Chhagan Bhagwan Kahar

Vs

N. L. Kalna and Others

Writ Petition (Criminal) No. 61 of 1989

(B. C. Ray, S. R. Pandian JJ)

16.03.1989

JUDGMENT

S. RATNAVEL PANDIAN, J. –

1. This petition under Article 32 of the Constitution of India is filed by the petitioner, the detenu herein, challenging the legality and validity of the order of detention dated October 21, 1988 passed by the detaining authority (the Commissioner of Police, Surat City) clamping upon the detenu the above said order of detention under sub-section (2) of Section 3 of the Gujarat Prevention of Anti-Social Activities Act, 1985 (hereinafter referred to as 'the Act') on the ground that he on consideration of the material placed before him was satisfied that it was necessary to make the said order with a view to preventing the detenu from acting in any manner prejudicial to the maintenance of public order in the area of Nanpura Machhiwad falling under the jurisdiction of Athwa Lines Police Station Surat City and directed the detenu to be detained in Sabarmati Central Prison, Ahmedabad under the conditions specified in the Gujarat Prevention of Anti-Social Activities Order, 1985. In pursuance of the impugned order the detenu has been detained in the aforesaid prison.

2. The second respondent, the State of Gujarat, approved the impugned order on October 26, 1988 and confirmed the same on December 13, 1988. The detenu submitted his representation dated December 15, 1988 which was received by respondent 1 on December 19, 1988 on which date itself the same was rejected. The copy of the representation sent to the second respondent was rejected on December 21, 1988.

3. It is stated in the grounds of detention that the detenu was illegally keeping in possession country liquor and openly selling the same at the corner of Nanpura, Machhiwad, Masjid Wali Gali, Bhandariwad and conducting a den (adda) and that he had been arrested in 1988 for offences under the Bombay Prohibition Act in respect of which number of cases were registered which cases are still pending trial as disclosed in Annexure I. It is further stated that the detenu had engaged 10 persons whose names are given in paragraph 2 of the grounds of detention, to accelerate his bootlegging activities and those hired persons who were conducting den (adda) under the instructions and guidance of the detenu had been arrested in 1988 in 19 different cases under the Bombay Prohibition Act from the detenu's adda during police raids of which 8 cases are pending trial and the remaining eleven are under investigation, the details of which are given in Annexure II attached to the grounds of detention. On the above materials and the statements of witnesses placed before him, the detaining authority had satisfied himself that the abovementioed bootlegging activities of the detenu in a large scale in an organised manner were seriously detrimental to the public health and were likely to endanger public health and consequently passed this impugned

order to detention. Hence this writ petition.

4. Mr. V. V. Vaze, learned counsel appearing on behalf of the petitioner, detenu raised several contentions assailing the legality and validity of the order of detention one of which being that the detaining authority for drawing his requisite subjective satisfaction to clamp this order of detention upon the petitioner/detenu had taken into consideration the previous grounds of detention which was the subject matter of Special Criminal Application No. 46 of 1987 before the High Court of Gujarat. Since we are inclined to dispose of this writ petition on this ground alone we are not traversing on other grounds. Admittedly, the Commissioner of Police, Surat City passed an order of detention under Section 3(2) of the Act on January 2, 1987, in No. PCB/PASA/1/87 on the ground that between 1984 to 1986 there were 19 cases filed against the detenu under the Bombay Prohibition Act to which 16 were pending in court and three others under investigation when this previous order was passed. The petitioner filed Special Criminal Application No. 46 of 1987 before the High Court of Gujarat at Ahmedabad challenging the validity of the said order. The High Court by its judgment dated August 3, 1987 quashed the earlier impugned order of detention and directed the release of the detenu forthwith. A copy of the High Court order is annexed to the writ petition as Annexure 'D'. The detaining authority in this case had made a reference about the previous order in the impugned grounds of detention which reads thus :

> You are associated with bootlegging activity for along time, therefore, under order number PCB/PASA/1-1987 dated January 2, 1987 you were ordered to be detained under PASA and were kept in Baroda Central Jai. But you filed a petition against this order of detention in the High Court by Special Criminal Misc. Application No. 46 of 1987. After this petition was heard on August 3, 1987, the Hon'ble High Court quashed the detention order and released you from detention. The proceedings taken against you have had no effect on you and after you were released from the detention, you have continued your activity.

