

Ajay Dixit

Vs

State of U. P. and Others

Writ Petition (Criminal) No. 916 of 1984

(E. S. Venkataramiah, Sabyasachi Mukharji JJ)

26.09.1984

JUDGMENT

SABYASACHI MUKHARJI, J. –

1. Shri Ram Narain Dixit in this petition under Article 32 of the Constitution challenges the detention of Ajay Dixit, his son in the District Jail of Agra, under the National Security Act, 1980. The District Magistrate, Agra passed a detention order and served on Ajay Dixit hereinafter called the detenu under Section 3 of the National Security Act, hereinafter called the Act, on six different grounds. The grounds mentioned therein are as follows :

1. That on April 10, 1981 at 10.30 p.m. you along with your companions surrounded Shri Kanhaiya Lal Sharma resident of Ferozepur and fired at him with the intention of killing him but he escaped slightly. In this connection a case under Section 307 of IPC was lodged with the police station and is pending the trial in the court against you.

2. That on September 27, 1982 at 3.10 p.m. you collected goondas in your house in the town of Ferozabad and when the police party reached in order to arrest the goondas you fired at the police party on which a case against you under Section 307/34 of Indian Penal Code is pending the trial in the court.

3. That on September 27, 1982 you were arrested by the police in the town of Ferozabad and a country made Tamancha and two live cartridge without licence were recovered from your possession in respect of which a case against you under Section 25/27 of Arms Act is pending the trial in the court.

4. That on January 15, 1983 at 5.00 p.m. you along with your brother shot Shri Naresh Paliwal brother of Shri Sanjeev Kumar Paliwal resident of Ferozabad. In this respect a case against you under Section 302 of Indian Penal Code was registered in the police station and is pending trial in the court.

5. That on October 31, 1983 Shri Sanjeev Kumar Paliwal lodged a report with the Thana Ferozabad (North) that he was carrying the profession of photography. 12-13 days before a boy took him away for the purpose of a photograph to a room where you and your associates were present and you forcibly compelled Shri Sanjeev Kumar Paliwal at the point of revolver to take a nude snap of immoral act being committed by Umesh with Sanjeev Kumar Gupta. In this respect a case against you

under Section 342/286 of Indian Penal Code was registered and the same is under trial.

6. That on February 26, 1984 at about 5.00 p.m. you along with your associates in the town of Ferozabad attempted to murder by sprinkling kerosene oil and by lighting it with a matchbox Shri Jai Kumar Jain resident of Ferozabad in order to recover your so-called money in respect of which a case against you under Section 307 of Indian Penal Code was registered and is under trial.

2. On the above grounds the District Magistrate by his order dated February 29, 1984 stated that he was satisfied that the said Ajay Dixit was likely to act in a manner prejudicial to maintenance of public order and that it was necessary to detain him with the object of preventing him from acting prejudicially to the maintenance of public order. The said order was passed under sub-section (2) of Section 3 of the National Security Act, 1980, and the petitioner was detained from February 29, 1984. On March 14, 1984 the petitioner submitted his representation to the Advisory Board. On March 23, 1984, the State Government rejected the representation of the detenu.

3. The petitioner alleged that the procedures and formalities provided under the Act had not been made available and applied in the case of the detenu. The petitioner states that the detenu was detained and the grounds mentioned in the order were illusory, insufficient and not bona fide and in any case irrelevant for the detention of the detenu for the maintenance of public order. Sub-section (2) of Section 3 of the Act empowers the Central Government and the State Governments, if satisfied with respect to any person, with a view to preventing him "inter alia from acting in any manner prejudicial to the maintenance of public order", it is necessary to do so to make an order directing such person be detained.

4. There are decisions which have dealt with limits and the scope of this rather drastic power of preventive vested in the Government and which is sanctioned under the provisions of Article 22(3), (4) and (5) of the Constitution. There are various procedural safeguards like making known to the detenu within a particular time the grounds of detention and giving him information that he can make representation against the detention within a particular time and further that the representation should be placed before the Advisory Board and the opinion of the Advisory Board should be placed before the Government concerned and thereafter decision taken. The petitioner made some other averments of non-compliance with the procedural safeguards under the Act. The main ground in the petition is that the petitioner was not informed of the rights available to him nor of the reasons or order passed on his representation. In view of the averments made in the petition and the affidavits filed on behalf of the respondent, it is not necessary in the facts and circumstances of this case to discuss these in detail.

