
(1983) 05 GAU CK 0002
In the Gauhati High Court

Jyoti Prasad Baruah

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 17-05-1983

Acts Referred:

Constitution of India, 1950 — Article 14
National Security Act, 1980 — Section 3

Citation : (1984) CriLJ 470

Hon'ble Judges : T.N. Singh, J;B.L. Hansaria, J

Bench : Division Bench

Judgement

B.L. Hansaria, J.—Both these petitions relate to one detenu; Rule in one was issued having received a communication from jail, and the other is a regular petition challenging the detention under the provisions of the National Security Act, 1980, hereinafter the Act.

2. We have been called upon to adjudge the legality of an order passed on 19-2-83, the grounds of which are dated 23-2-83 and read:

On Feb. 12, 1983 at about 23.30 hours you along with Phatik Bora and Ghana Bakalial laid an ambush to a C, R. P. F. foot patrol by concealing yourselves behind boundary wall of H. F. C. Namrup L. P. School and attacked the CRPF party by throwing a bomb first and then one round of fire from a sten gun. When the C. R. P. F. made counter-attack your two associates fled away and you were caught red-handed with a sten gun, two magazines with 31 rounds ammunition, and three hand bombs.

Your activity described above is prejudicial to the maintenance of public order and your detention is immediately necessary.

3. Shri Medhi appearing for the petitioner contends that though the allegations are serious, this may not weigh with us inasmuch as even a bully or a bad character is entitled to as much legal protection at our hand as is anybody else. and the constitutional safeguards given in this connection are available equally to

all. This proposition is indisputable. Let us, however, see if any of the safeguards was really denied to the writ petitioner; and whether the order is bad on any other count. Shri Medhi has assailed the validity, first, by contending that the grounds were not in existence when the order was passed which is apparent from the fact, according to the learned Counsel that the two communications bear different dates. We had occasion to deal with such submission in detail in *Mahendra Mohan Choudhuary v. State of Assam* (Civil Rule (HC) 42/83 disposed of on 28-4-83). As pointed out therein, such a conclusion cannot follow from the mere fact that the order of detention bears a date anterior to that of grounds. Of course, if it would be a case of non-existence of grounds, the matter would definitely be different as noted in *Mahendra Mohan* (supra) itself. To satisfy us, whether it was a case of non-existence of "grounds", which expression has to be understood in this context to mean basic facts and factual materials as explained in *Mahendra Mohan*, we have perused the records of the District Magistrate and we find that the facts mentioned in the "grounds" as communicated to the detenu are in the dossier which was enclosed along with the letter of the Superintendent, of Police, Dibrugarh dated 17-2-83 addressed to the District Magistrate, Dibrugarh, As such, the basic facts which were mentioned in the grounds cannot be said to be non-existent. This submission has, therefore, no force.

4. It is then brought to our notice that the order is founded on a solitary instance and reliance on the same to preventively detain the petitioner really speaks of non-application of mind. As to when such orders can be grounded on a solitary instance had also been examined by us in *Hari Charan Kalita v. District Magistrate* Civil Rule (HC) 111/83 disposed of on 11-4-83 : reported in *Hari Charan Kalita Vs. District Magistrate and Others*, and after noting the pronouncements of the Supreme Court, some guidelines or indicia in this regard were mentioned in Paragraph 11 of the judgment. Some of the tests indicated in that paragraph would undoubtedly be satisfied in the present case, inasmuch as the nature of the act and the attendant circumstances would itself give some indication that the petitioner was likely to repeat the alleged act. This apart, the ambushing of the C. R. P. F. patrol by concealing along with some others at a suitable place being armed with sten gun etc. would show that it was a planned and premeditated affair. The attack being a result of some technical skill cannot also be ruled out. Thus, we are satisfied that there was a correct prognosis of the future behaviour of the petitioner based on the conduct in the past.

