

Raj Kishore Prasad

Vs

State of Bihar and Others

Criminal Appeal No. 313 of 1982

(D. A. Desai, A. P. Sen JJ)

16.09.1982

JUDGMENT

DESAI, J. -

1. This appeal by special leave was heard on September 1, 1982, and having been satisfied that the detention order was vitiated, we made an order quashing and setting aside the order of detention, reserving that the reasons would follow. Here are the reasons.

2. Raj Kishore Prasad s/o Mahendra Prasad was detained pursuant to an order dated September 23, 1981, made by the District Magistrate, Gopalganj, under Section 3(2) of the National Security Act, 1980 ('Act' for short), on the ground that he be prevented from acting in any manner prejudicial to the maintenance of public order. This order was served upon the detenu on September 25, 1981, and he was taken into custody and was detained in Muzaffarpur Central Jail. The detaining authority simultaneously served upon him the grounds of detention. The order of detention was approved by the State Government on October 2, 1981, as required by sub-section (4) of Section 3 of the Act. He made a representation inviting the detaining authority to quash the order of detention. In the meantime, however, the case of the detenu was referred to the Advisory Board on October 5, 1981. The representation made by the detenu was rejected by the Chief Minister on November 16, 1981. The Advisory Board having reported that there was in its opinion sufficient case for detention of the person, the detention order was confirmed by the appropriate Government. Detenu thereupon filed a writ petition in the Patna High Court.

3. On behalf of the detenu four contentions were advanced before the High Court inviting it to invalidate the order. They were :

(i) that even if the grounds for detention were accepted on their face value they may indicate that there may be a reasonable apprehension of disturbance of law and order situation but there is nothing in the grounds to indicate that the activities of the detenu were such that it was necessary to prevent him from acting in any manner prejudicial to the maintenance of public order. In other words, the grounds disclosed a possible disturbance to law and order but not disturbance to the maintenance of public order;

(ii) of the four grounds relied upon four founding the detention order, one ground related to an incident of 1978 which was a stale one and it would vitiate the order;

(iii) there was inordinate delay in considering the representation of the detenu and the

inordinate unexplained delay of 28 days would vitiate the order;

(iv) the representation of the detenu was rejected after the receipt of the report of the Advisory Board which would imply that the representation of the detenu was never forwarded to the Advisory Board and, therefore, the case of the detenu went by default before the Advisory Board and accordingly the order would be vitiated.

4. An additional ground was urged before this Court that even though the representation was addressed to the detaining authority, viz., the District Magistrate, Gopalganj, he never applied his mind to the representation and never look any decision with regard to the representation of the detenu but he forwarded the same with his remarks to the Chief Minister who rejected the same and thus the failure of the detaining authority to examine the contention raised before this Court.

5. Section 3 confers power to make orders for detention of certain persons. Sub-section (2) provides as under :

3. Power to make orders detaining certain persons. -

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(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation. - For the purposes of this sub-section, "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to sub-section (1) of Section 3 of the prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 (7 of 1980), and accordingly, no order of detention shall be made under this Act on any ground on which an order of detention may be made under that Act.

6. Sub-section (2) of Section 3 thus confers power on the Central Government or the State Government to make an order, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order it is necessary so to do, directing that such person be detained. This power conferred by sub-section (2) can also be exercised by the District Magistrate or a Commissioner of Police. Sub-section (3) of Section 3 reads as under :

3. (3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the power conferred by the said sub-section :

Provided that the period specified in an order made by the State Government under this sub-section

shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.

