

**(2020) 12 OHC CK 0023**

**In the Orissa High Court**

**Case No : Writ Petition (Criminal) No. 82 Of 2020**

Sk.Mabud @ Mamud @ Madud

APPELLANT

Vs

State Of Odisha & Another

RESPONDENT

**Date of Decision : 16-12-2020**

**Acts Referred:**

National Security Act, 1980 — Section 3(2)

Indian Penal Code, 1860 — Section 395

Arms Act, 1959 — Section 25, 27

**Citation : (2020) 12 OHC CK 0023**

**Hon'ble Judges : Sanju Panda, J;S.K. Panigrahi, J**

**Bench : Division Bench**

**Advocate : Debasis Sarangi, B. S. Dasparida, S.K.Dash, S. Mohapatra, K. Mohanty, M.K. Agrawala, Janmejaya Katikia**

**Final Decision : Allowed**

## Judgement

S.K. Panigrahi, J.

1. The present Criminal Writ Petition has been filed by the petitioner invoking Articles 226 and 227 of the Constitution of India challenging the order of

detention dated 12.02.2020 passed by the District Magistrate, Balasore under Section 3(2) of the National Security Act, 1980.

2. Brief facts of the case are stated hereunder so as to appreciate the rival legal contentions urged on behalf of the parties:

(a) The petitioner was under judicial custody in the District Headquarters Jail Balasore in connection to P.S. Case No.319 dated 17.10.2019 held under Section 395 of

IPC and Sections 25 and 27 of the Arms Act. The Superintendent of Police, Balasore in his letter No.7586/1B dated 26.12.2019 addressing the District Magistrate

appealed for the detention of the petitioner under Section 3(2) of the National Security Act. He contended that the present petitioner has been indulging in antisocial

activities prejudicial to public order in town, Sahadevkhunta, Sadar, Industrial PSâ??s areas and throughout the district of Balasore and also bordering area of West

Bengal since 2013. He further emphasized that the petitioner does not have any ostensible means of livelihood and only depends upon extortion, robbery and other

criminal activities. Further, he contended that the people in the above-mentioned regions are in a state of constant fear due to the continuous atrocious activities of this petitioner who is a dreaded criminal. The Superintendent of Police has then attached a list of 20 cases, while detailing those he has mentioned that out of 14 cognizable cases, 8 cases have been charge sheeted and the rest 6 are under investigation and will be charge-sheeted soon.

(b) Acknowledging the Letter No.7586/1B, District Magistrate, Balasore ordered for detention of the petitioner on 12.02.2020 and consequently provided the grounds

of detention to the petitioner on 16.02.2020. The District Magistrate has stated that there is every possibility that his release on bail will lead to the probabilities of his

indulgence in more and more criminal activities. He has further stated that upon thorough perusal of materials of criminal cases registered against him, it is clear that

the petitioner is a die-hard anti-social and criminal who has scanty regard for the law of the land. Hence, his detention under Section 3(2) of the NSA Act is necessary

in the interest of the maintenance of public peace as well as upholding public order in the locality.

(c) The aforesaid order of detention was approved by the State Government on 20.02.2020 and subsequently based on the report of the Advisory Board, the same

was confirmed on 06.04.2020 for a period of three months. Thereafter the period of detention has been extended on 06.05.2020 and 30.07.2020 pursuant to which the

petitioner continues to be in detention.

3. Learned Counsel for the petitioner submits that the detaining authority while

presenting the report against the detainee has not disclosed the basic facts, material particulars which led to passing an order of detention. It has further not been disclosed that what is the basis and circumstances which led the District Magistrate to come to a conclusion that the detainee is terrorizing the innocent general public. Further, he has contended that the order of detention was passed on 12.02.2020 whereas the grounds of detention was served on 16.02.2020 which indicates that the order of detention was passed without considering the materials on record. It is therefore sufficient to activate this Court into examining the legality of detention.

4. He has further contended that the Superintendent of Police and the District Magistrate have relied on stale cases as the detainee has been acquitted

in quite a few of them, the same has not been brought on record. Moreover, the cases relied upon by the detaining authority are cases affecting

individuals and none of them in any manner affects the tempo of life. It has also been contended that there were no particulars for the detainee to

make his representation and the details for the same was also not provided. Therefore, the information being incomplete and misleading does not

satisfy the requirements of law. This Court has consistently shown great anxiety for personal liberty and refused to throw out a petition merely on the

ground that it does not disclose a prima facie case invalidating the order of detention. The detaining authority ought to have produced

contemporaneous evidence to show that the authority had applied its mind to arrive at subjective satisfaction regarding such detention.