5. The non-filing of any affidavit by the Union of India is then relied on by Shri Medhi to contend that this would show that the Government had not considered the report sent to it as required by Section 3(5) of the Act. This too, has not caused any infirmity for the reasons given by us in *Bikash Narayan v. State* (Civil Rule (HC) 63/83 disposed of on 4-4-83): (reported in *Bikash Narayan Sarma Vs. State of Assam and Others*, Of course, we would put on record our displeasure at the failure of the Union of India to file its return even though it got almost four weeks to do so. In matters involving personal liberty of a citizen, the persons

concerned with the detention have to acquaint the Court with the due discharge of the obligation fastened on them in such matters.

6. Something is also said about the delay in disposal of representation. We find from the records that the representation was submitted on 27-2-83 and the same was forwarded by the Superintendent of the District Jail on 2-3-83. which reached the Government on 8-3-83. A note was put up on that date itself to the Under-Secretary who endorsed the file to the Deputy Secretary on 11-3-83 who. in turn, sent it to the Secretary stating that the detenu has denied all charges against him in a general way and has brought some allegations against police atrocities. The Secretary was of the view that the representation did not have much force and desired that the allegations of police atrocities may be enquired into separately. The endorsement of the Deputy Secretary is dated 14-3-83 where the Secretary noted as above on 15-3-83. Finally, it received the approval of the Chief Minister on 19-3-83. This being the position, we cannot hold that there was such a delay in disposal of representation which merits striking down of the order on this ground itself. We may state in this connection that the delay in Thulanta Bora (Civil Rule (HC) 131/ 83 disposed of on 3-4-83) was a little more and the non-dealing of the file from 8-3-83 to 13-3-83 in the Secretariat had not been explained at all. As to the non-application of mind to the points urged in the representation, which is also urged by Shri Medhi in this connection, we would say that it is not so, because the essential answer of the detenu, the same being denial of the allegations, has been noted in the endorsement of the Deputy Secretary. We have ourselves perused the representation and the main theme of the same is that the allegations are baseless.

7. A point which is urged with some vehemence by Sri Medhi relates to the passing of the impugned order on 19-2-83 whereas the alleged prejudicial activities were committed on 12-2-83. This shows, as per the learned Counsel. that the detenu must have been kept confined most probably in some police station from 12-2-83 to 19-2-83 and some criminal case must have also been instituted against him for his alleged attack on the C. R. P. F. patrol. The argument built on these presumptions is that the impugned order or the return must have shown awareness about these facts which it does not; and as such the order is not maintainable in view of the recent decision of the Supreme Court in Biru Mahato Vs. District Magistrate Dhanbad, ; Merugu Satyanarayana Vs. State of Andhra Pradesh and Others, and Devi Lal Mahto Vs. State of Bihar and Another, These decisions amongst others were relied on by this Court in Joynath Sharma Vs. State of Assam and Others, where awareness of a pending criminal prosecution was also emphasised.

8. We are unable to accept this submission as well of Shri Medhi because the same is founded on some presumptions alone. There is absolutely nothing before us to show that the petitioner had been kept in custody from 12-2-83 to 19-2-83, or that any criminal case has been instituted against him for his alleged attack on the C. R. P. F. patrol. According to. Shri Medhi after Rule had been

issued by this Court, it was incumbent on the detaining authority to satisfy the Court that the detention is legal, and it is the bounden duty of this Court to satisfy itself that all the safeguards provided by the law have been scrupulously observed. as stated in Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, It is urged that the though he had made the above submission on 2-5-83, when the case had come up for hearing first, the State did not acquaint this Court till 6-5-83 when the case was finally heard as to how the petitioner had been dealt with during the period between 12-2-83 to 19-2-83. We do not find any merit in this submission inasmuch as there being nothing in the petition filed by or on behalf of the detenu in this regard, the State had no occasion to meet this aspect. Not that we are going by the strict rules of pleadings, but a negative fact ("doing nothing with the petitioner during the above period") could not have been dealt with in the absence of a positive averment. This apart, in the representation of the petitioner, which is dated 27-2-83, we do not find any statement even indicating that he had been kept detained by the C.R.P.F. or police. All that the representation states is about assault on him by the C. R. P. F. and police of Namrup Thana.

