

Shaik Hanif

Vs

State of W. B.

Kamal Saha

Vs

State of W. B.

Gudma Majhi

Vs

State of W. B.

Writ Petitions Nos. 1679, 1681 and 1662 of 1973

(Sarkaria, JJ)

01.02.1974

JUDGMENT

SARKARIA, J.

1. This judgment will dispose of all the three petitions above mentioned under Article 32 of the Constitution of India. It will be convenient to first take up Writ Petition No. 1679 of 1973.

2. The petitioner Shaik Hanif, aged 40 years, was arrested on February 23, 1973 in pursuance of a detention order, dated February 19, 1973, passed by the District Magistrate, West Dinajpur in West Bengal under sub-section (1) read with sub-section (2) of Section 3 of the Maintenance of Internal Security Act, 1971 (for short, 'the Act') on February 19, 1973 the District Magistrate reported about his detention to the State Government which approved it on March 1, 1973. The detenu made a representation which was rejected by the State Government on April 5, 1973 and forwarded to the Advisory Board for consideration. The Board reported to the State Government on April 24, 1973 that there was sufficient cause for the detention. Thereupon the Government confirmed the order of detention under Section 12(1) of the Act and directed that the detention of the petitioner would continue, "Till the expiration of 12 months from the date of his detention or until the expiry of Defence of India Act of 1971 whichever is later".

3. The grounds of detention as conveyed to the detenu under Section 8(1) read as under :

"You are being detained in pursuance of a detention order.... on the ground that you have been acting in a manner prejudicial to the maintenance of supplies and services essential to the community, as evidenced by the particulars given below :

On 3. 7. 72 at dead of night you along with your associates kept concealed 20

bundles of telegraph copper wire weighing 3 qntrs. 60 kgs. in your courtyard under earth with a view to dispose to the same in opportune moment. The said telegraph copper wire were recovered on 3. 7. 72 on the basis of the confession of your associates. The police seized those copper wire and arrested your associates but you evaded arrest. This activity of yours seriously affected one of the essential services to the community by disrupting telegraph facilities to the public and thus you acted in a manner prejudicial to the maintenance of supplies and services essential to the community.

You are hereby informed that you may make a representation of the State Government the detention order.... Your case shall be placed before the Advisory Board within thirty days from the date of your detention under the order.

You are also informed that under Section 11. .... (Act 26 of 1971) the Advisory Board, shall if you desire to be heard, hear you in person.....

# Sd/- K. L. GUPTA, 19. 2. 73. District Magistrate, West Dinajpur, Balurghat".##

4. In answer to the rule nisi issued by this Court, Shri Sukumar Sen, Deputy Secretary, Home (Special) Department, Government of West Bengal filed the counter-affidavit, explaining that the District Magistrate who passed the order of detention "is at present not available for affirming the affidavit as he has been transferred from the said District". In para 4 of the affidavit, it is stated :

"It appears from the records that after receiving reliable information relating to the illegal anti-social and prejudicial activities of the above names detenué petitioner relating to the maintenance of supplies and services essential to the community, the said District Magistrate of West Dinajpur passed order of detention against him under the provisions of the said Act."

In para 7, it is averred :

"I further state that it appears from the record that the petitioner is a veteran copper wire stealer. It was found on 3.7.72 that the petitioner and his associates kept concealed about 20 bundles of telegraphs cable wire underground in the courtyard of his house with a view to dispose the same at opportune moment. The said removal of copper wire from the telegraph service and he was detained under the said Act."

In paragraph 9 of the affidavit it is inter alia stated that the "statements made in paragraphs 3, 4, 5, 6 and 7 are based on information derived from the records kept in the office of the State Government in its Home Department (Special Section), which I verily believe to be true".

