

(2012) 10 OHC CK 0014
In the Orissa High Court
Case No : Writ Petition (Cri) No. 712 of 2012

Pradeep Sahu

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 19-10-2012

Acts Referred:

National Security Act, 1980 — Section 12(1), 13, 3, 3(2), 3(4)
Penal Code, 1860 (IPC) — Section 302, 34, 341, 387, 429

Citation : (2013) CriLJ 1101

Hon'ble Judges : V. Gopala Gowda, C.J.; S.K. Mishra, J

Bench : Division Bench

Advocate : Asim Amitabh Das, B. Ray, A.K. Behere, R. Verma, B.K. Parida and S. Mohanty, for the Appellant; S.D. Das, Asst. Solicitor General, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

V. Gopala Gowda, C.J.—In exercise of power conferred under sub-section (2) of Section 3 of the National Security Act, 1980, the District Magistrate, Sambalpur passed order dated 8-4-2012 (Annexure-1) directing detention of the petitioner Pradeep Sahu in the Circle Jail, Sambalpur until further orders with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. On 10-4-2012, the order of detention was served on the petitioner detenu in Circle Jail, Sambalpur where he was in intermediate judicial custody in connection with Thelkuli P.S. Case No. 42 dated 25-3-2012 u/s 387/ 341/ 429/ 506/ 34, IPC. The detention order was approved by the State Government on 19-4-2012. Thereafter, the petitioner made a representation to the State Government which was rejected by the State Government on 16-5-2012 which was communicated to the petitioner on 21-5-2012 vide Annexure-3. Copy of the representation and para-wise report was sent to the Government of India on 21-5-2012 which was rejected by the Central Government on 30-5-2012. The detention order was confirmed by the State Government on 12-6-2012. In this writ petition, the petitioner has prayed for quashing the order of detention

Annexure-1 as well as the order of the State Government rejecting his representation and confirming the order of detention, vide Annexures-3 and 5 respectively on the ground that the order of detention has been passed without application of mind and without regard to the procedure laid down under law and without considering his representation; the grounds of detention do not make out a case of disturbance of public order warranting detention u/s 3(2) of the National Security Act; and since the detenu was, already in intermediate judicial custody, there was no necessity of the order of preventive detention.

2. Mr. A.A. Das, learned counsel for the petitioner contends that one of the grounds on the basis of which the order of detention dated 8-4-2012 has been passed by the Collector-cum-District Magistrate, Sambalpur that there is possibility of the petitioner being released on bail, is not sustainable in law. Another ground of challenge of the detention order is that it discloses 20 cases against the petitioner starting from the year 2002 onwards, out of which one is u/s 110, two cases are mere Station Diary entries, in five cases the petitioner has not been named in the F.I.R., but subsequently impleaded on the basis of the 161 statement, three cases registered due to family rivalry, in six cases the petitioner has been implicated at the instance of one company, namely, M/s. Aryan Ispat Ltd. in three cases he has been implicated due to political rivalry relating to Gram Panchayat Election etc, in two cases, the police has implicated him on the allegation of preparation of dacoity although there is no antecedents regarding commission of dacoity, in two cases the petitioner has been acquitted by the competent Courts, in one case u/s 302/ 34, IPC criminal appeal has been filed before this Court, wherein he has been granted bail and against the said order, the SLP has been preferred for cancellation of bail at the instance of the informant, but not by the State Government. The narration of the facts and grounds mentioned in the order of detention, would reveal that except a few cases, in all other cases, the offences are triable by Magistrate First Class. It is further contended by him that the Home Department received information regarding detention on 11-4-2012 along with relevant materials and on 19-4-2012, the order of detention was approved and the said order was communicated to the Ministry of Home, Government of India and Secretary, National Security Advisory Board. Therefore, there is no application of mind on the part of the State Government while confirming the order of detention. Hence, the impugned order is liable to be quashed.

3. In support of the aforesaid contention, he has placed reliance upon the judgment of the Supreme Court in Yumman Ongbi Lembi Leima Vs. State of Manipur and Others, wherein the Apex Court has held that where the grounds of detention do not disclose any material, which were before the detaining authority other than the fact that there is every likelihood of the detenu being released on bail in connection with the cases to support the order of detention amounts to deprivation of his life and personal liberty and as such, violative of Articles 21 and 22(2) of the Constitution of India (Para 13). In the said case, the Apex Court also referred to another decision of the supreme Court in Haradhan Saha Vs. The

State of West Bengal and Others, wherein it is held that preventive detention is not to punish a person for something he has done but to prevent him from doing it. Thus, he submitted that the detention order has been passed by the District Magistrate on the allegation of involvement of the petitioner in number of criminal cases, but no material is forthcoming in the report of the Superintendent of Police or the materials available before the detaining authority that there is likelihood of committing breach of public order. According to Mr. Das, the aforesaid judgment is applicable to the case in hand and requests this Court to quash the detention order.

