Kanchanlal Maneklal Chokshi

Vs

State of Gujarat and Others

Criminal Appeal No. 193 of 1979

(R.S. Sarkaria, P.N. Shinghal, O. Chinnappa Reddy JJ)

23.07.1979

JUDGMENT

CHINNAPPA REDDY, J. -

1. Kanchanlal Maneklal Chokshi who is in preventive detention under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and whose petition for the issue of a writ of habeas corpus was rejected by the High Court of Gujarat is the appellant in this appeal. The High Court, while rejecting the petition, granted a certificate under Article 133(1) of Constitution that the case involved a substantial question of law of general importance which needed to be decided by the Supreme Court. The substantial question of law so certified was 'whether it is necessary for the detaining authority to consider whether a person should be prosecuted before an order of detention is made against him'. The Division Bench of the Gujarat High Court in rejecting the particular contention of the appellant purported to follow an earlier decision of another Division Bench of the same Court in Ashok Murlidhar v. State of Gujarat (Special Criminal Application No. 230 of 1978). In that case Divan C.J., and Majumdar, J., though inclined to the view that the possibility of a criminal prosecution being launched should be present to the mind of the detaining authority felt constrained to hold otherwise because of what, they thought, had been decided by this Court in Haradhan Saha v. State of W. B. ((1975) 3 SCC 198 : (1974) SCC (Cri) 816 : (1975) 1 SCR 778 : 1974 Cri LJ 1479). In our view, this Court did not say in Haradhan Saha v. State of W. B., that the possibility of a prosecution being launched was an irrelevant consideration which need never be present to the mind of the detaining authority. On the other hand, we do not also think that it is axiomatic, as sought to be contended by the learned Counsel for the appellant, that the detaining authority must invariably consider the possibility of launching a prosecution before making an order of detention and that, if not, the order of detention must necessarily be held to be bad.

2. In Haradhan Saha v. State of W. B., the vires of the provisions of the Maintenance of Internal Security Act was in question. One of the contentions was that Section 3 of the Act offended Article 14 of the Constitution as it permitted 'the same offence to be a ground for detention in different and discriminatory ways'. It was submitted that while A might be prosecuted but not detained preventively, B might not be prosecuted but only detained preventively and C might be both prosecuted and detained preventively. Dealing with the contention, a Bench of five judges of this Court explained the basic distinction between preventive detention and detention following upon conviction and observed : (SCC p. 208, para 32)

> The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is precautionary power exercised in reasonable

> anticipation. It may or may not relate, to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.

The Court then referred to various earlier decisions and deduced the following principles : (SCC p. 209, para 34)

> First, merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Act. Second, the fact that the police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under Code of Criminal Procedure and even lodges a first information report may be no bar against the District Magistrate issuing an order under the preventive detention. Third, where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or the public order. Fourth, the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the order. Fifth, the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances.

Clearly, the Court did not lay down that the possibility of a prosecution being launched was an irrelevant consideration, not to be borne in mind by detaining authority. All that was laid down was that the mere circumstance that a detenu was liable to be prosecuted was not by itself a bar to the making of an order of preventive detention. It does not follow therefrom that failure to consider the possibility of a prosecution being launched cannot ever lead to the conclusion that the detaining authority never applied its mind and the order of detention was, therefore, bad.

3. In Bhut Nath Mete v. State of W. B. ((1974) SCC 645 : 1974 SCC (Cri) 300 : (1974) 3 SCR 315 : AIR 1974 SC 806), Krishna Iyer and Sarkaria, JJ., declared the detention illegal for denial of opportunity to make effective representation. On the question whether the failure of criminal prosecution was a bar to preventive detention the answer was a definite 'no'. The learned judges however expressed an apprehension against the danger to the democratic way of life inherent in 'the potential executive tendency to shy at courts for prosecution of ordinary offences and to rely generously on the easier strategy of subjective satisfaction. The question presently under consideration, namely, whether the failure of the detaining authority to keep in mind the possibility of a prosecution would necessarily vitiate the order of detention was not considered by the learned judges.

4. In Srilal Shaw v. State of W. B. ((1975) 1 SCC 336 : 1975 SCC (Cri) 172 : (1975) 2 SCR 913 :

AIR 1975 SC 393), the prosecution was dropped and thereafter an order of preventive detention was passed. The substance of the allegation against the detenu was that he was in unlawful possession of scrap metal belonging to the Railway. The Court came to the conclusion that on the material which was available to the detaining authority, it was impossible to arrive at the conclusion that the possession of the petitioner was unlawful. The Court found that the reason given by the District Magistrate for dropping the prosecution was unacceptable. It was observed that the prosecution was in all probability dropped as the petitioner might have been able to establish that his possession of the goods was not unlawful. The case struck the Court as a typical case in which for no apparent reason a person who could easily be prosecuted under the punitive law was being preventively detained. It is seen that the decision turned on the peculiar facts of the case and throws no light on the question presently raised before us.

