

(2021) 10 OHC CK 0026

In the Orissa High Court

Case No : Writ Petition (Crl.) No.116 Of 2021

Sandeep @ Raja Acharya

APPELLANT

Vs

State Of Odisha & Others

RESPONDENT

Date of Decision : 08-10-2021

Acts Referred:

Constitution of India, 1950 — Article 22(5)
Indian Penal Code, 1860 — Section 34, 307, 386, 447, 506. National Security Act,
1980 — Section 3(2), 3(3), 3(4), 12(1), 13
Explosive Substances Act, 1908 — Section 3, 4, 5

Citation : (2021) 10 OHC CK 0026

Hon'ble Judges : Dr. S. Muralidhar, CJ; B.P. Routray, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, CJ

1. The challenge in the present petition is to an order dated 18th December, 2020 passed by the Commissioner of Police, Bhubaneswar-Cuttack (hereafter the 'Detaining Authority') under Section 3(2) of the National Security Act, 1980 (NSA) directing the detention of the Petitioner to prevent him from acting in the manner prejudicial to the maintenance of public order and tranquility. Also challenged is the order dated 28th December, 2020 passed by the Additional Secretary to Government, Home (Special Section) Department, Government of Odisha approving the order of detention dated 18th December, 2020.

2. The Petitioner further questions the order dated 11th February, 2021, the Joint Secretary, Home (Special Section) Department informing the Petitioner that his representation dated 17th October, 2020 was without merit. The petition also questions the order dated 18th February, 2021 passed by the Joint Secretary to Government, Home (Special Section) Department, Government of Odisha confirming the detention order in exercise of the powers conferred by Section 12 (1) read with Section 3(3) and 13 of the NSA and directing that the Petitioner

shall continue in the Special Jail, Jharpada, Bhubaneswar for 3 months from the date of his detention under the NSA or until further orders and the further order dated 8th June, 2021 by which the detention of the Petitioner was directed to continue for 9 months from the date of his detention under the NSA.

Grounds of detention

3. In response to the notice issued in the present petition by this Court on 1st September, 2021, a counter affidavit has been filed by the Detaining Authority on 17th September, 2021. Enclosed with the reply as Annexure-F4 are the grounds of detention. It states that by a letter dated 7th December, 2020, the Deputy Commissioner of Police (DCP), Bhubaneswar UPD had submitted a full report detailing the past activities of the Petitioner. The said grounds mentioned that the Petitioner had a long history in association with crimes. It set out a list of 44 cases registered against the Petitioner till 2008. The conclusion drawn by the Detaining Authority was that the prosecution under various provisions of the law had not been able to deter the Petitioner and that he continued a life of crime without demur or hesitation. Of the 44 cases, six were murder cases and 29 involved use of fire arms.

4. The ground of detention explain that the proximate event leading to the detention took place on 17th October, 2020 in the morning when the Petitioner was stated to be involved in disrupting the normal rhythm of life in the locality of Unit-II market area, Bhubaneswar under the Capital Police Station. It was stated that the Petitioner is a known anti-social in Bhubaneswar and was extorting 'Dadabati' from construction companies, builders, business establishments, shopkeepers and street vendors. On 17th October, 2020, between 9 and 10 am, the Petitioner with his associates, Binay Das and Nrusingha Ch. Behera and others being part of armed unlawful assembly visited the Unit-II market area, criminally intimidated the shopkeepers, vendors and people present there and constructed vending shops in front of Quarters No.VA1/1. The people around were intimidated and stunned into silence out of fear. He reminded the people that he had killed Biranchi Narayan Das and how no person could prevent him from ruling as he wished. It is pointed out that in view of such overact antisocial acts and throwing an open challenge to the law and public order, a pandemonium like situation was created in the Unit-II market area, disrupting public order. This resulted in registration of P.S. Case No.413 in the Capital Police Station under Sections 447, 386, 506 read with Section 34 of the IPC. The Petitioner was arrested and forwarded to the Court. The apprehension expressed in the grounds of detention was that he was about to be released on bail in the aforementioned case. The DCP apprehended that once released from judicial custody, the Petitioner would again create fear and panic in the society and was likely to act in a manner prejudicial to public order.

5. The Detaining Authority on examination of all the materials agreed with the DCP and was satisfied that in view of the proximate event, there was every likelihood that on emerging from jail, the Petitioner would disrupt public order

and tranquility again and, therefore, ordered his detention under the NSA.

