
(2000) 05 AHC CK 0019

In the Allahabad High Court

Case No : Criminal Misc. Habeas Corpus Petition No. 45541 of 1999

Govind Singh

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 12-05-2000

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 8
Constitution of India, 1950 — Article 22(4)
Criminal Law (Amendment) Act, 1932 — Section 7
National Security Act, 1980 — Section 10, 3(2), 8
Penal Code, 1860 (IPC) — Section 332, 333, 353, 427, 504

Citation : (2000) CriLJ 4513

Hon'ble Judges : U.S. Tripathi, J; R.R.K. Trivedi, J

Bench : Division Bench

Advocate : Janardan Sahai and D.S. Mishra, for the Appellant; A.K. Tripathi, AGA and K.N. Pandey, for the Respondent

Final Decision : Allowed

Judgement

R.R.K. Trivedi, J.—In this writ petition, petitioner Govind Singh has questioned his detention under order dated 7-9-1999. (Annexure 1), passed by District Magistrate, Jhansi u/s 3(2) of the National Security Act, 1980, hereinafter referred to as "Act"

2. Along with order of detention, petitioner, was also served the grounds on which basis detaining authority formed his satisfaction for detaining petitioner under the Act. From perusal of the grounds, it appears that on 25th August, 1999, a meeting was being held by Sri Suresh Chandra Tiwari, Junior Engineer of Rural Engineering Service in the meeting hall of the Development Block, which was already scheduled Village Development Officers were attending this meeting. The proceedings of the aforesaid meeting had commenced when the petitioner, who is husband of Smt. Kalian Devi, Pradhan of village Khelar, at about 12.30 p.m. suddenly entered in the meeting hall. He went near the table of Suresh

Chandra Tiwari and torned the agenda, Register of minutes and other Government documents and threw them away .Then he took out Slipper (indoor shoe) and started beating Suresh Chandra Tiwari on his face. The meeting was disturbed and the officers and employees present in the meeting hall and in the block premises fell under fear and terror and nobody could have courage to save Suresh Chandra Tiwari. The Government work in the block came to stand still. Officers and the employees left the block premises and went to safer places. On a written report lodged by Sri Tiwari, a criminal case was registered at Police Station Babina as Case Crime No. 215 of 1999, under Sections 332, 333, 353, 504, 427, I.P.C. and 7 Criminal Law Amendment Act. Injured Suresh Chandra Tiwari, Junior Engineer was referred to the Community Health Centre, Babina where he was examined at 2.50 p.m. On medical examination, it was revealed that Suresh Chandra Tiwari had suffered serious injury on his right ear and he was referred for specialised treatment. E.N.T. Specialist examined Suresh Chandra Tiwari on 27th August, 1999 and after internal examination gave opinion that on account of injury received in the right ear, his hearing power has been lost. On account of the aforesaid daring criminal activities of the petitioner, commotion and fear prevailed amongst officers and employees and the entire Government work was stopped in the block premises and lock was put to the block building and public Order was badly disturbed. On 29th August, 1999, a meeting of the members of Union of the Diploma Engineers took place and they passed resolution against the incident of 25th August, 1999 and requested the District Magistrate, Jhansi to arrest petitioner. The incident was also reported in newspapers having wide circulation.

3. Petitioner surrendered in the Court of II Additional Judicial Magistrate, Jhansi on 2nd Sept. 1999. He was remanded to the judicial custody. Petitioner made an application for bail same day in which 6-9-1999 was fixed for hearing. There was strong possibility of petitioner"s being granted bail.

4. On the aforesaid facts, detaining authority formed his satisfaction that in order to prevent the petitioner from acting in any manner prejudicial to the maintenance of the public order, it is necessary to make an order of his detention under the Act. Petitioner was also informed that he has right u/s 8 of the Act to make representation to the State Government Advisory Board and the Central Government which may be submitted by petitioner through the Superintendent of the District Jail, where petitioner is confined. Petitioner was also informed that he has right of personal hearing before the Advisory Board and if he desires so, this fact may also be communicated within three weeks through jail authorities.

