
(1989) 05 DEL CK 0029

In the Delhi High Court

Case No : Criminal Writ Appeal No. 484 of 1988

Rajinder Singh @ Raju

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 11-05-1989

Acts Referred:

Citation : (1989) 25 ECR 249 : (1990) 2 ILR Delhi 188 : (1989) ILR Delhi 188

Hon'ble Judges : S. Duggal, J

Bench : Single Bench

Advocate : Trilok Kumar and R.P. Lao, for the Appellant;

Judgement

Santosh Duggal, J.

5. petitioner, Rajinder Singh @Raju, was placed under detention in pursuance to an order of detention pasted by the Commissioner of Police, Delhi on 13th May, 1988 in exercise of the power conferred by subsection (2) of Section 3 of the National Security Act, 1980 (for short "the Act") with a view to prevent him from acting in a manner prejudicial to the maintenance of public order. This order was confirmed as required by the provisions of section 3(4) of the Act by the Administrator of Delhi on 24th May, 1988.

6. The facts, as set out in the writ petition, reveal that the petitioner was already in judicial custody and lodged in Tihar Jail when this order of detention was passed. While he was in judicial custody, the order of approval passed on 24th May, 1988 by the Administrator was served upon him through Superintendent, Central Jail, Tihar, on 26th May, 1988. However, the Administration realised the mistake and instructed the Superintendent Jail to withdraw the approval order. Accordingly the jail authorities directed the petitioner on 17th June, 1988 to hand back the approval order and the accompanying documents to then),

7. The petitioner alleges that thereafter he sought clarification through an advocate by letter dated 23rd June, 1988 as to the jurisdiction of the jail authorities to first serve an order and then withdraw the same and that instead

of admitting the irregularity committed, the Delhi Administration served a detention order purported to have been passed on 13th May, 1988 on the petitioner on 25th June, 1988 again through jail authorities and immediately after that order of approval was again served on him and thereafter the order of confirmation passed on 9th August, 1988 directing that the detenu shall be detained for a period of 12 months effective from the date of detention which was taken to be 25th June, 1988.

8. This writ petition filed under Article 226 of the Constitution of India read with section 482 Code of Criminal Procedure seeking a writ of habeas corpus directing release of the petitioner forthwith, takes up a number of challenges to the legality and validity of the detention order as also to the continued detention of the petitioner. The matter has been heard after the respondents were served, entered/appearance and filed the return.

9. Mr. Trilok Kumar, appearing for the petitioner, particularly referred to the facts of the case and the contention set up in the writ petition, but his main challenge was centered on the point that the detention order was not, at all, sustainable for the reason that it betrays absolute lack of awareness on the part of the detaining authority to the fact that the petitioner was already in Judicial custody, and that the grounds of detention do not indicate that the detaining authority was made aware of any material or facts which could constitute a compelling necessity for the passing of the detention order irrespective of the fact that the petitioner was already in jail, and had been there since 12th November, 1987.

10. Since the writ petition can be disposed of on this one ground alone, I will confine myself to the respective contentions canvassed by the learned counsel on both sides in respect to this plea of the petitioner.

11. I find that the petitioner has asserted categorically that he was already in jail at the time of passing of the detention order and had been in judicial custody for a period of about six months, and thus was fully prevented from committing any crime, and that the detention order had been passed without the detaining authority arriving at any subjective satisfaction, to preventively detain the petitioner by invoking of the provisions of National Security Act, and that the order had been passed mechanically when it was a fact that not only he had been already in custody since 12th November, 1987, but had not even sought bail and although. The petitioner has alleged that the authorities were in a hurry to clamp this order of detention without taking note of the facts, and that this explains the irregularity committed by them in serving an approval order on him even without ensuring or ascertaining as to whether the detention order had been actually served on him or not. He contends, Therefore, that the entire action smacks of mala fide intention to overreach the normal law of the land, and that without even taking any action by way of getting the bail previously granted to the petitioner in earlier cases cancelled or without considering the fact that in the last mentioned case, the petitioner had not been even approached any court for bail, the detention order was passed, and that it was a case of complete non-

application of mind.