6. Apart from the 44 cases listed, the grounds of detention also lists out the cases involving the Petitioner after he had committed the murder of Biranchi Narayan Das in 2008. It may be mentioned that in the case involving the murder of Biranchi Narayan Das, the Petitioner was convicted and his appeal is pending consideration before this Court. The grounds listed out 6 the other cases, which are still pending and of which 2 cases involve offences under the Explosives Substances Act (ES Act).

7. A counter affidavit has been filed by the Home Department, Government of Odisha giving a detailed time chart of the various stages when the detention order was passed; was approved; when the NSA Advisory Board gave its opinion and the steps thereafter. Another counter affidavit has been filed by the Union of India (Opposite Party No.2) explaining how the representation dated 17th October, 2020 of the Petitioner was dealt with.

Submissions of the Petitioner

8. Mr. Siba Sankar Mishra, learned counsel for the Petitioner, first submitted that this was not a case which could attract Section 3(4) of the NSA since, at the highest, it was only a case involving law and order and not public order. According to him, there is not a single case since 2017 involving the Petitioner except the case of 17th October, 2020. Reliance was placed on the decision of this Court in *Pramila Bastia v. State of Orissa*, 1984 CRL LJ 1402 to urge that failure to comply with the mandate of Article 22 (5) of the Constitution of India by terming a law and order situation to be that of breach of public order would vitiate the detention order.

9. Mr. Mishra submitted that the date on which the report was submitted to the State Government was 18th December, 2020 and the date on which the detention order was passed was 24th December, 2020 i.e. after a gap of 6 days. No reasons were given for the delay whereas Section 3(4) of the NSA required the decision to be taken forthwith. Placing reliance on the decision of the Supreme Court of India in *Hetchin Haokip v. State of Minipur* AIR 2018 SC 3419, he submitted that this unexplained delay was fatal to the detention order. In this connection, reliance was also placed on the decision of this Court in *Nakula Mahakud v. State of Orissa* 2019 (I) OLR 120.

10. It was next submitted that although the Petitioner did not make any representation against the detention order and instead relied on an earlier representation made on 17th October, 2020. According to Mr. Mishra it was incumbent on the Detaining Authority and even the Board to advise him to file such a representation.

11. Mr. Mishra submitted that otherwise there would be a violation of the mandate under Article 22 (5) of the Constitution of India. He placed reliance on the decision of the Supreme Court in *Pebam Ningol Mikoi Devi v. State of*

Manipur (2010) 9 SCC 618 and the decision of this Court in Babu v. State of Orissa, 2004 (II) OLR 560.

12. He submitted that there was an unreasonable delay in supplying the detenu with the copies of the documents, statements and other materials and this too vitiated the order of detention. Reliance was placed on the decision of the Supreme Court in *Icchu Devi Choraria v. Union of India*, AIR 1980 SC 1983.

Submissions of the Opposite Parties

13. Appearing on behalf of Opposite Parties 1 and 3, Mr. Katikia, learned Additional Government Advocate submitted that there was no representation in fact made by the detenu against the detention order and therefore it was not required to deal with it. Reliance was placed on the decision of the Supreme Court in *Union of India v. Paul Manickam*, (2003) 8 SCC 342.

14. Next, it was submitted by Mr. Katikia that the grounds of detention were cogent and clear and it was plain that the detenu is a serious threat to public order. No grounds were made out for interference by this Court with the detention order. Reliance was placed on the decisions of the Supreme Court in *T. Devaki v. Government of Tamil Nadu* (1990) 2 SCC 456 and *Harpreet Kaur v. State of Maharashtra* (1992) 2 SCC 177. Mr. Katikia placed reliance on the decision of the Supreme Court in *State of Maharashtra v. Balu* 2019 SCC OnLine SC 1457 to urge that the order of detention should not be interfered with by the High Court.

Reliance was also placed on the decision of the Supreme Court in *Makhan Singh Tarsikka v. State of Punjab* AIR 1952 SC 27.

Discussion and conclusions

15. As regard the delay in the detention order being passed by the Detaining Authority after receipt of the report, it is seen that between 18th December, 2020 when the report was sent and on 28th December, 2020 when the detention order was approved, there was an intervening weekend and therefore, it cannot be said that there is an unreasonable delay. On the facts of the decision in *Hetchin Haokip* (supra), the delay of 5 days was stated to be unexplained because of the specific averment made in the petition for which there was no reply. This is evident from para 18 of the judgment. However, in the present case, Mr. Mishra, learned counsel for the Petitioner, frankly stated that there was in fact no averment in the writ petition regarding the delay in passing the detention order after receipt of the report. Without such an averment, it would not be fair to expect the Respondents to offer an explanation. Consequently, the Court is unable to agree with Mr. Mishra that there is an unexplained delay in the passing of the detention order.

