

(1953) 10 CAL CK 0002
In the Calcutta High Court

Case No : Criminal Misc. Case No"s. 120 and 121 of 1953

Dhanpatrai Periwal

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 01-10-1953

Acts Referred:

Evidence Act, 1872 — Section 114

Preventive Detention Act, 1950 — Section 3(1), 3(2)

Citation : AIR 1954 Cal 518 : 58 CWN 363

Hon'ble Judges : S.R. Das Gupta, J; Lahiri, J

Bench : Division Bench

Advocate : G.P. Kar and Nirmal Chandra Choudhury, for the Appellant; A.K. Sen and D.K. Sen, for the Respondent

Judgement

S.K. Das Gupta, J.—This is a Rule calling upon the State of West Bengal, Mr. S. N. Roy, Chief Secretary to the Government of West Bengal, Deputy Commissioner of the District of Darjeeling and the Superintendent of Jail, Darjeeling, to show cause why an order under Article 226 of the Constitution of India or u/s 491, Criminal P. C. should not be made and the person named Mahabir Prosad Periwal set at liberty.

2. On 20-8-1953, the said Mahabir Prosad Periwal was arrested at Kalimpong and thereafter detained at Darjeeling Jail. The said arrest and detention were made under an order dated 19-8-53 passed by Mr. S. Dutt Majumdar, Deputy Commissioner, Darjeeling, purporting to act u/s 3(2), Preventive Detention Act, 1950, (Act 4 of 1950). On the date of the arrest, i.e. 20-8-1953, grounds for detention were served on the said Mahabir Prosad Periwal. The present petition on which the Rule has been issued has been made by one Dhanpatrai Periwal, a cousin of the said Mahabir Prosad Periwal.

3. Mr. Kar appearing on behalf of the petitioner in the first place contended before us that the order of detention having been passed by Mr. S. Dutt Majumdar in his capacity as Deputy Commissioner and not as District Magistrate

of Darjeeling was bad on the face of it. Mr. Kar contended that u/s 3(2), Preventive Detention Act power is given only to the officers named therein, i.e. the District Magistrate, Additional District Magistrate and the Commissioner of Police for Bombay, Calcutta, Madras or Hyderabad to make an order of detention. A Deputy Commissioner has no such power.

That being so, Mr. Kar contended, the present order of detention which was made by Mr. Dutt Majumdar in his capacity as the Deputy Commissioner of Darjeeling was made without jurisdiction. Mr. Kar raised several other contentions but in view of the fact that we have accepted this contention of Mr. Kar and have come to the conclusion that the present order of detention was made without jurisdiction it has become unnecessary for us to express any opinion thereon.

4. With regard to this contention of Mr. Kar, Mr. Sen appearing for the opposite parties contended before us that in making the said order Mr. Dutt Majumdar, who was also the District Magistrate of Darjeeling, must have been acting as such District Magistrate and not as the Deputy Commissioner. This, Mr. Sen contended, is evident from the fact that in the order itself it is stated that Mr. Majumdar was making the said order of detention u/s 3(1) (a) (iii), Preventive Detention Act which could be made by a District Magistrate and not by a Deputy Commissioner. Mr. Sen also contended that there should be presumption of regularity and it must be presumed that Mr. Dutt Majumdar acted in a regular manner, that is to say, in his capacity as the District Magistrate.

Mr. Sen relied on the decision of the Supreme Court in the case of -- Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others, (A) where it has been held that though the Preventive Detention Act contemplates and requires the taking of an executive decision for confirming a detention order u/s 11(1) omission to make and authenticate that executive decision in the form mentioned in Article 166 will not make the decision itself illegal, for, the provisions in that Article are merely directory and not mandatory and contended that on the parity of reasoning it should be held that omission to sign the order as the District Magistrate would not make the order itself illegal.

5. We have carefully considered the contentions of Mr. Sen but we are unable to accept the same. That Mr. Dutt Majumdar made the said order of detention in his capacity as the Deputy Commissioner and not as the District Magistrate seems to us to be quite clear. The order in question was not only signed by him as the Deputy Commissioner, it was also impressed with the seal of the Deputy Commissioner. The matter does not rest here. In paragraph 7 of the petition it has been stated that the authority making the said order of detention is not the proper person to pass such an order as contemplated under the said Preventive Detention Act and as such the said order of detention is wholly void, illegal and/or mala fide. In paragraph 18 of the petition the petitioner further stated inter alia that the Deputy Commissioner of Darjeeling had no jurisdiction.

The affidavit in opposition to this application was affirmed by the said Mr. S. Dutt

Majumdar. The said Mr. Dutt Majumdar affirmed the said affidavit describing himself as the Deputy Commissioner of the district of Darjeeling. Nowhere in his said affidavit Mr. Majumdar has alleged that in making the said order he was acting as the District Magistrate and not as the Deputy Commissioner as contended before us by Mr. Sen. With reference to paragraph 7 of the petition he merely denied that he was not the proper authority for making the said order. As for the statement contained in paragraph 18 of the petition, namely that the Deputy Commissioner has no jurisdiction, he does not even deal with the same.

