

**(2012) 06 AHC CK 0017**  
**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Habeas Corpus Writ Petition No. 76580 of 2011

Bachha @ Nihal Pasi

APPELLANT

Vs

Union of India and Others

RESPONDENT

**Date of Decision :** 01-06-2012

**Acts Referred:**

Arms Act, 1959 — Section 12, 25, 3(2), 3(5)  
Constitution of India, 1950 — Article 21, 22, 22(3)(b)  
Criminal Law (Amendment) Act, 1932 — Section 7  
National Security Act, 1980 — Section 3(2), 8  
Penal Code, 1860 (IPC) — Section 302, 307, 504

**Citation :** (2012) ACR 2848 : (2012) 7 ADJ 343 : (2012) CriLJ 4511 : (2013) 1 RCR(Criminal) 801

**Hon'ble Judges :** Ramesh Sinha, J; Dharnidhar Jha, J

**Bench :** Division Bench

**Advocate :** Deepak Mishra, Mahendra Pratap Yadav and Arun Kumar Mishra, for the Appellant; Nitin Gupta, A.G.A. and A.S.G.I., for the Respondent

**Final Decision :** Dismissed

## Judgement

1. Heard Sri Mahendra Pratap Yadav and Sri Arun Kumar Mishra, Learned Counsel for the petitioner and Sri Sudhir Mehrotra, learned A.G.A. for the State.

Counter and rejoinder-affidavits have been exchanged between the parties.

By means of this writ petition, the petitioner has challenged the detention order dated 25.10.2011 passed by the District Magistrate, Allahabad respondent No. 3 by which the detaining authority in exercise of its power u/s 3(2) of the National Security Act, 1980 (hereinafter referred to as "the Act") has ordered that the petitioner be detained in the Central Jail Naini, Allahabad stating the grounds of detention as required u/s 8 of the Act. The detention order has been passed by the District Magistrate, Allahabad, respondent No. 3 on a solitary ground arising out of a solitary incident which is alleged to have taken place on 4.8.2011 at about 9:00 a.m. for which an F.I.R. was lodged by one Munna Tiger stating that

he had gone to the house of his friend Vishwanath @ Fakirey for injecting medicine to his cow which was ill and he was sitting with Fakirey on a chair and was talking to him. In the meanwhile, the petitioner alongwith his associates had come there and started abusing Fakirey and suddenly the petitioner took out a firearm weapon from his waist and shot on the head of Fakirey thereafter the associates, who were accompanying the petitioner also fired at Fakirey from their weapon and all the persons exhorted the villagers and ran away towards them. Due to the said act of the petitioner and his associates, people of the village started closing their doors and windows and due to the firing of shots there was disturbance of public order in the village. The deceased, who succumbed to his injuries on the spot was taken to the doctor in Colvin hospital where he was declared dead by the doctor. An F.I.R. about the incident was lodged by the informant Munna Tiger, who was resident of village Ramman Ka Purwa at police station Dhoomanganj which was registered as Case Crime No. 331 of 2011 under Sections 302, 307, 504, I.P.C. and 7, Criminal Law Amendment Act. It was further mentioned in the grounds of detention that on 20.8.2011, the petitioner surrendered in the Court in connection with Case Crime No. 613 of 2008 u/s 25 Arms Act and he was taken into custody and sent to Central Jail Naini, Allahabad. The police in pursuance to the order passed by the Court on 30.8.2011, took the petitioner on remand on 1.9.2011. On the pointing out by the petitioner, a pistol of 9 m.m. bore which was used in the said crime was recovered. It has been further stated by the detaining authority in the grounds of detention that the petitioner being detained in judicial custody in the Central Jail Naini, Allahabad, his counsel and Pairokars have also filed a bail application in the Court of District and Session Judge, Allahabad for getting him released on bail and there was a likelihood that he would soon be released on bail from jail and again indulge in similar activities which were prejudicial to maintenance of public order, hence his detention under the Act in order to maintain public order, is necessary. The D.I.G., Allahabad vide his report dated 24th October, 2011 sent to the District Magistrate, Allahabad, respondent No. 3 had requested him to detain the petitioner in exercise of powers u/s 3(2) of the Act in order to maintain the public order.

