
(2008) 05 GAU CK 0070
In the Gauhati High Court

Gurumayum Rajatkanta Sharma @ Promise @ German APPELLANT
Vs
District Magistrate and Others RESPONDENT

Date of Decision : 29-05-2008

Acts Referred:

Arms Act, 1959 — Section 25
Constitution of India, 1950 — Article 22, 226
Criminal Procedure Code, 1973 (CrPC) — Section 167
Penal Code, 1860 (IPC) — Section 326, 34
Unlawful Activities (Prevention) Act, 1967 — Section 20

Citation : (2008) 2 GLT 853

Hon'ble Judges : B.D. Agarwal, J;Asok Potsangbam, J

Bench : Division Bench

Judgement

B.D. Agarwal, J.—The writ petitioner was initially arrested on 02.08.2007 in connection with Tengnoupal Police Station Case No. 14(8)2007. While the petitioner was still in police custody, he was shown arrested in connection with Singjamei P.S. Case No. 135(5) of 2007 u/s 326/34 of the Indian Penal Code read with Section 25(1-B) of Arms Act read with Section 20 of the Unlawful Activities (Prevention) Act, 1947. While the petitioner was still in police custody, he was brought under provisions of National Security Act, 1980 vide order No. CRIL/NSA/No. 39 of 2007 dated 14.08.2007 issued by the District Magistrate, Imphal West, Manipur. This order is under challenge in the present writ petition, which has been filed by the detenu himself under Article 226 of the Constitution of India.

2. We have heard Shri Kh. Mani, learned Counsel for the petitioner and Shri R.S. Reisang, learned Addl. Govt. Advocate for the respondents No. 1 and 2 as well as Shri C. Kamal, learned Assistant Solicitor General for the Union of India (respondent No. 3).

3. Although several grounds were taken in the writ petition challenging the detention order. However, during the course of hearing, learned Counsel for the petitioner challenged the detention order basically on the ground that there were

no materials before the District Magistrate to take a view that the petitioner was likely to be released on bail in near future. In support of this submission, learned Counsel relied upon the judgments of Hon''ble Supreme Court rendered in the case of Kamarunnissa and Others Vs. Union of India and another, , T.V. Saravanan @ S.A.R. Prasana Venkatachaariar Chaturvedi Vs. State through Secretary and Another, and the judgment of this Court passed in WP (Cril) No. 39 of 2007.

4. On the other hand, learned Addl. Govt. Advocate submitted that it is the settled position of law that subjective satisfaction of the detaining authority cannot be reviewed in the writ petition. In support of this submission, learned Govt. Advocate relied upon the judgments of Hon''ble Supreme Court rendered in the case of Sanjay Kumar Aggarwal Vs. Union of India (UOI) and Others, ; Gurdev Singh Vs. Union of India and ors, and Senthamilselvi Vs. State of Tamil Nadu and Another, . In addition to that, learned Government Advocate also submitted that in identical cases, this Court had also refused to interfere with the detention order in WP (Cril) No. 26 of 2006 and WP(Cril) No. 51 of 2007.

5. In the case of Ramesh Yadav Vs. District Magistrate, Etah and Others, as well as in the case of Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others, , the Hon''ble Supreme Court took a view that before forming an opinion that the accused was likely to be released on bail, the detaining authority could have opposed the bail application as well as the bail order could have also been challenged before any higher Court. Since these steps were not taken by the detaining authority, the detention orders were declared unsustainable in law. This principle of law was again approved in the case of Dharmendra Suganchand Chelawat and another Vs. Union of India and others, . In this case also, the detenu was released holding that the view of the detaining authority that the accused was likely to be released on bail was not supported by any material. In this cited authority, the bail application of the accused was rejected only a few days prior to the passing of the order of detention and in the opinion of the Hon''ble Apex Court, the ground of detention did not show that the detaining authority apprehended that further remand of the accused would not be granted by the Court.

6. The view taken by the Hon''ble Apex Court in the case of Ramesh Yadav and Binod Singh (supra) that proper course for the detaining authority, before taking a view that the accused was likely to be released on bail in near future, was to oppose the bail application or challenge the bail order before higher Court has somehow been diluted and negated in the case of Kamrunnissa (supra).

7. In the case of Kamrunnissa (supra) the legal principle has been discussed elaborately and the Hon''ble Supreme Court has clarified the theory of likelihood of release of the accused on bail as a ground for preventive detention. As per their Lordships, a person in custody can be put under preventive detention validly if (i) the authority passing the order is aware of the fact that any such person is actually in custody, (ii) if the detaining authority has reason to believe,

on the basis of reliable materials placed before him, that (a) there is a real possibility of his being released on bail and (b) that on being so released, he would in all probability would indulge in prejudicial activity and (iii) if it is felt essential to detain such accused to prevent him from doing so. The Hon"ble Apex Court has held that if the authority passes the detention order after recording his satisfaction in this behalf, such order cannot be struck down on the ground that proper course for the authority was to oppose the bail or to question the bail order before higher Court.

8. The law expounded by the Hon"ble Supreme Court in the case of Kamrunnissa (supra) holds the field till date. Without multiplying authorities on this point, we would like to quote one passage from the judgment of Hon"ble Apex Court rendered in the case of Senthamilselvi (supra), which runs as below:

10. It was also submitted that since the detenu had not filed any bail application, the detaining authority could not have inferred that there was possibility of his being released on bail. Strong reliance is placed on several decisions of this Court. It has to be noted that whether prayer for bail would be accepted depends on circumstances of each case and no hard and fast Rule can be applied. The only requirement is that the detaining authority should be aware that the detenu is already in custody and is likely to be released on bail. The conclusion that the detenu may be released on bail cannot be ipse-dixit of the detaining authority. On the basis of materials before him, the detaining authority came to the conclusion that there is likelihood of detenu being released on bail. That is his subjective satisfaction based on materials. Normally, such satisfaction is not to be interfered with. On the facts of the case, the detaining authority has indicated as to why he was of the opinion that there is likelihood of detenu being released on bail. It has been clearly stated that in similar cases orders granting bail are passed by various Courts. Appellant has not disputed correctness of this statement. Strong reliance was placed on Rajesh Gulati Vs. Govt. of N.C.T. of Delhi and Another, . The factual scenario in that case was entirely different. In fact, five bail applications filed had been already rejected. In that background this Court observed that it was not "normal" case. The High Court was justified in rejecting the stand of the appellant.

