
(1989) 02 MP CK 0023
In the Madhya Pradesh High Court

Rafiq Mohammad

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 01-02-1989

Acts Referred:

Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance, 1988 — Section 3(1)

Citation : (1989) CriLJ 1696 : (1989) JLJ 660 : (1989) MPJR 421

Hon'ble Judges : R.K. Varma, J;A.G. Qureshi, J

Bench : Division Bench

Judgement

R.K. Verma, J.

By this petition under Article 226 of the Constitution of India, the petitioner who is the brother of detenu Saleem, has sought quashing of the order of detention dt. 8th July, 1988 (Annexure "F") passed by the detaining authority, the Joint Secretary to the Government of India, u/s 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance, 1988 (7 of 1988) (hereinafter referred to as "the Ordinance") whereby the detenu has been detained and kept in custody in the Central Jail, Indore and has prayed that the detenu be set at liberty.

On 9th June 1988 acting on prior information, the officers of the Central Narcotics Control Bureau and the Police kept a watch over M/s. Saleem Auto Garage, South Tukoganj, Indore and detected one Rameshchandra Patel handing over a raxine foam bag to the detenu Saleem, the owner of the garage. Another hand bag was found retained by Rameshchandra Patel. The search of the two bags by the officers resulted in the recovery of one kilogram of morphine (500 gms from each of the bags). The morphine was seized u/s 8 read with Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "Narcotic Act") and Saleem Mohammed, the detenu was arrested. In connection with the investigation, statements u/s 67 of the Narcotic Act of Mohd. Saleem and Ramesh Chandra Patel were recorded as per Annexure "B"

and Annexure "C" respectively. An application for bail was moved on behalf of the detenu before the 5th Additional Judge to the Court of Sessions Judge, Indore which was heard and rejected on 24-6-1988. No challan was, however, filed in Court.

The order of detention dt. 8th-July, 1988 (Annexure "F") was passed by the detaining authority u/s 3(1) of the Ordinance and the detenu was served with the order of detention alongwith the grounds of detention through the Superintendent Central Jail, Indore where the detenu was already lodged.

The grounds of detention disclose that one Rameshchandra Patel was a partner in the Firm M/s. Lord Chemical Works, Indore and the firm was receiving morphine from Government Opium Factory, Ghazipur for manufacture of medicines. The premises of Lord Chemical Works were searched and detailed investigations established that Ramesh Chandra Patel was diverting the morphine, which was received legally from the Government Factory, for illicit purposes. It is further stated in the grounds of detention that the detenu had admitted his complicity in the illicit possession of morphine and had stated that Rameshchandra Patel and Lalit Patel used to give him the morphine for selling to customers and that the detenu received the commission for doing this work at the rate of Rs. 2000/- per kilogram. It is also alleged in the grounds of detention that the detenu had in the past, sold morphine on behalf of Rameshchandra Patel and Lalit Patel. It is stated that from these facts it is evident that the detenu knowingly involved himself in engaging in possession of narcotic drugs and therefore, the detaining authority is satisfied that the detenu should be detained under the provisions of the Ordinance with a view to preventing him from engaging in possession of narcotic drugs. It is also stated in the grounds of detention that even though the detenu is in jail there is every likelihood of his being released on bail.

Section 3 of the Ordinance empowers the detaining authority to make orders for detention of certain persons and reads as under:

3. Power to make orders detaining certain persons.

(1) The Central Government or a State Government, or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by the Government, or any officer of a State Government not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner) that, with a view to preventing him from committing any of the acts within the meaning of "illicit traffic" as defined in Clause (e) of Section 2, it is necessary so to do, make an order directing that such person be detained.

(2) When any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order.

(3) For the purpose of Clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing not later than fifteen days, from the date of detention."

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The "Illicit Traffic" is defined in Clause (e) of Section 2 of the Ordinance as under.

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(e) "illicit traffic" means-

(i) cultivating any coca plant or gathering any portion of coca plant;

(ii) cultivating the opium poppy or any cannabis plant;

(iii) engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing concealment, use or consumption, import inter-State, export inter-State, import into India, export from India or transshipment of narcotic drugs or psychotropic substances;

(iv) dealing in narcotic drugs Psychotropic substances otherwise than as provided in Sub-clauses (i) to (iii):

(v) handling or letting any premises for use for any of the purposes referred to in Sub-clauses (i) to (iv);

(vi) financing any activity by himself or through any other person in the furtherance or in support of doing any of the aforesaid acts;

(vii) harbouring persons engaged in any of the activities specified in Sub-clauses (i) to (vi); or

(viii) abetting or conspiring in the furtherance or in support of doing any of the aforesaid acts,

except to the extent permitted under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), or any rule or order made, or any condition of any licence, permit or authorisation issued, thereunder.