In this state of affairs, we are not in a position to accept the presumption of Shri Medhi as correct. The non-mentioning of any awareness about this aforesaid factor (s) has, therefore, no lethality.

9. The final and the most important point involved in this case is whether, the impugned order can be set aside on the ground that the detaining authority had not borne in mind the question of the possibility of prosecution of the petitioner. To decide this, a close look at the legal position which emerges from the decided cases of the Supreme Court is warranted. The learned Government Advocate has taken pains to acquaint us with the thinking of the highest Court of the land on this vital aspect. He has first reminded us about the very purpose and object of enacting a statute like the Act. He submits, by placing reliance on *Borjahan Gorey Vs. The State of West Bengal*, and *Mohd. Subrati alias Mohd. Karim Vs. State of West Bengal*, that the Act had to be enacted because the ordinary law of the land was not found sufficient to deal with the prevention of activities prejudicial to the security of the State or maintenance of public order etc. The emergent requirement is highlighted by stating that before the enactment of the Act, it had been considered necessary to even promulgate the National Security Ordinance, which was ultimately repealed by the Act. It is also urged that we should bear in mind that the fields of operation of the two provisions are not co-extensive, nor are they alternative. The submission is that the jurisdiction under the Act may be invoked when the available evidence does not come up to the standard of judicial proof but is otherwise cogent enough to give rise to suspicion in the mind of the authority concerned that there is a reasonable likelihood of a person indulging in prejudicial acts. It was therefore stated in *Mohd. Subrati alias Mohd. Karim Vs. State of West Bengal*, that the fact that prosecution could have also been launched is not a valid ground for saying that it precludes the authority from acting under the preventive detention law.

10. We are then referred to Bhut Nath Mete Vs. The State of West Bengal, which has sounded a note of caution in this regard by stating that the detention power cannot be used to subvert, supplant or to substitute the punitive law of the Penal Code. It was also pointed out that the preventive detention law is an instrument for protecting the community against specially injurious types of antisocial activities; and the power is not to be used to put behind the bars anyone regarded as dangerous or difficult of being got rid of by proof of guilt in court.

11. Reference to the Constitution Bench decision in Haradhan Saha Vs. The State of West Bengal and Others, is a must in this connection. After noting the earlier decisions, it was stated in Paragraph 34 that merely because a detenu is liable to be tried in a criminal court would not by itself debar the Government from taking action against preventive detention. It has been earlier stated in paragraph 32 that the power of preventive detention is qualitatively different from punitive detention. It was also observed that an order of preventive detention may be made before or during prosecution, or with or without prosecution.

12. This odyssey may be cut short by referring to Kanchanlal Maneklal Chokshi Vs. State of Gujarat and Others, wherein after referring to the earlier decisions, the principles emerging therefrom were summarised as below in paragraph 8:

The ordinary criminal process is not to be circumvented or short-circuited by ready resort to preventive detention. But, the possibility of launching a criminal prosecution is not an absolute bar to an order. of preventive detention. Nor is it correct to say that if such possibility is not present to the mind of the detaining authority the order of detention is necessarily bad, However, the failure of the detaining authority to consider the possibility of launching a criminal prosecution may, in the circumstances of the case, lead to the conclusion that the detaining authority had not applied its mind to the vital question whether it was necessary to make an order of preventive detention. Where an express allegation is made that the order of detention was issued in a mechanical fashion without keeping present to its mind the question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose, the detaining authority must satisfy the Court that the question too was borne in mind before the order of detention was made. If the detaining authority fails to satisfy the Court that the detaining authority so bore the question in mind the Court would be justified in drawing the inference that there was no application of the mind by the detaining authority to the vital question whether it was necessary to preventively detain the detenu.

(Emphasis by their Lordships).