5. Learned Counsel for the Opposite Party No.2 submits that the order of detention of the petitioner was given only after thorough consideration and

judicious application of mind. He has contended that there are chances of the petitioner getting bail in Sahadevkhunta P.S. Case No.319 dated

17.10.2019 and there is a chance of resumption of the said antisocial activities after his release. Further, upon preparation of the grounds of detention,

the same was issued to the detainee on 16.02.2020 which is very well within the statutory period. It is further submitted that according to Section 3(4)

of the NSA Act, the grounds of detention should be provided after 5 days and within 15 days and therefore there has been no violation of the Act.

Further he has submitted that the bare reading of the application dated 26.12.2019 of the Superintendent of Police, Balasore, it is evident that the

activities of the detenu has not only affected individuals but the whole community disrupting peace and public order. Hence, the present petition should be dismissed.

6. Learned Counsel for the Opposite Party No.2 submits that on the basis of the materials available on record against the petitioner showing his anti-social and criminal activities in different cases for a considerable period which are prejudicial to the interest of the public at large and as the fact remains when the normal law of the land failed to curb the anti-social activities of the petitioner, the detaining authority was compelled to take recourse under the provision contained in the NSA Act. The detention of the petitioner has been made according to the procedure established by law.

It is neither illegal nor unwarranted.

Hence, the present petition should be dismissed.

7. Heard Mr. Debasis Sarangi, learned counsel appearing for the petitioner and Mr. Janmejaya Katikia, learned Additional Government Advocate for

Opposite Party Nos.1 and 2 and perused the case records.

8. Preventive detention is not to punish a person for something he has done but to prevent him from doing it. Therefore, since the detention order passed on the allegation of involvement of the detenu in a number of criminal cases without disclosing any material in the report of the Superintendent

of Police or materials available before the Detaining Authority that there is likelihood of breach of public order, the detention order cannot be

sustained. The detaining authority at the time of passing the order of detention as well as the State Government while confirming the same should take

into consideration the nature of allegations and offences alleged in the grounds of detention to examine whether the same relates to 'public order' and

the normal law cannot take care of such offences and that the acts of the detenu mentioned in the grounds of detention are prejudicial to maintenance

of public order or they only relate to "law and order". While interpreting the provisions this Court has pointed out in a number of cases that this Court

rigidly insist that preventive detention procedure should be fair and strictly observed. The detaining authorities should exercise the privileges sparingly

and "in those cases only where there is full satisfaction".

9. The Hon'ble Supreme Court in the case of Yumman Ongbi Lembi Liema Vs. State of Manipur 2012 (I) OLR (SC) 55.0, referring to the earlier

decision of the Hon'ble Supreme Court in Haradhan Saha Vs. State of West Bengal (1975) 3 SCC 198, held that the extraordinary powers of

detaining an individual in contravention of the provisions of Article 22(2) of the Constitution where the grounds of detention do not disclose any

material which was before the detaining authority other than the fact that there is every likelihood of the detenu being released on bail in connection

with the cases in respect of which he had been arrested to support the order of detention. It is also held that preventive detention is not to punish a

person for something he has done but to prevent him from doing it. Only on the apprehension of the detaining authority that after being released on

bail, the petitioner-detenu will indulge in similar activities, which will be prejudicial to public order, order under the Act should not ordinarily be passed.

10. The Supreme Court in Alpesh Navinchandra Shah v. State of Maharashtra (2007) 2SCC 777.; State of Maharashtra v. Bhaurao Punjabrao

Gawande (2008) 3 SCC 613; and Rekha v. State of Tamil Nadu (2011) 5 SCC 244., wherein the detention orders were set aside on the ground that

the purpose for issuance of a detention order is to prevent the detenu from continuing his prejudicial activities for a period of one year, but not to

punish him for something done in the remote past. Further, there would have to be a nexus between the detention order and the alleged offence in

respect of which he was to be detained and in absence of a live link between the two, the detention order could not be defended.

