G. Sadanandan

Vs

State of Kerala & Anr.

Writ Petition No. 136 of 1965

(CJI P. B. Gajendragadkar, K.N. Wanchoo, M. Hidayatullah, J. C. Shah, S. M. Sikri, JJ)

16.02.1966

JUDGMENT

GAJENDRAGADKAR, C. J. -

This petition was heard on the 11th February, 1966; and at the close of the hearing, we allowed the petition and directed that the petitioner should be released forthwith and indicated that our reasons would be pronounced later. Accordingly, our present judgment gives our reasons for the order which has already been passed by us.

The petitioner, G. Sadanandan, has been detained by respondent No. 1, the State of Kerala, under Rule 30(1)(b) of the Defence of India Rules, 1962 (hereinafter called "the Rules") by an order passed by it on the 20th October 1965. The said order recites that from the materials placed before respondent No. 1, it was satisfied that with a view to prevent the petitioner from acting in a manner prejudicial to the maintenance of supplies and services essential to the life of the community it was necessary to detain him. The said order further shows that under Rule 30(4) of the Rules, respondent No. 1 had decided that the petitioner be detained in the Central Prison, Trivandrum, under conditions as to maintenance, discipline and punishment of offences and breaches of discipline as provided in the Travancore-Cochin Security Prisoners Order, 1950. The petitioner challenges the validity of this order by his present petition filed under Art. 32 of the Constitution.

The petitioner is a businessman who carries on wholesale business in kerosene oil as ESSO dealer and in provisions in his places of business at Trivandrum. In connection with his wholesale business of selling kerosene oil, the petitioner receives kerosene oil either in bulk or in sealed tins from the ESSO company. When the Kerosene oil is thus received by him, the petitioner transfers the kerosene oil from barrels into empty tins purchased from the market and sells them to his customers. Until the Kerala Kerosene Control Order, 1965 was promulgated, and brought into force on the 24th October, 1965, the petitioner was not required to take a licence for carrying on his business in kerosene oil. As from the 24th October, 1965 the said trade could not be carried on in Kerala without obtaining a licence. It is common ground that the petitioner has not been granted a licence in that behalf. To his present petition, the petitioner has joined respondent No. 1 and N. Paramasivan Nair, Deputy Superintendent of Police (Civil) Supplies Cell, Crime Branch, Trivandrum, as respondent No. 2.

The petitioner alleges that respondent No. 2 caused to be initiated criminal proceedings against him in Criminal Case No. 70 of 1965 in the Court of the District Magistrate, Trivandrum. These proceedings were commenced on the 20th May, 1965. The charge against the petitioner set out in the First Information Report was that the petitioner had exhibited a board showing stock "nil" on the

20th May, 1965, at about 7.00 p.m. in his wholesale shop at Chalai, Trivandrum when, in fact, there was stock available in his shop. The Police searched the shop that day in the presence of respondent No. 2, though in the relevant papers prepared in regard to the said search, no reference was made to his presence. According to the petitioner, the board indicating 'nil' stock had been exhibited in his shop, because 7 tins out of the available stock had been sold to one D. N. Siktar in regard to which a sale memo was being prepared when the raid took place, whereas the two remaining tins were in a damaged condition and could not have been sold. Even so, the raid was carried out and F.I.R. was lodged against the petitioner alleging that he had committed an offence by violating Rule 125(2) and (3) of the Rules read with clause 4 of the Kerosene (Price Control) Order, 1963.

The petitioner appeared before the District Magistrate before whom the F.I.R. had been filed, and was released by him on bail. In this case, all the witnesses for the prosecution had been examined, except the officer who had submitted the charge-sheet. Except the Sub-Inspector of Police (P.W.I.), and the Head Constable (P.W. 2), no other witnesses supported the prosecution case, though in all five witnesses were examined for the prosecution.

Pending the trial of this case, the Inspector of Police, Crime Branch (Food), Trivandrum, who is a subordinate of respondent No. 2, initiated another case at his instance, being case No. 332 of 1965 before the District Magistrate, Trivandrum, on the 29th September, 1965. In this case, it was alleged that the petitioner had violated R. 125(A) of the Rules read with Rules 3 and 4 of the Kerosene (Price Control) order, 1963, as well as had committed an offence under section 420, I.P.C. The F.I.R. in regard to this case was made by Narayan Pillai Sivasankaran Nair of Tampanoor, Trivandrum. This Nair is salesman in his elder brother's provision store at Trivandrum, and both these brothers are close relatives of respondent No. 2. This case was initiated after the search of the petitioner's shop at Chalai. The petitioner was then arrested and brought before the District Magistrate on the 30th September, 1965. On this occasion also, when the petitioner's shop was searched, respondent No. 2 was present. During the course of the search, the police seized one tin weighing 16.200 kgs. None of the other 899 tins which were stored in the two rooms of the place of sale of the petitioner, were seized. The police party also searched the godown of the petitioner and took into custody 632 tins of kerosene oil. Six barrels of oil were likewise seized. According to the petitioner, all this was done at the instance of N. Sivasankaran Nair who is a close relative of respondent No. 2 and who had purchased two tins of kerosene oil from the petitioner which were produced before the police officers for the purpose of showing that the tins were short of contents.