12. Mr. Trilok Kumar vehemently argued that although it cannot be disputed that in a given case or situation a person inspired of being already in judicial custody can be placed under preventive detention, but the essential requirement about the detaining authority being aware of this fact "cannot be dispensed with and that there is added condition that the ground of detention must reveal that the detaining authority felt a compelling necessity to pass the detention order irrespective of the fact that the person concerned was already continued to jail. He stressed that these requirements are directly linked with the question of subjective satisfaction of the detaining authority as well as application of mind, and the absence of both of them, or even either one of them, vitiate the detention order. Learned counsel placed reliance on various judgments of the Supreme Court in support of his plea and read out from judgments of the apex Court, laying down that although there was no bar to the passing of detention order in respect of persons who were in custody but in all cases it was essential that the ground of detention must indicate the awareness of the detaining authority in this respect and also spell out the material which led the said authority to come to a conclusion that inspired of the person concerned being already in jail, there was such an urgency that he must be placed under preventive detention.

13. One of the judgments referred to is Ramesh Yadav Vs. District Magistrate, Etah and Others, where a detention order was passed under the provisions of section 3(2) of the Act on 16th September, 1984 stating that :

"AT this time you were detained in the District Jail, Mainpuri and you have Filed an application for bail in the court of law which is fixed for hearing on September 17, 1984, and there is positive apprehension that after having bail you will come out of the jail and I am convinced that after being released on bail you will indulge in activities prejudicial to the maintenance of public order."

The Supreme Court struck down the detention order on the view that merely because an accused in custody as an under-trial prisoner was likely to get bail, an order of detention under the National Security Act should not ordinarily be passed and if the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum has to be raised.

14. In another case Gulab Mehra Vs. State of U.P. and Others, . this view was reiterated and the court observed that where there is nothing to show that there was awareness in the mind of the District Magistrate, the detaining authority, of the fact that the appellant was in jail at the time of clamping of order of detention order, and the detaining authority was satisfied in considering his antecedents and previous criminal acts, that there is likelihood of his indulging in criminal activities jeopardizing public order if he is enlarged on bail and that there is every likelihood that the appellant would be released on bail within a

short time; it was case of non-application of mind and the order of detention is invalid.

15. In yet another case reported as Air 1983 Sc 934, (Vijay Kumar v. Union of India and others) (3), the Supreme Court held that when a detenu is already under detention for an offence, whether bailable or non-bailable, the detaining authority will take into consideration the fact of detention of the detenu and there must be compelling reasons to justify his preventive detention inspired by the fact that he is already under detention on a charge of a criminal offence. It was further stressed in this case that there must be material for such compelling reasons and the material or compelling reasons must appear from the grounds of detention that will be communicated to the detenu. The court spelt out the essential requirements as under :

"IN other words, two facts must appear from the grounds of detention, namely, (1) awareness of the detaining authority of the fact that the detenu already in detention, and (2) there must be compelling reasons justifying such detention, despite the fact that the detenu is already under detention."

16. In the case of Vijay Kumar (supra), the Court took note of its earlier decision in Shashi Aggarwal Vs. State of U.P. and Others, . In that case which was also of detention u/s 3 of the National Security Act, the detention order stated :

"AT present you are detained in District Jail, Meerut and you are trying to come out on bail and there is enough possibility of your being bailed out."

The Supreme Court declared the detention order illegal on the view that every citizen in this country has the right to have recourse to law including the right to move the court for bail when he is arrested under the ordinary law of the land and if the State thinks that he does not deserve bail, the State could oppose the grant of bail but he cannot be interdicted from moving the court for bail by clamping the order of detention. The Supreme Court further observed:

"THE possibility of the court granting bail may not be sufficient. Not a bald statement that the person would repeat his criminal activities would be enough. There must also be credible information or cogent reasons apparent on the record that the detenu, if enlarged on bail, would act prejudicially to the interest of public order."

It was held that in the absence of such material made apparent on record, the order of detention cannot be justified.

17. In the case of Shashi Aggarwal (supra), the Supreme Court took note of its earlier decision in Binod Singh v. District Magistrate, Dhanbad AIR 1986 Sc 290 (5) where following proposition was enunciated :

"A bald statement is merely an ipse dixit of the officer. If there were cogent materials for thinking that the detenu might be released then these should have been made apparent. Eternal vigilance on the part of the authority charged with

both law and order and public order is the price which the democracy in this country extracts from the public officials in order to protect the fundamental freedoms of our citizens."

18. Mr. Trilok Kumar also placed reliance on another Supreme Court judgment Abdul Razak Abdul Wahab Sheikh Vs. S.N. Sinha, Commissioner of Police, Ahmedabad and Another, . This was again a case of detention u/s 3 of the National Security Act and the position was summed up as under :

". . . 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."

