

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

Writ Petition No.37144 of 2015

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ORDER:

The proceedings under challenge in this writ petition are the detention order passed by the Commissioner of Police, Hyderabad in proceedings dated 11.06.2015, detaining the detenu, by name Kalu Singh, as confirmed by the Government in G.O.Rt.No.2336 dated 24.08.2015. The detenu was involved in five crimes which are as under:

- a. Crime No.35 of 2013 dated 06.02.2013 of Mangalhat Police Station under Section 20(b) of NDPS Act;
- b. Crime No.2241 of 2013-14 dated 25.02.2014 of Excise Station, Dhoolpet, Hyderabad registered under Section 8(c) read with Section 20(b) of NDPS Act;
- c. Crime No.592 of 2014-15 dated 28.06.2014 of Excise Station, Dhoolpet, Hyderabad registered under Section 8 (c) read with Section 20(b) of NDPS Act;
- d. Crime No.1763 of 2014-15 dated 21.11.2014 of Excise Station, Dhoolpet, Hyderabad registered under Section 8(c) read with Section 20(b) of NDPS Act; and
- e. Crime No.56 of 2015 dated 27.02.2015 of Central Crime Station, Hyderabad registered under Section 20(b) of Anti NDPS Act.

While he was convicted for the offence in Crime No.35 of 2013, the appeal preferred thereagainst is said to be still pending. In Crime No.2241 of 2014-15, the detenu was granted conditional bail on 10.03.2014. Subsequently for the offences, in Crime Nos.592 of 2014-15, 1763 of 2014-15 and 56 of 2015, the detenu was arrested and remanded to judicial custody. He was in judicial custody when the order of detention

was passed.

Sri A.Prabhakar Rao, learned counsel for the petitioner, would submit that the satisfaction recorded by the detaining authority, of the genuine possibility of the detenu being released on bail, is not based on any material on record; the detenu did not even submit a bail application; and, in such circumstances, the order of the detaining authority, recording his satisfaction based on non-existent material, is vitiated and necessitates being set aside. Learned counsel would place reliance on **Rekha v. State of Tamilnadu**. He would also submit that the order and grounds of detention were supplied to the detenu in English and Hindi, whereas the material enclosed along with the grounds of detention were furnished to him in English and Telugu; and, as the detenu is not conversant with English or Telugu language, he was denied his right to submit an effective representation against his continued detention.

On the other hand, the learned Government Pleader for Home would submit that reliance placed by the petitioner, on the judgment of the Supreme Court in **Rekha**¹, is misplaced; the said judgment was subsequently considered and distinguished by the Supreme Court in **D.M.Nagaraja v. Government of Karnataka**; and the very fact that the detenu was released on bail, within 15 days of his arrest in Crime No.236 of 2014, would necessitate an inference that the satisfaction of detaining authority, of the genuine possibility of the detenu being released on bail, was based on the material on record. He would also rely on **T.P.Moideen Koya v. Govt. of Kerala**, **Huidrom Konungjao Singh v. State of Manipur** and **N.Meera Rani v. Government of Tamil Nadu**.

In the grounds of detention dated 11.06.2015, the detaining authority observed as under:

"I am aware that you were remanded to judicial custody on 30.05.2015 in Cr.No.56/2015 of CCS PS, Hyderabad and you are still in custody in Cr.Nos. 1) 592/2014-15 2) 1763/2014-15 of Dhoolpet Prohibition & Excise PS and 3) 56/2015 of CCS PS, Hyderabad, I believe that there is a genuine possibility of your release on bail and further on being released you would further indulge in the similar activities which are prejudicial to maintenance of public order."

Neither the order, nor the grounds of detention, make any reference to any material

based on which the detaining authority was of the opinion that there was a genuine possibility of the detenu being released on bail more so, as is now contended before us by Sri A.Prabhakar Rao, learned counsel for the petitioner, that the detenu had not even filed an application seeking bail nor were the other accused in the said three cases released on bail.

Before an authority can legitimately come to the conclusion that the detention of a person is necessary, to prevent him from acting in a prejudicial manner, the authority must be satisfied that, if the person is not detained, he would act in a prejudicial manner, and that inevitably postulates freedom of action to the said person at the relevant time. If a person is already in jail, it cannot be rationally postulated that, if he is not detained, he would act in a prejudicial manner? At the point of time, when an order of detention is to be served on a person, it must be patent that the said person would act prejudicially if he is not detained, and that is a consideration which would be absent when the authority is dealing with a person already in detention. The satisfaction that it is necessary to detain a person, for the purpose of preventing him from acting in a prejudicial manner, is the basis of the order of detention. **(Rameshwar Shaw v. District Magistrate, Burdwan; Jotha Viswanadh v. Chief Secretary, Govt. of A.P.)**. As preventive detention is intended to prevent a detenu from acting in any manner prejudicial to public order, ordinarily it need not be resorted to if the detenu is in custody unless the detaining authority has reason to believe that the subsisting custody of the detenu may soon terminate on his being released on bail and, having regard to his recent antecedents, he is likely to indulge in similar prejudicial activities, unless he is prevented from doing so by an appropriate order of preventive detention. **(N. Meera Rani⁵; Kamarunnissa v. Union of India)**.