2. The detention order dated 25.10.2011 was served upon the petitioner through respondent No. 4 in jail on 25.10.2011 itself. The detention order passed by the respondent No. 1 was approved on 2.11.2011 by the State Government in exercise of its power u/s 3(5) of the Act. The petitioner submitted his representation against the detention order to the District Magistrate and other authorities as mentioned in the grounds of detention through respondent No. 5 on 4.11.2011. The representation of the petitioner was rejected by the State Government on 16.11.2011 and by the Central Government on 22.11.2011. The petitioner appeared before the Advisory Board on 30.11.2011 and on 15.12.2011, the State Government confirmed the detention order for a period of twelve months in exercise of its power u/s 12 of the Act.

3. The sole ground on which the Learned Counsel for the petitioner challenged

the detention order of the petitioner is that the same is based on a single incident dated 4.8.2011 in which one Vishwanath is said to have been murdered by the petitioner alongwith his associates in village Ramman Ka Purwa for which an F.I.R. was lodged on the same day at police station Dhoomanganj as Case Crime No. 331 of 2011. It is then urged that the incident of murder on the basis of which the petitioner has been detained does not fall within the purview of the disturbance of public order as the same amounts to disturbance of law and order for which the petitioner has been put behind bars for offence under the Indian Penal Code. He further submitted that the detaining authority has misused his powers u/s 3(2) of the Act by passing the detention order though the act of the petitioner was not in any way prejudicial to the interest and security of the State and its citizens. It is further submitted by the Learned Counsel for the petitioner that the personal liberty of the citizens cannot be curtailed by misusing the powers u/s 3(2) of the Act and the detaining authority by passing the detention order against the petitioner has curtailed his personal liberty which falls foul of Article 21 of the Constitution of India though there is an ordinary law of the land to punish him for his anti social activities.

4. Learned Counsel for the petitioner in support of his contention has placed reliance on the judgment of the Apex Court in the case of Yumman Ongbi Lembi Leima Vs. State of Manipur and Others, and has further drawn the attention of the Court towards paragraph-27 of the said judgment which is quoted below :

27. As has been observed in various cases of similar nature by this Court, the personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part III thereof. The State has been granted the power to curb such rights under criminal laws as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order. An individual incident of an offence under the Penal Code, however heinous, is insufficient to make out a case for issuance of an order of preventive detention.

5. He has also drawn the attention of the Court to another judgment of the Apex Court in the case of Munagala Yadamma Vs. State of A.P. and Others, and has invited the attention of the Court towards paragraph Nos. 4, 5, 8 and 9 of the said judgment which are also quoted hereinbelow for ready reference:

4. On behalf of the appellant, it has been urged that the ground taken for issuance of the detention order was improper and not available in view of the reasoned judgment of this Court in Rekha v. State of T.N. Where a similar question had arisen and in para 23 of the judgment, a three-Judge Bench of this Court was of the view that criminal cases were already going on against the detinue under various provisions of the Penal Code, 1860, as well as under the Drugs and Cosmetics Act, 1940, and that if he was found guilty, he would be convicted and given appropriate sentence. Their Lordships also indicated that in

their opinion, the ordinary law of the land was sufficient to deal with the situation, and hence, recourse to the preventive detention law was illegal.

5. It has been submitted by Mr. Anil Kumar Tandale, learned advocate appearing for the appellant, that in the instant case also all the offences alleged to have committed by the husband of the appellant, were under the provisions of the Andhra Pradesh Prohibition Act, 1995, for which the normal law was sufficient to deal with the offence, if proved. He submitted that the detaining authority had wrongfully taken the easy way out and had resorted to an order of preventive detention in order to avoid having to investigate the cases filed against the appellant.