9. At this stage, it may be mentioned here that as per State Amendment of Section 167 of the Code of Criminal Procedure, an accused could have been detained in judicial custody for a period of 180 days, for the offences alleged in the criminal case. Hence, the view taken by the District Magistrate that there was every possibility of the accused being released on bail in near future does not hold much water. We are also taking this view on the premise that no bail application till then was filed by the accused. Besides this, the impugned order of detention speaks about a "police report" but no such police report was made a part of the grounds of detention nor any such police report has been filed by the State along with its affidavit-in-opposition.

10. In the case of Rajesh Gulati Vs. Govt. of N.C.T. of Delhi and Another, , the

Hon"ble Supreme Court has emphasized the necessity to ensure compliance of the procedural safeguards provided to a detenu in the following words:

In this case, the detaining authority's satisfaction consisted of two parts—one: that the appellant was likely to be released on bail and two: that after he was so released the appellant would indulge in smuggling activities. The detaining authority noted that the appellant was in custody when the order of detention was passed. But the detaining authority said that "bail is normally granted in such cases". When in fact the five applications filed by appellant for bail have been rejected by the Courts (indicating that this was not a "normal" case), on what material did the detaining authority conclude that there was "imminent possibility" that the appellant would come out on bail? The fact that the appellant was subsequently released on bail by the High Court could not have been foretold. As matters in fact stood when the order of detention was passed, the "normal" Rule of release on bail had not been followed by the Courts and it could not have been relied on by the detaining authority to be satisfied that the appellant would be released on bail.

We are of the view that the High Court erred in accepting the respondents' submissions and rejecting the appellant's writ application. This Court has repeatedly held that the law permitting a preventive detention must be meticulously followed both substantively and procedurally by the detaining authority.

11. In the case of T.V. Sraavanan (supra) also the view of the detaining authority that there was imminent possibility of the accused coming out on bail was found ipse-dixit since no bail application was pending in the Court for consideration. The noticeable feature of this judgment is that in this case one bail application filed by the accused was rejected and the second bail application was withdrawn. Although the accused was having the tendency of coming out on bail the Apex Court took the view that it was not enough for the detaining authority to form a subjective satisfaction of every possibility of the detenu being released on bail. The Apex Court has not taken any different view in the cases cited on behalf of the state.

12. Earlier to that also, in the case of Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, , the Hon"ble Supreme Court made it clear in no uncertain words that the preventive detention should not be equated with detention under penal statutes. Their Lordships have held that since preventive detention infringes fundamental rights and personal liberty of a detenu, the detaining authorities have an obligation to adhere to the safeguards provided under such preventive law as well as under Article 22 of the Constitution. Their Lordships have further held that in case of violation of procedural safeguards by the detaining authority, the obligation to enforce the fundamental rights of the detenu shifts upon the Courts and any such untenable order of preventive detention has to be interfered with, oblivious to its consequences. The valued observations of the Hon"ble Apex Court can be profitably taken note of, which

are as under:

...We are not unmindful of the harmful consequences of the activities in which the detenus are to be alleged to be involved. But while discharging our constitutional obligation to enforce the liberty, we cannot allow ourselves to be influenced by these considerations. It has been said that history of liberty is the history of procedural safeguards. The Framers of the Constitution, being aware that preventive detention involves a serious encroachment on the right to personal liberty, took care to incorporate, in Clauses (4) and (5) of Article 22, certain minimum safeguards for the protection of persons sought to be preventively detained. These safeguards are required to be zealously watched and enforced by the Court." Their rigour cannot be modulated on the basis of the nature of the activities of a particular person. We would, in this context, reiterate what was said earlier by this Court while rejecting a similar submission: (SCC para 4) May be that the detenu is a smuggler whose tribe (and how their numbers increase) deserves no sympathy since its activities have paralysed the Indian economy. But the laws of preventive detention afford only a modicum of safeguards to persons detained under them and if freedom and liberty are to have any meaning in our democratic set up, it is essential that at least those safeguards are not denied to the detenus [See Rattan Singh v. State of Punjab:

13. The judgments of this Court passed in WP(Cril) No. 26 of 2006 and WP(Cril) No. 51 of 2007 are based on different facts. It is settled position of law that the ratio of law has to be applied in the background of facts and circumstances of each case.

14. In the case before us, except mentioning in the detention order as well as in the grounds of detention that the accused was likely to be released on bail, no other materials are forthcoming to support the subjective satisfaction of the detaining authority. As mentioned in the beginning of this judgment the petitioner was arrested on 02.08.2007 and despite there was no attempt by the accused to secure his release on bail, he was booked under National Security Act within 12(twelve) days. Consequently, we hold that the subjective satisfaction of the detaining authority is nothing but ipse-dixit opinion, which is untenable in law.

15. In the result, the writ petition stands allowed. It is ordered that the writ petitioner, namely, Gurumayum Rajatkanta Sharma @ Promise @German shall be set at liberty forthwith, unless wanted in any other case. With the aforesaid direction, the writ petition stands disposed of.