5. In Abdul Gaffar v. State of W. B. ((1975) 4 SCC 59 : 1975 SCC (Cri) 307 : AIR 1975 SC 1496 : 1975 Cri LJ 1233), the order of detention was passed on the basis of a few instances of theft of Railway property for which the detenu could well and easily have been prosecuted. The contention before the Court was that the order of detention was passed by the detaining authority mechanically without applying its mind to the question whether the facts disclosed the tendency of the petitioner to act prejudicially in the manner mentioned in the detention order. The bald and sweeping allegation was made in the counter filed on behalf of the State that material witnesses were afraid of giving evidence in the Court against the detenu. The material witnesses were members of the Railway Protection Force. In that situation Sarkaria, J., observed that the version given in the counter was incredible and could not be swallowed. The learned Judge then observed, "the conclusion therefore is inescapable that the petitioner has been preventively detained without application of mind as to whether the prosecution against him was foredoomed to failure on the ground of witnesses being afraid to depose against the detenu in Court. The impugned order has been made in a casual and cavalier manner". It is seen that there was an express allegation that recourse was had to preventive detention despite the fact that criminal prosecutions could well have been successfully launched based as the case was on the evidence of members of the Railway Protection Force. The reasons given by the State for taking recourse to preventive detention was found to be fantastic. The decision thus stands on the special facts of the case.

6. In Dulal Roy v. District Magistrate, Burdwan ((1975) 1 SCC 837 : 1975 SCC (Cri) 329 : (1975) 3 SCR 186), the Court had to consider a situation where a month after a person was arrested in connection with a criminal case he was discharged but was taken into custody on the same day pursuant to an order of detention. Krishna Iyer and Sarkaria, JJ., while observing that as an abstract legal proposition an order of preventive detention could be validly passed against a person in jail custody on the same facts on which he was being prosecuted for a substantive offence in a Court, pointed out that such an order of detention was readily vulnerable to the charge that the detaining authority was taking recourse to preventive detention in order to circumvent the penal law and the process of the Court. The learned Judges were satisfied that the discharge of the detenu in a criminal case was not due to any shortcoming in the evidence or difficulty in its production in Court. The order of detention was, therefore, quashed on the ground of non-application of mind by the detaining authority.

7. In Salim v. State of W. B. ((1975) 1 SCC 653 : 1975 SCC (Cri) 290 : (1975) 3 SCR 394 : 1975 Cri LJ 581), Chandrachud, J., speaking for the Court observed that the fact that the detenu could have been prosecuted for the acts attributed to him did not affect the validity of the order of preventive detention. The further question whether it was incumbent on the detaining authority to consider the question of possibility of prosecution was not considered by the Court.

8. In Ashok Murlidhar v. State of Gujarat (supra) Divan C. J., and Majumdar, J., appeared to think that the Bench of five judges of this Court which decided Haradhan Saha v. State of W. B. (supra), had taken a view different from that expressed in Bhut Nath Mete v. State of W. B. (supra), Abdul Gaffar v. State of W. B., (supra), Srilal Shaw v. state of W. B. (supra) and Dulal Roy v. District Magistrate, Burdwan (supra). We do not think there is any such conflict as though by the Division Bench of the Gujarat High Court. The principles emerging from a review of the above cases may be summarised in the following way : The ordinary criminal process is not to be circumvented or short-circuited by ready resort to preventive detention. But, the possibility of launching a criminal prosecution is not an absolute bar to an order of preventive detention. Nor is it correct say that if such possibility is not present to the mind of the detaining authority the order of detention is necessarily bad. However, the failure of the detaining authority to consider the possibility of launching a criminal prosecution may, in the circumstances of a case, lead of the conclusion that the detaining authority had not applied its mind to the vital question whether it was necessary to make an order of preventive detention. Where an express allegation is made that the order of detention was issued in a mechanical fashion without keeping present to its mind the question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose, the detaining authority must satisfy the Court that the question too was borne in mind before the order of detention was made. If the detaining authority fails to satisfy the Court that the detaining authority so bore the question in mind the Court would be justified in drawing the inference that there was no application of the mind by the detaining authority to the vital question whether it was necessary to preventively detain the detenu.

9. The facts of the present case are that the grounds of detention served on the appellant contain a very elaborate statement of facts quite clearly pointing to an application of the mind by the detaining authority. The appellant did not complain in the writ petition that the detaining authority had not applied its mind and in particular had not considered the question of the possibility of a prosecution. Nor are there any facts appearing from the record which can lead us to infer that the detaining authority did not apply its mind to relevant considerations. We do not, therefore, think that the order of detention is in any manner infirm. The appeal is accordingly dismissed.

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