

(2006) 03 AHC CK 0239

In the Allahabad High Court

Case No : Habeas Corpus W.P. No. 55193 of 2005

Ramesh Kumar Upadhyaya

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 10-03-2006

Acts Referred:

Penal Code, 1860 (IPC) — Section 216, 364, 364A
Arms Act, 1959 — Section 25(1)1A, 26, 35
Constitution of India, 1950 — Article 22(5)
Criminal Law (Amendment) Act, 1932 — Section 7
Criminal Procedure Code, 1973 (CrPC) — Section 164
General Clauses Act, 1897 — Section 21
National Security Act, 1980 — Section 10, 14, 3, 3(2), 8

Citation : (2006) CriLJ 2247

Hon'ble Judges : Vinod Prasad, J;M.C. Jain, J

Bench : Division Bench

Advocate : Sameer Jain, for the Appellant; K.C. Sinha, A.S.C., Arvind Tripathi and N.I. Jafri, A.G.A., for the Respondent

Final Decision : Allowed

Judgement

Vinod Prasad, J.—The petitioner, through the present writ petition, has Challenged his detention order u/s 3(2) of The National Security Act 1980 (herein after referred to as the Act), passed by District Magistrate, Varanasi respondent No. 2, on 30-4-2005, annexure No. 1 to the writ petition.

2. The grounds of detention which were served on the petitioner indicate that Ajit Kumar Jain, resident of 221, Jawahar Extension, Bhelupur, District Varanasi is the father of Anmol Jain aged about 13 years, a student of class VI of St. John's School, Maduadhih District Varanasi. On 14-3-2005 his driver Ram Prasad took Anraol Jain to school and was bringing him back in a Maruti Zen car UP 53 P 5821, when at 3 P.M., near the FCI godown a white Tata Sumo overtook them and the occupants of Tata Sumo abducted them (Anmol Jain and Ram Prasad driver). Ajit Kumar Jain, father of Anmol Jain, lodged a report at police station

Maduadhih District Varanasi at 3,35 P.M. regarding the said abduction as crime number 66 of 2005 u/s 364 IPC vide GD No. 40. The news of abduction was flashed by wireless and RT sets by the police to the higher officials and to all officers in charge of various police stations. Investigation of the said crime was entrusted to SI Jagdish Prasad Diwedi, in-charge of police out post Maduadhih who after recording the statements of informant and other witnesses recovered the Maruti Zen Car in which Anmol and the driver were returning home and he prepared its recovery memo vide GD No. 4 dated 15-3-2005. The I.O. also searched for the victim boy and the driver but in vain. During the course of investigation the I.O. came to know that the parents, students and the businessmen were terror stricken and the children were deterred from going to schools thereby the public order was badly affected because of the said incident. The news of the said abduction was prominently flashed by newspaper "Hindustan". The management of the school including Father Peter, Father David, Manager Rajesh Singh gave statements that the parents and the students were in shock and fear and the children were afraid of attending the, school. Gravity of offence necessitated the Investigation to be entrusted to R.K. Singh, Station House Officer, police station Maduadhih. The said officer found that to register protest and show anguish and anger, the student of the school wanted to make a human chain and block the roads. This was so reported in noting dated 17-3-2005 in GD No. 7. Parents and children organized assembly prayers and a spate of meetings of parents and children were organized for the safe return of the boy. The local MLA Shyam Deo Rai Chaudhary also raised his concern in the UP Legislative Assembly. All these facts found prominent reporting in newspapers including "Hindustan", a reputed daily newspaper. On 22-3-2005 Superintendent of Police (City), Varanasi was informed on phone that the abducted boy and the driver had been safely got released from the clutches of the abductors from village Kathrain by the police of police out post Parasthua under police circle Kochai district Rohitas (Bihar). On the said information when the IO, R.K Singh SO reached Parasthua to bring back the boy and the driver he came to know that the abductors were Kaushleshwar Singh. Monu @ Santosh Singh, Santosh Kumar Singh, Deputy Singh and Nathu Singh and it was from their possession that the boy and the driver were recovered and illegal fire arms were also seized from them regarding which crime number 20 of 2005 under Sections 25(1)/26/35 Arms Act and 216 IPC was registered at police in District Rohitas (Bihar). It was also disclosed that the boy and the driver were kept in the house of Lal Bahadur Singh and Nathuni Singh who also guarded them. Accused abductor Kaushleshwar Singh disclosed the complicity of Shiv Prasad Singh @ Neta, Bholia Mia, and Mohan Paswan in the said abduction. Anmol Jain in his statement recorded on 25-3-2005 disclosed that at the time of abduction Ram Prasad driver did not resist nor he raised any alarm. Ram Prasad driver though confirmed the statement of Anmol Jain but he could not explain his queer behaviour and kept mum. It aroused suspicion against him. It was on 27-3-2005 that he was apprehended. On sever interrogation, he revealed that the present petitioner Ramesh Chand Upadhyay was also involved along with other culprits in the said

