

(2016) 03 AHC CK 0064
In the Allahabad High Court
Case No : Habeas Corpus No. 270 of 2015

Kapil Deo

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 02-03-2016

Acts Referred:

National Security Act, 1980 — Section 3, Section 3(1)(a), Section 3(2)

Penal Code, 1860 (IPC) — Section 376

Protection of Children from Sexual Offences Act, 2012 — Section 3, Section 4

Citation : (2016) 03 AHC CK 0064

Hon'ble Judges : Ajai Lamba and Aditya Nath Mittal, JJ.

Bench : Division Bench

Advocate : R.P. Mishra, for the Appellant; Govt. Advocate, A.S.G. and Vimal Kumar, for the Respondent

Final Decision : Allowed

Judgement

Aditya Nath Mittal, J.—1. The petition seeks issuance of a writ in the nature of certiorari quashing order dated 19.08.2015 as well as the detention order dated 04.07.2015 passed under National Security Act, 1980.

2. The facts giving rise to the present petition are that the petitioner was arrested by the Police on 01.03.2015 in Case Crime No. 260 of 2015 under Section 376 Indian Penal Code and Section 3/4 Protection of Children from Sexual Offences Act relating to Police Station Sadulla Nagar, District Balrampur in which the charge-sheet has also been filed on 30.04.2015. The District Magistrate, Balrampur passed a detention order on 04.07.2015 under section 3 of the National Security Act on the premises that the petitioner has filed the application for bail in the Court of Additional Sessions Judge/F.T.C., Balrampur.

3. The background of the impugned order is that the Station House Officer, Sadullu Nagar, District Balrampur had submitted a report to the Superintendent of Police, Balrampur that in the intervening night of 27/28-02-2015, the marriage ceremony of the daughter of Raksha Jaiswal was going on, in which the

Video Film was also displayed. The victim aged about 8 years had also gone to view the video. At about 3-4 a.m. in the morning, she told that a boy from the marriage party has committed rape with him.

4. Videography of the marriage ceremony was shown in which the victim had identified the accused, who was also identified by other villagers that he was Kapil Deo @ Babloo. Due to this incident, there was serious threat to public law and order and the case was registered against the petitioner. Upon the information of the informant, the petitioner was arrested on 01.03.2015 and was remanded to judicial custody by the Court concerned. The petitioner had moved an application for bail and he was trying to obtain bail from the Court concerned. Upon the information that the petitioner is trying to get release on bail, ladies and girl children got feared that if the petitioner is released on bail, then he will again commit such offence and the public order shall be disturbed. Therefore, recommendation was made to detain the petitioner under National Security Act, 1980. Upon the recommendation, the Circle Officer City, Balrampur send recommendation to the Additional Superintendent of Police, Balrampur and, in turn, the Additional Superintendent of Police, Balrampur forwarded the recommendation to impose the National Security Act upon the accused. Superintendent of Police, Balrampur had also recommended to the District Magistrate, Balrampur for detention of the petitioner under National Security Act.

5. The District Magistrate, Balrampur took the cognizance of the matter and came to the conclusion that this brutal incident of rape has created resentment and communal tension in the area and people were forced to confine in their houses. The normal life in the area is disturbed due to fear and resentment amongst the residents. This ghastly event had stirred the nerves of all the residents and public order was disturbed. Accordingly, on 04.07.2015, the detention order was passed, which was subsequently confirmed by order dated 19.08.2015.

6. With this backdrop, learned counsel for the petitioner has submitted that it could be the problem of law and order but not of public order. It has also been submitted that there was no likelihood of the petitioner coming out from jail since the bail was rejected on 26.06.2015 while the detention order was passed on 04.07.2015. It has also been submitted that the grounds of detention are stale as the same has been passed after a gap of five months and three days while the occurrence has taken place in the intervening night of 27/28-02-2015. There is no live-link between prejudicial activities of the petitioner - detenue and rationale of clamping. Therefore, the detention order has acquired a punitive character. It has also been submitted that the detaining authority has wrongly come to the conclusion that the petitioner was a hardened criminal while there was no material available before the detaining authority to arrive at such a conclusion.