On a plain reading of sub-section (3) of Section 3 it would appear that the District Magistrate or the Commissioner of Police, as the case may be, can exercise power conferred by sub-section (2) on the State Government to direct detention of a person on any of the grounds mentioned in sub-section (2) of Section 3 if the State Government on being satisfied that it is necessary to do so by order in writing direct that during such period as may be specified in the order such District Magistrate or the Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the power conferred by the said sub-section. The State Government can make an order which would enable the District Magistrate or Commissioner of Police to exercise power in the first instance for a period not exceeding three months but the State Government may, if satisfied in the manner provided in sub-section (3), amend such order extending the period from time to time but not exceeds three months at any one time. It appears that the State Government of Bihar has made an order under sub-section (3) which would enable the District Magistrate to exercise the power of detention against any person on any of the grounds mentioned in sub-section (2) of Section 3. In exercise of this power the District Magistrate, Gopalganj, made the detention order against the detenu. Therefore, the detaining authority is the District Magistrate, Gopalganj. Article 22(5) enjoins a duty on the detaining authority to communicate the grounds of detention to the person detained and also to offer him earliest opportunity of making a representation against the order of detention. This constitutional obligation has been statutorily recognised in Section 8 of the Act with a specific provision. Section 8 prescribes a time schedule within which a copy of the grounds has to be furnished to the detenu and further enjoins a duty to afford the detenu the earliest opportunity of making a representation against the order, not to the detaining authority but to the appropriate Government. Constitutional mandate was that the detaining authority must afford a reasonable opportunity to the detenu to make a representation. This Court in several decisions spelt out a duty of the detaining authority to consider the representation as expeditiously as possible. But the scheme of the Act shows that Parliament desired to confer this drastic power of deprivation of liberty without a trial or an opportunity to be heard before being detained on high authority like the Central or the State Government to permit exercise of power by the officers like District Magistrate or Commissioner of Police, it thought it prudent to provide that even if the officers like District Magistrate or Commissioner of Police exercise this power, the detenu must have an opportunity to make representation to Central or State Government as the case may be so that the functionary on whom Parliament chose to confer power must apply its mind to the representation of the detenu. Therefore, Section 8 made a statutory departure and provided for making representation to the appropriate Government. The contention is that constitutionally speaking a duty is cast on the detaining authority to consider the representation. That is of course true. But in view of the scheme of the Act, parliament has now made it obligatory on the appropriate Government to consider the representation. This is done presumably to provide an effective check by the appropriate Government on the exercise of power by subordinate officers like the District Magistrate or the Commissioner of Police. Therefore, if the appropriate Government has considered the representation of the detenu it cannot be said there is contravention of Article 22(5) or there is failure to consider the representation by the detaining authority. And be it noticed that the Chief Minister rejected the representation after calling for the remarks of the District Magistrate who made the detention order. In this background the decision of this Court in Santosh Anand v. Union of India would not be of help. In that case this Court invalidated the order on the ground that even though the order of detention was made by Chief Secretary, Delhi Administration, his representation

was considered and rejected by the Administrator of Delhi which indicated that the detaining authority did not apply its mind to the representation. While reaching this conclusion the Court took note of the fact that the detaining authority itself had forwarded the representation to the Advisory Board via the Administrator. Even then this Court held that the representation was considered by the Chief Secretary as the detaining authority only for the purpose of submitting the same for orders to the Administrator who in his turn after considering it rejected the same which would only mean that the detaining authority did not apply its mind to the representation and it would invalidate the order. However, in view of the specific provision contained in Section 8 which requires that the detaining authority shall afford earliest opportunity to make a representation not to detaining authority but to appropriate Government, it follows as corollary that the appropriate Government must consider it. The Chief Minister has considered the representation and rejected it after calling for parawise remarks of the detaining authority. Therefore, it is not possible to accept the contention that the failure of the detaining authority to consider the representation would invalidate the order.

7. The real rub is, however, the inordinate delay in considering the representation. We have already set out the dates. The representation was made on October 19, 1981, and it was rejected on November 16, 1981, the very date on which the report of the Advisory Board was also received. There was thus a delay of 28 days in considering the representation. It is, therefore, necessary to examine the explanation proffered by the respondents as to how the representation was dealt with. It is admitted that the representation was received in the office of respondent 1, the State of Bihar, on October 20, 1981. On October 20, 1981, a copy of the representation was sent to the District Magistrate, Gopalganj, the detaining authority. The District Magistrate returned the representation with his comments on October 31, 1981, and it was received in the Department of Home (Special) on November 4, 1981. On November 5, 1981, it was examined by the Deputy Secretary, Home (Special) on November 4, 1981. On November 5, 1981, it was examined by the Deputy Secretary, Home (Special) Department. On November 6, 1981, it was received by the Special Secretary, Home (Special) Department, who endorsed it to the Chief Minister on November 10, 1981. The district Magistrate took more than nine days in examining the representation and in forwarding his comments and for this there is no explanation. But for the provision contained in Section 8, which requires the representation to be made to the appropriate Government, the District Magistrate as a detaining authority would have been under an obligation to examine the representation. Even though he received it on October 22, 1981, he forwarded his comments on October 31, 1981. In this connection there is an affidavit of one Rajendra Prasad Singh, Deputy Collector of Gopalganj. He is not the detaining authority. As stated in his affidavit even though the District Magistrate was asked to send his comments by special messenger latest by October 27, 1981, the District Magistrate sent his comments on October 31, 1981, presumably by post which was received by State Government on November 4, 1981. Barring giving out the dates there is not the slightest explanation for the delay by District Magistrate as also the State Government. Even the rotating of the files from the Deputy Secretary to the Special Secretary and then the Chief Minister has taken unusually long time. On the whole we consider in the circumstances of this case delay of 28 days in disposing of the representation as inordinate delay which would vitiate the order. Therefore, on this short ground we quash and set aside the detention order.

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