crime which was the result of a well planned and hatched up conspiracy (that is how the name of the present petitioner figured in the crime on 27-3-2005). At the pointing out of Ram Prasad vehicle Tata Sumo UP 70 X 7396, used for abduction, was recovered from Bhabhua Taxi stand along with its driver Kapil Shah who was arrested. The present petitioner was arrested from village Kohari when he was on a motorcycle. All these facts find place in GD No. 56 dated 27-3-2005. In their confessional statements recorded by the Additional Chief Judicial Magistrate, Varanasi, u/s 164 Cr.P.C. on 28-3-2005, all the three accused- Ram Prasad, Kapil Shah and petitioner Ramesh Chand Upadhyay confessed involvement in the crime and were lodged in jail for the aforesaid crime number 66 of 2005 u/s 364A IPC and 7 Criminal Law Amendment Act. The petitioner was trying to get released on bail and after his release there was every likelihood of his indulging in similar activities of abduction and kidnapping. The District Magistrate, Varanasi respondent No. 2, to desist the petitioner from further indulging in such activity detained him under the Act wielding power u/s 3(2) thereof vide impugned order dated 30.4.2005, Annexure No. 1 to the writ petition, quashing of which is sought by the petitioner through this petition.

3. The petitioner was served with the grounds of detention on the day of its passing and a perusal of the same indicates the facts mentioned herein before. The petitioner was also informed about his right to make a representation to the concerned Detaining Authority, State Government, Union Government and to the Advisory Board in accordance with Section 8 of the Act. u/s 10 thereof, the petitioner made a representation to the authorities on 23-5-2005 which was received to the State Government on 24-5-2005 and the case of the petitioner was referred to the Advisory Board on 25-5-2005 and on its opinion, the detention order of the petitioner was confirmed by the State Government on 30-5-2005. On the said facts, the detention order is prayed to be quashed.

4. We have heard Sri Sameer Jain, learned Counsel for the petitioner, Sri A.K. Tripathi, learned AGA and Sri N.I.Jafri, learned Standing Counsel for the Union of India at great length and perused the material on record.

5. The learned Counsel for the petitioner urged three grounds before us. Firstly, he contended that on the basis of a solitary incident the petitioner cannot be detained, especially when his complicity is based on the statement of the coaccused which is not admissible under the law and on the basis of which the petitioner cannot be prosecuted. Secondly, he submitted that there was no material before the Detaining Authority to come to a subjective satisfaction that the petitioner was trying to get released on bail, as his bail application stood rejected by the Magistrate concerned and he had not moved any bail application in the higher court and, therefore, he was not at all endeavouring to get released on bail. Consequently, the detention order is bad in law being based on non-existent fact and the satisfaction of the Detaining Authority is vitiated in law and deserves to be quashed. Lastly, he contended that the Union Government, respondent No. 4 had not disposed off his representation filed by him on