4. He further contended that the detention order must satisfy three cumulative and additive nature of requirements as held by the Supreme Court in *Huidrom Konungjao Singh Vs. State of Manipur and Others*, they are:

(i) The authority was fully aware of the fact that the detenu was actually in custody;

(ii) There was reliable material before the said authority on the basis of which it could have reason to believe that there was real possibility of his release on bail and being released, he would probably indulge in activities which are prejudicial to public order;

(iii) Necessity to prevent him for which detention order was required.

According to Mr. Das, the detaining authority has not stated the aforesaid cumulative requirements as observed by the Supreme Court in the case referred to *supra* and since the observations made in the detention order, particularly, para 21, do not at all meet the requirement of law laid down by the Apex Court in the aforesaid two cases and, therefore, the same cannot stand to the scrutiny of this Court and therefore, is liable to be quashed.

5. He further submitted that neither the detaining authority at the time of passing of the order nor the State Government while confirming the same took into consideration the nature of allegations and offences alleged in the grounds of detention to examine whether the same relates to "public order" and the normal law cannot take care of such offences and that the acts of the detenu mentioned in the grounds of detention are prejudicial to maintenance of public order or they only relate to "law and order". Therefore, the detention order is not legal and valid and is liable to be quashed. In support of the said contention, he has placed reliance upon the decision of the Supreme Court in *Smt. Tarannum Vs. Union of India and Others*, .

6. He has also placed reliance upon the decision of this Court in *Sri Sadasiva Apat alias Sada v. State of Orissa and another*, 80 (1995) CLT 804 : (1995 AIHC 4774), wherein this Court referring to the decisions of the Supreme Court in *Dr. Ram Manohar Lohia Vs. State of Bihar and Others*, *Arun Ghosh Vs. State of West Bengal*, , *Dipak Bose alias Haripada v. State of West Bengal*, reported in 1972 SC 2686 and *Kuso Sah Vs. The State of Bihar and Others*, formulated that the

following factors to be borne in mind when determining whether the disturbance or disorder amounts to breach of "law and order" or "public order".

(i) The contravention of law always affects order, but before it can be said to affect the public order, it must affect the community or the public at large.

(ii) Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality.

(iii) It is the degree of disturbance and its effect on the life of the community in the locality, which determine whether that disturbance amounts breach of law and order or public order.

(iv) Any act by itself is not determinant of its own gravity. In its quality, it may not differ from another, but in potentiality it may be very different.

(v) Whether a man has committed breach of law and order or has acted in a manner likely to cause disturbance of the public order is a question of degree and the extent of the reach of the act on the society.

(vi) Every assaulting a public place like a public road and terminating in the death of a victim is likely to cause horror and even panic and terror in those who are the spectators. But that does not mean that all such incidents do necessarily cause disturbance or dislocation of the community life of the localities in which they are committed.

(vii) It is well established that stray and unorganized crimes of theft and assault not matters of public order since they do not tend to affect the even flow of public life.

(viii) Whether disturbance or disorder has led to breach of law and public order is a question of fact, in which case there is no formula by which one case can be distinguished from another.

Placing reliance upon the aforesaid proposition of law, Mr. Das, learned counsel appearing for the petitioner submitted that the present case makes out a case of only "law and order" and not "public order". Therefore, the observation made in para 22 of the detention order that after the petitioner is released on bail, he will create frequent lawlessness, affecting normal life and causing frequent disruption of public order, which would be detrimental to the maintenance of public order, should be held to be bad in law and is liable to be quashed.

7. Mr. D. Panda, learned Addl. Government Advocate sought to justify the order of detention urging that the grounds urged challenging the order of detention are totally irrelevant. He further submitted that the order of detention has been passed after careful application of mind by the detaining authority on the basis of the materials available on record as well as on the request made by the Superintendent of Police, Sambalpur. He further submitted that the procedural safeguards contained in the detention law has been complied with and both the State as well as the Government of India have dealt with the representations

expeditiously and no extraneous consideration has been taken into account in the grounds and all the materials on which reliance has been placed by the detaining authority has been supplied along with the grounds of detention order to the petitioner, In reply to the contention urged on behalf of the petitioner that the incidents narrated in the grounds of detention do not make out a case of breach of "public order", he submitted that the past criminal activities have been narrated in the grounds of detention, particularly, ground Nos. 14 to 19, show that the detenu has a propensity for committing crimes and ordinary laws of the land are insufficient to curb his criminal actions. Therefore, it will certainly affect public order. Hence, the order of detention is justified.