The petitioner was granted interim bail on the 30th September, 1965 by the District Magistrate, and finally released on bail on the execution of bail bond on the 21st October, 1965. When the order of bail was made absolute by the District Magistrate, the Assistant Public Prosecutor did not oppose the release of the petitioner on bail. The petitioner contends that though the case was posted several times for the submission of the final report by the prosecution, respondent No. 2 has so managed that the said final report has not been submitted till the date of the present petition.

After the petitioner was released by the District Magistrate on the 21st October, 1965, he reached home at 4 o'clock in the evening. Immediately thereafter, respondent No. 2 came in a jeep to the petitioner's residence and took him into custody. When the petitioner asked respondent No. 2 as to why he was being arrested, he refused to disclose the grounds. Respondent No. 2 took the petitioner into custody by force and carried him to jail.

The petitioner's wife thereafter instructed a lawyer to contact the petitioner who in turn tried to get in touch with the petitioner at Wanchiyoor Police Station, but did not succeed. Under these

circumstances, the petitioner's wife instructed her advocate to file a writ petition in the Kerala High Court for the production of the petitioner. Accordingly, a writ petition was filed on the 22nd October, 1965.

Later, the advocate engaged by the petitioner's wife was able to get in touch with the petitioner with the permission of the Home Secretary in the Central Jail at Trivandrum. At this interview, the advocate was given the detention order which had been served on the petitioner, and instructed to take suitable action to challenge the said order. In view of the fact that the petition filed by the Advocate in the Kerala High Court under the vague instructions of the petitioner's wife contained a very limited prayer, the petitioner's advocate withdrew the said petition on the 27th October, 1965. Ultimately, the present petition has been filed in this Court on behalf of the petitioner on the 20th November, 1965. That, in brief is the background of the present writ petition.

The petitioner challenges the validity of the impugned order of detention mainly on the ground that it is mala fide, and has been passed as a result of the malicious and false reports which have been prepared at the instance of respondent No. 2. The whole object of respondent No. 2, according to the petitioner, in securing the preparation of these false reports is to eliminate the petitioner from the field of wholesale business in kerosene oil in Trivandrum, so that his relatives may benefit and obtain the dealership of the ESSO Company. The Petitioner further alleges that the order of detention has been passed solely with the purpose of denying him the benefit of the order of bail which was passed in his favour by the District Magistrate on the 21st October, 1965. In support of the plea that his detention is mala fide, the petitioner strongly relies on the fact that on the 24th October, 1965, the Kerala Kerosene Control Order, 1965 has come into force and in consequence unless the petitioner gets a licence, it would be impossible for him to carry on his business of kerosene oil; and yet, the detention order ostensibly passed against him as result of his activities alleged to be prejudicial in respect of his business in kerosene oil, continue to be enforced against him even after the Control Order has been brought into operation. It is mainly on these grounds that the petitioner challenges the validity of the impugned order of his detention.

The allegations made in the petition have been controverted by Mr. Devassy who is the Secretary in the Home Department of respondent No. 1. In his counter-affidavit, the Home Secretary has, in a general way, denied all the allegations made in the petition. The purport of the counter-affidavit filed by the Home Secretary is that the impugned order of detention has been passed by respondent No. 1 bona fide and after full consideration of the merits of the case. Respondent No. 1 was satisfied, says the counter-affidavit, that the activity of the petitioner was likely to prejudice supplies essential to the life of the community as a whole; and so, the petitioner's contention that the impugned order is mala fide is controverted.

In dealing with writ petitions by which orders of detention passed by the appropriate authorities under r. 30(1)(b) of the Rules are challenged, this Court has consistently recognised the limited scope of the enquiry which is judicially permissible. Whether or not the detention of a detenu is justified on the merits, is not open to judicial scrutiny; that is a matter left by the Rules to the subjective satisfaction of the appropriate authorities empowered to pass orders under the relevant Rule. This Court, no doubt, realises in dealing with pleas for habeas corpus in such proceedings that citizens are detained under the Rules without a trial, and that clearly is inconsistent with the normal concept of the Rule of Law in a democratic State. But having regard to the fact that an Emergency has been proclaimed under Art. 352 of the Constitution, certain consequences follow; and one of these consequences is that the citizens detained under the Rules are precluded from challenging the validity of the Rules on the ground that their detention contravenes their fundamental rights

guaranteed by Articles 19, 20 and 21. The presence of the Proclamation of Emergency and the notification subsequently issued by the President constitute a bar against judicial scrutiny in respect of the alleged violation of the fundamental rights of the detenu. This position has always been recognised by this Court in dealing with such writ petitions.