23-5-2005 and therefore also his detention is bad in law and deserves to be set aside. He relied upon some judgments of the Apex Court for the said submission which will be dealt by us in the later part of this Judgment. Learned AGA as well as learned Standing Counsel for the Union of India, contrarily submitted that since the activity of the petitioner was hazardous to the maintenance of public order, therefore the Detaining Authority was justified in detaining the petitioner. It has been contended that it is potentiality of the activity which is relevant and germane for detaining a person and not the quantity of activity. Elaboratingly, it has been submitted that it is the effect of the activity of a person on the society that is the pivotal of the grounds of detention and not its arithmetical progression. It has been urged that the activity of the petitioner was such that it adversely affected the tempo of life of the society and without exception is covered by public order and hence his single activity had enough potentiality for the Detaining Authority to detain him and rightly so. It has been submitted that the second submission of the counsel for the petitioner is against the factual aspect of the case as it is mentioned in the grounds that the petitioner was trying to get him released on bail and further it is the knowledge of the detaining Authority that the person is in jail that is material along with the potentiality of his activity and not his actual coming out on bail. The AGA, in the end, along with the standing counsel for the Union of India, has argued that the Union Of India, respondent No. 4 rightly did not consider the representation of the petitioner as the same was not addressed to it and, therefore, it was under no obligation to consider the same. He, for this submission of his relied upon some judgments of the Apex Court which we will refer at the appropriate stage in our this order. Judging the first contention of the counsel for the petitioner that on the basis of a singular activity the petitioner cannot be detained, we find ourselves in disagreement with it as the said submission is without any substance. This ground no longer remains res integra as this Court and the Apex Court in various judgments have held that it is the potentiality of the activity in disturbance of public order and its likelihood of repetition that is relevant for passing a detention order. Preventive detention law is preventive in nature and not punitive. Moreover, it is not a criminal trial. It is only for the purpose of saving the society from the hazardous activity of malefactors. We are countenanced in our opinion by the judgments of Suresh Patel v. District Magistrate, Allahabad 45 (2002) ACC 406 : 2002 AILLJ 2278, Bhanu Saran v. Superintendent Central Jail, Naini and Ors. 45 (2002) ACC 599 and Alijan Mian Vs. District Magistrate, Dhanbad and Others, where it has been held that "for passing a detention order quality and nature of incident are material. Even one incident may be sufficient to satisfy the detaining authority for passing the detention order." In the case of Ayya alias Ayub Vs. State of U.P. and Another, it has been held by the Supreme Court that "even a single incident of activity tending to harm public order might in the circumstances if its commission reasonably supply justification for the satisfaction as to legitimate apprehension of a future repetition of similar activity to a detriment of public order". Thus the first submission of the counsel for the petitioner is not acceptable and is rejected.

Coming to the second submission of the counsel that there was no material before the Detaining Authority that the petitioner was trying to get his release on bail we do not find any force in it also. It is mentioned in the grounds of detention that the petitioner is in custody and he is likely to be released on bail soon. It is also mentioned therein that the petitioner is likely to indulge in activities of abduction and kidnapping in future and therefore to stop him from indulging into such similar activity it is essential to detain him. It was on this material that the detention order was passed by the detaining authority, respondent No. 2. This cannot be said to be illegal.

Supreme Court in the case of N. Meera Rani Vs. Government of Tamil Nadu and Another, thereof has summarized the position in this respect, thus :- "We may summarise and reiterate the settled principle. Subsisting custody of the detenu by itself does not invalidate an order of its preventive detention and the decision must depend on the facts of the particular case; preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order etc. Ordinarily it is not needed when the detenu is already in custody; the detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order but, even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities , the detention order can be validly made even in anticipation to operate on his release. This appears to us to be the correct legal position."

