**ORISSA HIGH COURT**

Shyamaghana Ray

Vs

State (Orissa)

Criminal Misc. Cases Nos. 195, 196, 200, 202 and 207 of 1951

(Das, C.J. and Panigrahi, J.)

26.02.1952

**JUDGMENT**

**Das, C.J.**

1. These are applications for the issue of writs of 'habeas corpus.' Criminal Misc. Nos. 195 and 202 relate to one Govinda Pradhan and challenge the validity of an order of detention against him dated 13.12.1951. Criminal Misc. Nos. 196, 200 and 204 relate to one Ramachandra Mishra and challenge the validity of an order of detention against him dated 15th December, 1951. Criminal Misc. No. 207/51 relates to one Harihara Das and challenges the validity of an order of detention against him dated 13th December, 1951.

2. These three persons have been released by the Court on bail pending the final hearing of these applications for the special reasons stated in the respective orders granting bail. The validity of the orders of detention is challenged mainly on the ground that they are orders passed by an official having absolutely no legal authority to pass any such order, and are therefore illegal.

3. In the petition relating to Govinda Pradhan, an affidavit, was filed on 20-12-51 by one Banamall Jena stating that on 13-12-51, when the detention order against this detenu was passed, the Hon'ble the Chief Minister, who according to his information, had to deal with detention was absent from Cuttack, and was present at Jharsuguda and that therefore the detention order could not have been passed by the Chief Minister. In the petition relating to Ramachandra Mishra, an affidavit was filed by his wife, Sabtri Mishra, that to her knowledge and information, the papers were not placed before the Hon'ble the Chief Minister who was the Minister in charge of detention and that the order of detention against this detenu dated 15-12-51 was not passed by him and it was consequently illegal. In the application relating to Harihara Das, the petitioner himself states in his petition that the Hon'ble the Chief Minister was absent from Cuttack and was at Jharsuguda on the 13th December when the detention order against him was passed. This is also in accordance with the affidavit in the application relating to Govinda Pradhan. Thus, the main ground on which the validity of the respective orders of detention are challenged is that the orders of detention though they purport to be on their face, the orders of the Provincial Government have not been passed by the responsible authority concerned, who has the legal

authority to act for the Provincial Government. These applications which were filed in the month of December 1951, i. e., more than two months ago were adjourned from time to time at the request of both parties on account of exigencies of elections and with a view to enable the Government to ascertain the correct facts and place the same before the Court. When these applications came up before us on 18-2-52, the learned Advocate-General appearing for the Government stated to us that he was prepared to accept the position that the concerned Minister may not himself have passed these orders; but that he would advance an argument, as a matter of law, that the same would be valid, even if passed by a Secretary to the Government. We declined to hear such hypothetical argument without the necessary facts, and without there being anything before us to show that even a responsible Secretary to the Government passed the orders in question. We accordingly directed the Advocate-General to file a statement showing who actually passed the orders now under challenge. That statement has now been filed in the form of a letter addressed by Sri K. Ramamurti, I. A. S., Under-Secretary to Government, Home Department, to the Registrar, High Court, Cuttack, of date 20th February 1952. It is as follows :

"Sir,

With reference to the High Court's order No. 5, dated the 18th February, 1952, in Criminal Misc. Nos. 195, 196, 200, 202, 204 and 207 relating to Govinda Pradhan, Ramachandra Mishra and Harihar Das, I am directed to state that the Secretary of the Home Department, Government of Orissa, Sri S. N. Mohapatra, I. A. S. actually passed the detention orders which have been challenged in these cases. The joint Secretary to Home Department authenticated the issue of these orders." The question, therefore, that arises for consideration is whether these orders passed by the Home Secretary and not by the Hon'ble Chief Minister, are valid, and legal. All these orders purport to have been passed under Section 3 of the Preventive Detention Act of 1950, as subsequently amended and read with Section 4 thereof. What is required under Section 3, for the validity of an order of detention is the satisfaction of the 'State Government'. The General Clauses Act (Central) as adapted under the Adaptation Laws Order of 1950, shows that the "State Government" means "The State Governor". Further, sub-article (1) of Article 166 of the Constitution shows that all executive action of the Government of a State, shall be expressed to be taken in the name of the Governor. The argument, on behalf of the Government, based on sub-article (2) of Article 166 of the Constitution, has been dealt with and overruled in the earlier stages of the hearing on these applications by the Court's order dated 20th December 1951 and it is unnecessary to deal with it again at any length. What the sub-article (2), of Article 166 of the Constitution prevents is the challenge to the validity of properly authenticated order on the ground that it is not an order or instrument made or executed by the Governor; but that does not prevent a challenge to the validity of the said order on the ground that such an order was not based on the satisfaction of the appropriate authority, who under the law, can legally act for the Provincial Government. Indeed, as pointed out by this Court in its previous order, this point is unarguable in the light of the decision of the Privy Council in '*Emperor v. Shibnath Banerji*'[1], which was a decision, with reference to Section 59 of the Government of India Act, 1935, corresponding, word for word to Article 166 (2) of the Constitution.