In case the detenu is already in custody, the detaining authority should apply his mind and show his awareness in this regard in the grounds of detention. The necessity of keeping such person under preventive detention should be clearly indicated. **(Union of India v. Paul Manickam; Yumman Ongbi Lembi Leima v. State of Manipur)**. The detaining authority must be aware, when he is passing the order of detention, that the detenu is in custody, and that cogent and relevant material disclose the necessity for making an order of detention. **(Binod Singh v. District Magistrate, Dhanbad; Ramesh Yadav v. District Magistrate, Etah; Vijay Narain Singh v. State of Bihar; Dharmendra Suganchand Chelawat v. Union of**

India; Kamarunnissa⁸; Abdul Razak Abdul Wahab Sheikh v. S.N. Sinha, Commr. of Police).

Where the concerned person is in jail, at the time when an order of detention is passed against him and he is not likely to be released for a fair length of time, it may be possible to contend that there can be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise public order (**Haradhan Saha v. State of West Bengal; The Secretary to Government v. Nabila**), and the power of preventive detention should not be exercised. If there is no indication that the factum, of the order of detention having been served upon the detenu when he was in jail or the detenu might be released or there is a possibility of his release, was taken into consideration by the detaining authority properly and seriously before service of the order, the detention order is rendered invalid. (**Binod Singh¹¹; Meena Jayendra Thakur v. Union of India**).

The detaining authority must be reasonably satisfied, with cogent material, that there is a likelihood of the detenu's release; and, in view of his antecedent activities which are proximate in point of time, he must be detained in order to prevent him from indulging in such prejudicial activities. (**Paul Manickam⁹; Yumman Ongbi Lembi Leima¹⁰**). Where the detention order, in respect of a person already in custody, does not indicate that the detenu was likely to be released on bail, the order would be vitiated. (**Paul Manickam⁹**). If the grounds of detention do not show awareness of this fact, the detention order would suffer from non-application of mind. (**M. Ahamedkutty v. Union of India**).

Where the grounds of detention merely speak of the "possibility" of the detenu's release in case he moves a bail petition, and does not state that such release is likely or that it is imminent, and there is no material before the detaining authority upon which he was satisfied that the petitioner was likely to be released or that such release was imminent, the detention order is liable to be quashed. (**Rivadeneyta Ricardo Agustin v. Govt. of the NCT of Delhi; Kamarunnissa⁸**). Exercise of the extra-ordinary power of detaining an individual, in contravention of the provisions of Article 22(2) of the Constitution, is not warranted where the grounds of detention do not disclose existence of any material before the detaining authority to support his conclusion that there was every likelihood of the detenu being

released on bail in connection with the cases in respect of which he had been arrested. The power, vested with the detaining authority, should be invoked and implemented in a justifiable manner as a detention order is an exception to the provisions of Articles 21 and 22(2) of the Constitution. (**Yumman Ongbi Lembi Leima**¹⁰; **K. Nageswara Naidu v. Collector & District Magistrate**).

Let us now take note of the judgments of the Supreme Court on which reliance is placed by the Learned Counsel on either side. In **Rekha**¹, the grounds of detention recorded that the sponsoring authority had stated that the relatives of the detenu were taking action to take him out on bail, in the case, by filing bail applications before the higher court; since in similar cases bails were granted by Courts after a lapse of time, there was a real possibility of his coming out on bail; and, if he came out on bail, he would indulge in further activities which would be prejudicial to the maintenance of public health and order. It is in this context that the Supreme Court, in **Rekha**¹, held that if details were given by the detaining authority about the alleged bail orders in similar cases mentioning the date of the orders, the bail application number, whether the bail order was passed in respect of the co-accused in the same case, and whether the case of the co-accused was on the same footing as the case of the petitioner, it could then be argued that there was a likelihood of the accused being released on bail, because it is the normal practice of most courts that, if a co-accused has been granted bail and his case is on the same footing as that of the petitioner, the petitioner is ordinarily granted bail; the detaining authority should have given details about the alleged bail order in similar cases, which has not been done in the present case; a mere *ipse dixit* statement, in the grounds of detention, cannot sustain the detention order, and has to be ignored; the detention order, in question, only contains the *ipse dixit* regarding the alleged imminent possibility of the accused coming out on bail; there was no reliable material to this effect; and, hence, the detention order could not be sustained.