5. Preventive detention is an exception to the normal procedure. It is sanctioned and authorised for very limited purpose under Article 22(3)(b) with good deal of safeguards. The exercise of that power of preventive detention must be with circumspection and care. We are governed by the Constitution and our Constitution embodies a philosophy of government and a way of life. The working of this Constitution requires understanding between those who exercise power and the people over whom or in respect of whom such power is exercised. The purpose of all government is to promote common well-being and it must subserve the common good and it is necessary therefore to protect individual rights as far as consistent with security of the society and an atmosphere where the even tempo of the community is least endangered. These provisions should be so read as to imply grant of power and also limit the user of the power. The observance of a written law about the

procedural safeguards for the protection of the individual is the normal and high duty of a public official. But in all circumstances is not the highest. The law of self-preservation and national security often claimed a higher priority. "To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us, thus absurdly sacrificing the end to the means." Thomas Jefferson Writings (Washington Ed. V, pages 542-545). Sometimes the executive may have to act without normal safeguards for ordinary detention and resort to preventive detention when the necessity demands it, but it must explain its action when called upon in judicial review and ask for acquittance.

6. The question of deference between 'law and order' and 'public order' has come up many a times in judicial decisions. In the case of *Dr. Ram Manohar Lohia v. State of Bihar* ((1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608) a full bench of this Court had to consider this controversy in the context of Rule 30(I)(b) of the Defence of India Rules, 1962. Mr. Justice Sarkar who was a party to the majority view observed that it was not necessary to take too technical a view but one should proceed in a matter of substance, if a man could be deprived of his liberty by the simple process of making of an order he could only be so deprived of it if the order is in terms of rule. If for the purpose of justifying the detention such compliance by itself is enough, non-compliance must have a contrary effect. A mere reference in the detention order to the rule is not sufficient to show that by "law and order" what was meant was public order. The learned Judge observed that the order no doubt mentioned another ground of the detention namely prevention of acts and so far as it did so, it was clearly within the rule. But the order has notwithstanding this, to be held illegal, though it mentioned a ground on which a legal order of detention could have been passed, because it could not be said that in what manner and to what extent the valid and invalid grounds operated on the mind of the detention authority. Of course, at the present law stands if one of the orders is invalid the order of detention cannot be set aside merely on that ground.

7. The National Security (Second Amendment) Act, 1984 was assented to by the President on August 31, 1984 and it provided that it should be deemed that the Act had come into force on June 21, 1984. Section 5-A of the Act by virtue of Section 2 of the National Security (Second Amendment) Act, reads as follows :

5-A. Where a person has been detained in pursuance of an order of detention whether made before or after the commencement of the National Security (Second Amendment) Act, 1984 under Section 3 which has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly :

(a) such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are -

1. vague,

(ii) non-existent,

(iii) not relevant,

2. not connected or not proximately connected with such person, or

(v) invalid for any other reasons whatsoever, and it is not, therefore, possible to hold that the Government or officer making such order would have been satisfied as

provided in Section 3 with reference to the remaining ground or grounds and made the order of detention;

(b) the Government or officer making the order of detention shall be deemed to have made the order of detention under the said section after being satisfied as provided in that section with reference to the remaining ground or grounds.

8. The Act specifically makes the provision of Section 5-A of the amended portion of the Act applicable in case of an order of detention whether passed before the commencement of the National Security (Second Amendment) Act, 1984 or after it. Therefore in this order of detention it would be applicable as the order was passed before the coming into force of the National Security (Second Amendment) Act, 1984.