4. The main question raised however by the learned Advocate-General, at the present hearing, is that under the Rules of Business of the Governments, the Home Secretary was entitled to pass the orders in question. He relies on sub-art. (3) of Article 166 of the Constitution which is as

follows :

> "The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the application among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

A copy of the Rules of Business has been placed in our hands by the learned Advocate-General. The schedule to the rules show that the Preventive Detention of persons falls within the purview of the Home Department. Though no notification of the Government showing which Minister is in charge of Home Department, is placed before us, it is admitted on both sides that this portfolio was at the relevant dates, in charge of the Hon'ble the Chief Minister. Rules 5 and 8 of the Rules of Business are important. 'Rule 5 is as follows:

> "The Council (the Council of Ministers) shall be collectively responsible for all executive orders issued in the name of the Governor in accordance with these Rules whether such orders are authorized by an individual Minister on a matter appertaining to his portfolio or as the result of discussion at a meeting of the Council."

and Rule 8 says as follows :

> "Without prejudice to the provision of Rule 5, the Minister in charge of a Department or a branch or branches thereof shall be primarily responsible for the disposal of business appertaining to that Department or branch."

The orders in question, though issued in the name of the Governor would be perfectly all right, b. virtue of Article 166 (1) of the Constitution : (See also Rule 11 of these rules) with reference to Rules 5 and 8 quoted above, if they had been passed by the Hon'ble the Chief Minister. Reliance is however placed by the learned Advocate-General on a Rule 2 in I of the Subsidiary Rules of Business, issued under Rule 14 of the main Rules of Business. The said Rule 2 is as follows :

> "Subject to the provisions of Rules 6, 8 and 14 below, cases shall ordinarily be disposed of by, or under the authority of, the Minister-in-charge, who may give such directions as he thinks fit for the disposal of cases by the Secretary."

The contention strongly urged by the learned Advocate-General is that this subsidiary rule, validates the order passed by the Home Secretary in this case and that the authority of the Minister-in-charge to the Home Secretary to deal with these cases is to be presumed in accordance with the ordinary presumption that all official acts are to be taken to have been regularly performed, vide Section 114, illustration (E) of the Evidence Act. The presumption, however, is one that "may" be drawn by a Court. In a matter so fundamental and important as the liberty of a subject, which can be deprived of only by strict compliance with the statutory requirements of Section 3 of the Preventive Detention Act, we are not prepared to uphold the validity of the orders in question by reliance on any such presumption. We specifically put it to

the Advocate-General, whether he was in a position to substantiate that the Home Secretary had the requisite authority either generally, or directed to these specific cases and we were prepared to consider if necessary, a request for short time for production of any such material, if available. But the learned Advocate-General frankly pleaded his inability. It must, therefore be taken as a fact, that the Home Secretary had no such authority which would enable him to pass the orders now under challenge in purported reliance on Rule 2 of subsdiary rules of business.

5. There is also another difficulty in the reliance on Rule 2 of the Subsidiary Rules. This rule is, in terms, subject to the provisions of Rules 6, 8 and 14 below. Clause (iii)of Sub-rule (b) of Rule 8 below taken with the said (b) indicates that all cases which affect or are likely to affect the peace and transquillity of the States have to be submitted to the Governor and the Chief Minister, presumably, before the issue of the orders. If, as we are 'prima facie' inclined to think the orders of preventive detention fall under C. (iii) of Sub-rule (b) of Rule 8 of the Subsidiary Rules, it would follow that even though the Secretary deals with such cases, they have to be submitted to the Chief Minister and Governor, and since there is no proof of the same, the orders are invalid.

6. There is, however, a much more fundamental and important objection than the above, to the validity of the orders. As already stated, the validity of the orders of detention passed under Section 3 of the Preventive Detention Act, depends on the satisfaction of the Provincial Govenment, and of no other. Having regard to Article 168, Sub-art. (3) of the Constitution and Rule 8 of the main Rules of Business made by the Governor, in exercise of the powers conferred by Clause (3) of Article 166 of the Constitution, the satisfaction of the concerned Minister, i.e., the Chief Minister in the present case, must be taken to be the satisfaction of the Provincial Government, but there is no legal provision at all for the delegation of that responsibility from the Chief Minister to the Home Secretary. We cannot treat Rule (2) of the Subsidiary Rules as authorising or validating any such delegation of responsibility. The Subsidiary Rules have been made by virtue of Rule 14 of the main Rules of Business and are meant to be merely supplementary. They cannot be effective to authorize the delegation of a statutory responsibility. Besides, Sub-article (3) of Article 166 of the Constitution, makes it clear that the allocation of the business of the Government is to be amongst the Ministers of the Government. A Secretary cannot be allocated any such business, at any rate, no such business which involves a statutory responsibility, though by virtue of rules made for the more convenient transaction of the business he can form an intermediate link. We have not, therefore, the slightest hesitation, in repelling the contention of the learned Advocate-General that the Home Secretary had the implied authority to pass the detention order and that his satisfaction must be taken to be the satisfaction of the Provincial Government which is the pre-requisite for a valid order of detention under Section 3 of the Preventive Detention Act.
Indeed, we would not have treated any such argument seriously, but for the fact that the same has been strenuously put forward by so responsible a person as the Advocate-General of the State. We accordingly hold that the orders of detention dated 13th, 15th and 13th December 1951, respectively against Govind Pradhan, Ramchandra Mishra and Harihar Das, are illegal and invalid. They are hereby quashed. We direct, that their bail-bonds shall stand cancelled, and that the petitioners be set at liberty forthwith.