5. Mr. R. K. Jain, who assisted the Court as amicus curiae advanced these contentions in support of the petition : (1) After the issue of rule nisi by this Court, it was incumbent upon the respondent-State to satisfy the Court about the legality of the detention by producing the affidavit of the District Magistrate who has passed the detention order. The counter-affidavit of the Deputy Secretary who did not personally deal with the case at any stage, is no substitute for the affidavit of the District Magistrate on the basis of whose subjective satisfaction, the detention has been effected. The omission to file the counter-affidavit of the district Magistrate coupled with the other circumstances of the case, shows that the detention order was passed in an utterly casual way, without application of mind and it was therefore, illegal; (2) From the counter-affidavit of the Deputy Secretary, it

appears that there were reliable informations and materials (other than the solitary ground of detention communicated to the detenu) before the detaining authority on the basis of which it was satisfied that the petitioner was a "veteran copper wire stealer" and had been indulging in "illegal anti-social activities prejudicial to the maintenance of supplies and services essential to the community". Since the non-disclosure of that information or material to the detenu is not sought to be justified under clause (6) of Article, 22 on the ground of its being facts which the detaining authority considers to be against the public interest to disclose, it was incumbent upon the authority to communicate to the detenu that information and material in full. Since this was not done, the detenu was unable to make an effective representation. The detention order was thus violative of the mandate of clause (5) of Article 22, and liable to be struck down on that score; (3) The Act is violative of Articles 19 and 21 of the Constitution because its -

(a) Section 3 makes, no provision or an objective determination of the truth of the allegations that form the basis of action under that Section;

(b) Section 8 does not provide for consideration of the representation of the detenu by an impartial body in accordance with the principles of natural justice;

(c) Section 11 enables the Advisory Board to base its report on the material received by the Board from the Officer passing the order of detention without the said report being disclosed to the detenu and without affording him an opportunity to controvert the contents of the said report;

(d) Sections 11 and 12 empower the Advisory Board and the State Government, as the case may be, to take into consideration materials and information without giving the detenu an opportunity to make his submissions with regard to those materials or to adduce evidence to disprove the allegations levelled against him.

(4) (a) The continuance of Emergency inasmuch as it suspends Fundamental Rights, indefinitely under an executive fiat is unconstitutional. What the Parliament cannot destroy in exercise of its amendatory powers under Article 368, a fortiori, the President cannot bury by embalming and encasing the same in a Proclamation of Emergency. Fundamental Rights guaranteed under Article 19 are essential features of the Constitution and their indefinite suspension under the cloak of Emergency, amounts to their destruction; (b) in forming an opinion as to the necessity of proclaiming Emergency under Article 352 of the Constitution the President has to act on certain objective facts open to judicial scrutiny. The war having ended more than two years ago, there is no justification for continuing the proclamation of Emergency.

6. We will take up contentions (1) and (2) together.

7. As was pointed out by this Court in *Niranjan Singh v. State of Madhya Pradesh*, where in a habeas corpus petition a rule nisi is issued, it is incumbent upon the State to satisfy the Court that the detention of the petitioner was legal and in conformity not only with the mandatory provision of the Act, but is also in accord with the requirements implicit in clause (5) of Article 22 of the Constitution. Since the Court is precluded from testing the subjective satisfaction of the detaining authority by objective standards, it is all the more desirable that in response to the rule nisi the counter-affidavit on behalf of the State should be sworn to by the District Magistrate or the

authority on whose subjective satisfaction the detention order under Section 3 was passed. If for sufficient reason shown to the satisfaction of the Court, the affidavit of the person who passed the order of detention under Section 3 cannot be furnished, the counter-affidavit should be sworn by some responsible officer who personally dealt with or processed the case in the Government Secretariat or submitted it to the Minister or other officer duly authorised under the rules of business framed by the Governor under Article 166 of the Constitution to pass orders on behalf of the Government in such matters.