8. Further, learned Addl. Government Advocate sought to justify the detention order contending that the detaining authority was aware of the subsisting custodial detention of detenu and that he had moved bail. Nevertheless she was satisfied that it was necessary to detain him under preventive detention laws. In support of the said contention, he has cited the decision in the case of Amin Mohammed Qureshi Vs. Commissioner of Police, Greater Bombay, wherein the Apex Court has held that where the detenu is of a desperate character and has been indulging regularly in committing offences like robbery, extortion, criminal intimidation etc. the magnitude of acts is such as would disrupt maintenance of public order. He has also placed reliance upon the decision of the Supreme Court in Fitrat Raza Khan Vs. State of Uttar Pradesh and Others, , wherein it has been held that the past conduct or antecedent history of a person can appropriately be taken into account in making a detention order and it is usually from prior events showing tendencies or inclination of a man that an inference can be drawn whether he is likely in the future to act in a manner prejudicial to the maintenance of public order. Reliance is also placed on the decision of the Supreme Court in Dharmendra Suganchand Chelawat and another Vs. Union of India and others,) in support of the proposition of law, wherein the apex Court after reviewing all earlier decisions held that an order of detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds must show that the detaining authority was aware of the fact of detenu being in custody and despite that compelling reasons existed to justify his detention. "Compelling Reasons" has been held to imply that cogent materials must be there before the detaining authority to hold that there is likelihood of his release from custody in the near future and that on such release, he would continue to indulge in prejudicial activities. The reliance placed upon the decision of this Court in Rabi @ Rabindra Behera @ Chicken Rabi, 2003 (II) OLR (MOC) 74, has no application to the facts situation as evident from the grounds urged at para 22 thereof. Therefore, he has submitted that the writ petition is liable to be rejected.

9. On the basis of the aforesaid factual and legal contentions, the following questions would arise for consideration by this Court.

(i) Whether the grounds on which the detention order is passed against the

petitioner satisfy the legal requirements that the detention order is to prevent the petitioner from acting in any manner which will be prejudicial to the maintenance of public order?

(ii) Whether the confirmation order passed by the State Government as required u/s 12(1) of the National Security Act is in conformity with law and application of mind?

(iii) To what order?

Point No. (i)

10. From the grounds of detention annexed as Annexure-2 to the writ petition, it appears that the detaining authority took note of the various criminal cases registered against the petitioner, which is sought to be explained by the petitioner to have been registered on account of family dispute, political rivalry and at the instance of the company M/s. Aryan Ispat Ltd. and in some of the cases he has not been named in the FIR but subsequently included on the basis of 161 Cr.P.C. statement. The detaining authority also took note of the fact that although the detenu was arrested and forwarded in several cases including Thelkuli P.S. Case No. 36 dated 28-4-2011, he was released on bail in each of the cases and immediately after release without caring the Court orders, he indulged in series of sensational crimes affecting the peace and tranquillity as well as public order. The detenu was again arrested and remanded in connection with Thelkuli P.S. Case No. 42 dated 25-3-2012 and was in intermediate judicial custody in Circle Jail, Sambalpur by the lime of consideration of his case by the detaining authority. He had also filed bail application No. 224 of 2012 in the said case before the Sessions Judge, Sambalpur and the Court had posted the said case for consideration on 10-4-2012. Apprehending that there is possibility of the petitioner being released on bail, the detaining authority at paragraph 22 has stated thus:

From the past experience it may not be out of place to circumspect that in the event of your release on bail, you will increase such activities creating frequent lawlessness, affecting normal life and causing frequent disruption of public order, which would be detrimental to the maintenance of public order.

11. Thereafter, the detaining authority after referring to several instances has further stated thus:

In spite of being arrested repeatedly and forwarded in custody in several criminal cases of heinous nature, your activities which are prejudicial to maintenance of public order continued unabated. On being convicted and released in a heinous case like murder and also released in other cases, on Court bail and violating the conditions imposed by Hon"ble Courts, on each occasion, you have been committing further offences and creating havoc and panic by terrorizing the general public leading to frequent disruption of public order in Sambalpur Town. You have no stones unturned to scuttle the criminal justice system by terrorizing

and intimidating the informants and prosecution witnesses of different cases, instituted against you. Due to such activities, of late, people out of fear do not venture to report against you regarding your dreaded criminal and anti-social activities before police or Court. You are not only in a habit of repeatedly threatening the complainants and witnesses but also goes to the extent of physically assaulting them with intention of tampering with the prosecution evidence as well as to paralyze the process of criminal justice system.

