

(2003) 09 OHC CK 0049
In the Orissa High Court
Case No : WPCRL No. 53 of 2003

Step on Padhan alias Mallick

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 09-09-2003

Acts Referred:

Arms Act, 1959 — Section 25
Criminal Procedure Code, 1973 (CrPC) — Section 107
National Security Act, 1980 — Section 3, 3(1), 3(2)
Penal Code, 1860 (IPC) — Section 106, 143, 144, 149, 294

Citation : (2003) 09 OHC CK 0049

Hon'ble Judges : Sujit Barman Roy, C.J; L. Mohapatra, J

Bench : Division Bench

Advocate : D.P. Dhal, A.K. Acharya and B.B. Mishra, for the Appellant; D. Nanda, Additional Government Advocate for O.Ps. 1 to 3 and M. Agarwalla, Sr. Std. Counsel (Central) for O.P. No. 4, for the Respondent

Final Decision : Dismissed

Judgement

L. Mohapatra, J.—The Petitioner having been detained in custody under the provisions of National Security Act, 1980 has filed this writ application challenging the detention order.

2. The case of the Petitioner is that he was arrested in connection with some criminal cases on 25.11.2002 and while in custody, the preventive order of detention was passed on 28.11.2002 by the District Magistrate, Kandhamal, Phulbani in exercise of power under Sub-section (2) of Section 3 of the National Security Act, 1980 for a period of twelve months. On the very same day, he was served with the grounds of detention enclosing a copy of the report indicating the number of cases in which he was involved and the Petitioner was also informed that he has right to make representation to the State Government-Central Government and can also claim personal hearing before the Advisory Board.?The detention order was confirmed by the opposite party No. 1-State Government on 03.1.2003. After service of the grounds of detention, the Petitioner submitted

representations to the Chief Minister, Human Rights Commission for necessary action. However, the preventive order of detention is challenged on the grounds of procedural irregularities and on factual aspect. According to the Petitioner, the representation forwarded to the opposite party No. 3, Superintendent of Police, Kandhamal was not considered and he was not informed as to what happened to the representation filed by him. It is also challenged on the ground that in the grounds of detention there is no mention that the Petitioner is likely to get indulged in similar activities, if he is released on bail and in absence of any such apprehension, no preventive order of detention could be passed. The other ground on which the preventive order of detention is challenged relates to the custody of the Petitioner. It is stated that since the Petitioner was in custody on the date the preventive order of detention was passed and there was no likelihood of grant of bail, there was no necessity to pass an order of detention. The last ground taken is that the number of cases mentioned in the grounds of detention relate to three different F.I. Rs. lodged on 17.11.2000 by three different persons in respect of same incident that occurred in one village at one time on 16.11.2000, as well as the F.I.R. lodged on 19.11.2002 in respect of the incident dated 18.11.2002, the offences alleged are looked into, they are all minor offences and even if the prosecution case in all the cases are accepted, it may at best amount to breach of law and order, but under no stretch of imagination, it can be termed as breach of public order.

3. A counter affidavit has been filed by the District Magistrate. It is stated in the counter that the representation of the Petitioner dated 9.12.2002 was received by the District Magistrate on 12.12.2002 and on receipt of the same, necessary parawise comment was sent to the Principal Secretary to Government, Home Department for consideration at the Government level on 12.12.2002. The State Government in the department of Home was pleased to reject the representation and the same was communicated to the Petitioner on 27.12.2002. It is also stated in the counter affidavit that the Petitioner has been organising Adivasis and instigating them against Harijans. He has been a constant threat and panic to the Harijans and the Petitioner has been instrumental in disturbing the normal tempo of the society. It is also stated that the District Magistrate expected that there was likelihood of release of the Petitioner on bail and after release on bail, he shall again indulge in anti-social activities. For the above reasons, the preventive order of detention was passed. The District Magistrate in his counter affidavit has stated that in view of the long standing criminal antecedents of the Petitioner, the detention order under the National Security Act was necessary and therefore the said order was passed.

4. Shri Dhal, the Learned Counsel appearing for the Pletitioner at the time of hearing of the application submitted that the Petitioner was arrested in connection with an incident that occurred on 19.11.2002 which was registered as Kotagarh PS. No. 64 of 2002 for commission of offences under Sections 143,294, 379, 106 and 149 of the Penal Code read with Section 25 of the Arms Act. Further he was taken to custody on 28.11.2002. While in custody, the Petitioner

was informed that he was detained under the National Security Act. In the body of the grounds of detention reference has been made to three criminal cases of the year 2000 and the offences in the aforesaid three cases are mostly under Sections 143, 379, 506 of the Penal Code. Two non-FI.R. cases have also been tagged where the Petitioner has been noticed u/s 107, Code of Criminal Procedure. It was further contended by Shri Dhal that by the time the order of detention was served on the Petitioner, he was in custody and had not applied for bail and there was no occasion for the District Magistrate to observe that if he is released on bail, he may once again indulge in the anti-social activities against the non-Advivasis. It was also contended on behalf of the Petitioner that all the three cases relating to the year 2000 only make out minor offences and all the three FI. Rs. lodged by three different persons relate to the same incident on 16.11.2000. Therefore, pendency of these cases may not be a ground for detaining the Petitioner under the National Security Act. Shri Dhal further contended that if the nature of offences are looked into and the nature of allegations are considered, it may at best amount to breach of law and order and under no stretch of imagination it can be termed as breach of public order.