8. In fact, recently, in *Yumman Ongbi Lembi Leima v. State of Manipur*, we had occasion to consider the same issue and the three-Judge Bench had held that the personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part III thereof. The State has been granted the power to curb such rights under criminal laws, as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order warranting the issuance of such an order.

9. No doubt, the offences alleged to have been committed by the appellant are such as to attract punishment under the Andhra Pradesh Prohibition Act, but that in our view has to be done under the said laws and taking recourse to preventive detention laws would not be warranted. Preventive detention involves detaining of a person without trial in order to prevent him/her from committing certain types of offences. But such detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of investigating crimes which the detainee may have committed. After all, preventive detention in most case is for a year only and cannot be used as an instrument to keep a person in perpetual custody without trial. Accordingly, while following the three Judge Bench decision in *Rekha* case we allow the appeal and set aside the order passed by the High Court dated 20.7.2011 and also quash the detention order dated 15.2.2011, issued by the Collector and District Magistrate, Ranga Reddy District, Andhra Pradesh.

6. Learned Counsel for the petitioner has also cited another judgment of the Apex Court in the case of *Rekha Vs. State of T. Nadu tr. Sec. to Govt. and Another*, and has further invited the attention of the Court towards paragraph Nos. 13, 14, 15, 18, 29, 33 and 34 of the said judgment which are also quoted hereinbelow :

13. In our opinion, Article 22 (3) (b) of the Constitution of India which permits preventive detention is only an exception to Article 21 of the constitution. An exception is an exception, and cannot ordinarily nullify the full force of the main rule, which is the right to liberty in Article 21 of the Constitution. Fundamental

rights are meant for protecting the civil liberties of the people, and not to put them in jail for a long period without recourse to a lawyer and without a trial. As observed in *R. v. Secy. of State for the Home Deptt., exp Stafford*: (WLR p.518 F-G)

.....The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law.

14. Article 21 is the most important of the fundamental rights guaranteed by the Constitution of India. Liberty of a citizen is a most important right won by our forefather after long, historical and arduous struggles. Our Founding Father realised its value because they had seen during the freedom struggle civil liberties of our countrymen being trampled upon by foreigners, and that is why they were determined that the right to individual liberty would be placed on the highest pedestal alongwith the right to life as the basic right of the people of India.

15. Right to liberty guaranteed by Article 21 implies that before a person is imprisoned a trial must ordinarily be held giving him full opportunity of hearing, and that too through a lawyer, because a layman would not be able to properly defend himself except through a lawyer.

18. In *State of Maharashtra v. Bhaurao Punjabrao Gawande*, this Court observed : (SCC p. 624, para 23)

.....personal liberty is a precious right. So did the Founding Fathers believe because, while their first object was to give unto the people a Constitution whereby a Government was established, their second object, equally important, was to protect the people against the Government. That is why, while conferring extensive powers on the Government like the power to declare an emergency, the power to suspend the enforcement of fundamental rights or the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against executive and legislative despotism those human rights which they regarded as "fundamental". The imperative necessity to protect those rights is a lesson taught by all history and all human experience. Our Constitution-makers had lived through bitter years and seen an alien Government trample upon human rights which the country had fought hard to preserve. They believed like Jefferson that "an elective despotism was not the Government we "fought for". And, therefore, while arming the Government with large powers to prevent anarchy from within and conquest from without, they took care to ensure that those powers were not abused to mutilate the liberties of the people

(Vide *A.K. Roy v. Union of India* and *Attorney General for India v. Amratlal Prajivandas*.)

29. Preventive detention is, by nature, repugnant to democratic ideas and an

anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22 (3) (b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous and historic struggles. It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.

33. No doubt it has been held in the Constitution Bench decision in *Haradha Saha* case that even if a person is liable to be tried in a criminal Court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in Articles 21 and 22 of the Constitution (which we have already explained). Article 22 (3) (b) is only an exception to Article 21 and it is not itself a fundamental right. It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him an opportunity of placing his defence through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (the Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.

