
(2009) 09 JH CK 0043
In the Jharkhand High Court

Babar Khan @ Rasid Hussain

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 09-09-2009

Acts Referred:

Constitution of India, 1950 — Article 22

Citation : (2009) 09 JH CK 0043

Hon'ble Judges : R.R. Prasad, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.R. Prasad, J.—While the petitioner was in jail custody at Jamshedpur in connection with Mango P.S. case No. 148 of 2009, he was served with the order dated 17.5.2009 (Annexure 1) passed u/s 12(1) of the Bihar (Jharkhand) Crime Control Act, 2002 (hereinafter referred to as "the Act") by the District Magistrate, East Singhbhum, Jamshedpur, respondent No. 4 on the same day along with the grounds of detention whereby and where under the order of detention was passed for a period of 12 months. Subsequently, the State Government in exercise of power conferred u/s 12(3) of the Act, vide its order dated 25.5.2009 (Annexure D to the counter affidavit) approved the order of detention within 12 days, copy of which seems to have been served upon the petitioner. Thereafter the petitioner filed his representation before the Secretary, Department of Home, Government of Jharkhand, Ranchi, respondent No. 2 with a prayer to revoke the order of detention which was rejected by the State Government, vide its order dated 29.6.2009. Thereupon, this application has been filed whereby the order of detention has been challenged to be bad on several counts.

2. Learned Counsel appearing for the petitioner submitted that the detention order was passed while the petitioner was in custody and as such, the order of detention should have been passed in compelling necessity, satisfaction/reason of which should have been recorded by the respondent but the order of detention

as contained in Annexure 1 would go to show that the detaining authority has not recorded any reason whatsoever.

3. In this regard it was submitted that the detaining authority while passing the order of detention in a case where detenu is already in jail is required to record his satisfaction on the basis of the materials placed before him that the detenu is likely to indulge in acts prejudicial to maintenance of public order, if he is enlarged on bail and that he is satisfied from various reports and facts that the detenu is likely to be released on bail but if this satisfaction is not recorded in the order of detention, it would be deemed to have been passed mechanically and as such, it is unsustainable in law.

4. Learned Counsel in support of his submission has referred to a decision rendered in a case of *Sayed Abul Ala v. Union of India and Ors.* 2007 (12) Scale 345.

5. The other ground on which the impugned order has been sought to be quashed, is that there was no valid conferment of the power on the District Magistrate, Singhbhum East, respondent No. 4 to make the detention order as the notification dated 23.3.2009 (Annexure D to the counter affidavit) under which the State Government, in exercise of power u/s 12(2) of the Act, conferred power upon all the District Magistrates of the District of Jharkhand to pass order in terms of Section 12(1) of the Act within his territorial jurisdiction, is conspicuously silent as to whether power has been conferred upon all the District Magistrates to pass detention order in terms of Section 12(1) of the Act either on the circumstances prevailing on the date of the order preventing the detenu from acting any manner prejudicial to the maintenance of the public order or in the circumstances likely to prevail during three months for which power has been conferred. Since the notification (Annexure D) is silent, as to under what circumstances either in the circumstances prevailing on the date of the order or in the circumstances likely to prevail during three months, the power has been conferred by the State Government upon all the District Magistrates of the State, the said notification can be said to have been issued mechanically without application of mind and in this respect learned Counsel has referred to a decision in the case of *Abhay Shridhar Ambulkar Vs. S.V. Bhave, Commissioner of Police and Others*, and also in a case of *Ram Singh and Vs. State of Rajasthan and Another*, .

6. The other ground on which the impugned order has been sought to be quashed is that the representation made by the petitioner which under the scheme of the Act was required to be considered at the earliest but in the instant case, it has been disposed of after 27 days of its filing, still the State Government has not come forward with any explanation much less any cogent explanation for the delay caused in disposal of the representation whereas in some cases even delay of 16 days in disposing of the representation has been held to be fatal.

7. In this regard a case of Sunil Khatik @ Sunil Prasad @ Sunil Bihari Vs. The State of Bihar and Others, was referred to.

8. As against this, learned Counsel appearing for the State submitted that the District Magistrate, East Singhbhum, at Jamshedpur, while passing the order of detention has taken into account criminal acts of the petitioner including the illegal act of the petitioner of placing a "Kalash" on a restricted land leading to communal tension, forcibly stopping of electricity of consumers of a particular area and forcibly trying to capture land used for public purposes whereby he had created terror in the locality which was prejudicial to the public order and hence, the order of detention was passed u/s 12(2) of the Act which was approved by the State Government in exercise of the power u/s 12(3) of the Act within 12 days can never be said to be illegal.