7. Per contra, Sri Vimal Kumar, learned counsel appearing for Union of India and Sri Rishad Murtaza, learned Government Advocate appearing for respondent-

State have supported the impugned order in view of the grounds mentioned in the detention order.

8. We have heard learned counsel for the parties" and perused the pleadings of petition.

9. Certainly, the problem of law and order is distinguishable from the problem of public Order. Hon"ble the Apex Court has also dealt with this aspect in the following way:

"In the case of Arun Ghosh v. State of West Bengal reported at , 1970 (1) SCC 98, Hon"ble the Apex Court has held that:

"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. 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. There is no formula by which one case can be distinguished from another.

In Kanu Vishwas v. State of West Bengal; , (1973) SCC (Cri) 16, it has been held as under:

"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. Public order is what the French call "order publique" and is something more than ordinary maintenance of law and order. The test to be adopted in determining whether an act affects law and order or public order is: Does it lead to disturbance of the current life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed."

10. In the present case, the petitioner was arrested on 01.03.2015 and the detention order was passed on 04.07.2015 while application for bail was already rejected on 26.06.2015."

11. We fail to understand that when the petitioner was already in custody, then how he could have caused the disturbance of public order. We do not find that the alleged breach of law and order in the present case, was likely to cause a disturbance of the public order. It is also not disputed that on the date of passing of order dated 04.07.2015, the application for bail of the petitioner was already rejected on 26.06.2015 and it is also the admitted position that on the date of passing of the said order dated 04.07.2015, second application for bail or any application for bail before any competent court, was not pending.

12. Regarding the detention order of a person, who is already in jail custody, Hon"ble the Apex Court has considered this aspect in the following cases:

"In *Rameshwar Shaw v. District Magistrate, Burdwan and another*; , AIR 1964 SC 334, Hon"ble the Apex Court has held that:

"if a person is already in jail custody, as a result of a remand order passed by a competent authority, it cannot rationally be postulated that if he is not detained, he would act in a prejudicial manner. At the point of time when an order of detention is going to be served on a person, it must be patent that the said person would act prejudicially if he is not detained and that is a consideration which would be absent when the authority is dealing with a person already in detention. The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus the basis of the order under section 3(1)(a) and is outside its purview."

Similarly in *Alijan Mian v. District Magistrate, Dhanbad and others*; , 1983 SCC (Cri.) 840, Hon"ble the Apex Court has held as under:

"It may be pointed out at the very outset that the detaining authority was alive to the fact that the petitioners were in jail custody on the date of the passing of the detention orders as will be clear from the following statement in the grounds of detention:

"The subject is in jail and is likely to be released on bail. In the circumstances I am satisfied that if he is allowed to remain at large, he will indulge in activities prejudicial to the maintenance of public order."

The position would have been entirely different if the petitioners were in jail and had to remain in jail for a pretty long time. In such a situation there could be no apprehension of breach of "public order" from the petitioners. But the detaining authority was satisfied that if the petitioners were enlarged on bail, of which there was every likelihood, it was necessary to prevent them from acting in a manner prejudicial to public order."

13. Hon"ble the Apex Court in a case reported at , (1989) SCC 22 [*Abdul Razak Abdul Wahab Sheikh v. S.N. Sinha, Commissioner of Police, Ahmedabad and another*] after considering the law laid down in *Rameshwar Shaw v. District Magistrate, Burdwan and another* [, AIR 1964 SC 334]; *Alijan Mian v. District Magistrate, Dhanbad and others* [, 1983 (4) SCC 301]; *Ramesh Yadav v. District Magistrate Etah* [, (1985) 4 SCC 232]; *Suraj Pal Sahu v. State of Maharashtra* [, 1986 (4) SCC 378]; *Vijay Narain Singh v. State of Bihar* [, (1984) 3 SCC 14]; *Raj Kumar Singh v. State of Bihar* [, (1986) 4 SCC 407]; *Binod Singh v. District Magistrate Dhanbad* [, (1986) 4 SCC 416]; *Poonam Lata v. M.L. Wadhawan* [, (1987) 4 SCC 48]; and *Smt. Shashi Aggarwal v. State of U.P.* [, (1988) 1 SCC 436 has held as under:

"On a consideration of the aforesaid decisions the principle that emerges is that there must be awareness in the mind of the detaining authority that the detenu

is in custody at the time of service of the order of detention on him and cogent relevant materials and fresh facts have been disclosed which necessitate the making of an order of detention. In this case, the detenu was in jail custody in connection with a criminal case and the order of detention was served on him in jail. It is also evident that the application for bail filed by the detenu was rejected by the Designated Court on 13th May, 1988. It is also not disputed that thereafter no application for bail was made for release of the detenu before the order of detention was served on him on 23rd May, 1988. It appears that in the grounds of detention there is a statement that at present you are in jail yet "there are full possibilities that you may be released on bail in this offence also." This statement clearly shows that the detaining authority was completely unaware of the fact that no application for bail was made on behalf of the detenu for his release before the Designated Court and as such the possibility of his coming out on bail is non-existent. This fact of non-awareness of the detaining authority, in our opinion, clearly establishes that the subjective satisfaction was not arrived at by the detaining authority on consideration of relevant materials."

14. The aforesaid law squarely applies to the present set of facts because on the date of passing of the detention order as well as on the date of recommendation to pass order under National Security Act right from Station House Officer, P.S. Sadulla Nagar, District Balrampur to Superintendent of Police Balrampur, the petitioner was already in custody and his bail was already rejected on 26.06.2015. No further application for bail was pending before any competent Court. Therefore, in these circumstances, we are satisfied that there was no subjective satisfaction of the detaining authority, as provided in Section 3(2) of the National Security Act, 1980, to pass the detention order. Further more, mere possibility of release on bail of the detenue is not enough for preventive detention. There must also be credible information or cogent reasons apparent on the record that the detenue, if released on bail, is likely to commit activities prejudicial to the maintenance of public order.

15. In the present case, there is no other criminal history of the petitioner except the aforesaid one case. However, an exception to this rule is that where a co-accused whose case stands on the same footing had been granted bail, in such circumstances, the detaining authority can reasonably conclude that there is likelihood of the detenue being released on bail even though no bail application of his, is pending since most courts normally grant bail on the ground of parity.

16. In the instant case, the petitioner is the sole accused in the matter. Therefore, there is no possibility that the detenue could have taken the benefit of grant of bail of co-accused.

17. We find substance in the submissions of the learned counsel for the petitioner that there was no live-link between the pre-judicial activities of the petitioner and rationale of clamping. The detention order was passed after a gap of five months and three days and during this period, there was no other conduct or overt act of the petitioner, which could have granted the satisfaction to the

detaining authority that the petitioner is likely to disturb the public order.

18. The apprehension of the detaining authority that the petitioner shall be released on bail appears to be without any cogent material and it appears to have been passed on mere ipse dixit of the detaining authority. In these circumstances, the order of detention is not based on sufficient material as well as subjective satisfaction of the detaining authority.

19. The detaining authority in exercise of power under "NSA" must act strictly within the limitations provided under the Act, so that grant of liberty is not imperilled beyond the Constitution. Individual liberty is a cherished right, one of the most valuable fundamental rights provided by our Constitution to the citizens of this country. Such right may be envied only strictly in accordance with law. The authorities cannot be expected to deal with the liberty of individual in a causal manner.

20. In view of the above, we are of the view that on the date of passing of detention order, there was no subjective satisfaction of the District Magistrate, Balrampur because no application for bail was pending and the petitioner was also in judicial custody. The chain of connection between the alleged offence of rape relied on, and the detention order passed is further snapped by long and unexplained delay.

21. For the aforesaid reasons, the petition deserves to be allowed and the detention order dated 04.07.2015 as well as confirmation order dated 19.08.2015 deserves to be set aside.

22. Accordingly, the detention order dated 04.07.2015 and the consequential approval order dated 19.08.2015 passed under National Security Act, 1980 are hereby quashed.

23. The petition is allowed.