Learned Counsel for the petitioner has submitted that the detenu has been arrested in connection with the offence which was registered under the Narcotic Act of 1985 and while the detenu was in jail in connection with the offence under the Act, he was served with the order of detention under the Ordinance on the ground that there is every likelihood of his being released on bail, as is disclosed from the grounds of detention. Learned Counsel for the petitioner has contended that the order of preventive detention on the ground that the detenu in detention as under-trial prisoner, is likely to get bail, is not proper as has been held by the Supreme Court in *Ramesh Yadav Vs. District Magistrate, Etah and Others*, . In

this case while considering preventive detention under National Security Act, their Lordships found that out of the five incidents forming the grounds for detention four were stale and not available to be used in an order of detention and the 5th incident led to a trial which ended in an acquittal and as such, was not available to be used. In these circumstances it was observed that merely on the ground that an accused in detention as an under-trial prisoner was likely to get bail, an order of detention under the National Security Act should not ordinarily be passed

It has been observed by the Supreme Court in *Rameshwar Shaw Vs. District Magistrate, Burdwan and Another*, that whether an order of detention can be against a person who is already in detention or in jail will always have to be determined in the facts and circumstances of each case. In *Vijay Kumar Vs. Union of India (UOI) and Others*, on which reliance has been placed by the learned Counsel for the petitioner, it has been laid down that two facts must appear from the grounds of detention viz. (i) awareness of the detaining authority of the fact that the detenu is already in detention and (ii) there must be compelling reasons justifying such detention, despite the fact that the detenu is already under detention.

In the instant case the grounds of detention disclose the awareness of the detaining authority of the fact that the detenu was already in detention and the fact that the detaining authority directed the detention of the detenu under the ordinance with a view to preventing him from engaging in possession of narcotic drugs since he felt that there was every likelihood of the detenu being released on bail in the criminal case which was to be instituted for the offence under the Act. Learned Government Advocate states that although the offence under the Act was registered and investigated and the detenu was arrested initially in connection with the offence, the challan has not been filed. The illicit traffic in narcotic drugs and psychotropic substances is clandestinely organised and carried on and the activities of such illicit traffic largely go undetected, because of the considerable economic interests of all those involved in such activities. The detenu was to get Rs. 2000/- for arranging sale of one kilogram of morphine as stated by him. In these circumstances, in our opinion, the illicit traffic in narcotic drugs and psychotropic substances defies detection by reason of its surreptitious and clandestine nature, justifies such detention and the fact that the detenu was in detention in connection with the offence under the Act would not detract from the order being passed for preventive detention. The contention of the learned Counsel that the order of detention under the Ordinance could not be validly served on the detenu while he was already in detention in connection with the offence has, therefore, no merit and must be rejected

Learned Counsel for the petitioner has next submitted that the possession of morphine with the detenu was a single incident and he cannot be said to be engaging in the possession of narcotic drugs or psychotropic substances so as to constitute "illicit traffic" within the meaning of Section 2(e) of the Ordinance and

as such, the order of detention is invalid This submission of the learned Counsel, in our opinion, has no substance. The dictionary meaning of the word "engage" is to involve oneself. The detenu was engaging or involving himself in possession of morphine in the instant case in pursuance of an agreement entered into with the owners of Lord Chemical Works, to arrange for sale of morphine illegally diverted from the process of manufacture of drugs by the owners of Lord Chemical Works. On the basis of commission of Rs. 2000/- per kilogram as is disclosed from the statements of the detenu and Rameshchandra Patel one of the partners of M/s. Lord Chemical Works vide Annexures "B" and "C" respectively which form the basis of the grounds of detention delivered to the detenu.

It has been submitted that the detention order is based on a solitary incident and that . an isolated offence allegedly committed by the detenu cannot constitute the basis of detention. There are no prior incidents which constitute tendency or propensity for committing an offence which would justify the detention. Learned Counsel for the petitioner placed reliance on the following observations made in the case of Wasiuddin Ahmed Vs. District Magistrate, Aligarh, U.P. and Others, :

The past conduct or antecedent history of a person can appropriately be taken into account in making a detention order it is indeed usually from prior events showing tendencies or inclination of a man that an inference is drawn whether he is likely in the future to act in a manner prejudicial to the maintenance of public order, of course, such prejudicial conduct or antecedent history should ordinarily be proximate in point of time and should have a rational connection with the conclusion that the detention of the person is necessary.