13. Strongly relying on this summary, it is contended by the Government Advocate that failure to consider the possibility of prosecution may only in the circumstances of a case lead to the conclusion that the detaining authority had not applied his mind to this vital question. Where, however. an express allegation is made about this failure, the detaining authority must satisfy the Court that this

question too was borne in mind before the order of detention was made. Shri Prasad. therefore, urges to consider the facts and circumstances of this case, in the absence of an express allegation in this regard, to decide as to whether the non-application of mind can be read because of not considering the question of prosecution of the detenu for his alleged activities on 12-2-83. It is submitted that in no case decided by the Supreme Court, the non-consideration of this aspect has been regarded as fatal in serious cases of the present nature. As per the learned Counsel only in some cases relating to theft of some materials, the failure to consider this question was regarded as fatal.

14. Before expressing our views on the matter. we have to note two other cases. One is that of Smt. Hemlata Kantilal Shah Vs. State of Maharashtra and another, ; where after noting the decision in Kanchanlal Maneklal Chokshi Vs. State of Gujarat and Others, it was stated that 1982 Cri LJ 9 .

a prosecution or the absence of it is not an absolute bar to an order of preventive detention; the authority may prosecute the offender for an isolated act or acts of an offence for violation of any criminal law, but if it is satisfied that the offender has a tendency to go on violating such laws, then there will be no bar for the State to detain him under a Preventive Detention Act in order to disable him to repeat such offences. What is required is that the detaining authority is to satisfy the Court that it had in mind the question whether prosecution of the offender was possible and sufficient in the circumstances of the case. In some cases of prosecution it may not be possible to bring home the culprit to book as in case of a professional bully, a murderer or a dacoit; as witnesses do not come forward to depose against him out of fear, or in case of international smuggling, it may not be possible to collect all necessary evidence without unreasonable delay and expenditure to prove the guilt of the offender beyond reasonable doubt.

(Emphasis supplied.)

The second decision which required to be mentioned is that of Mrs Saraswathi Seshagiri Vs. State of Kerala and Another, . In that case, the submission that the detention was uncalled for as the detenu could be prosecuted under the Customs Act, was not accepted after referring to what was stated in Smt. Hemlata Kantilal Shah Vs. State of Maharashtra and another, (supra). Therein, the detenu had attempted to export illegally Indian currency to the tune of Rupees 2,88,700/- by clever concealment of it in several parts of his baggage. This act was regarded as planned and premeditated and it was held that the same could well be taken as an indication of his future conduct. So, despite silence about showing any awareness to prosecute, the petition was dismissed.

15. On the basis of the aforesaid pronouncements. we could say the following on this aspect of the matter:

(1) The possibility of prosecution is not a bar to the use of preventive detention law, because the two ways (prosecution and detention) of dealing with the activity in question have different aims - one wants to punish a person for what

he has already done, and the other desires to prevent him from indulging in similar activities in future. They have, therefore, been regarded as qualitatively different. (See *Inter State Transport Commission, New Delhi Vs. P. Manjunath Kamath and Others*, , *Haradhan Saha Vs. The State of West Bengal and Others*, , *Kanchanlal Maneklal Chokshi Vs. State of Gujarat and Others*, and *Smt. Hemlata Kantilal Shah Vs. State of Maharashtra* and another,

(2) To regard use of preventive law as a bar where criminal prosecution could be launched, would frustrate the very purpose of enactment of the former type of laws, as these were brought into existence because the ordinary law was not regarded as sufficient to deal with the situation posing threat to the security of the State etc. Indeed the fields of operation of the two types of law are distinct and different. (Vide *Mohd. Subrati alias Mohd. Karim Vs. State of West Bengal*, and *Haradhan*).

(3) But then the preventive detention laws do not contemplate supplanting of ordinary laws and were not enacted to throw a person into a prison cell merely because it is "irksome to undertake the inconvenience of proving guilt in court"; and therefore, the executive tendency "to shy at courts for prosecution of ordinary offences and to rely generously on the easier strategy of subjective satisfaction" is regarded as a danger to the democratic way of life, as stated in *Bhutnath*.