11. The Detaining Authority did not apply its mind before passing the order of detention so as to take the present petitioner to be a dangerous person

and that he has become a threat to the public order and on overall consideration of the facts and circumstances it does appear that the Detaining

Authority has failed to strike a balance between the Constitutional and the legal obligation charged upon him before passing the detention order and the

manner in which the power of detention has been exercised in this case. It does not appear to have been exercised rationally. In fact, the District

Magistrate has relied on a list of 20 cases provided by the Superintendent of Police while ordering for detention. However, he has not been taken into

consideration that out of the 14 cognizable cases, there are 6 cases which have not yet been charge-sheeted yet including the one in which the SP is

apprehensive that the petitioner may receive bail. Moreover, the learned Counsel for the petitioner has contended that out of the 20 cases, there are a

few cases where the petitioner has been acquitted, which has not been brought on record by the SP. Further, the District Magistrate has failed to

establish a proper nexus between alleged offence and order of detention under the grounds of detention.

12. In *Yumman Ongbi Lembi Leima v. State of Manipur and Ors.* (2012) 2 SCC 176, the Hon'ble Supreme Court held that-

â??Para 15. â?|personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part III thereof. The State has been granted the power to curb such rights under criminal laws as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order.â??

13. The Hon'ble Supreme Court in the case of *Huidrom Konungjao Singh Vs. State of Manipur* (2012) 7 SCC 18,1 held that three cumulative and

additive nature of requirements are to be satisfied to pass the order of detention; they are:

Â â??Para 9.(i) The authority was fully aware of the fact that the detenu was actually in custody;

(ii) There was reliable material before the said authority on the basis of which it could have reason to believe that there was real possibility of his release on bail and

being released he would probably indulge in activities, which are prejudicial to public order;

(iii) NecessityÂ toÂ prevent himÂ for which detention order was required.â??

In *Rekha v. State of Tamil Nadu through Secretary to Govt. and Anr.* (2011) 5 SCC 244, where the Supreme Court quashed the order of detention,

while dealing with the issue held:

â??Para 8. A perusal of the above statement in para 4 of the grounds of detention shows that no details have been given about the alleged similar cases in which

bail was allegedly granted by the concerned court. Neither the date of the alleged bail orders has been mentioned therein, nor the bail application number, nor

whether the bail orders were passed in respect of the co-accused on the same case, nor whether the bail orders were passed in respect of other co-accused in

cases

on the same footing as the case of the accused.â??

14. Preventive detention is an exception to the normal procedure and is sanctioned and authorized for very limited purpose under Article 22(3)(b) with good deal of safeguards. The exercise of that power of preventive detention must be with proper circumspection and due care. In a regime of

constitutional governance, it requires the understanding between those who exercise power and the people over whom or in respect of whom such

power is exercised. The legal obligation in this type of case, need to be discharged with great sense of responsibility even if the satisfaction to be

derived is a subjective satisfaction such subjective satisfaction has to be based on objective facts. If the objective facts are missing for the purpose of

coming to subjective satisfaction, in absence of objective facts the satisfaction leading to an order without due and proper application of mind will

render the order unsustainable. In view of the above legal position, this Court has expected from the detaining authority that subjective satisfaction of

the detaining authority should be based on objective facts.

15. Similarly, in the instant case, the details of the alleged bail application have not been provided in the order of detention, ground of detention or in the

application of the Superintendent of Police, Balasore. Further, no details have been given about the alleged similar cases in which bail was allegedly

granted by the concerned Court. The only mention regarding bail is in the letter dated 26.12.2019 by the Superintendent of Police, Balasore wherein he

had reported that it has come to his knowledge that the petitioner has arranged for his bail. However, this statement is entirely ambiguous and this

Court cannot rely on the same. Considering the above submissions, we are of the view that this Court should not allow the petitioner-detenu to be kept

in custody on the basis of order of detention which is illegal, bad in law hence amounts to illegal custody of the petitioner detenu.

16. In view of what is discussed hereinabove, this Writ Petition deserves to be allowed and accordingly it is allowed. Consequently, the order of

detention approved by the State Government on 20.02.2020 is quashed. However, we make it clear that this will not affect the criminal cases pending

against the petitioner.