6. Further, it is to be noted that preventive detention is an anticipatory measure and it does not relate to an offence. The object of preventive detention is preventive and not punitive. The exercise of power under the Act can be resorted to if there is some material justifying the same. In this view of the matter the contention of the learned Counsel for the petitioner that there was no material before the detaining authority, indicating that the petitioner detenu was trying to get him bailed out is rejected.

7. Coming to the last submission of the counsel for the petitioner we find that in paras 20 and 28 of the petition it is averred-"That it is very respectfully submitted here that no information has been given to the petitioner as to whether the Central Government has been decided the representation of the petitioner on which date, it clearly indicates that the both Central Government and State Government has adopted the lethargic and indifferent attitude in disposing of the petitioner's representation. This fact also vitiates the detention of the petitioner under the Act. Hence detention order dated 30-4-2005 is liable to be quashed.

Because no information has been given to the petitioner as to whether the Central Government has been decided the representation of the petitioner on

which date, it clearly indicates that the both Central Government and State Government has adopted the lethargic and indifferent attitude in disposing of the petitioner's representation. This fact also vitiates the detention of the petitioner under the Act, hence detention order dated 30-4-05 is liable to be quashed.

8. On behalf of Union of India Rita Dogra has filed a counter affidavit in para 5 thereof it is averred-

It is stated that a representation dated 21-5-05 from the detenu along the para wise comments of the detaining authority was received by the Central Government in the Ministry of Home Affairs on 7-5-05 through District Magistrate, Badaun on behalf of State Government of Uttar Pradesh Lucknow vide letter No. III/2/65/2005-CX-6 dated 24-5-2005. As the said representation was addressed to Home Secretary, Government of Uttar Pradesh, Lucknow and not to Central Government the same was returned to Government of Uttar Pradesh for taking action under appropriate Section of N.S.A., 1980.

9. It is, thus, clear that the Union Government respondent No. 4 did not consider the representation of the petitioner and returned the same to the State Government. It is to be noted that under the National Security Act the Union Government has got the power to revoke the detention order vide Section 14 thereof. Consequently, it was the obligation of the Union Government respondent No. 4 to consider the representation of the detenu. On a mere technicality the Union Government cannot eschew its responsibility of not considering the representation filed by the detenu. For the proper understanding we quote Section 14 of the National Security Act hereinbelow:

(1) Without prejudice to the provisions of Section 21 of the General Clauses Act, 1897 (10 of 1897), a detention order may, at any time, be revoked or modified-

(a) notwithstanding that the order has been made by an officer mentioned in sub-section (3) of Sections, by the State Government to which that officer is subordinate or by the Central Government;

(b) notwithstanding that the order has been made by a State Government, by the Central Government.

(2) The expiry or revocation of a detention order (hereafter in this sub-section referred to as the earlier detention order) shall not (whether such earlier detention order has been made before or after the commencement of the National Security (Second Amendment) Act, 1984) bar the making of another detention order (hereafter in this sub-section referred to as the subsequent detention order) u/s 3 against the same person:

Provided that in a case where no fresh facts have arisen after the expiry or revocation of the earlier detention order made against such person, the maximum period for which such person may be detained in pursuance of the subsequent detention order shall, in no case, extend beyond the expiry of a period of twelve months from the date of detention under the earlier detention

order.

10. The learned Counsel for the petitioner relied upon two judgments of the Supreme Court. The first is *Smt. Gracy Vs. State of Kerala* and another, In this judgment while dealing with the said aspect of the matter the Apex Court has held in paras 8 and 9 thereof as follows:-

The question, therefore, is; Whether one of the requirements of consideration by government is dispensed with when the detenu's representation instead of being addressed to the government or also to the government is addressed only to the Advisory Board and submitted to the Advisory Board instead of the government? On principle, we find it difficult to uphold the learned Solicitor General's contention, which would reduce the duty of the detaining authority from one of substance to mere form.