Nevertheless, this Court naturally examines the detention orders carefully and allows full scope to the detenus to urge such statutory safeguards as are permissible under the Rules, and it has been repeatedly observed by this Court that in cases where this Court is satisfied that the impugned orders suffer from serious infirmities on grounds which it is permissible for the detenus to urge, the said orders would be set aside. Subject to this position, the merits of the orders of detention are not open to judicial scrutiny. That is why pleas made by the detenus that the impugned orders have been passed by the appropriate authorities without applying their minds properly to the allegations on which the impugned orders purport to be based, or that they have been passed mala fide, do not usually succeed, because this Court finds that the allegations made by the detenus are either not well-founded, or have been made in a casual and light-hearted manner. But cases do come before this Court, though not frequently, where this Court comes to the conclusion that the impugned order of detention is passed without the appropriate authority applying its mind to the problem, or that it can well be regarded as an order passed mala fide. Having heard Mr. Ramamurthi for the petitioner and the learned Additional Solicitor-General for respondent No 1, we have come to the conclusion that the impugned order in the present case must be characterised as having been passed mala fide.

The first consideration which has weighed in our minds in dealing with Mr. Ramamurthi's contentions in the present proceedings is that respondent No. 2 has not chosen to make a counter-affidavit denying the several specific allegations made against him by the petitioner. Broadly stated, the petition alleges that respondent No. 2 is responsible for the criminal complaints made against the petitioner, that respondent No. 2 was present when his premises were searched, and that respondent No. 2 actually went to the house of the petitioner when the petitioner was forcibly taken into custody and removed to the jail. The petition further alleges that the second criminal complaint filed against the petitioner was the direct result of the F.I.R. by Narayan Pillai Sivasankaran Nair who had his brothers are the trade rivals of the petitioner and are closely related to respondent No. 2. The petition likewise specifically alleges that the reports on which the impugned order of detention has been passed, were the result of the instigation of respondent No. 2. Whether or not these allegations, if proved, would necessarily make the impugned order mala fide, is another matter; but, for the present, we are dealing with the point that respondent No. 2 who has been impleaded to the present proceedings and against who specific and clear allegations have been made in the petition, has not chosen to deny them on oath. In our opinion, the failure of respondent No. 2 to deny these serious allegations constitutes a serious infirmity in the case of respondent No. 1.

The significance of this infirmity is heightened when we look at the counter-affidavit filed by the Home Secretary. This affidavit has not been made in a proper form. The deponent does not say which of the statements made by him in his affidavit are based on his personal knowledge and which are the result of the information received by him from documents or otherwise. The form in which the affidavit has been made is so irregular that the learned Additional Solicitor-General fairly conceded that the affidavit could be ignored on that ground alone. That, however, is not the only infirmity in this affidavit.

It is surprising that the Home Secretary should have taken upon himself to deny the allegations made by the petition against respondent No. 2 when it is plain that his denial is based on hearsay evidence at the best. It is not easy for us to appreciate why the Home Secretary should have

undertaken the task of refuting serious allegations made by the petition against respondent No. 2 instead of requiring respondent No. 2 to make a specific denial on his own. Whether or not Narayan Pillai Sivasankaran Nair and his brother are close relatives of respondent No. 2 and whether or not they are the trade rivals of the petitioner and expect to receive benefit from his detention, are matters on which the Home Secretary should have wisely refrained from making any statement in his affidavit. He should have left it to respondent No. 2 to make the necessary averments. Besides, it is impossible to understand why the specific allegations made by the petition against respondent No. 2 in regard to the part played by him either in searching the petitioner's shop or in arresting him should not have been definitely denied by respondent No. 2 himself. The statements made by the Home Secretary in his affidavit in that behalf are very vague and unsatisfactory. We have carefully considered the affidavit made by the Home Secretary and we are satisfied that apart from the formal defect from which it plainly suffers, even otherwise the statements made in the affidavit do not appear to us to have been made by the deponent after due deliberation.