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The authority cited is inapplicable to the facts and circumstances of the instant case. It is no doubt permissible to take into consideration past prejudicial conduct of the detenu for making a detention order with a view to preventing him from acting in a manner prejudicial to the maintenance of public order. But from this it does not necessarily follow that absence of prejudicial conduct of the detenu in the past prior to the incident puts any legal restraint on the detaining authority in making a detention order based on the grounds relating to the incident in question, if it is satisfied from the material placed before it that the detenu is likely to commit any of the acts within the meaning of illicit traffic.

In a case of detention under National Security Act, as in Wasiuddin Ahmed Vs. District Magistrate, Aligarh, U.P. and Others, it is easy to ascertain the past conduct of the detenu since past conduct of creating disturbances of public tranquillity cannot go unnoticed But such is not the case of a detenu under the ordinance because the acts within the meaning of "illicit traffic" in narcotic drugs and psychotropic substances are committed in a concealed and clandestine manner, firstly, because of such acts having been made serious offences peremptorily punishable with long jail sentences and heavy fines under the Narcotic Act and secondly, because of substantial stakes of monetary interests of

persons involved in such illicit traffic.

Because of the activities in illicit traffic of narcotic drugs and psychotropic substances being organised clandestinely, it may well be that amongst the persons who are apprehended while committing offences under the Narcotic Act, most of them might have gone undetected in respect of series of such offences in the past and might go undetected in respect of several such offences in future. The past conduct of detenu, therefore, may be shrouded in mystery for want of detection of such offences having been committed by him. A case of proposed detention under the ordinance is, therefore, not comparable as regards knowledge about past conduct, with a case of detention under the National Security Act where the past prejudicial conduct of the detenu is registered in the public eye. The detenu in the instant case was apprehended, while he was in possession of narcotic drugs (morphine) in pursuance of an agreement with the supplier to arrange its sale.

The learned Counsel for the petitioner has finally contended that the order of detention passed by the detaining authority suffers from the vice of non-application of mind. It is contended that the impugned order is based on the grounds of detention which are not borne out from the statement of the detenu and the material placed before the detaining authority. In order to appreciate this contention of the learned Counsel it is necessary first to advert to the statement of the detenu (Annexure "B"),

In the statement of the detenu Saleem Mohd. (Annexure "B") which was recorded by the Inspector, Central Bureau of Narcotics before the Superintendent Central Bureau of Narcotics on 9-8-88 u/s 67 read with Sections 8 and 21 of the Act, it has been stated by the detenu that about 25 days ago Lalit Patel (the other partner of Lord Chemical Works) had visited his garage and had asked for arranging sale of one kilogram of morphine telling the detenu that the price of one kilogram morphine was Rs. 24-25 thousand and that the detenu would be given Rs. 2000/- commission. The detenu also stated that even earlier Lalit Patel and his brother Rameshchandra Patel had asked him to sell morphine on commission. Upon this, the detenu told both the brothers that they should bring morphine in his Auto garage so that he could arrange sale of morphine through known persons. About four days prior to the incident the two brothers Lalit Patel and Rameshchandra Patel came to the Auto-Garage of the detenu and informed him that they would bring the substance (morphine) on Thursday and on 9-6-1988 Rameshchandra Patel came to the Garage with two raxine bags containing 500 grams of morphine in each bag and just at that time while the detenu was talking to Rameshchandra Patel the Narcotics and Police Authorities arrived and they both admitted that they were talking about illicit sale of morphine.

The grounds on which detention order dt. 8-7-1988 has been made against the detenu Saleem Mohd. u/s 3(i) of the Ordinance refer to the statement of the detenu as under:

In your statement you admitted your complicity in the illicit possession of morphine and stated that Rameshchandra Patel and Lalit Patel used to give you the morphine for selling to customers and that you received the commission for doing this work @ Rs. 2000/- per kilogram;

(Underlining is ours)

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The grounds of detention further alleges that the detenu had in the past sold morphine on behalf of Rameshchandra Patel and Lalit Patel. It is also stated in the grounds of detention that the detaining authority considered it against the public interest to disclose the source of information mentioned in the grounds of detention and the further facts and details contained in the said information.