5. The learned Additional Government Advocate, on the other hand, submitted that the nature of allegations made in the grounds of detention clearly make out a case that the Petitioner was heading a group of Adivasis and acting in a manner prejudicial to the interest of the Harijans. The three FI. Rs. of 17.11.2000 clearly indicate the manner in which he was heading a group of Adivasis and interfered with the peaceful living of the Harijans. The FI.R. dated 19.11.2002 also relates to a similar incident. Since the Petitioner was involved in such type of activities, even though he had not applied for bail in the last case, in which he was taken to custody, the District Magistrate was of the view that if the Petitioner is released on bail, he shall again indulge in similar anti-social activities which amounts to breach of public order and, therefore, his detention under the National Security Act was necessary.

6. Considering the respective submissions made by the Learned Counsel appearing for the parties, now we proceed to examine the grounds of detention. It appears that three F.I. Rs. by three different persons were lodged on 17.11.2000 alleging therein that on 16.11.2000 the Petitioner along with some others, who are Tribals, being armed with traditional weapons entered inside the paddy field of the respective informants, forcibly took away the standing crops and when protest was raised against such act, the Petitioner and his companions threatened them with dire consequence. Again on 19.11.2002 Kotagarh P.S. Case No. 64 of 2002 was registered for the offence of similar nature alleged to have been committed by the Petitioner and his companion on 18.11.2002. The said case was registered for commission of offences under Sections 143, 144, 295, 506 and 149 of the Penal Code read with Section 25 of the Arms Act. In connection with case, the Petitioner was taken to custody and while in custody, the order of detention was served on him, The satisfaction of the District Magistrate recorded u/s 3(2) of the detention order is quoted below:

Lastly due to your above-mentioned activities, the public order in Katagarh P.S: area was seriously jeopardized. You are also agonising Adivasis who are carrying their traditional weapons like bows, arrows, axe and country-made guns in various places. Further, you are instigating against Adivasis to forcibly trespass into the lands of Harijans and took away the ripe standing paddy crops from the lands which creates ethnic issues between Kandh Tribals and Pano Harijans. There is every likelihood that you may be released on bail. After your release on bail you may once again indulge in the anti-social activities against non-Adivasis with greater vigour and the same cannot be prevented otherwise than by detaining you under the "National Security Act" in the interest of maintenance of public order of the Society.

7. The observation made by the District Magistrate in the above paragraph is challenged on the ground that the Petitioner at the time of service of the detention order was in custody in connection with Kotagarh P.S. Case No. 64 of 2002 and had not moved for bail. Since the Petitioner was in custody and did not move for bail, there was no necessity on the part of the District Magistrate to apprehend that the Petitioner may be released on bail and after his release, he is likely to get indulged in similar activities.

8. The sum and substance of Shri, Dhal the Learned Counsel appearing for the Petitioner being that all the cases mentioned in the grounds of detention relate to only breach of law and order and the Petitioner being in custody at the relevant time and having not moved for bail, there was no need to pass an order of preventive detention. In this regard reliance was placed by him on a decision in the case of Rameswar Shaw v. District Magistrate, Burdwan and Anr. reported in AIR 1964 SC. 344. The Apex Court in the aforesaid case held that before an order of detention can be validly made by the detaining authority, specified in Section 3(2), the authority must be satisfied that the detention of the person is necessary in order to prevent him from acting in any prejudicial manner as indicated in Clauses (i) to (Hi) of Section 3 (1)(a). Since the Act authorises the preventive detention of citizens without a trial, the material provisions of the Act must be strictly construed and safe-guards which the act has deliberately provided for the protection of citizens must be liberally interpreted. The Court further held that the satisfaction of the detaining authority to which Section 3(1) (a) refers is his subjective satisfaction, and so is not justiciable. Therefore, it would not be open to the detenu to ask the Court to consider the question as to whether the said satisfaction of the detaining authority can be justified by the application of objective tests. It would not be open, for instance, to the detenu to contend that the grounds supplied to him do not necessarily or reasonably lead to the conclusion that if he is not detained, he would indulge in prejudicial activities. The reasonableness of the satisfaction of the detaining authority cannot be questioned in a Court of law; the inaccuracy of the material on which the said satisfaction purports to rest also cannot be examined in a court of law. The Apex Court with regard to the contention raised by the Learned Counsel for the Petitioner observed as follows:

Before an authority can legitimately come to the conclusion that the detention of the person is necessary to prevent him from acting in a prejudicial manner, the authority has to be satisfied that if the person is not detained, he would act in a prejudicial manner and that inevitably postulates freedom of action to the said person at the relevant time. If a person is already in jail custody, as a result of a remand order passed by a competent authority, it cannot rationally be postulated that if he is not detained, he would act in a prejudicial manner. At the point of time when an order of detention is going to be served on a person, it must be patent that the said person would act prejudicially if he is not detained and that is a consideration which would/be absent when the authority is dealing with a person already in detention. The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus the basis of the order u/s 3(1)(a) and this basis is clearly absent in the case of a person already in jail custody. Therefore, the detention of the person in the circumstances of this case, is not justified by Section 3(1)(a) when he holds that it was necessary to detain the person in order to prevent him from acting in a prejudicial manner.