The order of detention was held liable to be quashed for the reason that in the case before the Court the detenu was in jail arrested in connection with criminal acts and the order of detention was served on him in jail and the petition for bail moved by the detenu had already been rejected and no fresh bail petition was shown to have been filed during the interval after the dismissal of the first petition and the date on which the detention order was passed, and it was held that there was absolutely no Justification for the passing of a detention order u/s 3 of the National Security Act.

19. Mr. Trilok Kumar lastly referred to a Division Bench judgment of Madras High Court reported in 1989(1) Crimes 135, (Manonmani v. Commissioner of Police, Madras and another) (7), where also this proposition was reiterated on the basis of the judgment of the Supreme Court that the detaining authority must show awareness of the fact that the person against whom the proposal for detention was being considered, was already in jail, and that he was satisfied about the existence of the compelling necessity to detain the said person notwithstanding the fact that he is admittedly in judicial custody. On the facts of that case where the detenu was in jail at the time the detention order was passed and there was no material showing imminent possibility of his being released on bail and there were no considerations of any compelling reasons to justify his preventive detention, the detention order was held to be bad and invalid in law, and it was specifically observed that "in view of the ratio laid down in various decision"s of the Supreme Court, the mere averment that if he were to remain at large he would endanger further activities prejudicial to the maintenance of public order, in our view, hardly a sufficient ground for passing the order of detention".

20. In view of the overwhelming number of judgments on the question raised in this writ petition, Mr. Trilok Kumar argued that this was a fit case where the detention order was liable to be quashed because the grounds of detention, as served on the petitioner, do not at all indicate any awareness on the part of the detaining authority that the petitioner was in judicial custody at the time he was passing this order and that had been so since 12th November, 1987. He read out from the relevant portion of the detention order to emphasise the point that the

fact that the petitioner was in custody was not, at all, in the mind of the detaining authority, and that he was persuaded to pass this order in view of his alleged past activities and antecedents because all that is stated in the detention order is :

"HIS being at large hazardous to the public and is detrimental to the maintenance of public order."

This expression, the learned counsel argued, means obviously that in the view of the Commissioner of Police, the petitioner was at large which means he was out and would continue to be so, and that it was on this account that there was need to place him under preventive detention. Mr. Trilok Kumar contended that this smacks of complete non-application of mind, and absolute lack of subjective satisfaction about the necessity of passing detention order because had the detaining authority adverted to the actual facts, then it would have been clear to him that the man is already in judicial custody for the last 7 months, and he had not even attempted to come out inasmuch as no petition for bail had been moved by him during all this period. He further pointed out that in spite of dear assertion made in this regard in the grounds of detention, there is no affidavit in reply by the detaining authority himself, and that all that we have on record is an affidavit by the Deputy Commissioner of Police, head quarters Mrs. K. Deol, whereas that it was the detaining authority himself who had to state on affidavit that he was aware of the fact that the detenu was in judicial custody at the relevant time, and that there was such material or facts before him which made him take the decision that it was a fit case to pass the detention order irrespective of the fact that the person was confined to jail at that moment of time. He placed reliance in support of this contention, namely, the need for the detaining authority himself to swear an affidavit to satisfy the court about the awareness on his part to the facts of the case and about the subjective satisfaction as to the compelling necessity, on judgment of the Supreme Court, reported as (1982) 2 Scc 322. (Biru Mahato v. District Magistrate, Dhanbad) (8) and also Gulab Mehra Vs. State of U.P. and Others, .

21. Mr. R. P. Lao, appearing for the respondents 2 to 4, controverted these contentions by urging that it was not necessary that the grounds of detention must reveal the awareness on the part of the detaining authority or the existence of compelling necessity, and that the court has to see the conspectus of the entire facts and circumstances of the case, and then come to the conclusion as to whether the detention order had been validly passed in a given case or not. He read out from the grounds of detention to say that it is very clearly mentioned that a resume of the three criminal cases registered against the detenu established that he was a desperate and dangerous criminal who keeps a revolver with him which facilitates him in achieving his goal and his activities have proved to be a menace to the public at large and have created a sense of terror and that his arrest I prosecution in number of cases has not deterred him from criminal activities and he is continuously indulging in activities in Delhi