5. Counter and rejoinder affidavits have been exchanged between parties. We have heard Sri D.S. Mishra, learned counsel appearing for petitioner, Sri A.K. Tripathi, learned A.G.A. appearing for respondents Nos. 1 to 3 and Sri K.N. Pandey for respondent No. 4, Union of India.

6. Learned counsel for petitioner has questioned the legality of his detention on the following grounds :

7. First submission is that the incident dated 25th Aug. 1999 only related to problem of law and order and it had no potential to disturb the public order and the impugned order of detention is wholly unjustified.

8. Second submission is that the representation submitted by petitioner was not forwarded by the State Government to the Advisory Board and thus the provisions of Section 10 of the Act have been violated and the petitioner is entitled for release and the continued detention has been rendered illegal.

9. Last submission is that there is delay in deciding the representation of the petitioner by Central Government which rendered continued detention of petitioner illegal.

10. Sri A.K. Tripathi, learned A.G.A. on the other hand, has submitted that the representation of petitioner was directly sent to Advisory Board by the District Magistrate and which was made available to the Advisory Board at the time of hearing, no prejudice has been caused to petitioner and provisions of Section 10 have been complied with. It has been further submitted that the requirement of law is that the representation made by petitioner should reach Advisory Board which has been achieved and petitioner is not entitled for any relief. Learned counsel has further submitted that the incident had sufficient potential to disturb the public order. If the petitioner disturbed the meeting of the Development Officers of the block, the public order was apparently disturbed in that locality. The order does not suffer from any error of law.

11. After hearing counsel for parties, judgment was reserved in this case on 19th April, 2000. The learned A.G.A., however, filed a supplementary counter-affidavit of Sri R.A. Khan. Under Secretary, Home and Confidential Department on 20th April, 2000. Learned counsel for petitioner strongly opposed the filing of supplementary counter -affidavit at this stage and submitted that it may not be taken on record. Learned counsel has also submitted that no application has been filed seeking leave of the Court to file counter-affidavit at such belated stage. No explanation for the delay has been given. Both the learned counsel have placed reliance on judgments of Hon'ble Supreme Court and this Court, which shall be referred to at the relevant places.

12. We have carefully considered the submissions of the learned counsel for the parties and perused the record. Learned counsel for the petitioner has submitted that the incident dated 25th August, 1999 related to the problem of law and order and had no potential and reach to disturb the public order which means the even tempo of the life of the community. We do not find any substance in this submission. A Division Bench of this Court in similar circumstances, after examining the legal position in detail held that such incidents where Government authorities are insulted and meeting is disturbed, shall have sufficient potential to disturb the public order in the area. The view expressed by Division Bench in case of Prem Chandra Sharma Advocate v. Superintendent, District Jail, Moradabad (1999) 2 FFR 413 has been followed by

another Division Bench in case of Sanjay Singh v. State of U.P. (2000) 1 FLR 114. In our opinion, on basis of the view expressed by aforesaid two Division Benches the submission of the petitioner cannot be accepted.

13. In order to reinforce and supplement the views expressed by the Division Bench we wish to further elaborate the legal position in this regard. It cannot be disputed that the authority of the State always remains and works at the bottom of the public order in the society. Citizens of the country feel secured and protected for presence of this authority of the State. It is this authority which remains behind the even tempo of life of community and they live in peace and harmony. In the incidents of the present nature, loss of State's Authority cannot be ruled out absence of which shall necessarily lead to disturbance of public order. The submission of the learned counsel for petitioner cannot be accepted.