In **N.Meera Rani**⁵, a three Judge Bench of the Supreme Court observed:

“.....We may summarise and reiterate the settled principle. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case; preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the

*maintenance of public order etc. ordinarily it is not, needed when the detenu is already in custody; the detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order; but, **even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made even in anticipation to operate on his release.** This appears to us, to be the correct legal position...” (emphasis supplied)*

The law declared by the Supreme Court, in **N.Meera Rani**⁵, is that if the detaining authority is reasonably satisfied, on cogent material, that there is a likelihood of the detenu's release and, in view of his antecedent activities which are proximate in point of time, he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made even in anticipation to operate on his release. The fact, however, remains that, in the case on hand, the grounds of detention do not disclose any material on the basis of which the detaining authority arrived at the satisfaction that there was a genuine possibility of the detenu being released on bail; and the conclusion that there was a genuine possibility of the detenu being released on bail was merely the ipse-dixit of the detaining authority.

In **Huidrom Konungjao Singh**⁴ the Supreme Court relied on its earlier judgment in **Rekha**¹, wherein it was held that there was a real possibility of a person being released on bail who is already in custody, provided he has moved a bail application which is pending; and if the co-accused, in the same offence, was enlarged on bail, on the same basis the detenu could also be enlarged on bail. Reliance placed on **Huidrom Konungjao Singh**⁴ is misplaced as, in the present case, it has not even been stated by the detaining authority that there was a co-accused, or that such a co-accused had already been enlarged on bail, resulting in the possibility of the detenu also being similarly released on bail.

In **T.P.Moideen Koya**³, a three Judge Bench of the Supreme Court, following its earlier judgments in **Binod Singh**¹¹ and **Rameshwar Shaw**⁶, held that if a person is in custody, and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised; and there must be cogent material before the authority, passing the detention order, for inferring that the detenu was likely to be released on bail. As noted herein-above, in the present

case, the detaining authority has not referred to any material based on which he arrived at the satisfaction that there was a genuine possibility of the detenu being released on bail.

It is no doubt true that the Supreme Court in **D.M.Nagaraja**² distinguished its earlier judgment in **Rekha**¹. The distinction, as is evident from the judgment itself, was with respect to the opinion expressed by the Supreme Court in **Rekha**¹ that normal recourse to ordinary law would be sufficient, and there was no need for invoking the special Act. After referring to the several criminal activities indulged in by the detenu, and to the details relating to the eleven cases mentioned in the grounds of detention, the Supreme Court, in **D.M. Nagaraja**², held that, in view of the enormous material which was available in the grounds of detention, and as such habituality had not been cited in **Rekha**¹, they were satisfied that the said decision was distinguishable on facts with reference to the case on hand.

In the present case, we are not concerned with the question whether normal recourse to ordinary law would suffice to prevent the detenu from indulging in activities prejudicial to the maintenance of public order, or whether there was a need to invoke the provisions of Act 1 of 1986 to prevent him from doing so. These are all matters within the realm of the subjective satisfaction of the detaining authority, and it would be wholly inappropriate for us, while exercising jurisdiction under Article 226 of the Constitution of India, to fault the detaining authority, in recording his satisfaction of the need to detain the detenu in preventive custody under Act 1 of 1986, on this score. What we are, however, concerned with, in the present case, is whether there was cogent material before the detaining authority for arriving at the satisfaction that there was a genuine possibility of the detenu being released on bail.

Reference by the learned Government to the earlier part of the order of detention, wherein the detaining authority had noted that the accused was arrested in Crime No.2241 of 2013-14, he was arrested on 25.02.2014, he was remanded to judicial custody, and he was subsequently released on bail on 10.03.2014, is of no avail. The mere fact that the detenu was released on bail earlier in connection with Crime No.2241 of 2013-14, would not automatically result in his being released on bail in Crime No.56 of 2015 also, more so when it is not in dispute that the detenu did not even file an application seeking bail.