which are prejudicial to the maintenance of public order. Mr. Lao urged that this speaks of the compelling necessity for preventive detention and that an affidavit which has been filed in counter by the Deputy Commissioner of Police has very categorically mentioned that the Commissioner of Police was aware of the fact, at the time of passing of this detention order, that the detenu was already in jail inasmuch as this fact was mentioned in the papers submitted to him with the proposal for detention. Mr. Lao also placed before the court the file received from Delhi Administration containing nothings and the last note contained a line that Rajinder Singh was in jail since 12th November, 1987. According to the learned counsel this was sufficient to infer that it was to the knowledge of the Commissioner of Police, when he passed this detention order, that this person was in jail and it has to be presumed that he must have gone through the entire file including this note before passing the detention order. He further argued that the detention order was passed on 13th May, 1988 whereas the three cases detailed in the grounds of detention vide Fir No. 164 dated 28th May, 1986 under sections 302/34/448/120-B/596 Indian Penal Code , police station Vasant Vihar, New Delhi; Fir No. 330 dated 3rd June. 1986 under sections 307/186/353/34/ Indian Penal Code and 25127154159 Arms Act, police station Darya Ganj, New Delhi; and Fir No. 337 dated 12th November, 1987 under sections 397, 139, 213^ Indian Penal Code police station Kirti Nagar, New Delhi were so proximate in time that the conclusion reached by the Commissioner of Police about the necessity to pass the detention order was fully justified. He relied on the judgment of the Supreme Court in the case of Vijay Kumar (supra) in support of his contention that the order of detention need not expressly incorporate the facts as to awareness or subjective satisfaction in respect to compelling necessity to detain a person in spite of the fact of his being in jail at the relevant time.

22. He further argued that it was not obligatory on the detaining authority to file an affidavit in reply to the writ petition. He relied upon in support of this contention, on the recent case of the Supreme Court in the case of State of Gujarat Vs. Sunil Fulchand Shah and Another, .

23. I have read with utmost care this judgment of the Supreme Court, and I must say that the respondents cannot draw any support from this decision, to make up for their lapse in not having an affidavit of the detaining authority himself. A full reading of the text of the judgment in the case of Sunil Fulchand Shah (supra) makes it abundantly clear that the principle that ordinarily when a question of subjective satisfaction or application of mind on the part of the detaining authority is raised, then that authority himself should swear an affidavit in return was fully endorsed. All that was stated on the facts of that case was that this cannot be read as an inflexible rule applicable to all detention cases irrespective of the circumstances. This observation was made in the text of the plea made by an additional affidavit to the effect .that the detaining authority in that case was the Home Minister of the State, who had ceased to be so at the relevant time and the affidavit that had been filed earlier was by a Deputy Secretary in the Home Department who was fully conversant with the facts of the

case. It was thus in view of the fact that the detaining authority was not available to make an affidavit; an additional affidavit was filed to satisfy the court that the counter had been filed earlier by an officer who was fully conversant with the facts of the case, that it was held to be a case on facts where the non-filing of the affidavit by the detaining authority himself may not be considered fatal.

24. The above judgment does not in any manner overrule the proposition enunciated unequivocally in the case of Gulab Mehra (supra) where it was laid down that in a case where the grounds of detention do not indicate awareness on the part of the detaining authority that the person proposed to be put under preventive detention was already in custody, nor do the grounds spell out any circumstances which constituted compelling necessity in the mind of the detaining authority to place that person under preventive detention, then the said authority, (the District Magistrate in that case), who passed the impugned detention order must file an affidavit stating whether he had taken into consideration" the fact that the appellant was already in judicial custody and on considering his past activities, he was subjectively satisfied that if set free from jail custody on bail, there was likelihood of the appellant indulging in criminal activities and endangering public order. In that case, an affidavit filed by the police officer who had access to the file was considered to be not an adequate substitute for the affidavit of the detaining authority.

25. A similar view had also been expressed by the Supreme Court in Biru Mahato (supra) where also this requirement was stressed and the affidavit filed by the succession-in-office of the detaining authority, who happened to be District Magistrate, was held to be not sufficient on the principle, "mere holder of office of that authority cannot arrogate to substitute subjective satisfaction of that authority and Therefore not competent to file affidavit justifying the detention". That case was also of detention under National Security Act. In an earlier judgment reported in the same volume, namely, Merugu Satyanarayana Vs. State of Andhra Pradesh and Others, some emphasis was laid, namely, that where a preventive order may have to be made against a person already confined to jail, then the detaining authority himself show awareness that the person sought to be detained is already in jail and that a preventive detention order is a compelling necessity and this awareness must find its place either in the detention order or in the affidavit justifying the detention order when challenged .