9. Justice Hidayatullah, as the learned Chief Justice then was, and Justice Bachawat observed in the said decision that the satisfaction of the detaining authority cannot be subjected to objective tests and courts are not to exercise appellate powers over such authorities and an order proper on its face, passed by a competent authority in good faith, would be a complete answer to a petition for a writ of habeas corpus. But when from the order itself circumstances appear which raise a doubt whether the officer concerned had not misconceived his own powers, there is need to pause and enquire. The enquiry then is, not with a view to investigate the sufficiency of the materials but into the officer's notions of his power. If the order passed by him showed that he thought his powers were more extensive than they actually were, the order might fail to be a good order. When the liberty of the citizen is put within the reach of authority and the scrutiny by courts is barred, the action must comply not only with the substantive requirements of law but it should be with those forms which alone can indicate the substance. The learned Judges further observed that the contravention 'of law' always affects 'order' but before it could be said to affect 'public order', it must affect the community or the public at large. One has to imagine three concentric circles, the largest representing "law and order", the next representing "public order" and the smallest representing "security of State". An act may affect "law and order" but not "public order", just as an act may affect "public order" but not "security of the State". Therefore one must be careful in using these expressions.

10. In the decision of this Court in the case of Arun Ghosh v. State of W.B ((1970) 3 SCR 288 : (1970) 1 SCC 98 : 1970 SCC (Cri) 67 : 1970 Cri LJ 1136)., the question was whether the grounds mentioned could be construed to be breach of public order and as such the detention order could be validly made. There the appellant had molested two respectable young ladies, threatened their father's life and assaulted two other individuals. He was detained under Section 3(2) of the Preventive Detention Act, 1950 in order to prevent him from acting prejudicially to the maintenance of public order. It was held by this Court that the question whether a man has only committed a breach of law and order, or has acted in a manner likely to cause a disturbance of the public order, is a question of degree and the extent of the reach of the act upon society. The test is : Does it lead to a disturbance of even tempo and current of life of the community so as to amount a disturbance of the public order, or, does it affect merely an individual without affecting the tranquillity of society. This Court found in that case however reprehensible the appellant's conduct might be, it did not add up to the situation where it may be said that the community at large was being disturbed. Therefore, it could not be said to amount to an apprehension of breach of public order, and hence, he was entitled to be released.

11. The law on this point was stated by this Court in the case of Ram Ranjan Chatterjee v. State of

W.B. ((1975) 4 SCC 143, 146 : 1975 SCC (Cri) 400) as follows : [SCC para 8, p. 146 : SCC (Cri) p. 403]

It may be remembered that qualitatively, the acts which affect 'law and order' are not different from the acts which affect 'public order'. Indeed, a state of peace or orderly tranquillity which prevails as a result of the observance or enforcement of internal laws and regulations by the Government, is a feature common to the concepts of 'law and order' and 'public order'. Every kind of disorder or contravention of law affects that orderly tranquillity. The distinction between the areas of 'law and order' and 'public order' as pointed by this Court in *Arun Ghosh v. State of West Bengal* ((1970) 3 SCR 288 : (1970) 1 SCC 98 : 1970 SCC (Cri) 67 : 1970 Cri LJ 1136), "is one of degree and extent of the reach of the act in question on society". It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order. If the contravention in its effect is confined only to a few individuals directly involved as distinguished from a wide spectrum of the public, it would raise a problem of law and order only. These concentric concepts of 'law and order' and 'public order' may have a common 'epicentre', but it is the length, magnitude and intensity of the terror-wave unleashed by a particular eruption of disorder that helps distinguish it as an act affecting 'public order' from that concerning 'law and order'.

12. Reliance was also placed upon *Jaya Mala v. Home Secretary, Government of J & K* ((1982) 2 SCC 538 : 1982 SCC (Cri) 502). In that case also a criminal case had been started on the basis of an incident. The Court felt that the grounds of detention were such grounds upon which no valid order of detention can be sustained. It has been further observed at page 540 as follows : [SCC para 7, p. 540 : SCC (Cri) p. 504]

But it is equally important to bear in mind that every minor infraction of law cannot be upgraded to the height of an activity prejudicial to the maintenance of public order..... If every infraction of law having a penal sanction by itself is a ground for detention danger looms large that the normal criminal trials, and criminal courts set up for administering justice will be substituted by detention laws often described as lawless law.

13. See also in this connection the observation of this Court *Alijan Mian v. D. M., Dhanbad* ((1983) 4 SCC 301, 308 : 1983 SCC (Cri) 840, 847).

