
(2006) 02 PAT CK 0075
In the Patna High Court
Case No : Cr.WJC No. 495 of 2005

Mithilesh Yadav @ Mitthu Yadav

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 27-02-2006

Acts Referred:

Arms Act, 1959 — Section 25(1B) A, 26, 27, 35
Bihar Control of Crimes Act, 1981 — Section 12, 12(2), 17, 21(1), 22
Constitution of India, 1950 — Article 21, 22, 22(5)
Penal Code, 1860 (IPC) — Section 307, 332, 333, 34, 353

Citation : (2006) 2 PLJR 187

Hon'ble Judges : S.N. Hussain, J; R.N. Prasad, J

Bench : Division Bench

Advocate : Ram Balak Mahto and Ajay, for the Appellant; Lalit Kishore and Binita Singh, for the Respondent

Final Decision : Allowed

Judgement

S.N. Hussain, J.—Heard learned counsel for the petitioner and learned counsel for the State. By this writ petition the petitioner has challenged the order of the State Government passed in exercise of powers conferred by Section 21(1) read with Section 22 of the Bihar Control of Crimes Act, 1981 (hereinafter referred to as "the Act" for the sake of brevity) communicated by order dated 27th May, 2005 (Annexure-1) of the Deputy Secretary, Department of Home (Police), Government of Bihar (respondent No. 3) confirming the detention order dated 6.4.2005 (Annexures 2 & 3) passed by the District Magistrate, Patna (respondent No. 4) under the provision of Section 12(2) of the Act with respect to the petitioner directing him to remain in detention till 5th of April, 2006. The short fact of this case is that while the petitioner was in Sub-Jail, Barh in connection with Ghoswari P.S. Case No. 35/2004 for offences punishable under Sections 399, 402, 353, 332, 333, 307 and 34 of the Penal Code read with Section 25(1-B) A, 26, 27 and 35 of the Arms Act, the Senior Superintendent of Police, Patna (respondent No. 5) submitted a report to the District Magistrate, Patna alleging

that the illegal and antisocial activities of the petitioner were so serious that his remaining out of Jail may at any time disrupt public order and would be detrimental to the peace of general people and on the said report the District Magistrate, Patna (respondent No. 4) passed his order dated 6.4.2005 (Annexures-2 & 3) for preventive detention of the petitioner for one year as he was a notorious criminal accused in several cases for serious offences like kidnapping, extortion, murder and violation of the provisions of the Arms Act etc., due to which his remaining out of Jail would disturb the peace of general people and would disrupt public order. The said order of the Collector was challenged by the petitioner by representation dated 15.4.2005 under the provision of Section 12(2) of the Act but the said representation was rejected by the State Government, which was communicated vide Government Memo No. 4097 dated 4.5.2005 (Annexure-4) of the aforesaid Deputy Secretary (respondent No. 3) and subsequently, on the opinion of the Advisory Board the order of the District Magistrate (respondent No. 4) dated 6.4.2005 (Annexures-2 & 3) was confirmed by the State Government under the provisions of Section 21(1) and Section 22 of the Act and the same is evident by order dated 27th May, 2005 (Annexure-1) passed by the Deputy Secretary of the Department (respondent No. 3).

2. Learned counsel for the petitioner has submitted that the order of detention of a person who is already in custody is beyond the powers of the District Magistrate and in the instant case it is apparent from the order of the District Magistrate himself that the petitioner was already in Jail at that time and hence the District Magistrate went beyond his jurisdiction in passing the said order. He further stated that a person already in Jail cannot act in any prejudicial manner and it is not evident from the record that the authorities concerned were satisfied that the petitioner is likely to be released from Jail or he is acting in any prejudicial manner from the Jail itself. Learned counsel for the petitioner also averred that the powers u/s 12 of the Act for preventive detention has to be passed on the subjective satisfaction of the authority himself but the impugned order of the District Magistrate shows that the said order was passed merely upon the report of Police Officers regarding involvement of the petitioner in a few cases without appreciating that in most of them his prayer for bail has already been allowed by the competent courts.