The satisfaction of the detaining authority must be reflected in the order, and the grounds, of detention. It is not open to the detaining authority to subsequently justify how, or on what basis he had arrived at the subjective satisfaction, of the genuine possibility of the detenu being released on bail, either in the counter-affidavit filed before this Court or otherwise. The satisfaction recorded in the detention order must be based on cogent material on record before the detaining authority when he passed the order and the grounds of detention. It would be wholly inappropriate for us, therefore, to draw an inference, from the grounds of detention, that there was a genuine possibility of his being released on bail as that would require this Court to either sit in judgment over the subjective satisfaction of the detaining authority or to substitute its views for that of the detaining authority. Both these courses are impermissible in proceedings under Article 226 of the Constitution of India. Even otherwise, the attention of the two Judge Bench of the Supreme Court, in **D.M.Nagaraja**², was not drawn to the earlier three Judge Bench judgments of the Supreme Court in **N.Meera Rani**⁵ and **T.P.Moideen Koya**³ wherein the Supreme Court categorically held that there must be cogent material before the detaining authority for inferring that the detenu is likely to be released on bail.

Ordinarily a detention order should not be passed merely on the ground that the detenu was likely to be enlarged on bail. In such cases the proper course would be to oppose the bail application and, if granted, challenge the order in the higher forum, and not circumvent or supersede it by passing an order of detention (**Ramesh Yadav**¹²; **Kamarunnissa**⁸; **Suraj Pal Sahu v. State of Maharashtra**). An order of detention would be valid if the grounds of detention show that (i) the detaining authority is aware of the fact that the detenu is already in detention; and (ii) there are compelling reasons justifying such detention despite the fact that the detenu is already in custody. The expression “compelling reasons”, in the context of making an order for detention of a person already in custody, implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that, after his release from custody, he would indulge in prejudicial activities; and it is necessary to detain him in order to prevent him from engaging in such activities. (**Dharmendra Suganchand Chelawat**¹⁴). If the authority passes an order, after recording his satisfaction in this behalf, such an order cannot be struck down on

the ground that the proper course for the authority was to oppose the bail and, if bail is granted notwithstanding such opposition, to question it before a higher court. (**Kamarunnissa**⁸).

The mere possibility of the court granting bail is not sufficient, nor is a bald statement that the detenu would repeat his criminal activities enough, to pass an order of detention unless there is credible information and cogent reason apparent on the record that the detenu, if enlarged on bail, would act prejudicially. (**Shashi Aggarwal v. State of Uttar Pradesh; Kamarunnissa**⁸; **Anand Prakash v. State of Uttar Pradesh; Dharmendra Suganchand Chelawat**¹⁴). The words "likely to be released" connote chances of being bailed out, in case there be a pending bail application or in case, if it is moved in future, it is decided. The type of crime to be dealt with under the criminal law, the contents of the bail application, each separately or all of them composite, would constitute relevant material for arriving at a conclusion. (**Ahamed Nassar v. State of Tamil Nadu**).

The inference, of "imminent possibility" of the detenu coming out on bail, should be drawn from the material available on record. In the absence of such material on record, the mere ipse dixit of the detaining authority is not sufficient to sustain the order of detention. (**T.V. Saravanan v. State; A. Shanthi v. Govt. of T.N.**). Before passing a detention order, in respect of the person who is in jail, the concerned authority must reach the satisfaction on the basis of cogent material, that there is a real possibility of the detenu being released on bail and further, if released on bail, the material on record reveals that he will indulge in prejudicial activities necessitating his preventive detention. (**Binod Singh**¹¹; **Ramesh Yadav**¹²; **Kamarunnissa**⁸). The grounds of detention do not disclose either the basis or the material on which the detaining authority arrived at the satisfaction that the detenu was likely to be released on bail. The satisfaction of the detaining authority, on whether or not to detain a person in preventive custody, must be arrived at on the basis of material on record as on the date on which the detention order was passed, and cannot be justified by way of a counter-affidavit based on subsequent events.

There is a real possibility of a person being released on bail, who is already in custody, *provided he has moved a bail application which is pending*. It follows

logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. The exception to this rule is where a co-accused, whose case stands on the same footing, has been granted bail. In such cases, the detaining authority can reasonably conclude that there is a likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground. Details of such alleged similar cases must be given, and a bald statement of the detaining authority would not suffice. (**Rekha**¹). As the order and grounds of detention make no reference to any material, based on which the subjective satisfaction was arrived at that there was a genuine possibility of the detenu being released on bail, the order of detention is vitiated and is liable to be set aside.

As we are satisfied that the order of detention must be set aside on this ground alone, we see no reason to examine the other contention, urged on behalf of the petitioner, that the documents supplied to the detenu were in a language alien to him, more so, as the respondents have not had the benefit of filing a counter affidavit in reply to the additional affidavit filed before this Court wherein this ground has been urged for the first time.

The writ petition is allowed, the order of detention is quashed, and the detenu is set at liberty forthwith, provided he is not required to be kept in custody in connection with any other case/cases registered against him.

The miscellaneous petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.

RAMESH RANGANATHAN, J

M. SATYANARAYANA MURTHY, J

Date: 29.12.2015.

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THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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