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(1993) 10 AHC CK 0009

In the Allahabad High Court

Case No : Habeas Corpus Writ Petition No. 15862 of 1993

Shabban — APPELLANT

Vs

The State of Uttar Pradesh and Others — RESPONDENT

Date of Decision : 06-10-1993

Acts Referred:
Constitution of India, 1950 — Article 14
National Security Act, 1980 — Section 12(4), 2(2), 3(2), 8
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (1993) 17 ACR 683

Hon'ble Judges : Palok Basu, J;J.P. Semwal, J

Bench : Division Bench

Advocate : S.P. Singh Raghav, for the Appellant; Mahendra Pratap, for the Respondent

Judgement

Palok Basu, J.—Shabban, son of Babu has filed this Habeas Corpus writ petition challenging the detention order dated 6-1-1993 passed by the District Magistrate, Ghaziabad u/s 3(2) of the National Security Act (For short, the Act).

2. This writ petition was admitted and counter and rejoinder affidavits were exchanged. An additional factor was brought to the notice of the Court by filing a supplementary affidavit and that is that three other persons, namely, Nazim, Qazim and Yasin who were similarly detained by orders of the District Magistrate, Ghaziabad, dated 11-1-1993 in each case stand released from the jail because the Advisory Board had not recommended their detention and had come to the conclusion that there was no sufficient cause for permitting their detention to continue as a result of which they are enjoying liberty. On filing of this supplementary affidavit opportunity was granted to the State Counsel to file a supplementary counter affidavit in reply. Two such affidavits have been filed, one on behalf of the State Government and the other by the District Magistrate himself. Reference to the various allegations in the respective affidavit of the parties shall be adverted to at the relevant places at the subsequent paragraphs.

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3. It may be stated here that the order dated 6-1-1993 says that the District Magistrate was satisfied that in order to prevent the Petitioner from acting in any manner prejudicial to the maintenance of the public order the said detention order was being passed u/s 3(2) of the Act. This order was served on the Petitioner in jail on 7-1-1993. The Petitioner?s confinement was due to his involvement in a criminal case registered as case crime No. 737 of 1992, under Sections 147, 148, 149, 302, 307, IPC, Police-station Kotwali district Ghaziabad. The grounds of detention as mentioned and furnished to the Petitioner u/s 8 of the Act, translated into English, would read as under:

Since you Shabban, son of Babu, resident of 203, 1bboo ka Bhatta, police-station Kotwali Chaziabad has been detained under my orders dated 6-1-1993, u/s 3(2) of National Security Act, therefore, the grounds of detention are as follows:

(i) On 6-12-1992 an incident happened in Ayodhya as a result of which communal tension has built up in Ghaziabad city and for maintaining public order various measures have been taken by the District Administration, But on 9-12-1992 at 5.45 P.M. in the evening in Mohalla-Jassipura, Mahant Sri Mahendra Giri alias Pahalwan Baba, son of Dhyan Chand, while he was going from Dudheshwar Nath temple to his own Baba Kalbhairav temple and had reached a little distance upto Gaushaha road that 15-20 persons belonging to Muslim community in which you were one, who cumulatively with the common object of murdering him attacked him. The accused were armed with knives and daggers. Rajesh Kumar son of Manphool Singh, resident of Vijainagar, Police-station Vijainagar, Ghaziabad and Deoraj, s/o Kartar Singh, resident of Vijai-Nagar and Netrapal, s/o-Rajaram, r/o-Sarai Nazar Ali, Police-station Kotwal, Ghaziabad tried to save him at which you and your companions attacked them with knives and daggers with the intention to cause death. In this incident Mahant Mahendra Giri and Rajesh died at the spot while Netrapal and Deoraj were seriously injured who have been admitted in the hospital. At the time when you and your companions were perpetrating this crime, at that time in that locality the patrol police team deputed there consisting of Sub-Inspector Patiram Shekhar, Sub-Inspector Arvind Kumar Goswami constables Sahdeo Singh, Ompal and Virsen reached there and seeing the incident accosted and gave a chase as a result of which some of your companions were successful in running away but you and your four other companions were arrested on the spot and from three of your companions blood-stained knives were recovered which were used in killing and injuring the deceased and the victims. When the police patrol party had reached, while fleeing they were saying that we will not leave any temple or priest of a temple because in Ayodhya our old mosque existing since the time of Babar has been broken into pieces as a result of which Islam has come to face danger. This incident perpetrated by you and your companion resulted in all the shops abruptly closing down in Gaushala road. All residents had closed their doors. There was terror amongst the passers by and the public order was thus totally disrupted. A case was registered at police station Kotwali against you and your companions as case crime No. 737 of 1992, under Sections 147, 148, 149, 302,