3. Learned counsel for the petitioner further submitted that neither the report of the Senior Superintendent of Police was ever served upon the petitioner, nor any reason was assigned by the authority concerned for rejecting his representation. Learned counsel for the petitioner also stated that the entire facts of the case show that there was unreasonable and unexplained delay in deciding the representation of the petitioner against his detention, which is not only violative of the Constitutional provision prescribed in Articles 21 and 22 but is also a very serious encroachment upon his personal freedom without any trial.

4. On the other hand, learned counsel for the State vehemently opposed the

contentions of the learned counsel for the petitioner and submitted that there is no question of any serious encroachment on the personal freedom of the petitioner as he has been ordered to be detained under the specific provision of law for the maintenance of public order and also for providing peace and tranquility for the general people, which was under threat by the illegal activities of the petitioner, which is fully proved by the serious nature of the crimes in which he is involved. Learned counsel for the State also stated that there is no delay in the disposal of the petitioner's representation as it has been decided on 4th May, 2005 (Annexure-4) itself.

5. No doubt Law is well settled that preventive detention in certain cases is essential for maintenances of public order and it depends upon subjective satisfaction of the detaining authority for maintenance of public order and while making judicial review of such preventive detention this Court cannot sit as an appellate authority nor can it weigh the quantum of materials relied upon by the detaining authority, but at the same time it is also well settled that such detention of a person without trial is a very serious encroachment on his personal freedom, hence at every stage all questions relating to detention must be carefully and solemnly considered and every provision of law must be strictly construed and followed. The most important question relates to delay in deciding the representation of the detainee against the order passed by the detaining authority. Although Article 22(5) of the Constitution of India or Section 17 of the Act do not provide any period of limitation for disposal of representation of the detainee, but the words "as soon as may be" make it mandatory for the authority to dispose of the representation without any delay.

6. The question of such a delay as mentioned above has to be considered in the facts and circumstances of each case and no straitjacket formulae can be prescribed in all the cases. But it is clearly mandated that every delay has to be validly explained as longer explained delay may be condoned but shorter unexplained delay can be fatal. In the instant case the District Magistrate had passed the order of detention on 6.4.2005 against which the petitioner filed his representation on 15.4.2005 which was rejected by the authorities concerned on 4.5.2005, whereafter on the basis of opinion of Advisory Board the order of detention was confirmed on 27.5.2005. But neither in the said order dated 4.5.2005 nor in the order dated 27.5.2005 passed by the authorities concerned any reason for such a long delay of 20 days and 43 days has been sought to be explained by the authorities concerned and moreover they had not even cared to explain when the opinion of Advisory Board was sought and when such an opinion was received. Hence it is apparent that the authorities concerned were absolutely unaware of the aforesaid requirement and their legal obligation. Thus there being unexplained delay in the disposal of petitioner's representation by the authorities concerned, the order of his detention cannot be sustained in law.

7. Before passing an order for preventive detention the authority has to be satisfied about two points; Firstly that detention of the person concerned was

necessary for "public order" which is quite distinct from "law and order", as when tempo of life is disturbed it goes beyond law and order and enters the realms of public order and in such circumstances subjective satisfaction of the authority is required for preventive detention; Secondly that if the person is not detained, he would act in a manner prejudicial to public order and that inevitably postulates that the said person has freedom of action at that time, hence if a person is already in jail/custody on the basis of remand order passed by competent authority in some other case, it cannot rationally be postulated that if he is not put in preventive detention he would act in a manner prejudicial to public order. Thus the assumption that a person would act prejudicially to public order, which is the basis of the provision of Section 3(1)(a) and (b) of the Act, is absent in the case of a person already in jail/custody.

8. However, the matter would be a bit different if the detaining authority feels that the release of such person is imminent and mentions about it in his order and in such a case it cannot be validly said that the order of detention was merely to pre-empt his release on bail. But in the instant case the petitioner was admittedly in jail/custody but no mention has been made in the impugned order of detention that either the release of petitioner is imminent or he had even filed any application for his release on bail and thus the said order does not reflect the awareness of the detaining authority in that regard. Hence the said impugned order of detention is violative of the provisions of law and cannot be held to be legal and justified on that ground also. In the aforesaid facts and circumstances of this case the impugned orders contained in Annexures-1, 2, 3 and 4 of this writ petition are hereby quashed and accordingly, this writ petition is allowed. Let the petitioner be released forthwith if not required in any other case.

Ram Nandan Prasad, J.

9. I agree.