14. The next submission of the learned counsel for petitioner is regarding non-compliance of Section 10 of the Act as admittedly representative submitted by petitioner was not forwarded by the State Government to the Advisory Board, Sri R.K. Khan, Under Secretary, Home and Confidential Department, who filed counter-affidavit dated 6th Dec. 1999 has stated in paragraph No. 3 that the petitioner's representation along with parawise comments thereon, was forwarded by the District Magistrate, Jhansi vide his letter dated 22nd Sept. 1999 to the Advisory Board directly. The representation sent to State Government was received by State Government on 23rd Sept. 1999. The Advisory Board had already fixed 23rd Sept. 1999 for hearing of the case on which, date Advisory Board heard petitioner in person. The opinion of the Advisory Board was given on 8-10-1999 that there was sufficient cause to detain petitioner under the Act. Thereafter the State Government confirmed the order for a period of 12 months. By filing supplementary counter affidavit on behalf of State Government by Sri. R.A. Khan, effort has been made to explain for not forwarding the representation by the State Government. As learned counsel has raised strong objection against filing of supplementary counter-affidavit at this belated stage, in our opinion rightly, we are not taking into consideration this supplementary counter affidavit filed on behalf of State Government. However, the question raised by learned counsel for petitioner can be answered on basis of the counter-affidavit filed earlier. It is undisputed that the petitioner filed his representation on 21st Sept. 1999 and on the same day it was sent to the office of the District Magistrate, Jhansi through special messenger. This fact has been admitted by Murli Charan Tripathi, Deputy Jailer, who has filed counter-affidavit on behalf of respondent No. 3 District Magistrate who passed the impugned order of detention has filed counter-affidavit, paragraph No. 4 whereof reads as under :-

That in reply to the contents of para 7 of the writ petition, it is submitted that the representation submitted by the petitioner through Jail authorities was received on 21-9-1999 and after preparing parawise comments immediately the same was sent to State Government through special messenger on 22-9-1999. It is, further submitted that the aforesaid representation was also sent on the same

day to the Central Government, Ministry of Home Affairs Department of Internal Security. The above said representation was rejected by the State Govt. regarding which information was received vide R.G. dated 27-9-1999.

15. From aforesaid paragraph No. 4 of the counter -affidavit, it is clear that the District Magistrate has not asserted that the copy of the representation with his comments was sent directly by him to the Advisory Board, though he is very specific about his sending representation to the State Government and to the Central Government. If the representation of the petitioner was also forwarded to the Advisory Board directly, the detaining authority would not have hesitation in asserting so in his counter-affidavit. Hon"ble Supreme Court in case of Smt. Kavita Devidasani Vs. State of Maharashtra and Others, through a Division Bench of three Hon"ble Judges while examining the legal position regarding Section 8 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), which is par materiai to Section 10 of the Act, expressed the legal position in paragraph No. 4, the relevant extract of which is reproduced below :-

xxxxxxxxxxxxxxxxxxxxxx We are, therefore, of the view that the act of making a reference to the Advisory Board is a mechanical or ministerial act involving no exercise of discretion, though of course the Government is at that stage as at all other stages, at liberty to revoke the order of contention. The prescription of five weeks in Section 8(b) of the COFEPOSA for the making of a reference to the Advisory Board is with a view to enable fulfilment of the constitutional requirement of Article 22(4) and not a view to imposing an obligation upon the Government to consider the question of the length of detention and arrive at a tentative conclusion even at that stage, xxxxxxxxxxxxxxxxxxxx.

16. In the case of State of Rajasthan and Another Vs. Shamsheer Singh, , Hon"ble Supreme Court, again discussed about the legal obligation of the State to forward the representation of detenu u/s 10 of the Act to the Advisory Board. The relevant portion from paragraph No. 7 of the judgment is being reproduced below:-

The legislative scheme contained in this section envisages the situation that there may be a case where no representation at all is made or within the time contemplated u/s 10, the representation has not been forthcoming. We agree with the submission of Mr. Jethmalani that the obligation cast u/s 10 of the Act is paramount and the strictness with which such a mandate has to be complied with is absolute. While making of the reference u/s 10 with the grounds of detention is a must, furnishing of the representation is conditional upon it having been made and receipt thereof by the appropriate Government. Though under the general scheme of the Act definite and different periods have been prescribed for compliance with the step to step treatment of the matter, there is no obligation cast on the detenu to make a representation within any definite time. We are, therefore, prepared to accept the submission of the learned Advocate-General that while considering the compliance with Section 10 of the Act emphasis has to be laid on making of the reference and forwarding of the

grounds of detention and the placing of the representation has to be judged on different basis. We may not be understood to be of the view that it is open to the appropriate Government to withhold the placement of the representation unduly or indefinitely.