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307 IPC, while you and your four other companions were lodged in police station-Kotwati on arrest. During investigation it was revealed that on 9-12-1992 in Mohalla Kaila Bhatta a secret meeting was held under the Presidentship of Imam Kazi Farooq of Marqas Masjid in which it was decided that Mahant Mahendra Giri alias Pahalwan Baba should be killed in order to take revenge of breaking of Babri Maszid. The aforesaid incident perpetrated by you and your companions was the result of the aforesaid meeting and the deliberations. Since in the entire city communal tension existed from before, therefore, you and your companions, accentuated by communal feelings have indulged in killing Mahant and other persons of other community, the entire communal harmony in the district has been disrupted and damaged. The District Administration has some how attempted to maintain public order after great difficulty. On 9-12-1992 curfew order was imposed since night in Mohalla-Chowki Kaila Shatta, Chowki Bazariaya, Chowki Navyug Market and Chowki Dasna Gate within police-station Kotwali and by summoning police from other police-stations public order was restored. Though curfew has been withdrawn now but the communal tension still continues in the city.

You are at the moment in judicial custody in district Jail, Meerut in the aforesaid case and your bail application has been rejected by the Chief Judicial Magistrate, Ghaziabad and on your behalf a bail application has been moved in the court of Session in which 7-1-1993 has been fixed for hearing. Looking at the facts and circumstances there is every likelihood of your bail application being allowed by the Sessions Judge. Since you and your companions have indulged in the aforesaid action due to communal passion even which has resulted in disrupting public order in the entire city and thus on being released on bail you are likely to indulge in similar activity which will again disrupt the public order, therefore, in order to prevent you from acting in any manner prejudicial to the maintenance of public order it is necessary and imperative that you be retained u/s 2(2) of the National Security Act.

S/d. Pradeep Shukla District Magistrate Ghaziabgd.

Enclosures:

(24 enclosures were attached which are not necessarily to be mentioned here.)

4. Sri S.P.S. Raghav, learned Counsel for the Petitioner has been heard at length in support of this habeas Corpus petition while Sri Mahendra Pratap learned A.G.A. has opposed the writ petition and has placed the report of the Advisory Board also not only relating to the Petitioner but also relating to three persons regarding whom the Advisory Board did not find sufficient cause to continue detention.

5. The principal argument advanced on behalf of the Petitioner is that the grounds of detention against all the four detenus being identical and three of the detenus having been released from detention in pursuance of the opinion of the Advisory Board the Petitioners? continued detention on the same ground and not

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only bad and illegal but also amounts to violative of law of equality enshrined under Article 14 of the Constitution of India. Since this is the only point canvassed, no other grounds taken in the writ petition have to be taken up for discussion. It must be stated here that Sri Mahendra Pratap, learned A.G.A. has tried to establish the contention that some of the materials which may have been relied upon by the Detaining Authoriiy concerning the Petitioner Shabban appears to have been over and above the materials placed relating to the detention of Nazim, Qazim and Yasin. He, however, candidly agreed, and rightly so, that the grounds of detention of the Petitioner was identical with the grounds of detention of Nazim, Qazim and Yasin.

6. In order to appreciate the aforesaid argument it may be relevant to quote hear in verbatim the averments made in the supplementary counter affidavit of the State and the District Magistrate. A supplementary counter affidavit of Shri B.S. Srivastava on behalf of the State of U.P. avers as under:

Para. 3. That the only question which has to be answered by the State Government is whether the Advisory Board has released the accused, namely, Nazim, Qazim and Yasin Pahalwan and whether the order of the Petitioner has been confirmed by the Advisory Board. In this connection it is submitted that it is a fact that the other persons have been released from the National Security Act by the Advisory Board whereas after full consideration the order of detention passed by the District Magistrate against the Petitioner has been confirmed by the Advisory Board. It may also be stated that the detailed counter affidavit in this case will be filed by the District Magistrate.

7. Coming to the supplementary counter affidavit filed by the District Magistrate which is in Hindi the relevant paras, transtated into English, would read as under:

Para 4. That in reply to paras Nos. 2 to 7 of the affidavit it is submitted that the Petitioner Shabban and others, namely, Yasin Pahalwan, Kazim and Nazim were detained under the N.S.A. because all of them on account of their actions had disrupted public order and if they would have come out from jail on being bailed out they would have indulged in similar activities/actions which were again to result in disrupting the public order. Hence relating all of them separate orders of detention were passed and in the aforesaid incident all of them had specific different roles against the detention order representations were forwarded to the Advisory Board through the State Government alongwith comments of the deponent and after hearing, the Advisory Board forwarded its opinion to the State Government as a result of which the State Government directed release of all the three but maintained the detention order vis-a-vis the Petitioner Shabban. Since action of letting off the three by passing release order and continuing the detention of the Petitioner by confirming the order is-an action of the State Government, it is for the State Government to reply to the other factual basis.

8. It may be mentioned here that in an action under the Act, the Detaining Authority is empowered to direct detention of a citizen if he is of the opinion that

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the Act complained of has the effect of disrupting the public order and that if such a person continues to move freely his actions would be prejudicial to the maintenance of the public order.