5. The detenu, presumably based on the above statement, has stated in his writ petition that the present order of detention is clamped upon him since the earlier order passed on January 2, 1987 had been quashed and set aside. The detaining authority in attempting to reply to the allegations made in paragraph 6 of the writ petition, wherein it is averred : "The petitioner states that in some of the case, the petitioner is acquitted and in none of the cases the petitioner is convicted till today", has made following statement in paragraph 9 of his counter :

> It is submitted that the present detaining authority took into consideration the previous grounds of detention also to establish that the petitioner was engaged in bootlegging activities since long.

6. Now on this above statement it has been strenuously urged that since the detaining authority for drawing his subjective satisfaction had taken into consideration all the previous grounds of detention, namely, the earlier grounds of detention passed on January 2, 1987 which had been subsequently quashed by the High Court the present detention order is liable to be set aside. According to learned counsel for the petitioner, once the previous grounds of detention had been quashed on its merits, then the detaining authority has no justification to take into consideration the earlier grounds of detention for passing this present detention order which should have been based only the fresh grounds that were available subsequent to the quashing of the previous detention order. In support of this statement several decisions were relied on about which we make reference presently. Firstly, the attention of the Court was drawn to Ghulam Nabi Zaki v. State of Jammu and

Kashmir ((1969) 3 SCC 851 : (1970) 3 SCR 35) wherein the State contended that the existence of fresh material is not a condition precedent for passing the second order and that in any event, the second order can be made when the first order is withdrawn or revoked for technical defect. Hidayatullah. C.J. speaking for the bench repelled that contention holding thus : (SCC p. 854, para 5)

> The matter is not res integra. In a number of decision of this Court to which reference will be made presently, this point has been considered and it has been held that once an order of revocation is made, another order detaining the same person can only be passed if some additional or fresh material is in the possession of the State Government on which action can be based.

7. The referring to the decision of the Constitution Bench in Hadibhandu Das v. District Magistrate, Cuttack ((1969) 1 SCR 227 : AIR 1969 SC 43 : 1969 Cri LJ 274), the learned Chief Justice observed : (SCC p. 854, para 5)

In other words, the revocation or expiry of the previous order cannot lead ipso facto to a revival of the detention by the passing of a fresh order, because a person who is entitled to his liberty can only be put in a second jeopardy when there are additional or fresh facts against him.

8. Ultimately, he concluded : (SCC p. 855, para 6)

As pointed out in the All India Reporter case (Hadibandhu Das case ((1969) 1 SCR 227 : AIR 1969 SC 43 : 1969 Cri LJ 274)) the inference is very compulsive that fresh facts must be found for new orders otherwise once the old detention comes to an end either by the expiry of the period of detention or by the cancellation of the order of detention, a fresh detention cannot be ordered.

9. In Har Jas Dev Singh v. State of Punjab ((1973) 2 SCC 575 : 1973 SCC (Cri) 895 : (1974) 1 SCR 281), this Court while examining a similar question with regard to validity of second detention order passed under Section 14(2) of the Maintenance of Internal Security Act (Act 26 of 1971) on identical grounds of the earlier order expressed its view : (SCC p. 581, para 4)

In these circumstances after the date on which the order ceased to be in force, unless fresh facts had arisen on the basis of which the Central Government or a State Government or an officer, as the case may be, was satisfied that such an order should be made, the subsequent detention on the very same grounds would be invalid.

10. The learned counsel also cited for the same principle of law, the decision in Chotka Hembram v. State of West Bengal ((1974) 2 SCC 24 : 1985 SCC (Cri) 149).