We are satisfied that the order in question was made by the said Mr. S. Dutt Majumdar in his capacity as the Deputy Commissioner and not as the District Magistrate of Darjeeling. Merely because in the said order it has been stated that the same was being made u/s 3(1) (a) (iii), Preventive Detention Act, we cannot hold that the said Mr. Majumdar was acting in his capacity as the District Magistrate. We cannot also come to that conclusion, having regard to the facts and circumstances of this case, on the doctrine of presumption of regularity on which Mr. Sen relied.

As for the decision of the Supreme Court in the case of "Dattatraya Moreshwar v. The State of Bombay (A)", cited by Mr. Sen, we cannot see how that decision helps Mr. Sen in his present contention. That was a decision on Section 11, Preventive Detention Act and not on Section 3. All that their Lordships of the Supreme Court decided in that case was that although the decision u/s 11 of the Act has to be taken by the Government (and therefore Article 166 would apply) the omission to make and authenticate that decision in the form mentioned in Article 166 would not make that decision illegal.

The question of Article 166 applying to the case before us does not arise, because, the order in this case is purported to have been made under Sub-section (2) of Section 3 and the order under that subsection is to be made not by the Government but the officers mentioned. That decision cannot, in our opinion, be said to be an authority for the proposition that although the said Sub-section (2) of Section 3 only authorises particular officers to make the order of detention an order would still be, a good order even if made by some other officer. Under the said sub-section not only the satisfaction must be the satisfaction of one of the officers named therein but the order directing a person to be detained must be an order made by one of such officers.

6. Mr. Sen then relied on the case of -- "High Court Bar Association v. Emperor" AIR 1941 Lah 324 (B) and on the case of -- "Nadar Alam Khan v. Emperor" AIR 1935 Pesh 108 (C) and contended on the authority of those decisions that it does not matter what Mr. Dutt Majumdar calls himself but what power he does exercise in this case. Mr. Sen contended, Mr. Dutt Majumdar may call himself a Deputy Commissioner but the powers he was exercising were those of the District Magistrate and if that is so, then, the order made in the exercise of such powers is legal. We are unable to accept that contention of Mr. Sen. What was decided in those cases was that a Magistrate empowered by the local

Government u/s 30, Criminal P. C. need not mention the existence of his special powers in order to exercise them and need not sign the judgment as such.

We should mention that an opposite view was taken in the case of -- "Emperor v. Sukhdeo Raj" AIR 1934 Lah 361 (D). Even if we agree with the view taken in those cases, the position here is different. In this case Mr. Dutt Majumdar had two capacities -- one as District Magistrate and the other as the Deputy Commissioner. He could make the order only in his capacity as the District Magistrate but he has not done that. He made the order in his capacity as the Deputy Commissioner. This he could not do. This is not a case where an officer having only one capacity was given additional powers in the same capacity. This fact, in our opinion, distinguishes the present case from the two cases cited by Mr. Sen.

7. Mr. Kar on the other hand relied on the observations of Page C. J, made in the case of -- "Sein Tha U v. Maung Kyow Khine" AIR 1935 Rang 137 (E) which are as follows : "But if it be so, it follows that it is of importance for the due administration of justice that persons performing dual role of Deputy Commissioners and District Magistrates should ever be mindful that their outlook and action in one capacity should not infringe upon their outlook and action in the other. I am fully alive to the difficulties inherent in the position in which such officials find themselves but I make bold to say that officials who function both as Deputy Commissioner and District Magistrate, ought to take meticulous care to differentiate between their exacting and to some extent incompatible duties as Deputy Commissioners and District Magistrates."

8. We have come to the conclusion that the order of detention passed in this case was illegal. Before concluding our judgment we would refer to the observations of Patanjali C. J. made in the case of -- Ram Narayan Singh Vs. The State of Delhi and Others, (F) which are as follows :

"This court has often reiterated before that those who feel "called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty must strictly and scrupulously observe the forms and rules of the law."

9. We, therefore, make an order directing the said Mahabir Prosad Periwal to be set at liberty forthwith. This Rule is disposed of accordingly.

Criminal Miscellaneous Case No, 120 of 1953 :

10. For the reasons mentioned in our judgment delivered in Criminal Miscellaneous Case No. 121 of 1953 ("Mahabir Prosad Periwal v. The State and others"), I hold that an order should be made directing Gajananda Periwal to be set at liberty forthwith.

11. I therefore make an order directing the said Gajananda Periwal to be set at liberty forthwith. This Rule is disposed of accordingly.

12. Let these orders be sent down at once.

Lahiri, J.

13. I agree.