7. What has been brought to the notice of the Court on these applications, discloses a somewhat extraordinary state of affairs. We have no idea whether the phenomenon of the orders of detention having been passed by the Home Secretary on his satisfacion, is one, confined to these

three cases, or whether there has been either a general practice relating to such matters of the Home Secretary disposing of such cases in the absence of concerned Minister from the Headquarters. What has been done in these three cases is all the more a matter for very serious concern inasmuch as all the three orders are open to the obvious imputation of 'mala fides' in the context of elections then pending. What we are anxiously concerned with, is the likelihood of the existence of an illegal practice, i.e., that of departmental secretary of the Government taking upon himself the functions of a responsible Minister in such matters impairing the foundations of a constitutional democracy.

8. As regards the order of detention dated 13.12.1951, against Govinda Pradhan, we find that that order has been passed in the following circumstances : There was a prior application on behalf of this petitioner in this Court in Criminal Misc. 189/51, by which the order of detention against him dated 27th November 1951, passed by the District (Sic Magistrate?) Ganjam, was challenged in this Court. That application was heard by a special Bench and orders were pronounced on 13.12.1951, rejecting the said application. At the time, when the judgment was delivered, a press report relating to the judgment of the Supreme Court in *'Makhan Singh v. State of Punjab*[2]', by then recently delivered, and since reported in '1951 SCJ 835', was brought to our notice as likely to have a bearing on the legality of the order of detention then under challenge. We were accordingly asked to await receipt of the official copy of that judgment of the Supreme Court. But we thought that in view of the fact that the detenu was a candidate for the elections, we could not hold up the pronouncement of the judgment. We added that on receipt of the judgment of the Supreme Court, the petitioner was at liberty to file a fresh application if he found any support for his contention therein. As a matter of fact, the Court received pronouncement of the order dismissing Criminal Miscellaneous 189/51. Thereupon, the Court sent for the Advocates on both sides and informed them in open Court that the copy of the Supreme Court judgment was since received and passed it on to the Advocate concerned on both sides for their perusal.
Criminal Miscellaneous No. 195/51, was consequently filed that very same day on behalf of the petitioner Govind Pradhan, and notice was forthwith given thereof to the Advocate-General (or Government Advocate) in Court and the petition was adjourned to the next day for final hearing. On the 14th when the petition came up for hearing, it
was stated on behalf of the Government that the impugned order of the District Magistrate, Ganjam, had since been revoked and that a fresh order was passed by the Home Department, dated 13th December 1951, and a short adjournment was asked for on behalf of the Government. Criminal Miscellaneous No. 195/51, was accordingly adjourned for further hearing to 17th December. On the 17th December, a copy of the fresh grounds of detention was handed over to Counsel for the petitioner in Court and thereupon, another application, Criminal Miscellaneous No. 202/51, was filed on behalf of the petitioner, Govind Pradhan, challenging the legality of the order of detention dated 13.12.1951, on revocation of the order of detention of the District Magistrate, dated 27.11.1951. The order-sheet shows that both these applications were adjourned to the next day that is, to 18.12.1951, and orders were passed thereon on 20.12.1951, releasing the petitioner. Govind Pradhan, on ball and adjourning the further hearing of the petitioners till after the 15th January 1952. Thus, it would appear on the above facts, that the present patently illegal order of detention, dated 13.12.1951, against Govind Pradhan, was passed during the pendency of Criminal Miscellaneous No. 195/51 and in anticipation of the orders of the Court on that petition. The question as to whether or not such a patently illegal order passed, when the validity of prior order of detention was pending in Court, constitutes contempt of this Court,

requires careful consideration. Without, therefore, expressing any opinion thereupon, we feel, we ought to issue notice, to the Home Secretary, Sri Somenath Mohapatra, I.A.S., to show cause why he should not be committed for contempt of Court.

9. Notice, returnable within three days, will accordingly issue and the motion for contempt will be posted for further orders on 3rd March 1952.

**Panigrahi, J.**

10. I agree.

Orders quashed.

Cases Referred.

[1] AIR 1945 PC 156
[2]'Petition No. 308 Of 1951