(4) So, possibility of prosecution has to be borne in mind as stated in *Kanchan Lal*. Even so, an order of detention will not necessary be bad in all cases due to non-application of mind about this aspect, as made clear in para 1 of *Kanchanlal* itself. This will depend upon circumstances of each case. What these could be is difficult to say dogmatically. The nature of the act would, however, be relevant. The setting aside of orders in *Srilal Shaw Vs. The State of West Bengal and Others*, and *Abdul Gaffer Vs. State of West Bengal*, was, it seems, mainly due to the nature of the act-theft or unlawful possession of railway property. Added to this was the unsatisfactory explanation for not prosecuting - the same being fear of witnesses. whereas the main witnesses were R. P. F. personnel. In *Saraswathi* 1982 Cri LJ 1251(SC) (supra) such a contention was not countenanced even though there was nothing to show if the authority had applied its mind to this aspect, as the facts of the case fully satisfied the Court about due arrival of subjective satisfaction. *Kanchanlal* itself is a case where no awareness was shown in this regard, despite which no infirmity was read on this score as the elaborate statement of facts in the grounds clearly showed application of mind and as there was nothing else on record to infer non-bearing of mind to relevant considerations.

(5) Even if nothing is specifically stated in the return about consideration of this aspect, this may not matter for some type of cases (in the absence of specific averment), as, it has been pointed out in *Hemlata* (which is followed in *Saraswathi*) that in cases of professional bully etc. prosecution may not be possible because witnesses may not come forward to depose out of fear, or in

case of international smuggling, prosecution is not feasible without unreasonable delay and expenditure.

(6) If an allegation of non-application of mind qua this fact is made then, of course, the detaining authority has to satisfy that this question was borne in mind before the order of detention was made.

(7) What has been stated above applies not only to full dress trial, but also to preventive proceedings under Chap. VIII of the Criminal Procedure Code, vide *Borjahan Gorey Vs. The State of West Bengal*, and *Mohd. Subrati alias Mohd. Karim Vs. State of West Bengal*,

(8) The matter may wear a different form where the question is not of trying to prosecute the detenu, but of detention after a discharge or acquittal in a criminal case. As the instant case is not of this nature, we are not examining this facet and expressing no opinion as to whether an order would be bad or not for non-consideration of the same.

16. Testing the present case on the above touchstone, it has to be first stated that there is no specific averment regarding non-application of mind on this score. The nature of the act is definitely such which posed a serious threat to the maintenance of public order. and if because of this, decision to preventively detain the petitioner was taken without considering the possibility of prosecution under the ordinary law, we do not think, we would be justified to hold that the same has introduced a serious infirmity in the order. The act in question is definitely of the "specially injurious" type about which mention has been made in *Bhut Nath Mete Vs. The State of West Bengal*. If the Act has to be allowed to operate, persons indulging in activities of the type mentioned in the grounds must be allowed to be preventively detained.

17. We would, therefore, hold that the final submission of Shri Medhi has also no force. There being no other contention, we are constrained to dismiss the petition.

T.N. Singh, J.

18. Conclusions in this case of my noble brother, both of law and facts, have my full concurrence. I consider it necessary however to make it clear that as a challenge to the validity of a detention order on the score of non-consideration of the possibility of prosecution in a given case can be directed merely to testing the reality of the "subjective satisfaction" of the detaining authority, the limitation of Courts' jurisdiction in this regard must be borne in mind. In my opinion, the argument can have an edge in the context of an "existing detention" (under general or ordinary law). Because, it is only then that a judicial scrutiny of the factual position is called for. This follows, according to me, from the end result obtained in the decisions of the apex Court in which the contention was raised only to be repelled (see *supra*, *Kanchanlal Maneklal Chokshi Vs. State of Gujarat and Others*, *Smt. Hemlata Kantilal Shah Vs. State of Maharashtra* and

another, and Saraswati 1982 Cri LJ 1251(SC)).

