Biru Mahato

Vs

District Magistrate Dhanbad

Writ Petition (Criminal) No. 1125 of 1982

(R. B. Misra, D. A. Desai JJ)

15.10.1982

JUDGMENT

DESAI, J. -

1. By our Order dated October 8, 1982, the order of detention dated February 5, 1982, made by the District Magistrate, Dhanbad, against detenu Biru Mahato was quashed and set aside by us further stating that the reasons would follow. Here are the reasons.

2. Detenu Biru Mahato was arrested on January 13, 1982, on the allegation that he was involved in two incidents which occurred, first at 5 p.m. and the second at 5.30 p.m. on January 12, 1982. In the first occurrence detenu and his associates appear to have committed offences under Sections 341, 323 and 506 read with Section 34 of the Indian Penal Code. FIR led to registration of the offences at Bagmara Police Station numbered as 25(1)/82. FIR No. 24(1)/82 has been registered at Bagmara Police Station for offences under Sections 307 and 323, IPC. After his arrest the detenu was confined in prison. In respect of the first occurrence bail application of the detenu was accepted but in respect of the second occurrence the bail application was rejected by the learned District and Sessions Judge, Dhanbad on February 12, 1982. In the meantime the District Magistrate, Dhanbad, made an order on February 5, 1982, in exercise of powers conferred by the sub-section (2) read with sub-section (3) of Section 3 of the National Security Act, 1980 ('Act' for short), directing that the detenu be detained so as to prevent him from acting in any manner prejudicial to the maintenance of public order. On February 10, 1982, grounds of detention were served on the detenu in jail where he was already detained. The grounds of detention refereed to the two incidents which occurred on January 12, 1982. The detenu made a representation on February 15, 1982, which was rejected by the State Government on February 16, 1982. Case of the detenu was referred to the Advisory Board and after receipt of its report the State Government confirmed the order of detention.

3. Detenu preferred a petition for a writ of habeas corpus in the High Court at Patna which was dismissed in limine by a Division Bench of the High Court. Detenu has filed this writ petition under Article 32 as also appeal by special leave under Article 136. Both the appeal and writ petition are being disposed of by this common judgment.

4. Two contentions were canvassed on behalf of the detenu : (i) the date on which the detention order came to be made the detenu was already deprived of his liberty as he was arrested and was confined in jail and, therefore, he was already prevented from pursuing any activity which may prove prejudicial to the maintenance of public order, hence no order of detention could be made against him; and (ii) the detaining authority was not even aware that the detenu was already in jail and the order suffers from the vice of non-application of mind. In our opinion both the grounds are

weighty and go to the root of the matter and would vitiate the detention order.

5. Sub-section (2) of Section 3 of the Act confers power on the Central Government or the State Government to make an order of detention with a view to preventing any person 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, etc. In this case the detaining authority has made the order on being satisfied that it is necessary to detain the detenu with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. A preventive action postulates that if preventive step is not taken the person sought to be prevented may indulge in to an activity prejudicial to the maintenance of public order. In other words, unless the activity is interdicted by a preventive detention order the activity which is being indulged into is likely to be repeated. This is the postulate of the section. And this indubitably transpires from the language employed in sub-section (2) which says that the detention order can be made with a view to preventing the person sought to be detained from acting in any manner prejudicial to the maintenance of public order. Now, if it is shown that the man sought to be prevented by a preventive order is already effectively prevented, the power under sub-section (2) of Section 3, if exercised, would imply that one who is already prevented is sought to be further prevented which is not the mandate of the section, and would appear tautologous. An order for preventive detention is made on the subjective satisfaction of the detaining authority. The detaining authority before exercising the power of preventive detention would take into consideration the past conduct or antecedent history of the person and as a matter of fact it is largely from the prior events showing the tendencies or inclinations of a man that an inference could be drawn whether he is likely even in the future to act in a manner prejudicial to the maintenance of public order. If the subjective satisfaction of the detaining authority leads to this conclusion it can put an end to the activity by making a preventive detention order (see Ujagar Singh and Jagjit Singh v. State of Punjab (1952 SCR 756 : AIR 1952 SC 350 : 1953 Cri LJ 146). Now, if the man is already detained can a detaining authority be said to have been subjectively satisfied that a preventive detention order be made ? In Rameshwar Shaw v. D.M. Burdwan ((1964) 4 SCR 921 : AIR 1964 SC 334 : 1964 (1) Cri LJ 257), this Court held that as an abstract proposition of law the detention order can be made in respect of a person who is already detained. But having said this, the Court proceeded to observe as under :