11. Those decisions mentioned albeit are cases wherein the first detention order ceased to be either by revocation or by expiry of the period of detention. As to what would be the legal implications and ultimate effect of quashing an order of detention by the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India this Court in Ibrahim Bachu Bafana v. State of Gujarat ((1985) 2 SCC 24 : 1985 SCC (Cri) 149), made the following rule : (SCC pp. 29-30, para 10)

When the High Court exercises jurisdiction under Article 226 of the Constitution it does not make an order of revocation. By issuing a high prerogative writ like habeas corpus or certiorari it quashes the order impugned before it and by declaring the order to be void and striking down the same it

nullifies the order. The ultimate effect of cancellation of an order by revocation and quashing of the same in exercise of the high prerogative jurisdiction vested in the High Court may be the same but the manner in which the situation is obtained is patently different and while one process is covered by Section 11(1) of the Act, the other is not known to the statute and is exercised by an authority beyond the purview of sub-section (1) of Section 11 of the Act. It is, therefore, our clear opinion that in a situation where the order of detention has been quashed by the High Court, sub-section (2) of Section 11 is not applicable and detaining authority is not entitled to make another order under Section 3 of the Act on the same grounds.

12. It emerges from the above authoritative judicial pronouncements that even if the order of detention comes to an end either by revocation or by expiry of the period of detention there must be fresh facts for passing a subsequent order. A fortiori when a detention order is quashed by the court issuing a high prerogative writ like habeas corpus or certiorari the grounds of the said order should not be taken into consideration either as a whole or in part even along with the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the court strikes down an earlier order by issuing rule it nullifies the entire order.

13. In the present case, no doubt, the order of detention contains fresh facts. In addition to that the detaining authority has referred to the earlier detention order and the judgment of the High Court quashing it, presumably for the purpose of showing that the detention in spite of earlier detention order was continuing his bootlegging activities. But what the detaining authority says clearly in paragraph 9 of his affidavit in reply is that he took into consideration the previous grounds of detention also for his conclusion that the detenu 'was engaged in bootlegging activities since long'. In other words the detaining authority has taken into consideration the earlier grounds of detention which grounds had been nullified by the High Court in Special Criminal Application No. 46 of 1987 by issuing a prerogative writ of habeas corpus.

14. Under Section 15 of the Act, the expiry or revocation of an earlier detention order is not a bar for making a subsequent detention order under Section 3 against the same person. The proviso annexed to that section states that in a case where no fresh facts have arises after expiry or revocation of an earlier order made against such person the maximum period for which such person may be detained in pursuance of the subsequent detention order shall in no case extend beyond the period of 12 months from the date of detention under the earlier order. Chinnappa Reddy, J. in Abdul Latif Abdul Wahab Sheikh v. B. K. Jha ((1987) 2 SCC 22 : 1987 SCC (Cri) 244 : (1987) 2 SCR 203) speaking for the bench of this Court while dealing with Section 15 of the Act observed : (SCC p. 25, para 3)

It, therefore, becomes imperative to read down Section 15 the Gujarat Prevention of Anti-Social Activities Act, 1985 which provides for the making of successive orders of detention so to bring it in conformity with Article 22(4) of the Constitution. If there is to be a collision between Article 22(4) of the Constitution and Section 15 of the Act, Section 15 has to yield. But by reading down the provision, the collision may be avoided and Section 15 may be sustained.

15. Mr. Poti has sought to explain the statement of the detaining authority made in his counter saying that the earlier proceeding was considered only for limited purpose of taking note of the detenu's continued involvement of bootlegging activities; but the entire grounds of earlier detention as they were, were not considered. We are unable to accept this explanation because the detaining authority, in the counter, in clear terms had expressed that he considered the earlier grounds of detention also. Incidentally, it was brought to our notice that a copy of the earlier grounds of

detention was also one of the documents furnished to the detenu in the present case which confirms the fact that the detaining authority has considered the earlier grounds of detention along with other documents for drawing his requisite subjective satisfaction for passing this impugned order. In other words, the earlier grounds of detention dated January 2, 1987, quashed by the High Court was one of the material documents considered by the detaining authority in drawing his subjective satisfaction. Therefore, we hold that this order of detention is vitiated on the grounds that the detaining authority has taken into consideration the grounds of earlier detention order along with other materials for passing this impugned order. Hence, the order is liable to be set aside. Accordingly, we quash the detention order on this ground and direct that the detenu be set at liberty forthwith if his detention is not required for any other case.

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