

Victoria Fernandes

Vs

Lalmal Sawma and Others

Criminal Writ Petn. No. 1321 of 1991 with Criminal Appeal No. 33 of 1992

(A.M. Ahmadi, K. Ramaswamy JJ)

20.1.1992

JUDGEMENT

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S. C. AGRAWAL, J.:-

1. Writ Petition No. 1321/91 has been filed by Smt. Victoria Fernandes (hereinafter referred to as 'the petitioner) wherein she has challenged the legality of the detention of her son, Rudolf Fernandes (hereinafter referred to as 'the detenu') in pursuance of the detention order dated April 6, 1991 passed by the District Magistrate, North Goa District, Panaji, under Section 3(2) of the National Security Act, 1980 (hereinafter referred to as 'the Act'). SLP (Cri) No. 4169 / 91 is directed against the judgment dated September 20, 1991 of the High Court of Bombay at Panaji, Goa whereby Writ Petition No. 9/91 filed by the petitioner challenging the detention of the detenu was dismissed by the High Court.

2. We have heard learned counsel for the parties. We grant special leave to appeal and proceed to dispose of the appeal as well as the Writ Petition.

3. The detenu was the President of an organisation known as 'Goa Protectors'. He has been detained under order of detention dated April 6, 1991, passed under Section 3(2) of the Act, with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. The said order was approved by the State Government by order dated April 8, 1991. The detenu was arrested on June 14, 1991. He made a representation to the Advisory Board and after considering the report of the Advisory Board, the State Government passed the order dated July 13, 1991 whereby the order of detention of the detenu was confirmed and it was directed that the detenu be detained for a period of one year from the date of his detention. In the meanwhile, the petitioner had filed writ petition No. 9 of 1991 in the High Court of Bombay at Panaji, Goa on July 9, 1991. The said writ petition was dismissed by a division bench of the High Court by judgment dated September 20, 1991. Feeling aggrieved by the said judgment of the High Court, the petitioner filed SLP (Cri.) No. 4169/ 91 and she also filed WP (Cri) No. 1321/91 under Article 32 of the Constitution.

4. In the grounds of detention dated April 6, 1991, it has been stated :

On the night of March 22, 1991, one Anthony Fernandes, Chief Reporter of the 'Herald', an English daily published from Panaji, was physically assaulted by some persons at the Horse shoe Bar, Rua de Orem, Panaji. A complaint of the said incident was lodged at Police Station, Panaji by one Norman Daatas wherein it was stated that some unknown persons numbering 4 or 5, had assaulted

Anthony Fernandes with swords, iron rods, etc., with an attempt to commit murder. During the course of the investigation by the Police in that case, it appears that the assault is having a nexus with the organisation, Goa Protectors, of which the detenu is the President and that from the investigation now under way by the police and the news reports, it appears that the detenu is using the organisation for promoting illegal activities like gambling, assault, intimidation etc. and it appears that the assault on Anthony Fernandes was carried out at the behest of the detenu and his mother, the petitioner herein. The reason for the assault on Anthony Fernandes is the news item carried by the newspaper 'Herald' on March 17, 1991 about the Goa Protectors starting the illegal matka business in Goa on the lines of what is called the Bombay Matka and that when this item was published, the detenu sent Mr. Sanjeev Nalk and Mr. Shekar Naik, both members of Goa Protectors, to the house of Anthony Fernandes and threatened him to issue a clarification on the matka business in the paper and accordingly a clarification was issued by the Herald on March 18, 1991. Threats were also given over telephone on March 27, 1991 to the Proprietor of Gomantak Pvt. Ltd., which publishes both the English 'Gomantak Times' and Marathi 'Gomantak' and that the said threats which were given in Konkani were to the effect that these papers were writing against the Goa Protectors and like the 'Herald' reporter, the legs of the reporters of these papers would be broken and that on account of these threats, the publisher and manager of Gomantak Pvt. Ltd. has had to seek police protection as he apprehended that members of the Goa Protectors might attack him and other staff or their property. From the above it appears that the detenu is trying to resort to organised violence, assaults, intimidation to thwart the process of investigation into the illegal activities of matka business carried out allegedly by the organisation headed by the detenu in a premeditated manner. From these incidents, it appears that the detenu is getting involved in lots of serious crimes like organising matka and threatening the very existence of free press which is vital for a democratic society. The activities of the detenu taken together definitely lead one to the conclusion that his being at large in the present circumstances and in the immediate future would not only hamper proper investigation into the serious allegations and free functioning of the press but also disturb the even tempo of public life as a consequence thereof and that unless he is detained there is every likelihood of public order being affected adversely.

5. In the grounds of detention reference has been made to the past history as deduced from the report of the Superintendent of Police, North Goa District. It is stated that five cases, registered in the year 1986, are pending in which the detenu has been charge-sheeted for offences pertaining to Sections 143, 147, 149, 305, 427, 436, 447 and 457, IPC and that these cases relate to crimes of serious nature. Reference has also been made to three other cases bearing Cr. No. 332/88, Cr. No. 333/88 and Cr. No. 10/90 of years 1988 and 1990.