14. Stale incidents cannot also be a valid ground for sustaining detention. See in this connection the observations of this Court in *Kamlakar Prasad Chaturvedi v. State of M.P.*((1983) 4 SCC 443 : 1983 SCC (Cri) 848) When a challenge is made to a detention of the grounds that the stale and irrelevant grounds were the basis for detention then the detenu is entitled to be released and to that extent the order is subject to judicial review not on the ground of sufficiency of the grounds nor the truth of the grounds but only about the relevancy of the grounds which would come under judicial scrutiny.

15. Bearing the aforesaid principles in mind, the first ground mentioned in the order of detention was that the detenu along with the companions surrounded one Kanhaiya Lal Sharma and had committed an offence under Section 307 of Indian Penal Code on or about April 10, 1981. Apart from the fact that the ground was old and stale, it is irrelevant inasmuch as the detenu has been acquitted of the charge before the detention order was passed. He was acquitted on February 2, 1984 whereas the detention order was passed on February 29, 1984. The respondents in their counter do not dispute this position but state that the information had not reached the detaining or the recommending authority. This is unfortunate. The other grounds mentioned in the detention order

no doubt are also unfortunate and the conduct alleged of the detenu is reprehensible. Such conducts if true are not of such nature which could possibly endanger 'public order'. The incident alleged is to have happened ten or twelve days prior to October 31, 1983, yet the detention order was passed quite some time thereafter in February 1984. In certain criminal charges mentioned in grounds numbers 2, 3, 4 and 5, there is no difficulty in arresting the detenu. The grounds mentioned therein are not of such magnitude as to amount to apprehend disturbance of public order, nor was there any evidence that for any conduct of the detenu public order was endangered, or there could be reasonable apprehension about it. As emphasised by the decisions of this Court, it is important to bear in mind the difference between law and order situation and maintenance of public order. The act by itself is not determinate (sic determinant) of its gravity. In its quality it may not differ from another but its potentiality may be very different. Therefore the question whether a man has only committed a breach of law and order or acted in a manner likely to the disturbance of public order is a question of degree of the reach of the act upon society. In this connection it may be appropriate to refer to the observations in the case of Arun Ghosh v. State of West Bengal ((1970) 3 SCR 288 : (1970) 1 SCC 98 : 1970 SCC (Cri) 67 : 1970 Cri LJ 1136) at page 290 as follows :

It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. The French distinguish law and order and public order by designating the latter as order publique. The latter expression has been recognised as meaning something more than ordinary maintenance of law and order. Justice Ramaswami in Writ Petition 179 of 1968 drew a line of demarcation between the serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large from minor breaches of peace which do not affect the public at large. He drew an analogy between public and private crimes. The analogy is useful but not to be pushed too far. A large number of acts directed against persons or individuals may total up into a breach of public order. In Dr. Ram Manohar Lohia case ((1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608) examples were given by Sarkar, and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. The question to ask is : Does it lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed ? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another.

16. It is, therefore, necessary in each case to examine the facts to determine, not the sufficiency of the grounds nor the truth of the grounds, but nature of the grounds alleged and see whether these are relevant or not for considering whether the detention of the detenu is necessary for maintenance of public order.

17. In view of the nature of the allegations mentioned in the grounds, we are of the opinion that these are not of such nature as to lead to any apprehension that the even tempo of the community would be endangered. Therefore the detention of the detenu under the provisions of Section 3(2) of the Act was not justified.

18. There are various allegations of mala fide in this application namely that one of the relations of Advocate-General of U.P. was involved. It is alleged that the Advocate-General of U.P. is the father-

in-law of a local resident with whom the family of the detenu had land dispute due to which many attempts on the life of the detenu and his brother has been caused to be made by the Advocate-General. In the view we have taken it is not necessary for us to go into these questions. There are some submissions about the procedural irregularities. Though on the whole we do not find much substance but it is not necessary also to detain ourselves on the examination of these questions.

19. In the aforesaid view of the matter, the detention order dated February 29, 1984 which is Annexure I to the petition is hereby quashed. The detenu should be set at liberty forthwith.

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