8. In the instant case, the counter-affidavit of Shri Sukumar Sen Deputy Secretary, Home, suffers from two infirmities. Firstly the deponent does not swear that he had at any relevant time personally dealt with the case of the detenu. He has verified the correctness of the averments in his affidavit on the basis of facts gathered from the official records. Secondly the explanation given for not furnishing the affidavit of the District Magistrate who had passed the detention order, is that the Magistrate has been transferred from that District. The explanation is far from being satisfactory.

9. In *Ranjit Dam v. State of West Bengal*, the reason given for not making the counter-affidavit by the Magistrate himself who had passed the detention order, was that he had since then been appointed as Secretary of the State Electricity Board. It was held that the reason given was not satisfactory. Shri Sukumar Sen is in-charge of a specially created cell in the Government Secretariat of West Bengal, which maintains the records of all persons detained under the Act. It is true that a similar reason given for not furnishing the affidavit of the Magistrate who passed the impugned order was accepted by this Court in *J. N. Roy v. State of West Bengal*, and instead the counter-affidavit of the Secretariat official specially entrusted with detention cases was deemed sufficient. But that was so because nothing turned on it. Nevertheless, the failure to furnish the counter-affidavit of the Magistrate who passed the order of detention, is an impropriety. In most cases, it may not be of much consequence but in a few cases, for instance, where mala fides or extraneous considerations are attributed to the Magistrate or the detaining authority, it may, taken in conjunction with other circumstances, assume the shape of a serious infirmity, leading the Court to declare the detention illegal. In the present case too the mere omission to file the affidavit of the District Magistrate does not vitiate the detention orders. But it is a circumstance among others, in the light of which contention (2) is to be appreciated.

10. The Act restricts citizens' personal liberty which is a fundamental right under the Constitution. It has therefore to be construed strictly, as far as possible, in favour of the citizen and "in manner that does not restrict that right to an extent greater than is necessary to effectuate that object". The provisions of the Act have, therefore, to be applied with watchful care and circumspection. It is the duty of the Court to see that the efficacy of the limited, yet crucial, safeguards provided in the law of preventive detention is not lost in mechanical routine, dull casualness and chill indifference on the part of the authorities entrusted with their application. Let us therefore see whether there has been such a careful and strict compliance with the legal procedure in the instant case. In the counter-affidavit, the Deputy Secretary has inter alia state that the petitioner is a "veteran copper wire stealer" and there were "reliable informations" before the District Magistrate about his anti-social activities prejudicial to the maintenance of supplies and service essential to the community. "Veteran copper wire stealer" implies a long course of repetitive thievery of copper wire. No one is born a knave; it takes time for one to become so. It is manifest that but for those "reliable informations" showing that the detenu was repeatedly and habitually stealing copper wire, the District Magistrate might not have passed the detention order in question. Those "reliable informations" were withheld. No privilege under clause (6) of Article 22 has been claimed in respect of them. Even the main ground viz. that the petitioner is a "veteran copper wire stealer" was not, as such, communicated to

the detinue. The ground intimated was that "You have been acting in a manner prejudicial to the maintenance of supplies and services essential to the community". Only one solitary instance of the recovery of stolen copper wire from the petitioner's house on July 3, 1972 was conveyed to the detinue.

11. Learned Counsel for the State has been fair enough to collect and place before us what the Deputy Secretary in his counter-affidavit called "reliable informations" on the basis of which the District Magistrate ordered the detention. In this, under the caption "Criminal Biography", is mentioned inter alia, how the petitioner with his associates organised a gang to steal telegraph copper wire systematically.

12. From what has been said above, it is clear as day light that all material particulars of the ground of detention which were necessary to enable the detinue to make an effective representation, were not communicated to him. The impugned order of detention is thus violative of Article 22(5) of the Constitution, and is liable to be quashed on that score alone. In view of the above finding, it is not necessary to decide the remaining contentions canvassed by Mr. Jain.