6. In this context, it may be mentioned that earlier the detenu had been preventively detained under order of detention dated December 4, 1986. The said order was challenged by the brother of the detenu by filing criminal writ petition No. 3 / 87 in the High Court of Bombay at Panaji, Goa. During the pendency of the said writ petition, the order of detention was revoked and the detenu was released and thereupon the said writ petition was dismissed as withdrawn on March 11, 1987.

7. Shri Ram Jethmalani, learned counsel appearing for the petitioner in both the matters, has urged that the grounds of detention served on the detenu refer to incidents against individuals which only involve breach of law and order and that the said incidents would not constitute breach of public order and that in passing the impugned order of detention with a view to preventing the detenu from acting in any manner prejudicial to the maintenance of public order, the detaining authority has ignored the well-defined distinction between 'law and order' and 'public order' and that the impugned order of detention is liable to be quashed on the ground of non-application of mind by the

detaining authority.

8. The distinction between 'law and order' and 'public order' has been explained by this Court time and again. It has been pointed out that while the expression 'law and order' is wider in scope inasmuch as contravention of law always affects order, while 'public order' has a narrower ambit and public order would be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specified locality. The distinction between the areas of 'law and order' and 'public order' 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 life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it could raise the problem of law and order only. 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'. The question to ask is : Does it lead to disturbance of the current 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 its facts. (See : *Dr. Ram Manohar Lohia v. State of Bihar*, (1966) 1 SCR 709 : (AIR 1966 SC 740); *Arun Ghosh v. State of West Bengal*, (1970) 3 SCR 288: (AIR 1970 SC 1228); *Ram Ranjan Chatterjee v. State of West Bengal*, (1975) 3 SCR 301: (AIR 1975 SC 609); *Ashok Kumar v. Delhi Administration*, (1982) 2 SCC 403: (AIR 1982 SC 1143)).

9. If the facts of the instant case are examined in the light of these tests it would appear that according to the grounds of detention there was an incident of assault on the night of March 22, 1991 on one Anthony Fernandes, Chief Reporter of 'Herald', an English daily published from Panaji by some persons in a restaurant at Panaji. The said incident was preceded by publication of a news item in 'Herald' on March 17, 1991 about Goa Protectors starting the illegal matka business in Goa and the detenu having sent two members of Goa Protectors, Sanjeev Naik and Shekar Naik, to the house of Anthony Fernandes who threatened the latter to issue a clarification on the matka business. It is claimed that the assault on Anthony Fernandes has a nexus with Goa Protectors, of which the detenu was the President and the said assault was carried out at the behest of the detenu. The only material that is referred to in the grounds of detention in this regard is the statement of Shekar Naik recorded on March 24, 1991. The statement of Shekar Naik dated March 24, 1991, (Annexure K to the Writ Petition No.1321/91) does not indicate that the detenu had sent Sanjeev Naik and Shekar Naik with a view to extend any threat to Anthony Fernandes. In his statement, Shekar Naik has stated :

"On 17-3-1991 in the morning, I had come to the house of Shri Rudolf Fernandes for a meeting and read the paper 'Herald' and this news item regarding matka by Protectors in the said paper was discussed in the meeting. Advocate Shri Guru Shirodkar was also there. During the meeting we all decided to give clarification to the paper that Goa Protector is not involved in the matka and Rudolf told me to go to Antony with Sanjeev Naik who knows Antony Fernandes very well. At about 15.10 hrs. both of us went to the house of Shri Antony Fernandes. He came out. Sanjeev Naik introduced me to Antony. We told Mr. Antony Fernandes that we Goa Protectors are not organising any matka and some Bombay boy by name Edwin who is not in our organisation has decided to start. Antony Fernandes told me that he found some Protectors boys were meeting in Panaji City and people were saying that Goa Protectors have started matka and that Antony Fernandes was awaiting for

Sanjeev Naik for the clarification whether they have already started matka and since the views had to appear in the paper, he published it on Sunday i.e. 17-3-1991 and he requested us to clarification and assured us that he would give clarification that matka is not organised by Goa Protectors etc. That he will give clarification in the papers and both of us came to Panaji....."

This would show that the detenu had sent these persons only with a view to give clarification that Goa Protectors was not involved in the matka business and as a result of their visit Anthony Fernandes had agreed to give a clarification and such a clarification was published in the 'Herald' on March 18, 1991. In other words, the statement of Shekar Naik dated March 24, 1991 does not indicate that the detenu had sent Sanjeev Naik and Shekar Naik to Anthon Fernandes with a view to threaten him.