34. Hence, the observation is SCC para 34 in *Haradhan Sana* case cannot be regarded as an unqualified statement that in every case where a person is liable to be tried, or is actually being tried, for a crime in a criminal Court a detention order can also be passed under a preventive detention law.

7. On the other hand the learned A.G.A. has submitted that though the detention of the petitioner is based on a solitary incident but one incident is sufficient to detain the petitioner under the Act as has been done by the detaining authority by exercising his power u/s 3 (2) of the Act. He further submitted that the antecedents of the petitioner is that he has been involved in several criminal cases of similar nature and the impact of the act of the petitioner was such that there was disturbance of public order in the village due to which the District Magistrate after being satisfied and taking into consideration, the solitary incident as well as the antecedents of the petitioner has passed the detention order against him. The learned A.G.A. in support of his contention has placed reliance on the judgment of the Apex Court in the case of *Abdul Sathar Ibrahim Manik Vs. Union of India and others*, and has drawn the attention of the Court towards paragraph-6 of the said judgment which is quoted hereinbelow :

The next submission is that there were no antecedents and that this being the solitary incident the detention is unwarranted. It is again a question of

satisfaction of the detaining authority on the basis of the material placed before it. Even a solitary incident which has been detected may speak volumes about the potentialities of the detenu and merely on the ground that there were no antecedents the detention order cannot be quashed. The authorities cannot and may not in every case salvage the antecedents but as noted above even a solitary incident may manifest the potentialities of a detenu in the activities of smuggling.

8. Learned A.G.A. also relied on another judgment of the Apex Court in the case of Union of India and another v. Chaya Ghoshal (Smt.) and another, (2005) 10 SCC 99 and has pointed out the law written in paragraph-23 of the said judgment which is quoted hereinbelow :

So far as the finding of the High Court that there was only one incident is really a conclusion based on erroneous premises. It is not the number of acts which determine the question as to whether detention is warranted. It is the impact of the act, the factual position as highlighted goes to show that the financial consequences were enormous and ran into crores of rupees, as alleged by the detaining authority. The High Court seems to have been swayed away that there was only one incident and none after release on bail. The approach was not certainly correct and the judgment on that score also is vulnerable. At the cost of repetition it may be said that it is not the number of acts which is material, it is the impact and effect of the act which is determinative. The High Court's conclusions in this regard are therefore not sustainable.

9. Learned. A.G.A. also relied on another judgment of the Apex Court in the case of David Patrick Ward and Another Vs. Union of India (UOI) and Others, and has drawn the attention of the Court towards paragraph-22 of the said judgment which is quoted hereinbelow :

22. Tested in the light of the above decision, certainly, the acts in which the petitioners indulged would form the basis of detention. The detaining authority can base its order of detention even on a solitary act provided that the conduct of the person concerned with the act in the circumstances in which it was committed, is of such a nature as would enable the formation of requisite satisfaction that the person, if not prevented by an order of detention, is likely to indulge in repetition of similar acts in future. That is certainly so in the present case, having regard to the various circumstances from the beginning, viz. The concealment of the purpose of visit, the entry without permit in the prohibited area up to the time of arrest of the petitioners. Therefore, the ground of detention relating to what occurred on the night between January 30 and 31, 1992 sufficed for making the detention orders under challenge. Debu Mahato and M. Mohamed Sulthan the decision of this Court on which reliance is placed to support the point under examination, indeed go against the point. Hence, the point cannot succeed.