16. On the question whether there were sufficient grounds for detention and whether the matters preferred to in the grounds of detention were 'staled' and offered no proximate nexus for passing the detention order, the Court finds that

the immediate incident was that of 17th October, 2020 involving allegations of the Petitioner causing a breach of peace and indulging an extortion in the market place in the day time along with a gang of other persons, who were armed. The background history of 44 criminal cases involving the Petitioner prior to 2008 when he was charged with the murder of Biranchi Narayan Das and in which case he was ultimately convicted, also supports the apprehension expressed on behalf of the State regarding breach of peace if the Petitioner would emerge on bail. Such apprehension was real and not imaginary. Even the cases after 2008 revealed that as long as the Petitioner was in custody for the murder case, no case was registered against him but once he emerged on bail sometime in 2017, the registering of cases against him again commenced and these cases involved offences under Section 307 IPC and Sections 3,4 and 5 of the ES Act. The 6 cases apart from the murder case registered against the Petitioner after 2010 shows that there were 2 cases in March, 2010, 2 in April, 2010. Once, he emerged from custody in 2017 there was a criminal case in November, 2019 and one in October, 2020. It is, therefore, not possible to agree with the submission of Mr. Mishra that the instant case should be viewed as one of law and order and not public order.

17. In Harpreet Kaur (supra), the Supreme Court, after referring to the earlier decisions, explained the concepts of 'public order' and 'law and order' as under:

"10. "Public Order" or "Law and Order" are two different and distinct concepts and there is abundance of authority of this Court drawing a clear distinction between the two. With a view to determining the validity or otherwise of the order of detention, it would be necessary to notice the difference between the two concepts.

11. In Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740, speaking for the majority, Hidayatullah, J. pointed out the distinction in the following words (SCR p. 746 D-E)

"One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State"

12. In Arun Ghosh v. State of W. B. (1970) 1 SCC 98, again Hidayatullah, J. speaking for the Court pointed out that what in a given situation may be a matter covered by law and order, on account of its impact on the society may really turn out to be one of 'public order'. It was observed: (SCC p. 100, para 3)

"Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chambermaids. He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely

places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its effect upon the public tranquility there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies."

13. A Constitution Bench in *Madhu Limaye v. Sub-Divisional Magistrate* (1970) 3 SCC 746 again dealt with the question and it was observed : (SCC p. 756, Para 20)

"In our judgment the expression 'in the interest of public order' in the Constitution is capable of taking within itself not only those acts which disturb the security of the State or act within order publique as described but also certain acts which disturb public tranquility or are breaches of the peace. It is not necessary to give the expression a narrow meaning because, as has been observed, the expression 'in the interest of public order' is very wide."

14. In *Kanu Biswas v. State of W. B.* (1972) 3 SCC 831, this Court opined : (SCC p. 834, para 7)

"The question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order, ... is a question of degree and the extent of the reach of the act upon the society. Public order is what a French call 'order publique' and is something more than ordinary maintenance of law and order. The test to be adopted in determining whether an act affects law and order or public order, as laid down in the above case, is : Does it lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of society undisturbed ?"

15. In *Ashok Kumar v. Delhi Administration* (1982) 2 SCC 403, this Court re-examined the question and observed: (SCC pp. 409-10, para 13)

"The true distinction between the areas of 'public order' and 'law and order' lies not in the nature or quality of the act, but in the degree and extent of its reach upon society. The distinction between the two concepts of 'law and order' and 'public order' is a fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order, while in another it might affect public order. The act by itself therefore is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the

life of the community which makes it prejudicial to the maintenance of public order."

16. In *Subhash Bhandari v. District Magistrate, Lucknow* (1987) 4 SCC 685, a Division Bench of this Court has held: (SCC headnote, pp. 686-87)

"A solitary act of omission or commission can be taken into consideration for being subjectively satisfied, by the detaining authority to pass an order of detention if the reach, effect and potentiality of the act is such that it disturbs public tranquility by creating terror and panic in the society or a considerable number of the people in a specified locality where the act is alleged to have been committed. Thus it is the degree and extent of the reach of the act upon the society which is vital for considering the question whether a man has committed only a breach of law and order or has acted in a manner likely to cause disturbance to public order."