As an abstract proposition of law, there may not be any doubt that Section 3(1)(a) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail; but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail. Take for instance, a case where a person has been sentenced to rigorous imprisonment for ten years. It cannot be seriously suggested that soon after the sentence of imprisonment is pronounced on the person, the detaining authority can make an order directing the detention of the said person after he is released from jail at the end of the period of the sentence imposed on him. In dealing with this question, again the consideration of proximity of time will not be irrelevant. On the other hand, if a person who is undergoing imprisonment, for a very short period, say for a month or two or so, and it is known that he would soon be released from jail, it may be possible for the authority to consider the antecedent history of the said person and decide whether the detention of the said person would be necessary after he is released from jail, and if the authority is bona fide satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released. The antecedent history and the past conduct on which the order of detention would be based would, in such a case, be proximate in point of time and would have a rational connection with the conclusion drawn by the authority that the detention of the person after his release is necessary. It may not be easy to discover such rational connection between the antecedent

history of the person who has been sentenced to ten years' rigorous imprisonment and the view that his detention should be ordered after he is released after running the whole of his sentence. Therefore, we are satisfied that the question as to whether an order of detention can be passed against a person who is in detention or in jail, will always have to be determined in the circumstances of each case.

6. One can envisage a hypothetical case where a preventive order may have to be made against a person already confined to jail or detained. But in such a situation as held by this Court it must be present to the mind of the detaining authority that keeping in view the fact that the person is already detained a preventive detention order is still necessary. The subjective satisfaction of the detaining authority must comprehend the very fact that the person sought to be detained is already in jail or under detention and yet a preventive detention order is a compelling necessity. If the subjective satisfaction is reached without the awareness of this very relevant fact the detention order is likely to be vitiated. But as stated by this Court it will depend on the facts and circumstances of each case.

7. The view herein taken finds further support from the decision of this Court in Vijay Kumar v. State of J & K (AIR 1982 SC 1023 : (1982) 2 SCC 43 : 1982 SCC (Cri) 348), wherein this Court recently held as under : (SCC p. 48, para 10)

> ... Preventive detention is resorted to, to thwart future action. If the detenu is already in jail charged with a serious offence, he is thereby prevented from acting in a manner prejudicial to the security of the State. Maybe, in a given case there yet may be the need to order preventive detention of a person already in jail. But in such a situation the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made. There is nothing to indicate the awareness of the detaining authority that detenu was already in jail and yet the impugned order is required to be made. This, in our opinion, clearly exhibits non-application of mind and would result in invalidation of the order....

8. This leads us to the second limb of the submission. Conceding that in a given case a preventive detention order is required to be made even against a person who is already in jail or under detention and that the detaining authority shows its awareness of the fact situation and yet passes the detention order, the detention order must show on the face of it that the detaining authority was aware of the situation. Otherwise the detention order would suffer from vice of non-application of mind. The awareness must be of the fact that the person against whom the detention order is being made is already under detention or in jail in respect of some offence. This would show that such a person is not a free person to indulge into a prejudicial activity which is required to be prevented by a detention order. And this awareness must find its place either in the detention order or in the affidavit justifying the detention order when challenged. In the absence of it, it would appear that the detaining authority was not even aware of this vital fact and mechanically proceeded to pass the order which would unmistakably indicate that there was non-application of mind to the relevant facts and any order of such serious consequence when mechanically passed without application of mind is liable to be set aside a invalid.

9. Turning to the facts of this case the detention order refers to Biru Mahato son of Mohan Mahato of village Jamdiha, P.S. Bagmara, District Dhanbad. There is not even a whimper of the detenu being in jail for nearly three weeks prior to the date on which the detention order was made.

10. The detenu is referred to as one who is staying at a certain place and is a free person. Assuming that this inference from the mere description of the detenu in the detention order is impermissible, the affidavit is conspicuously silent on this point. Not a word is said that the detaining authority was aware of the fact that the detenu was already in jail and yet it became a compelling necessity to pass the detention order. Therefore, the subjective satisfaction arrived at clearly discloses a non-application of mind to the relevant facts and the order is vitiated.

11. Mr U.P. Singh, learned counsel for the detenu urged that this Court should not take into consideration the affidavit filed by Dr. J.S. Brara on behalf of the respondent. Dr. J.S. Brara, describing himself as District Magistrate, Dhanbad, has made the affidavit as if he was the detaining authority. When this statement was challenged on behalf of the detenu, Mr Goburdhan, learned counsel for the respondent went to the extreme length of asserting that Mr Brara was the detaining authority. At that stage Mr U.P. Singh, learned counsel for the detenu produced the original order of detention signed by one Shri D. Nand Kumar as District Magistrate. This was shown to Mr Goburdhan and he was unable to sustain his submission that Mr Brara who has filed the affidavit was the detaining authority. In fact, at one stage we were inclined to take a very serious view of the conduct of Mr Brara in making the affidavit as if he is the detaining authority. In para 1 he has described himself as District Magistrate being the detaining authority of the petitioner which statement is not borne out by the record. He may be the holder of office of District Magistrate. But when the subjective satisfaction of holder of officer is put in issue the mere occupant of office cannot arrogate to substitute his subjective satisfaction. He may speak from the record but that is not the case here. Therefore, the affidavit of Mr Brara has to be ignored and one must reach the conclusion that the averments made by the detenu have remained uncontroverted.

12. For these reasons we have quashed and set aside the order of detention.

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