12. The grounds of detention only indicate that the detaining authority was apprehensive that in case the detenu was released on bail, he would again carry on his criminal activities and on such apprehension passed the order of detention. Such detention will be contrary to the judgment of the Supreme Court in *Yumman Ongbi Lembi Leima Vs. State of Manipur and Others*, wherein the apex Court referring to the earlier decision of the Supreme Court in *Haradhan Saha Vs. The State of West Bengal and Others*, , held that the extraordinary powers of detaining an individual in contravention of the provisions of Article 22(2) of the Constitution where the grounds of detention do not disclose any material which was before the detaining authority other than the fact that there is every likelihood of the detenu being released on bail in connection with the cases in respect of which he had been arrested to support the order of detention. It is also held that preventive detention is not to punish a person for something he has done but to prevent him from doing it. Only on the apprehension of the detaining authority that after being released on bail, the petitioner-detenu will indulge in similar activities, which will be prejudicial to public order, order under the Act should not ordinarily be passed. In fact, the reasons assigned in para 22 of the detention order that after release on bail, the petitioner has violated the terms and conditions of the bail and he has intimidated the complainants and prosecution witnesses by creating havoc and panic by terrorizing the general public leading to frequent disruption of public order at Sambalpur town is without any material and the same is on the basis of conjectures and surmises.

13. We have perused the grounds of detention dated 10-4-2012 annexed as Annexure-2 to the writ petition. It transpires from the grounds of detention that the petitioner is accused in 19 cases starting from the year 2002. It further appears from the grounds of detention vide ground No. 2 that the petitioner has been convicted u/s 302/ 34, IPC in ST No. 44/16 of 2004 and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 1000.00. He has filed appeal against the said order in this Court and while admitting the appeal this Court has granted him bail. Most of the cases relate to law and order and not public order. Learned Additional Government Advocate submitted that ground Nos. 14 to 19 relate to disturbance of public order. They are also proximate in point of time to the order of detention. On a careful reading of the allegations made in the aforesaid grounds, we are of the view that they do not make out case of disturbance of public order. The case mentioned at ground Nos. 15 and 16 were registered on the report of the IIC himself. No information of commission of any lawlessness leading to disturbance of public order has been

lodged in these two matters although the occurrence in ground No. 15 is said to have taken place at the work-site of Ramkay Infrastructure Pvt. Ltd. and the occurrence in ground No. 16 is said to have taken place at the work-site of Gamon India Limited where number of persons must have been working. It is therefore difficult to believe that in the aforesaid incidents, there was disturbance of public order. The allegation in ground No. 17 is against one Sonu Ghosh but it is said that the involvement of the petitioner was well proved. We failed to understand how this ground can be utilized against the petitioner. Similarly the criminal act attributed to the petitioner under ground No. 18 was against some individual and it has nothing to do with disturbance of public order. After going through the allegations in ground No. 19, we are not satisfied that the acts complained of in the said ground can be said to have disturbed public order. All these grounds can at best be said to be instance of law and order to tackle which the ordinary law of the land is sufficient. Therefore, the reason in support of the grounds urged in the detention order in para 22 is wholly without any factual foundation. Hence, the detention order is contrary to the judgment of the Supreme Court and personal liberty guaranteed under Articles 21 and 22 of the Constitution of India. Further, regarding grant of bail in Criminal Appeal by this Court, it can be said that the said order was passed by this Court after going through the judgment of the Court below and being satisfied that the petitioner is entitled to be released on bail pending disposal of the appeal against the judgment convicting and sentencing the petitioner. Therefore, the same could not have been a ground for passing detention order. It is clearly opposed to the judgment of the Supreme Court referred to supra and therefore, the reliance placed by the learned counsel for the petitioner on the aforesaid decision of the Supreme Court is applicable to the facts and circumstances of the case. Hence, conclusion reached by the detaining authority after referring to the pending criminal cases against him as indicated in the grounds of detention that the antecedents of the petitioner warrant preventive detention, is contrary to the legal principles laid down by the apex Court in the aforesaid cases as the same would infringe the fundamental rights of a person guaranteed under Articles 21 and 22(2) of the Constitution.