9. The State Government on being satisfied that a person, being an anti social element cannot be prevented from indulging in criminal activities otherwise than the order of detention may confer power upon the District Magistrate to pass order of detention in terms of Section 12(1) of the Act. Therefore, we can say that the subjective satisfaction of the detaining authority is of prime importance in case of preventive detention of a person. The courts exercising power of judicial review are not expected to consider the challenge to an order of detention as if sitting as appellate court weighing and re appreciating into the question and basis of subjective satisfaction. But at the same time the court must not loose sight of the fact that since the order of detention in prison involves curtailment of fundamental right of liberty of a citizen, freedom of movement and pursuit of normal life, the authorities passing, approving and confirming the order of detention cannot claim absolute immunity in regard to decision arrived at and hence, it is open to the court to see whether there has been due and proper application of mind and all the vital and relevant materials have been notice and considered. However, at the same time no activities of anti-social element should be allowed to pose threat and danger to maintenance of public order and tranquility.

10. Keeping in view the said background, the points raised on behalf of the petitioner over the propriety and the legality of the notification dated 23.3.2009 conferring power u/s 12(2) of the Act upon the District Magistrate to pass order of detention in the circumstances stipulated u/s 12(1) needs to be considered.

11. It be noticed that the State Government in the following terms has conferred the power upon the District Magistrate to pass order u/s 12(1) of the Act.

Jharkhand Sarkar Griha Vibhag Adhisuchana

Ranchi, dt. 23 March, 2009.

Sankhaya-12/Vividh (29)-13/2005-1151/ Jharkhand apradh Niyantaran Adhiniyam-2002 ke Adhyay-2 ki dhara 12(2) ke antargat pradatt shaktiyon ka prayog karte huye Jharkhand Rajyapal sabhi zila ke Kshetradhikar ke antargat

Griha Vibhag, Jharkhand, Ranchi dwara etad vishayak nirgat adhisuchana sankhaya -171, dt. 15.01.09 ke kram me agale tin mah ke liye arthat 01.04.2009 se 30.06.2009 tak prayog karne ki shakti pradan ki jati hai.

Jharkhand Rajyapal ke aadesh se. Sd/ (Gaurishankar Prasad) Sarkar ke sanyukta Sachiv.

Gyapank-12/vividh (29)-13/2005-1151/ Ranchi, dt. 23 March, 2009. Pratilipi: Adhikshak, Rajkiya Mudralaya, Doranda, Ranchi ko Jharkhand Gazette ke agale ank me prakashnarth preshit.

Sd/- Sarkar ke sanyukta Sachiv

12. It was contended by learned Counsel for the detenu that there is no material to show the satisfaction of the State Government when the power was conferred to the District Magistrate, East Singhbhum that the conferment of the power u/s 12(2) of the Act was necessary having regard to the circumstances prevailing or likely to prevail.

13. It was further contended that even in a case where the State Government is satisfied that the conferment of the power is necessary, there has to be specific order to the effect as to whether as a result of circumstances prevailing or as a result of circumstances likely to prevail in future activities of anti-social elements can not be prevented otherwise than by the immediate arrest of such person. But here in the case as it appears from the notification (Annexure D) neither the satisfaction of the State Government has been recorded nor power has been conferred separately one with respect to circumstances prevailing and other in the circumstance likely to prevail in future and as such, notification conferring power on the District Magistrate (respondent No. 4) is quite invalid.

14. Learned Counsel in putting the aforesaid submission challenging propriety of the aforesaid notification has drawn strength from a case of Abhay Shridhar Ambulkar v. S.B. Bhawe, Commissioner of Police and Ors. (supra) where the same question was before the Hon'ble Supreme Court as to whether the order conferring power on the Commissioner of Police to pass order of detention under the National Security Act, both in the circumstances prevailing as well as in the circumstances likely to prevail would be valid. The answer was in negative as it was held that the conferment of the power has to be specific either with regard to the circumstances prevailing or likely to prevail and not for both. In that case text of the order which was under challenge was as follows:

ORDER Dated 6th January, 1990 59, NATIONAL SECURITY ACT, 1980

No. NSA - 2390/1/SPL-3(B) - Whereas the Government of Maharashtra is satisfied that having regard the circumstances prevailing or likely to prevail in the Greater Bombay Police Commissionerate, it is necessary that during the period commencing on 30th January, 1990 an ending on the 20th April, 1990, the Commissioner of Police and the said Commissioner should also exercise the powers conferred by Sub-section (2) of Section 3 of the National Security Act,

1980 (65 of 1980) (hereinafter referred to as "the said Act").

Now therefore, in exercise of the powers conferred by Sub-section (3) of Section 3 of the said Act, the Government of Maharashtra hereby directs that for the period commencing on the 30th January, 1990 and ending on 20th April, 1990 the Commissioner of Police Greater Bombay may also if satisfied as provided in Sub-section (2) of Section 3 of the said Act exercise the powers conferred on the State Government by Sub-section (2) of Section 3 of the said Act.

By order and in the name of Governor of Maharashtra.