17. From the aforesaid two judgments of Hon^{ble} Supreme Court, it is clear that the representation of petitioner, if received before the date of hearing fixed by the Advisory Board, appropriate Government is under obligation to place it before the Advisory Board. It is admitted fact that the representation of petitioner was handed over to Jail authorities on 21st Sept. 1999. It was forwarded to the detaining authority same day. Detaining authority with his comments forwarded it to the State Government on 22nd Sept. 1999 and which was admittedly received by State Government on 23rd Sept. 1999 which was the date fixed for hearing. It is not clear at what time on 23rd Sept. 1999 representation of the petitioner was received. In any view of the matter it is not disputed that the Advisory Board gave its opinion on 8-10-1999. Thus the representation of the petitioner could have been forwarded by the State Government for consideration of the Advisory Board immediately. It should not have been forgotten that the consideration by the Advisory Board of the matter and material used against detenu is the only opportunity available to him for a fair and objective appraisal of his case. It is true that the petitioner submitted his representation just two days before the date of hearing fixed by the Advisory Board but as it was received on 23rd Sept. 1999 it ought to have been forwarded by the State Government. The allegations that the District Magistrate forwarded be representation to the Advisory Board directly, cannot be accepted for the reasons that the detaining authority is silent about his sending representation to Advisory Board directly and secondly that no authority has filed affidavit asserting that the representation of petitioner was actually placed before the Advisory Board at the time of hearing or at any time subsequent thereto. In these circumstances in our opinion, in this case, Section 10 has not been complied with and continued detention of petitioner has been rendered illegal.

18. While examining the grounds of detention, we have also noticed that the detaining authority failed to record the satisfaction that in case petitioner is released on bail, there is real apprehension that he shall indulge again in similar activities which shall be prejudicial to the maintenance of public order. Hon^{ble} Supreme Court in case of Kamarunnissa and Others Vs. Union of India and another, has held in paragraph No. 13 as under.

From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validity be passed (1) if the authority passing the order is aware of the fact that he is actually in custody, (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released he would in all probability indulge, in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes and order after recording his

satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition, to question it before a higher court, What this Court stated in the case of Ramesh Yadav Vs. District Magistrate, Etah and Others, was that ordinarily a detention order should not be quashed merely to pre-empt or circumvent enlargement on bail in cases which are essentially criminal in nature and can be dealt with under the ordinary law. It seems to us well settled that even in a case where a person is in custody, if the fact and circumstances of the case so demand, resort can be had to the law of preventive detention. This seems to be quite clear from the case law discussed above and there is no need to refer to the High Court decisions to which our attention was drawn since they do not hold otherwise. We, therefore, find it difficult to accept the contention of the counsel for the petitioner that there was no valid and compelling reason for passing the impugned orders of detention because the detenu were in custody.

19. From perusal of the grounds, it is clear that the detaining authority failed to record satisfaction for passing the order of detention that the petitioner after release on bail shall again indulge in activities which may be prejudicial to the maintenance of the public order, in absence of this satisfaction, order of preventive detention could not be passed.

20. As petitioner is found entitled for relief on the aforesaid two grounds, we do not think it necessary to enter into consideration of the third submission regarding delay in deciding representation raised by learned counsel for the petitioner.

21. For the reasons stated above, this writ petition is allowed. As order of detention and continued detention of petitioner had been found illegal, respondents are directed to set petitioner at liberty forthwith, if his detention is not required in another case.