9. It is admitted that the ground of detention relating to the four persons was the same and that is the incident dated 9-12-1992 in which one Mahant Mahendra Giri alias Pahalwan Baba was done to death and some others received injuries. The name of the Petitioner Shabban along with Nazim, Qazim and Yasin Pahalwan is mentioned in the FIR. The role attributed to them is similar. The additional factor available against other three was that from their possession blood-stained knives were also recovered. There was, however, no such recovery from the Petitioner. It may be mentioned here that along with the Petitioner three other accused were allegedly arrested at the spot. The fact however, remains that from out of four persons who were arrested on the spot, the Petitioner alone was chosen by the District Administration for detention along with those other three who had escaped and run away from the place of occurrence having been named in the FIR. Consequently no distinction whatsoever can possibly be made in the cases of the four detenus inasmuch as the ground of detention of the Petitioner and the ground of detention of those three are identical.

10. It may be pointed out here that in all cases of this type it may not be at all necessary to call for the orders of the Advisory Board. It may be noticed that by virtue of the provisions contained in Section 12(4) of the Act, the first part of the order of the Advisory Board is a confidential document. It is not necessary to decide whether the question of confidentiality would remain confined to the deteue who challenges the detention by a petition in this Court or would also include even those regarding whom the confidential orders have been passed by the Advisory Board. This matter was touched by the Supreme Court in the case of Calcutta Dock Labour Board Vs. Jaffar Imam and Others, . One thing, however, flows from the aforesaid decision and the provisions contained in the said Section 12(4) of the Act. It is implicit that the Advisory Board cannot sit to examine the materials as a criminal court and the most that it can do is, being the Constitutional Authority to check the action of the Executive, decide whether there was sufficient material for passing the detention order or not. Keeping this discussion in the forefront, one fails to understand now any distinction should be permitted to be drawn on the facts or consequences which are contained in that part of the order which is confidential when the latter part of the order of the Advisory Board entitles them to claim parity and equality before law on the premise that the ground of detention for the detenu challenging his detention are same and identical and in parity with the grounds of those who have been extended the benefit of liberty at the subsequent action of the State Government, though on the advice of the Advisory Board. Therefore, a word must be said about the argument that all the materials of "spot arrest" as regards the Petitioner must be different and, therefore, on that distinction the argument of applicability of parity of Article 14 of the Constitution is not available

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to the Petitioner. As noted above, the grounds or basis of an order of detention is not the truthfulness of an allegation made in the FIR but only ''sufficiency of materials furnished before the detaining authority regarding that ground. If one were to go into question of acceptability of the version put through the FIR then it would mean that the Detaining Authority will have to hold trial in the matter of detention, which certainly is not the law.

11. Reliance was placed by the learned Counsel for the Petitioner on two decisions of the Supreme Court. First one is reported in Mohd. Shakeel Wahid Ahmed Vs. State of Maharashtra and Others, . It was held in this case that where the Advisory Board''s opinion directing release of some o* the detenus was available and yet the matter was not placed before the Detaining Authority the confirmation of the deteation of the remaining detenu would suffer from non-application of mind. To some extent it must be said that the principle laid down in the aforesaid decision can be brought in aid of the argurnent advanced by learned Counsel for the Petitioner.

12. The second case, Wazir Yadav Vs. The State of U.P. and Others, . In the said case it has been held that if the grounds of detention were identical with regard to those who have been granted the benefit of the opinion of the Advisory Board by the State Government and stand released, the principles of Article 14 should be brought in so that justice is also done to the remainder and they also stand released. On the facts and circumstances of the present case the propositions settled in Wazir''s case are applicable.

13. Sri Mahendra Pratap, learned A.G.A. also cited the cases A.K. Roy and Others Vs. Union of India (UOI) and Others, , Yogendra Murari v. State of U.P. 1988 SCC 992 and Haradhan Saha Vs. The State of West Bengal and Others, . It may be stated here that in A.K. Roy''s case constitutional validity of the Act was upheld and the principles laid down in various paras have to be applied to certain facts and the bare proposition may have to be held inapplicable to those facts which do not attract the observations therein. So far as Yogendra Murari''s case is concerned the observations in para 8 is that Article 14 cannot be brought into play. It is not being held in the instant case that because of non-action under the N.S A. against the other similarly placed accused, the benefit is being extended to the Petitioner. The third case is also not applicable because Haradnan Saha''s case says what should constitute the satisfaction of the Detaining Authority.

14. In view of the aforesaid discussion it is to be held that the continued detention of the Petitioner Shabban is illegal. This writ petition therefore, is allowed. The detention of the Petitioner in pursuance of the order dated 6-1-1993 is quashed. The Petitioner Shabban son of Babu, shall be released forthwith unless wanted in any other case.

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