14. Further, learned counsel for the petitioner has rightly placed reliance upon the other two judgments of the Supreme Court in *Associated Cement Co. Ltd. Vs. Keshvanand*, . Hence, we are of the view that the allegations in the criminal cases on the basis of which the detention order was passed relate to violation of law and order and that cannot be construed as violation of public tranquillity and public order, which is the requirement as provided u/s 3(2) of the Act to pass an order of detention against the detenu. While passing the order of detention, the detaining authority is required to see that the public interest is safeguarded, which is not forthcoming in the order of detention though elaborately number of facts regarding criminal cases against the petitioner are referred to in the order of detention. Accordingly, we hold that the reasons for passing the detention order as indicated above, are wholly unsustainable in law and the same are

wholly contrary to the judgments of the Supreme Court, referred to above. Thus, point No. (i) is answered against the State and in favour of the petitioner.

Point No. (ii)

15. Section 12(1) of the Act provides that where the Advisory Board is of the opinion that there exists sufficient cause for the detention of a person, the appropriate Government "may" confirm the detention order and continue the detention of the person concerned for such period as it thinks fit. Such confirmation in our view requires application of mind by the State Government to the facts of the case. In this case, it is worthwhile to refer to the Orissa Government Rules of Business, which has been enacted by the Governor in exercise of the powers conferred by clause (3) of Article 166 of the Constitution of India. Rule 7 of the said Rules of Business provides that the Council of Ministers shall be collectively responsible for all executive orders issued in the name of the Governor. Rule 9 states that without prejudice to the provision of Rule 7, the Minister-in-charge or the Minister of the State-in-charge of a Department or a branch or branches thereof shall be primarily responsible for the disposal of business appertaining that department or branch. Rule 11 states that all orders or instruments made or executed by order or on behalf of the Government of Orissa shall be expressed to be made by or by order of or executed in the name of the Governor of Orissa. Rule 12 is the procedure, which prescribes as follows;

Every order or instrument of the Government of the State shall be signed either by a "Principal Secretary, a Secretary, a Special Secretary, a Joint Secretary, a Deputy Secretary or an Under-Secretary or such other officer as may be specifically empowered in, that behalf and such signature shall be deemed to be the proper authentication of such order or instrument.

16. A careful reading of the aforesaid provisions, more particularly, Rule 9, it is clear that the Minister who is the political executive of the Home Department is required to apply his mind by examining the correctness of the detention order passed by the detaining authority before approving the same in exercise of power u/s 3(4) of the Act. In order to verify whether the business transaction rule has been strictly adhered to by the political executive of the State Government as the order of detention that would be passed will have serious consequences for in the event the detention order is confirmed, he will be liable to be detained for a period of one year and his personal liberty will be affected, which will be in violation of the fundamental rights guaranteed under Articles 19, 21 and 22 of the Constitution of India. We have called for the entire file relating to the petitioner from the concerned Department of the State Government for our perusal. On perusal of the original file, we find that upon receipt of the report from the Advisory Board with regard to the petitioner-detenu, the Joint Secretary after referring to the report of the District Magistrate, Sambalpur and Sections 12(1) and 13 of the Act put up a note dated 30-5-2012 to the Special Secretary for obtaining approval of the Government for confirmation of the order of

detention and to detain the detenu for a period of 12 months u/s 12(1) read with Section 13 of the Act. The Special Secretary in turn submitted the file to the Principal Secretary with the note "For kind approval". Thereafter the Principal Secretary submitted the file to the Chief Minister who only put his signature on 8-6-2012. So, the aforesaid note from the original file clearly indicates total non-application of mind by the political executive, who is required to pass an order in conformity with Rule 9 of the Rules of Business of the State Government. The manner in which approval of confirmation has been made does shows that there was non-application of mind to the facts of the case by the political executive. Use of the word "may" indicates that the exercise of power of the appropriate Government for confirmation of the order of detention is independent of the report of the Advisory Board stating that there is sufficient cause for the detention. No such independent consideration appears to have been done and only on the basis of the report of the Advisory Board confirmation of the order of detention has been made. Therefore, we answer point No. (ii) in favour of the petitioner holding that there was total non-application of mind by the State Government while approval for confirmation of the order of detention on account of which, the fundamental rights guaranteed under Articles 14, 19, 21 and 22(2) of the Constitution are affected.

17. Having answered point Nos. (i) and (ii) in favour of the petitioner, the writ petition must succeed. Accordingly, the writ petition is allowed and the order of detention and the order of confirmation by the State Government are hereby quashed. Issue Rule. The petitioner-detenu be released forthwith if he is not required in any criminal case/case pending against him.

S.K. Mishra, J.

I agree.