15. In spite of satisfaction as required u/s 3(2) of the National Security Act being there, even then the Hon"ble Supreme Court held that order is invalid as by the aforesaid conferment of the power, the Commissioner had no jurisdiction to pass order of detention as paragraph 1 of the order contains only reproduction of the terms of Sub-section (3) of Section 3 but Sub-section (3) refers to two independent circumstances, namely, (i) the prevailing circumstances, (ii) the circumstances that are likely to prevail. The Hon"ble Supreme Court goes further to say that the former evidently means circumstances in praesenti that is prevalent on the date of the order and the later means the anticipated circumstances in future. The Court further goes to say that if the Government wants that the District Magistrate or the Commissioner of Police should also exercise the powers for the current period, it has to satisfy itself with the prevailing circumstances and if the Government wants that the District Magistrate or the Commissioner of Police should also exercise the powers during the future period, it must be satisfied with the circumstances that are likely to prevail during that period and hence, subjective satisfaction of the detaining authority cannot be lightly recorded by reproducing both the alternative clauses. While coming to such conclusion the Court has held so.

The use of the word "or" signifies either of the two situations for different periods. That, however, is not to say that the power cannot be exercised for a future period by taking into consideration circumstances prevailing on the date of the order as well as circumstances likely to prevail in future. The latter may stem from the former. For example, there may be disturbances on the date of the order and the same situation may be visualized at a future date also in which case the power maybe conferred on the subordinate officers keeping both the factors in mind, but in the case the two circumstances would have to be joined by the conjunctive work "and" not the disjunctive word "or" in the impugned Government order only indicates non-application of mind and obscurity in thought.

16. So far as the present case is concerned, the notification under which power has been conferred to the District Magistrate by the State Government in exercise of power u/s 12(2) of the Act, neither speaks about the satisfaction as required u/s 12(1) of the Act nor it can be said to have been empowered the District Magistrate separately either to pass detention order in the circumstances

prevailing or in the circumstances that are likely to prevail. Thus, in view of the aforesaid decision, notification dated 23.3.2009 has got to be declared as invalid. Consequently, the District Magistrate, Jamshedpur will have no jurisdiction to exercise the power of detaining authority u/s 12(1) of the Act.

17. Coming to the other submission, it be stated that the impugned order has also been sought to be quashed as the detaining authority without recording his satisfaction that the detenu is likely to indulge in his criminal activities soon after his release, has passed the order. In the context of the submission, it be stated that it is always the past conduct, activities or the antecedents of a person which the detaining authority takes into account in making a detention order but the same by itself may not be sufficient to pass an order of detention when the detenu is in custody, rather the detaining authority as per the decision of the Hon"ble Supreme Court in a case of Sayed Abul Ala v. Union of India and Ors. 2007 (12) SCALE 345 needs to record his satisfaction on the following points.

(1) if the authority passing the order is aware of the fact that he is actually in custody;

(2) if he had a reason to believe on the basis of reliable material placed before him;

(a) that there is a real possibility of his being released on bail, and (b) that on being released, he would in all probability indulge in prejudicial activities; and

(3) it is felt essential to detain him to prevent him from so doing.

18. In the present case, the detention order does indicate that the detaining authority was only aware of the fact that detenu is in custody. Detaining authority seemed to be quite oblivious of rest of the conditions a nowhere neither in the detention order nor in the counter affidavit, it has been recorded that the materials were there before the detaining authority to come to the conclusion that there is possibility of detenu being released on bail and that on being released, he would in all probability indulge in prejudicial activities. Thus, on this ground also the detention order cannot be sustained.

19. Now coming to the third point relating to delay in disposal of the representation, it be recorded that the order of preventive detention curtails the personal liberty guaranteed under the Constitution. The right of representation has been given with a view that the said representation is to be considered at the earliest so that in case it is found that the detention order is not in accordance with law, the detenu should be released forthwith. Inordinate delay or unexplained delay has been held to be violative of constitutional mandate under Article 22(5) and on this ground alone the order of detention will vitiate. The Apex Court in catena of cases has held that the representation has to be disposed of at the earliest and if there has been the delay in disposal of the representation, the reasons for the delay must be indicated to the court or else the unexplained delay or unsatisfactory explanation in the disposal of the

representation would vitally affect the order of detention and in that situation, the continued detention becomes bad.

20. Reference in this connection may be made to a decision of the Hon''ble Supreme Court in a case of Kundanbhai Dulabhai Shaikh v. District Magistrate, Ahmedabad and Ors. : AIR 1996 SC 2998.

21. In the instant case, there appears to be absolutely no explanation of delay in disposal of the representation. At paragraph 5 of the counter affidavit filed on behalf of the respondent No. 2, Secretary, Home, Government of Jharkhand, only statement is there that the representation filed by the detenu before the respondent No. 1 was considered and rejected and was communicated to the detenu, vide letter No. 2653 dated 29.6.2009 whereas the State Government had approved the order of detention on 25.5.2009 and as such, no explanation whatsoever of delay of 27days has been explained and as such, action of the respondent can be said to be violative of the constitutional mandate under Article 22(5) of the Constitution of India and therefore, on this ground also the order of detention can not be sustained.

22. Thus, the order of detention as contained in Annexure 1 and also the order whereby it has been approved are hereby quashed. Consequently, the petitioner is ordered to be released forthwith unless he is required to be detained in any other case.

23. In the result, this application is allowed.