10. After having considered the submissions advanced by Learned Counsel for

the parties, we are of the considered opinion that it is true that the detention order is based on a solitary incident in which one person is said to have been murdered by the petitioner alongwith his associates in a broad day light in village Ramman Ka Purwa under police Station Dhoomanganj, District Allahabad but the impact of the act of the petitioner affected the community and led to disturbance of the current life of the community so as to amount to a disturbance of public order and it did not affect merely an individual leaving the tranquillity of the society undisturbed. The satisfaction of the detaining authority is based on the relevant materials placed before him showing that the act of the petitioner was such that it disturbed the tempo of life of the community as after the incident there was disturbance in the village as well as in the nearby area so much so that National Highway was blocked and people had indulged in acts of arson and rioting on the highway and had also demonstrated at the police station by taking the body of the deceased to the police station and had stopped the traffic on the National Highway for about four hours and had also demonstrated against the police. The police of various police stations were called to control the situation. The said incident was also published in the local newspapers as well as was telecast on the local T.V. channels. The detaining authority, being apprised that the petitioner had moved a bail application for his release in the Court of District and Session Judge, Allahabad through his lawyer and Pairokar then apprehending that there was every likelihood of the petitioner being released on bail and would again indulge in anti social activities, hence to prevent such prejudicial activities in future the detaining authority had passed the detention order against him as the acts of the petitioner was prejudicial to the security of the locality as well as of the State. The Hon''ble Apex Court in the case of Arun Ghosh Vs. State of West Bengal, , has drawn the distinction between public order and law and order and has held as to when the individual acts can be subversive of public order. The said distinction between the public order and the law and order has been discussed in paragraph-3 of the said judgment which is quoted hereinbelow :

The question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. Individual act can be a ground for detention only if it leads to disturbance of the current of life of the community so as to amount a disturbance of the public order and not if it affects merely an individual leaving the tranquillity of the society undisturbed.

Public order embraces more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of



causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order.

11. The Apex Court in another case of Alijan Mian Vs. District Magistrate, Dhanbad and Others, in para-9 has held that if the detenu is already in custody and if the detaining authority was aware of the fact that the detenu was already in jail on the date of passing of the detention order and was satisfied that if the detenu was enlarged on bail of which there was every likelihood of his indulging in anti social activities, it was necessary to prevent him from acting in a manner prejudicial to the public order, the detention order was held to be valid.

It was further held in the said judgment that the pendency of Court proceedings is no bar to an order of preventive detention nor is the order of preventive detention a bar to the prosecution. It is for the detaining authority to have the subjective satisfaction where in such a Court's trial there was sufficient material to place the person under preventive detention in order to prevent him from acting in a manner prejudicial to the public order alike in future. It is noteworthy to mention here that in a judgment of this Court in the case of Tasleemuddin v. State of U.P. through Secretary (Home) Lucknow, 2008 (60) ACC 851, it was held that a single incident of murder based on personal enmity having effect of terrorising public and affecting the even tempo of life of the community in such place, would constitute an act of disturbance of public order.

12. In this context, the Hon'ble Apex Court in the case of Pooja Batra v. Union of India, (2009) 2 SCC (Cri) 659, has enunciated the law as quoted in para-40 of the judgment which is quoted hereinbelow :

40. Further, subjective satisfaction of the authority under the law is not absolute and should not be unreasonable. In the matter of preventive detention, what is required to be seen is that it could reasonably be said to indicate any organised act or manifestation of organised activity or give room for an inference that the detenu would continue to indulge in similar prejudicial activity warranting or necessitating the detention of the person to ensure that he does not repeat this activity in future.

From the facts and circumstances of the case emerging from the material on record, it is apparent that the act of the petitioner in killing the deceased in the village in broad day light alongwith his associates and thereafter fleeing away from the place of occurrence displaying fire-arm weapons in the public had definitely disturbed the tempo of life of the community. There was incident of arson and rioting. People of the area took the dead body of the deceased to the police Station Dhoomanganj and blocked the National Highway for several hours which caused disruption on the National Highway causing great inconvenience to the people, hence the impact of the said act of the petitioner undoubtedly disturbed the public order.

The judgments of the Apex Court cited by the petitioner are distinguishable on

facts and circumstances of the present case.

In our opinion, subjective satisfaction of the detaining authority in passing the detention order against the petitioner under the Act on the basis of the material placed before it cannot be said to be illegal or arbitrary. The detention order passed by respondent No. 1 against the petitioner is upheld.

The petition lacks merit and is, accordingly, dismissed.