26. It was further held that if the subjective satisfaction is reached without the awareness of this very relevant fact, the detention order would stand vitiated.

27. In the present case, the detention order has been passed by the Commissioner of Police u/s 3(2) of the National Security Act. It is nobody's case that he was not available to swear the affidavit. In fact, a judicial notice can be taken of the fact that he continues to be in office in the same capacity. The only affidavit on record is by DCP, police headquarters, who seemingly filed the

counter on the basis of facts apparent , record. She does not specifically say that she had dealt with this case personally or was present with the Commissioner of Police when decision was taken by him to pass this detention order.

28. In view of the clear requirement that in such cases the return on affidavit should be filed by the defaming authority himself, which principle has been set out in Gulab Mehra's case (supra) in very unambiguous terms unless as clarified in Sunil Fulchand Shah's case (supra) that the detaining authority was not available for any reason, which is not the case here, the detention order stands vitiated because there is no credible material to vouchsafe for the subjective satisfaction as well as the awareness on the part of the detaining authority, of the essential facts. namely, that the detenu was already in judicial custody since 12th November. 1987 and had not even applied for bail during all this period till the detention order was passed on 13th May, 1988. and no reason has been made in the grounds of detention that there was, irrespective of this situation, a compelling necessity to put this person under preventive detention, the order stands vitiated.

29. It has been held in a catena of authorities in this behalf that the awareness as well as compelling necessity must be apparent on record as held in Smt. Shashi Aggarwal's case (supra) or in the grounds of detention as very clearly laid down in Vijay Kumar's case (supra). In Binod Singh's case (supra), the Supreme Court held that, "If there were cogent materials for thinking that the detenu might be released then these should have been made apparent."

30. This also is the ratio in the latest judgment in Abdul Razak Abdul Wahab Sheikh's case (supra) where on summing up of case law, it was held that there must be awareness in the mind of the detaining authority that the detenu is in custody at the time of service of notice of detention on him and cogent relevant materials and fresh facts have been disclosed which necessitated the making of an order detention. Even in the case of Vijay Kumar (supra), to which Mr. Lao made reference, it has been held that the requisite awareness as well as material indicating subjective satisfaction about the existence of compelling necessity must be made apparent in the grounds of detention. All that was held in that case was that this need not be incorporated in the detention order itself.

31. It has already been observed in the present case, that the grounds of detention do not indicate that the detaining authority was, at the time he passed detention order, aware of the fact that the detenu was already in judicial custody in connection with criminal case Fir No." 337 dated 12th November, 1987.

32. Even in the noting on the file which was perused by the court on being shown by learned counsel for the respondents, there is no mention of any fresh facts or material, as having been in the notice of the detaining authority that inspire of the fact that the man was in jail and that he had not applied for bail and there is no imminent possibility of his coming out, the order of preventive detention was

necessary. That there was no such need is also apparent from the fact, from the way the concerned authority went about in executing the detention order. The least that can be said is that they acted in very slipshod and irresponsible manner. The order of approval passed on 24th May, 1988 was not served on the detenu in jail without first order of detention dated 13th May, 1988 being given to him. However, the approval order was withdrawn subsequently on realisation of the mistake committed. Immediately after the detenu sought some clarification through counsel, the detention order was got served on him on 25th June, 1988 i.e. after about 1 1/2 months of the passing of the detention order. This smacks of lack of sense of urgency on the part of the detaining authority and it is apparent that the detention order was clamped on the detenu simply because of his involvement in three criminal cases in the year 1986 and 1987.

33. In face of this, a mere one line note in the papers that this person was now in jail since 12th November, 1987 would not be sufficient to draw the inference that the detaining authority was aware of this fact because the order recorded by him on the file does not reveal that he had taken conscious note of this fact and had nevertheless felt satisfied that an order of detention was necessary. The grounds of detention do not give indication" of any such awareness or satisfaction or application of mind, about on this essential aspect. The wording of the relevant portion in the grounds of detention, namely, that "his being at large is hazardous to public and is detrimental to the maintenance of public order" clearly suggests that the detaining authority felt that the man was out and was likely to remain so, for this is the only meaning that can be drawn from the user of this expression.

34. In view of the foregoing it is not possible to sustain F this detention order and the same is liable to be quashed.

35. The petition is accordingly allowed making the rule absolute and it is directed that the petitioner be released forthwith if not required to be detained in any other case or proceedings.