The Detaining Authority has relied on the statement of the detenu recorded on 9-6-1988 (Annexure "B"). It is submitted by the learned Counsel for the petitioner that the detenu has nowhere in his statement admitted or stated that Rameshchandra Patel and Lalit Patel used to give him morphine for selling to customers. The detenu has stated about the giving of morphine by Rameshchandra Patel only at the time when he was apprehended by the officers of the Narcotics Department. Likewise, there is no basis for the allegation that the detenu had in the past sold morphine on behalf of Rameshchandra Patel and Lalit Patel. The learned Government Advocate appearing for the respondents was asked to ascertain from the records of the case whether there was any basis for the allegation that the detenu had in the past sold morphine. But he reported to us that there was no such material on record with them to substantiate this allegation.

Learned Counsel for the petitioner has submitted that the order of detention has been passed by the Detaining Authority in a mechanical manner without application of mind since the grounds formulated as above, are without any basis. The detenu's statement does not appear to have been read with application of mind inasmuch as he is alleged to have stated that Rameshchandra. Patel and Lalit Patel used to give him morphine for selling to customers whereas no such statement has been made by the detenu in his statement (Annexure "B"). The allegation made in the grounds of detention that the detenu had in the past sold morphine on behalf of Rameshchandra Patel and Lalit Patel is also not based on any material available with the detaining authority. The inference of the detaining authority that the detenu knowingly involved himself in engaging in possession of narcotic drugs has been drawn on the grounds that Rameshchandra Patel and Lalit Patel used to give him morphine for selling and that he had in the past sold morphine on their behalf. But these grounds are mere assumptions and not borne out either from the statement of the detenu which had been relied upon or from any material available with the Detaining Authority, The assumption that the detenu had stated that Rameshchandra Patel and Lalit Patel used to give him morphine for selling and

the assumption that there was material to show that the detenu had in the past sold morphine on their behalf are not warranted from the material on record and demonstrate non-application of mind by the detaining authority. It has also been submitted that there is no affidavit filed by the detaining authority to state that he was himself satisfied u/s 3(i) of the Ordinance that the detenu be detained and kept in custody with a view to preventing him from engaging in the possession of narcotic drugs. The fact of subjective satisfaction should properly be sworn in by the authority subjectively satisfied, to say that he was so satisfied.

Having heard learned Counsel for the parties we have come to the conclusion that this petition must be allowed.

As has been observed in the case of *Biram Chand Vs. State of Uttar Pradesh and Others*, the scope of inquiry in the case of preventive detention based upon subjective satisfaction being necessarily narrow and limited, the scrutiny of the Court has to be even stricter than in a normal case of punitive trial.

We have perused the statement-made by the detenu which has been relied upon by the detaining authority and we do not find any admission in his statement that Rameshchandra Patel and Lalit Patel used to give him morphine for selling to customers. Also no material is shown to exist for the allegation that the detenu had in the past sold morphine on behalf of Rameshchandra Patel and Lalit Patel. Therefore, in the instant case we hold that the detention order is vitiated as it suffers from the defect of non-application of mind by the detaining authority.

The ordinance has been enacted to provide for detention in certain cases for the purpose of preventing illicit traffic in narcotic drugs and psychotropic substances. The Ordinance like any other enactment for preventive detention clothes the detaining authority with power to deprive any person of his personal liberty upon its being subjectively satisfied on the basis of material against such person that it is necessary to detain him with a view to preventing him from committing any of the acts within the meaning of "illicit traffic" as defined in the Ordinance, The process of arriving at and recording satisfaction about the necessity to preventively detain a person is neither an empty formality nor a mechanical process. It is as subjective process based on the application of mind by the detaining authority to the relevant material so as to safeguard against arbitrary detention. The basic requirement for reaching subjective satisfaction in respect to the person sought to be preventively, detained is the application of mind by the detaining authority, to the material placed before it against such person and the detaining authority cannot be said to have been satisfied subjectively with respect to such a person without applying its mind to the relevant material. Non-application of mind by the detaining authority, therefore, negative subjective satisfaction on his part and renders the detention order null and void.

In the light of the discussion aforesaid, the detention order passed against the detenu cannot, therefore, be sustained in law, being vitiated on account of non-application of mind as held earlier. As such, the detention order is liable to be

quashed

In the result this petition succeeds and is hereby allowed. The detention order dt. 8-7-1988 (Annexure "F") passed by the Detaining Authority Respondent 1 is hereby quashed Accordingly we direct that the detenu shall be set at liberty forthwith.