Take, for instance, the statements made by the Home Secretary in regard to the petitioner's contention that the continuance of his detention after the Kerala Kerosene Control Order, 1965 came into operation on the 24th October, 1965, is wholly unjustified. The petitioner's grievance is clear and unambiguous. He says that unless a licence is granted to him, he would no longer be able to trade in kerosene oil; and since admittedly, no licence has been granted to him, his continued detention on the ostensible ground that his dealings in kerosene oil amount to a prejudicial activity, is entirely unjustified. Now, what does the Home Secretary say in respect of this contention ? On the date of the detention of the petitioner, says the Home Secretary's affidavit, the Control Order had not come into force, and that, no doubt, is true. But the question is : is the continuance of the petitioner's detention justified after the said Order came into force ? The affidavit says that the petitioner is not a licensee under the Kerala Kerosene Control Order, 1965, and cannot legally carry on the business as a dealer in kerosene at present; but there is nothing under the law preventing him from applying for such licence to carry on the same business. It is difficult to understand the logic or the reasonableness of this averments. Indeed, we ought to add that the learned Additional Solicitor-General fairly, and we think rightly and wisely, conceded that this part of the Home Secretary's affidavit could not be supported and that he saw no justification for the continuance of the petitioner's detention after the Kerala Kerosene Control Order came into operation on the 24th October, 1965. It is remarkable that in the whole of his affidavit, the Home Secretary does not say how he came to know all the facts to which he has purported to depose in his affidavit. We have, however, assumed that as Home Secretary, the file relating to the detention of the petitioner must have been handled by him, though the Home Secretary should have realised that he should himself have made a statement to that effect in his affidavit. We have had occasion to criticise affidavits made by appropriate authorities in support of the detention orders in writ proceedings, but we have not come across an affidavit which shows such an amount of casualness as in the present case. We have carefully examined all the material and relevant facts to which our attention has been drawn in the present proceedings and we see no escape from the conclusion that the impugned order of detention passed against the petitioner on the 20th October, 1965, and more particularly, the petitioner's continued detention after the 24th October, 1965, must be characterised as clearly and plainly mala fide. This is a case in which the powers conferred on the appropriate authority have, in our opinion, been abused.

We are conscious that even if a subordinate officer makes a malicious report against a citizen suggesting that he should be detained, the malice inspiring the report may not necessarily or always make the ultimate order of detention passed by the appropriate authority invalid. Even a malicious report may be true in the sense that the facts alleged may be true, but the person making the report

was determined to report those facts out of malice against the party concerned. But a malicious report may also be false. In either case, the malice attributable to the reporting authority cannot, in law, be attributed to the detaining authority; but in such cases, it must appear that the detaining authority carefully examined the report and considered all the relevant material available in the case before passing the order of detention. Unfortunately, in the present case, the affidavit made by the Home Secretary is so defective and in many places so vague and ambiguous that we do not know which authority acting for respondent No. 1 in fact examined the case against the petitioner and what was the nature of the material placed before such authority; and the affidavit does not contain any averment that after the material was examined by the appropriate authority, the appropriate authority reached the conclusion that it was satisfied that the petitioner should be detained with a view to prevent him from acting in a manner prejudicial to the maintenance of supplies and services essential to the life of the community.

After all, the detention of a citizen in every case is the result of the subjective satisfaction of the appropriate authority; and so, if a prima facie case is made by the petitioner that his detention is either mala fide, or is the result of the casual approach adopted by the appropriate authority, the appropriate authority should place before the Court sufficient material in the form of proper affidavit made by a duly authorised person to show that the allegations made by the petitioner about the casual character of the decision or its mala fides, are not well-founded. The failure of respondent No. 1 to place any such material before us in the present proceedings leaves us no alternative but to accept the plea made by the petitioner that the order of detention passed against him on the 20th October, 1965, and more particularly, his continued detention& after the 24th October, 1965, are totally invalid and unjustified.

In conclusion, we wish to add that when we come across orders of this kind by which citizens are deprived of their fundamental right of liberty without a trial on the ground that the Emergency proclaimed by the President in 1962 still continues and the powers conferred on the appropriate authorities by the Defence of India Rules justify the deprivation of such liberty, we feel rudely disturbed by the thought that continuous exercise of the very wide powers conferred by the Rules on the several authorities is likely to make to the conscience of the said authorities insensitive, if not blunt, to the paramount requirement of the Constitution that even during Emergency, the freedom of Indian citizens cannot be taken away without the existence of the justifying necessity specified by the Rules themselves. The tendency to treat these matters in a somewhat casual and cavalier manner which may conceivably result from the continuous use of such unfettered powers, may ultimately pose a serious threat to the basic values on which the democratic way of life in this country is founded. It is true that cases of this kind are rare; but even the presence of such rare cases constitutes a warning to which we think it is out duty to invite the attention of the appropriate authorities. In the circumstances of this case we direct that respondent No. 1 will pay the costs of the petitioner quantified at Rs. 500.

Petition allowed.

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