts to exercise the powers conferred by Sub-section (1) of Section 3 of the said Act.

13. In other words, as it clearly emerges from Section 3(1) of PASA Act, power to make order of detention vests with State Government which on being satisfied and having regard to circumstances & for maintenance of public order, may order for detaining a person or it may direct the District Magistrate to exercise powers u/s 3(1) of PASA Act for passing an order of detention so as to maintain public order against any person within its respective jurisdiction.

14. Before issuance of notification, delegating powers upon District Magistrates, the State Government has to record its satisfaction that there are "circumstances prevailing or likely to prevail" in the area within local limits of jurisdiction of a District Magistrate; and if the State Govt is satisfied that it is necessary to do so it may, by order in writing, direct District Magistrate to exercise the powers conferred u/s 3(1) of PASA Act.

15. It goes without saying that such satisfaction on the part of the State Govt is solely dependent upon "circumstances prevailing or likely to prevail" in local area of District Magistrate, which is sine qua non for exercise of the said powers.

16. Words, "circumstances prevailing or likely to prevail" in an area of local limits

of its jurisdiction of district magistrate, cast legal obligation upon the State Govt to record its satisfaction particularly about an area of a district where "circumstances are prevailing or likely to prevail", calling for conferment of powers upon the District Magistrate of that area, which can certainly be in the entire district or the State but there must exist material on record to show the satisfaction having been arrived at or recorded by State Government for conferring powers upon a District Magistrates u/s 3(2) for entire State or a particular district or wherever necessary.

17. Almost same analogous provisions where notification was issued by State Government on 06.12.2001 conferring powers of upon District Magistrate or Commissioner of Police u/s 3(2) of National Security Act, 1980, came up for consideration before Division Bench of this Court in Aruna Bano v. State 2003(3) RCC 1226, *ibid* and taking note whereof, it was observed *ad infra*:

5. It is evident that the power to pass an order of detention primarily rests with the Central or State Government. The State Government, however, being satisfied that in any area within the local limits of the jurisdiction of District Magistrate or Commissioner of Police, there exists certain circumstances prevailing or likely to prevail confer power on such District Magistrate or Commissioner of Police under Sub-section (2) of Section 3 of NSA. Such satisfaction of the State Government when solely depends on the circumstances prevailing or likely to prevail in future date, in a local area in the district is a *sine qua non* for the exercise of powers. Since very drastic powers of detention without trial are to be conferred on an officer of district level i.e. District Magistrate of the Commissioner of Police, the State Government is expected to apply its mind on the material available on record. The use of word, "any area within the local limits of the jurisdiction of the District Magistrate" is of great significance. It enjoins a duty on the State Government to specify the particular areas in a district wherein circumstances prevailing or likely to prevail which calls for conferment of power on an officer at the district level under Sub-section (3) of Section 3 of NSA. No doubt, limits can be the entire district and even the entire State but there must exist material to show that situation, has arisen where the conferment of power on District Magistrate or Commissioner of police under Sub-section (3) for entire State or a particular district or part of district has become necessary.

In the cases at hand, the record placed before this Court does not depict that there were circumstances prevailing or likely to prevail in entire State, which made it necessary to confer powers under Sub-section (2) of Section 3 of PASA Act upon all the District Magistrates of the State. No material has been placed on record which may satisfy that there were circumstances prevailing in districts- Jaipur, Jhunjhunu, Kota, Alwar & Sawai Madhopur, necessitating to call upon the State Government u/s 3(2) to confer/delegate powers upon District Magistrates to exercise the powers for passing order of detention u/s 3(1) of PASA Act. There cannot be any dispute that subjective satisfaction is always of the State

Government but where it is based on no material, then that can always be examined by this Court within limited scope of judicial review U/Article 226 of the Constitution.

18. Based on record, this Court can observe that subjective satisfaction of State Government conferring powers upon all the District Magistrates of Rajasthan in general was without examining as to whether there were circumstances prevailing or likely to prevail in local limits of their jurisdiction. There is no material on record to satisfy such circumstances prevailing or likely to prevail in future calling upon State Government to confer/delegate its powers u/s 3(2) of the Act vide notification dt.18.08.2008 to all District Magistrates-in absence whereof notification impugned is in clear violation of Sub-section (2) of Section 3 of PASA Act.

19. We are therefore of the opinion that the very authorization under the notification dt.18.08.2008 is illegal and invalid-on the basis whereof, District Magistrates of Jaipur, Kota, Jhunjhunu, Sawai Madhopur & Alwar had no jurisdiction and could not have exercised powers of detaining authority u/s 3(1) of PASA Act. In consequence whereof, the very orders of detention impugned herein passed against the detenu, to whom present habeas corpus petitions relate, cannot be said to be legally sustainable and deserve to be set aside. In such view of the matter, the other grounds of challenge taken up by the Counsels for the petitioners need not be taken up by us.

20. Before parting with this judgment, we may reiterate while observing that analogous notification, as impugned herein was issued by State Government u/s 3(2) of National Security Act, 1980 conferring powers of detaining authority upon all the District Magistrates had come up for consideration in Ram Singh v. State of Rajasthan 1993 (2) RLR 375 and this Court observed that such general authorization upon all District Magistrates conferring powers of detaining authority cannot be held to be justified and is not in consonance with the provisions of preventive laws.

21. Again, similar notification had been issued by the State Government on 06.12.2001 in exercise of powers u/s 3(2) of National Security Act conferring powers upon all District Magistrates which was examined by this Court in Aruna Bano v. State of Rajasthan 2003 (3) R. Cr. Cas 1226.

22. Despite of two consistent judgments of this Court laying down the principles on the issue, the State Government having not taken note whereof, yet committed illegality in issuing the notification dt.18.08.2008 u/s 3(2) conferring general powers upon all District Magistrates to exercise powers of detaining authority u/s 3(1) of PASA Act. It is, therefore, enjoined upon the State Government to take note of the precedents laid down before taking any action under the preventive law.

23. In Ram Singh v. State (supra), this Court further observed that State Government must seriously consider to establish an independent section to deal

with matter of detention, which would compile complete case law so as to act in accordance with it and the detaining authority must apply its independent mind. But it appears that despite consistent view of this Court, still the State Government has not taken care to establish an independent section dealing with matters of preventive detention. We hope and trust that State Government will take it seriously and avoid recurrence of such errors in future.

24. Consequently, these nine habeas corpus petitions succeed and are hereby allowed. Notification dt.18.08.2008 pertaining to jurisdiction of districts namely Jaipur, Jhunjhunu, Alwar, Kota, & Sawai Madhopur conferring powers u/s 3(2) of PASA Act upon their District Magistrates are hereby quashed & set aside-as a consequence whereof, orders impugned herein as well as consequential approval whereof passed by State Government pertaining to preventive detention of detenu (1) Anil Nayak, (2), Zimmi @ Jumma, (3), Dependra @ Rahul, (4), Rajesh @ Raju Pandit, (5), Kuldeep Singh @ D.C., (6) Parmanand @ Gajju, (7) Jitu @ Jitendra, (8) Lala @ Rajeev, & (9) Shankar Jangam are quashed & set aside. Accordingly, afore named detenu be released forthwith if not required to be detained in connection with any other case.

25. A copy of this order be sent to the Chief Secretary & Principal Secretary Home Department (respondent-1), Govt of Rajasthan for compliance.