19. This empirical test has a sound legal basis. The offensive activities which partake the character of "grounds" in a case of preventive detention are, in one way or other in most cases, violative of one or other penal provision and a general plea based on the possibility of prosecution is always available to the detenu. The plea becomes justiciable obviously when the factual base therefore is laid. As the Court cannot adjudge the propriety of the action of the detaining authority of resorting to preventive detention in preference to prosecution under ordinary law, it can call upon the detaining authority merely to satisfy it about the necessity of preventive action in the face of an existing detention under ordinary law. Indeed, even this inquiry has a limited scope. It is to be directed merely to see whether there was "rational material" for arriving at the required "subjective satisfaction" with "due care" as the Court is constitutionally obligated to ensure that "unscrupulous" exercise of power is eschewed. (see *Bhut Nath Mete Vs. The State of West Bengal*,

20. As has been vocally emphasized by my learned brother, the fields of operation of the ordinary law and the preventive detention law being separate, by judicial fiat the plain legislative purpose of the special law cannot be foiled or fettered. Judicial safeguards in the field of preventive detention laws have albeit been assiduously, built up, but on recognised canons of interpretation. Even as the apex Court has held that these laws inhere "draconian powers" such laws have importantly also acquired the label of "necessary evil", (see *supra*, *Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others*, It is to be borne in mind in this connection that in *Haradhan Saha Vs. The State of West Bengal and Others*, a general challenge grounded on the infraction of Article 14 was rejected and the Court held that although there is, in every case of a preventive detention, an alternative of prosecution under ordinary law, the purpose of the special law and the nature of the proceeding thereunder, must receive due consideration.

21. In my opinion therefore when the "subjective satisfaction" for non-application of mind to the possibility of prosecution under ordinary law is challenged without pleading the fact of "existing detention" the objection has to be viewed in a different perspective and considerations weighing with the Court in cases where the rule of awareness as to pending prosecution is in issue cannot, be invoked to support such objection raised in general terms. The judicial inquiry into the area of subjective satisfaction having a limited range and object the Court will not suo motu embark upon an uncharted course and in my opinion the rule that pleadings in cases of preventive detention have to be liberally construed has limits for the same reason. What omission in the pleadings can in the particular circumstances of case be considered material must be left to the Court to decide. The general observations in *Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others*, at para 4 are, in my opinion, not open to the construction which will place onus of inquiry in all cases squarely on the Court as the decision itself

limits the onus to the case of "safeguards provided by law" which would be nothing more than constitutional and statutory safeguards.

22. Thus, as has been stated by my learned brother by reference albeit to *Srilal Shaw Vs. The State of West Bengal and Others*, *Abdul Gaffer Vs. State of West Bengal*, and *Kanchanlal* 1979 Cri LJ 130 (SC) (all supra). Court's decisions in such cases have to be based inevitably on other circumstances, namely, circumstances other than an "existing detention" and I agree with my learned brother to say that it is difficult to draw a complete catalogue of them. It is precisely for this reason that in this region the Court has to exercise a discretion consonant with the object of the enactment in refusing or accepting as conclusive any one or more circumstances as to the awareness (or the lack of it) of the detaining authority of the possibility of prosecution in the absence of specific averment of relevant facts by one side and denial or admission thereof by the other side. The Court may accept such facts disclosed in the grounds as manifesting the required awareness as may be related to the nature of the offensive acts or activities. Their serious and grave nature and repetitive tendency may justify an inference that awareness of the necessity of preventive detention in preference to criminal prosecution was present to the mind of the detaining authority.

23. I am therefore of the opinion that in the instant case an "existing detention" not having been pleaded the Court is justified in looking merely at the grounds and arriving at the conclusion from the nature of the acts and activities attributed to the detenu that the possibility of prosecution on the same facts was present to the mind of the detaining authority and the detention order was therefore, not passed in a mechanical fashion as may proceed from a tainted and unreal satisfaction.