17. It is not necessary to multiply the authorities on this point.

18. From the law laid by this Court, as noticed above, it follows that it is the degree and extent of the reach of the objectionable activity upon the society which is vital for considering the question whether a man has committed only a breach of 'law and order' or has acted in a manner likely to cause disturbance to 'public order'. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of 'public order'. Whenever an order of detention is questioned, the courts apply these tests to find out whether the objectionable activities upon which the order of detention is grounded fall under the classification of being prejudicial to 'public order' or belong to the category of being prejudicial only to 'law and order'. An order of detention under the Act would be valid if the activities of a detenu affect 'public order' but would not be so where the same affect only the maintenance of 'law and order'. Facts of each case have, therefore, to be carefully scrutinised to test the validity of an order of detention."

18. The following further observations in *Harpreet Kaur* (supra) are relevant for the present case:

"24. Crime is a revolt against the whole society and an attack on the civilisation of the day. Order is the basic need of any organised civilised society and any attempt to disturb that order affects the society and the community. The distinction between breach of 'law and order' and disturbance of 'public order' is one of degree and the extent of reach of the activity in question upon the society. In their essential quality, the activities which affect 'law and order' and those which disturb 'public order' may not be different but in their potentiality and effect upon even tempo of the society and public tranquility there is a vast difference. In each case, therefore, the courts have to see the length, magnitude and intensity of the questionable activities of a person no find out whether his activities are prejudicial to maintenance of 'public order' or only 'law and order'.

25. There is no gainsaying that in the present state of law, a criminal can be punished only when the prosecution is able to lead evidence and prove the case against an accused person beyond a reasonable doubt. Where the prosecution is unable to lead evidence to prove its case, the case fails, though that failure does not imply that no crime had been committed. Where the prosecution case fails, because witnesses are reluctant on account of fear of retaliation to come forward to depose against an accused, obviously, the crime would go unpunished and the criminal would be encouraged. In the ultimate analysis, it is the society which suffers. Respect for law has to be maintained in the interest of the society and discouragement of a criminal is one of the ways to maintain it. The objectionable activities of a detenu have, therefore, to be judged in the totality of the circumstances to find out whether those activities have any prejudicial effect on the society as a whole or not. If the society, and not only an individual, suffers on account of the questionable activities of a person, then those activities are prejudicial to the maintenance of 'public order' and are not merely prejudicial to the maintenance of 'law and order'."

19. In the present case, the activities of the Petitioner as noted in the grounds of detention do support the case of the Detaining Authority that this was a case involving breach of public order and not merely law and order.

20. As regards the non-consideration of the Petitioner's representation, the fact of the matter is that there was in fact no representation by the Petitioner against the order of detention. The Petitioner having already been involved in a large number of cases and having pursued those cases in various Courts was well aware of the legal procedures in this regard. In the present case, he was aware to whom the representation was to be made. The order of detention made that clear in no uncertain terms. The fact of the matter is that he relied on a representation made on 17th October, 2020, which was prior to the actual detention order being passed. In this context the following observation of the Supreme Court in Paul Manickam (supra), are relevant:

"19. xxx. While dealing with a habeas corpus application undue importance is not to be attached to technicalities, but at the same time where the court is satisfied that an attempt has been made to deflect the course of justice by letting loose red herrings the Court has to take serious note of unclean approach. Whenever a representation is made to the President and the Governor instead of the indicated authorities, it is but natural that the representation should indicate as to why the representation was made to the President or the Governor and not the indicated authorities. It should also be clearly indicated as to whom the representation has been made specifically, and not in the manner done in the case at hand. The President as well as the Governor, no doubt are constitutional Heads of the respective Governments but the day-to-day administration at respective levels is carried on by the Heads of the Department/Ministries concerned and designated officers who alone are ultimately responsible and accountable for the action taken or to be taken in a given case. It really the

citizen concerned genuinely and honestly felt or was interested in getting an expeditious consideration or disposal of his grievance, he would and should honestly approach the really concerned authorities and would not adopt any dubious devices with the sole aim of deliberately creating a situation for delay in consideration and cry for relief on his own manipulated ground, by directing his representation to an authority which is not directly immediately concerned with such consideration."

21. Indeed, in the present case, the representation dated 17th October, 2020 was not a representation against the order of detention at all and, therefore, it was not incumbent on the Respondent Authorities to consider it. Nevertheless the affidavit of the Union of India explains the time taken to deal with the said representation and the manner in dealing with it, the Court is unable to find any illegality committed in that regard. Equally no case has been made out by the Petitioner to demonstrate that there was any unreasonable delay in supply of the grounds of detention or the materials relied upon in support thereof.

22. The Court finds that no grounds have been made out for interference with the impugned order of detention or its confirmation or even the rejection of the Petitioner's representation.

23. The writ petition is accordingly dismissed but in the circumstances, with no order as to costs.

24. An urgent certified copy of the order be issued as per rules.