10. The only other incident mentioned in the grounds of detention is about the threat given on telephone on March 27, 1991 to the Proprietor of Gomantak Pvt. Ltd. and the publisher and manager of Gomantak Pvt. Ltd. having sought police protection in view of the said threat. In the grounds of detention it is not mentioned that the said threat was extended by the detenu or by any person at his behest. Moreover, the solitary incident of assault on Anthony Fernandes on March 22, 1991 and the two incidents of extending threats to journalists on March 17, 1991 and March 27, 1991 are incidents involving particular individuals. It cannot be said that the said incidents were of such a magnitude and intensity as to have the potentiality disturbing the even tempo of communit to amount to acts prejudicial to the maintenance of public order.

11. The learned Additional Solicitor General has submitted that apart from the three incidents referred to above in the grounds of detention, there is also reference to five cases which were registered in the year 1986 in which the detenu has been chargesheeted for offences pertaining to Sections 143, 147, 149, 305, 427, 436, 447 and 457, I.P.C. and which are still pending, and three cases pertaining to the years 1988 and 1990. He has submitted that the incident of assault on Anthony Fernandes on March 22, 1991 and the two incidents of threats extended to journalists on March 17, 1991 and March 27, 1991 have to be considered in the light of the above-mentioned cases to which a reference has been made in the grounds of detention. As regards the incidents of 1986, it may be mentioned that earlier an order for detention of the detenu was passed on December 4, 1986 which covered the said incidents and the said order was revoked and the detenu was released. Moreover the aforesaid incidents of 1986, 1988 and 1990 have been mentioned in Annexure 'B' with the report of the Superintendent of Police dated April, 1, 1991 annexed to the grounds of detention. In the counteraffidavit of Shri A. Venkataratnam, District Magistrate and Collector of North Goa District, filed on behalf of the respondents in Writ Petition No. 1321/91 in this Court, it has been stated that Annexure 'B' to the Police Report was not the basis for issuing the order of detention and the same was not considered. This would indicate that the incidents other than the three incidents of 1991 mentioned in the grounds of detention were not taken into consideration by the detaining authority for arriving at the requisite satisfaction with regard to the detention of the detenu and the incidents of 1986, 1988 and 1990 to which a reference has been made in Annexure 'B' to the Report of the Superintendent of Police were not taken into consideration while passing the impugned order of detention. It is no doubt true that Shri A. Venkataratnam, who has filed the aforesaid counter-affidavit in this Court, was not the person who passed the order of detention dated April 6, 1991 and normally such affidavit should have been filed by the person who had actually passed the order of detention. But, as pointed out by this Court in Shaik Hanif v. State of West Bengal, (1974) 3 SCR 258 : (AIR 1974 SC 679), the absence of the affidavit of the person who passed the order of detention would not be of much consequence except

in cases where mala fides or extraneous considerations are attributed to the District Magistrate or the detaining authority. Since the instant case does not fall in the category of such cases, the counter-affidavit of Shri A. Venkataratnam can, therefore, be taken into consideration. Moreover, we find that the High Court has also dealt with this question and in the return that was filed on behalf of the detaining authority at one place it was stated that the authority had considered the entirety of the material placed before him which included the reports of the Superintendent but at a later stage it was stated that the detaining authority has eschewed some materials. The High Court has held :

"..... An harmonious reading is essential whether it be in relation to a document or in respect of pleadings. So read, the assertion of the authority about its not having reckoned some of the materials have only to be accepted."

12. In the circumstances, we are unable to accept the contention of the learned Additional Solicitor General that the incidents of 1986, 1988 and 1990 should be considered along with the incidents referred to in the grounds of detention, viz. the incident of assault on Anthony Fernandes on March 22, 1991 and the two incidents of threats said to have been extended to Anthony Fernandes on March 17, 1991 and to the publisher of Gomantak Pvt. Ltd. on March 27, 1991. The satisfaction of the detaining authority has to be considered only in the light of these three incidents. We have already dealt with these three incidents and are of the view that the said incidents cannot be considered to be of such a magnitude and intensity as to be considered as having the potentiality to disturb the even tempo of life of the community and thereby constitute acts prejudicial to the maintenance of public order. In the circumstances, we are unable to agree with the High Court that the activities referred to above were of such a nature as to endanger maintenance of public order. In our view the Detaining authority in passing the order dated April 6, 1991 for detention of detenu has misconceived the scope of the power conferred by Section 3(2) of the Act and as a result the requisite satisfaction for exercise of power by the detaining authority is vitiated. The impugned order of detention of the detenu cannot, therefore, be upheld and must be set aside.

13. In the result, the appeal is allowed, the judgment of the High Court of Bombay at Panaji Goa, dated September 20, 1991 in writ Petition No. 9/ 91 is set aside and the said writ petition is allowed and it is directed that the detenu, Rudolf Fernandes be set at liberty forthwith. In view of the order passed in the appeal, it is not necessary to give any further direction in Writ Petition (Cri.) No. 1321/91 and the same will stand disposed of accordingly.

Appeal allowed.

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