The contents of Article 22(5) as well as the nature of duty imposed thereby on the detaining authority support the view that so long as there is a representation made by the detenu against the order of detention, the aforesaid dual obligation under Article 22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the Advisory Board or to both. The mode of address is only a matter of form, which cannot whittle down the requirement of the constitutional mandate in Article 22(5) enacted as one of the safeguards provided to the detenu in case of preventive detention.

11. In another case *Kubic Darusz v. Union of India and Ors.* : AIR1990SC605 . The Apex Court after considering various rulings has observed thus:-

Admittedly, this representation was not disposed off by the appropriate Government and, indeed, has not been disposed of or acted upon till today. Mr. Mahajan submits that it having been addressed to the Chairman, Central Advisory Board it need not have been dealt with by the Central Government and it could not be regarded as representation at all and the Government smarted out of the trap by not admitting that the detenu did not know English. We are not inclined to accept this submission. Admittedly the representation was sent through the Superintendent, Central Jail, Dum Dum, Calcutta, There was no scope to hold that what has been stated to be "representation" was not representation at all inasmuch as it only requested for translated copies of the grounds of detention and the annexed documents in Polish Language.

There has been a catena of decisions of this Court that the representation of the detenu must be considered by the appropriate Government and Article 22(5) does not say which is the authority to whom representation shall be made or which authority shall consider fit. But it is indisputable that the representation may be made by the detenu to the appropriate Government and it is the appropriate Government that has to consider the representation as was reiterated in *John Martin v. State of West Bengal*.

12. It is, thus, clear that whether the representation is addressed to the Union

Government or not, the same has to be considered by the Union Government. We have earlier pointed out that u/s 14 of the Act Union Government is one of the authorities empowered to quash the detention order and therefore, it is the mandate of the Constitution under Article 22(5) that the authority who has got a right to set aside the detention order must consider the representation made by the detenu, whether addressed to it or not, as he is appointed with the power to set aside the detention order. It must, therefore see the reasonability and correctness of the detention order. In the garb of technicality, the Union Government cannot eschew its Constitutional responsibility by refusal to consider the representation of the detenu on the pretext that it was not addressed to it.

13. Learned A.G.A. on the other hand relied upon judgment reported in 2001 SCC 289: (AIR 2001 SC 301) R. Keshava v. M.B. Prakash and Ors. and basing his argument in para 17 thereof he submitted that because the detenu did not forward the representation to the Union Government, therefore, the Union Government was under no obligation to consider it. The aforesaid judgment, through countenance the submission made by learned A.G.A, but is distinguishable on fact. In that case no representation was made to the appropriate government at all and instead it was addressed to the Advisory Board only whereas in the present case the representation was made to the appropriate government and the same was received to the Union Government also on 24-5-05. Thus, the Union Government was under obligation to consider the said representation. Thus, the aforesaid judgment relied upon by learned A.G.A. is of no help to him. Another judgment relied upon by the learned A.G.A. is reported in 38 (1999) ACC 801 Jasbir Singh v. Lt. Governor, Delhi and Anr. In paragraph 3 of the aforesaid judgment it has been held by the Apex Court that since there was another representation made to the Central Government on 22-6-1994 by the detenu, which was considered and disposed off by the Central Government on 12-7-1995, therefore, if the Central Government has not considered the representation of the detenu, which was addressed to the Advisory Board "the question of infraction of Constitutional right of the detenu because the representation address to the Advisory Board has not been considered by the Central Government does not arise". Thus the two judgments cited by the learned A.G.A are distinguishable on facts and consequently are of no help to him.

14. In this view of the matter, we are of the opinion that the continued detention of the petitioner is rendered bad in law and deserves to be set aside because of non-consideration of his representation by the Central Government though it had received the same.

15. Consequently, the writ petition succeeds and is allowed. The continued detention of the petitioner under the Act, dated 30-4-05 passed by respondent No. 2 District Magistrate, Varanasi, Annexure No. 1 to the writ petition is rendered illegal. The petitioner be set at liberty if not wanted in any other case.