9. While the Apex Court in the aforesaid decision held that the purpose of preventing the detenu from acting in a prejudicial manner is the basis of the order u/s 3(1)(a) of the Act and such basis is clearly absent in case lot a person is already in custody, a different view has been taken by the later decision of the Apex Court as well as this Court. In this connection, reference may be made to a decision of this Court in the case of Tilatama Parida v. State of Orissa reported in (1997) 13 OCR 377. Referring to three decisions of the Apex Court reported in N. Meera Rani Vs. Government of Tamil Nadu and Another, , Dharmendra Suganchand Chelawat and another Vs. Union of India and others, and Kamarunnissa and Others Vs. Union of India and another, as well as an earlier decision of this Court reported in (1995) 9 O.C.R. 28 Saras Kumar Mohanty v. State of Orissa and Ors. this Court observed as follows:

So far as the second question relating to procedure to be adopted in case the detenu is already in custody is concerned the guidelines have been indicated by one of us (Pasayat, J) in Sarat Kumar Mohanty seeking release of Saras Kumar Mohanty seeking release of Kunumunia alias Sisir Mohanty Vs. State of Orissa and Others, . In matter where the detention orders are in Jail under Some other laws, the detaining authorities should apply their mind and show their awareness in this regard in the grounds of detention, the Chances of release of such persons on bail and stating the necessity of keeping such persons in detention under the preventive detention laws. Substituting custody of the detenu by itself does not invalidate an order of his preventive detention, one 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 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. If the detaining authority is reasonably satisfied on cogent materials 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. Where the detention order in respect of a person already in custody does not indicate that the detenu was likely to be released on bail, the order would be vitiated. (See *N. Meera Rani Vs. Government of Tamil Nadu and Another*, : *Dharmendra Suganchand Chelawat and another Vs. Union of India and others*,). The point was gone into in detail in *Kamarunnissa and Others Vs. Union of India and another*, . The principles were set out as follows. Even in the case of a person in custody, a detention order can be validly passed (1) If the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him; (a) that there is a real possibility of his release on bail, and (b) that on being released, he would in all probability indulge in prejudicial activities, and (3) if it is felt essential to retain him to prevent him from so doing. If an order is passed after recording satisfaction in that regard, the order would be valid. In the case at hand the order of detention and grounds of detention show awareness of custody and/or possibility of release on bail, and/or apprehension aspect. This is manifest from following indications in that regard in the grounds of detention.

In spite of being arrested and forwarded in custody in several cases, your anti-social activities are going unabated.. You are coming out on bail and committing further offences by creating havoc in the area more vigorously. You were arrested and forwarded to jail custody in Purighat P.S. Case No. 266 dated 4.9.96.

A situation has now come when the normal laws of the land are not felt adequate to curb your daredevil, high-handed anti-social activities.

It is likely that you might be released on bail and indulge in further violent and anti-social activities prejudicial to the maintenance of public order and tranquillity.

The records reveal that the detenu having been on earlier occasions released on bail continued his criminal activities. Therefore, the conclusion of the detaining authority cannot be said to be based on presumptions and without any foundation. The plea in that regard taken by the Petitioner fails.

10. In view of the law as laid down and quoted above, it is clear that even when a detenu is already in jail under some other laws, the detaining authorities should apply their mind and show their awareness in this regard in the grounds of detention, the chances of release of such persons on bail and stating the necessity of keeping such persons in detention under the preventive detention laws. In the present case, as it appears from the grounds of detention on all other earlier occasions for commission of similar offences the Petitioner had already been released on bail. Therefore, there was every likelihood of his being released on bail in the case in connection with which he had been taken to custody. The Court is now to see whether the detaining authority had applied its

mind to the said fact or not. In the last but one paragraph of the detention order quoted earlier, the detaining authority has clearly indicated that there is every likelihood that the Petitioner may be released on bail. After he was released on bail on earlier occasions, he had indulged in anti-social activities against non-Advivasis with greater vigour. In view of the above observation made by the detaining authority and in view of the nature of allegations made in all the cases, we are of the view that the detaining authority before passing the order under the Act had applied its mind to the above extent and passed the order.

11. No other point having been raised in the writ application or in course of hearing, we do not find any merit in the writ application and the same stands dismissed.