13. Now we take up Writ Petition No. 1662 of 1973. In this case also, Shri Sukumar Sen, Deputy Secretary in his counter-affidavit averred that the detinue was a "veteran copper wire stealer" and that the District Magistrate, Burdwan, has passed the order of the petitioner's detention on receipt of reliable information about the illegal anti-social and prejudicial activities of the petitioner. Here also all the 'material information' showing or even alleging how the petitioner was a "veteran copper wire stealer" was not communicated to him. Only two instances of theft of electric copper wire which took place on November 6, 1971 and November, 25, 1971 were intimated to him.

14. Learned Counsel for the State has placed for our perusal a copy of history-sheet of the detinue on receiving which the District Magistrate had passed the impugned order of detention. Among other facts, it is mentioned therein that on November 3, 1973 also, the petitioner along with his two associates had committed theft of electric copper wire, measuring 125 ft. from the electric poles near Hatgarui and a case under Section 379, Penal Code, was registered in Police Station Asansol on the same date, relating to this theft. It is further stated that from his boyhood the petitioner started mixing up with anti-social elements, wagon-breakers and in course of time, he along with his associates, indulged in thefts of iron materials, copper wire and other forms of crime. All this matter including that concerning the theft dated November 3, 1973 was admittedly not communicated to the detinue. Its non-disclosure to the detinue is not being justified as privileged under Article 22(6). Thus in this case also, all the material adequate particulars relatable to the ground intimated, were not conveyed to the detinue. It is not possible to predicate how far the mind of the detaining authority was influenced in passing the order of detention by the uncommunicated material. By this omission, the petitioner's constitutional right of making an effective representation was seriously jeopardised.

15. In the result, the detention of the petitioner (Gudma Majhi) must be held to be illegal.

16. In Writ Petition No. 1681 of 1973, the ground of detention as communicated to the Petitioner Kamal Saha ran as under :

"That on 10. 12. 1972 at about 19.30 hrs. you and your associates being armed with daggers put all the passengers to fear of death of IInd class Compartment of 162 Dn. train at New Barrackpore R.S. and committed robbery in respect of one bundle of

woollen Shawl containing 90 pieces value at Rs. 9,500 from Golam Kadar Kashmiri of 96 Ripon Street Calcutta-16, you were subsequently arrested. 44 pieces of shawl valued at Rs. 4,500 were recovered later on. Your action caused panic, confusion and disturbed public order then and there, you have thus acted in a manner prejudicial to the maintenance of public order".

In para 7 of counter-affidavit, Shri Sukumar Sen, Deputy Secretary stated :

"That it appears from the records that the petitioner is a veteran railway criminal and was indulging in committing robbery in running suburban trains. It appears that on 10. 12. 1972 at about 19.30 hrs. the petitioner and his associates armed with daggers, committed robbery in a II class Railway Compartment..."

17. The history-sheet communicated by the Superintendent of Police to the detaining authority states that :

"he formed and organised a gang and starting committing robbery in Sealdah Bongaon Railway Station. This gang is so desperate that no body of the locality resists them, even if they commit robbery and other offences even in their very presence. They always move with deadly weapons such as pipe-guns, daggers, bombs etc. by which they intimidate the local people."

18. Thereafter, instances of two robberies committed by him along with his associates on January 30, 1972 and August 1, 1972 are mentioned. The particulars of any past crimes committed by him which were necessary for showing how he was a veteran railway criminal were not communicated to the detenu. In respect of the uncommunicated material, no privilege under Article 22 (6) was claimed. In the absence of those material particulars, the detenu could not exercise his constitutional right of making an effective representation. In other words, the grounds communicated to the petitioner suffered from vagueness.

19. For the reasons aforesaid, all the three petitions are allowed and the petitioner in each of them is directed to be set at liberty forthwith.

20. Nothing in this judgment, however, shall preclude the State Government/District Magistrate, if so advised, from passing fresh orders of the detention of the petitioners or any of them after full and meticulous compliance with the procedure prescribed by law.

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