

*THE HONOURABLE SRI JUSTICE C.V. NAGARJUNA REDDY
AND
THE HONOURABLE SRI JUSTICE G. SHYAM PRASAD

+Writ Petition Nos.42090 of 42092 of 2015

%13-07-2016

W.P. No.42090 of 2015
Girish Kumar Makhija ... Petitioner

Vs.

\$ The State of Telangana
Rep. by its Secretary
Home Department
Secretariat
Hyderabad
and another ... Respondents

! Counsel for the petitioner : Mr. Vedula Venkata Ramana
Senior Counsel,
For M/s. Bharadwaj Associates

^Counsel for the respondents : G.P. for Home (TS)

<GIST :

>HEAD NOTE :

? CITATIONS : 1. (2008) 9 SCC 89
2. (2011) 5 SCC 244
3. (1964) 4 SCR 921 : AIR 1964 SC 334
4. (1970) 1 SCC 98
5. (1982) 2 SCC 403
6. (1975) 3 SCC 198
7. (2012) 2 SCC 389
8. AIR 1966 SC 740 : 1966 SCR (1) 709
9. (1972) 1 SCC 498
10. (1970) 1 SCC 149
11. (1990) 2 SCC 456
12. AIR 1951 SC 157
13. (2003) 8 SCC 342
14. (2010) 9 SCC 618
15. (2012) 4 SCC 699
16. (1972) 2 SCC 550

17. (1973) 4 SCC 76
18. (1973) 1 SCC 301
19. (1974) 4 SCC 135
20. (2015) 12 SCC 127
21. (1986) 5 SCC 404
22. (2005) 10 SCC 97

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
AND

THE HON'BLE SRI JUSTICE G. SHYAM PRASAD

WRIT PETITION NOs.42090 AND 42092 OF 2015

DATED:13-07-2016

W.P. No.42090 of 2015

-
Between:

Girish Kumar Makhija ... Petitioner

And

The State of Telangana,
Rep. by its Secretary
Home Department
Secretariat, Hyderabad
and another ... Respondents

W.P. No.42092 of 2015

-
Between:

Jaspreet Kaur ... Petitioner

And

The State of Telangana,
Rep. by its Secretary
Home Department
Secretariat, Hyderabad
and another ... Respondents

COUNSEL FOR THE PETITIONERS: Mr. Vedula Venkata Ramana,

Senior Counsel,
for M/s. Bharadwaj Associates

COUNSEL FOR THE RESPONDENTS: G.P. for Home (TS)

-

COMMON JUDGMENT: *(per the Hon'ble Sri Justice C.V. Nagarjuna Reddy)*

These two writ petitions arise out of common set of facts. Hence, they are heard and being disposed of together.

W.P. No.42090 of 2015 is filed by one Girish Kumar Makhija, father of Mr. Puneet Mukhija (for short, 'detenu No.1'), and W.P. No.42092 of 2015 is filed by one Jaspreet Kaur, wife of Mr. Manish Tandon (for short, 'detenu No.2'). Both these writ petitions are filed for issue of *habeas corpus* for the release of the detenus after quashing separate but identical detention orders dt.17.12.2015 of the two detenus.

The facts

2. The detenus are residents of New Delhi. Detenu No.2 is allegedly the proprietor/promoter of Dial Easy Network Private Limited and M/s. Union Value Services Private Limited. Detenu No.1 is the Floor Manager of M/s. Dial Easy Network Private Limited. Cyber Crime Police Station, Hyderabad, has registered as many as five cheating cases, vide Crime No.303 of 2015, 306 of 2015 and 335 of 2015 for the offences under Section 66(C) and (D) of the Information and Technology Act, 2008 (for short, 'the IT Act'), and Sections 419 and 420 of the Indian Penal Code, and Crime Nos.184 of 2015 and 190 of 2015 for the offences under Sections 468, 471, 417, 419 and 420 of IPC and Section 66(C) and (D) of the IT Act. The allegations in these cases are almost common. It was alleged that the complainants have received frequent telephone calls from the tele-callers of M/s.

Union Value Services Private Limited, represented by detenu No.2 and his associates, stating that they will provide loan of Rs.10,00,000/- on low rate of interest and insisted them to take two insurance policies towards the sanctioned loan amount and to pay some amount towards processing fee, EMI charges, insurance charges etc., and believing their version, the complainants had taken insurance policies and they have made payments varying between Rs.1,20,000/- and 2,38,232/-, by way of money transfer to different account numbers provided by the staff of the detenus, that after encashing the amounts detenu No.2 and his associates changed the sim cards of their staff and thereby delinked them with the complainants. Thus, the grievance of the complainants is that the detenus have cheated them. Based on registration of the above mentioned crimes, respondent No.2 passed detention orders dt.17.12.2015 invoking the provisions of sub-section (2) of Section 3 of the Telangana Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug-offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 (for short, '1986 Act').

3. In the orders of detention, it is *inter alia* stated that the detenus have been indulging in cheating the innocent people on the pretext of providing personal loans, that therefore they fall within the definition of 'goonda' under clause (g) of Section 2 of the 1986 Act, that with a view to prevent the detenus from acting in a manner prejudicial to maintenance of public order, respondent No.2 is satisfied that the provisions of Act 1986 should be invoked to detain them and that the ordinary law under which they were booked is not sufficient to deal with the illegal activities of the detenus. The grounds of detention referred to Crime No.303 of 2015 registered on the complaint of one Mr. Syed Hussain, R/o.H.No.17-3-3/1/93, Azmath Nagar, Yakuthpura, Hyderabad; Crime No.306 of 2015 registered on the complaint of Mr. Nischal Narender Prasad, S/o. Rajender Prasad, R/o.5-9-884, Gunfoundry, Abids, Hyderabad; and Crime No.335 of 2015 registered on the complaint of Mr. S. Ramu, S/o. S. Balram, R/o.13-4-735/3, Jain Mandi Lane, Karwan, Hyderabad. It is also mentioned in the grounds

of detention that the detenus were arrested on 20.11.2015 in connection with Crime No.306 of 2015 of Cyber Crime Police Station, Hyderabad, and remanded to judicial custody, that they have filed separate petitions on 14.12.2015 before the XVI Metropolitan Magistrate, Cyberabad, at Kukatpally, in connection with Crime No.190 of 2015, that there was genuine possibility of release of the detenus and that on being released they may further indulge in the activities which are prejudicial to maintenance of public order. It was further alleged that the series of offences constitutes acts of goondaism committed by the detenus creating terror and fear in the minds of the general public and thereby they are disturbing public order and tranquillity in the area and that they have been causing a feeling of insecurity in the minds of the public on a regular basis, which are prejudicial to the maintenance of public order, adversely affecting the peace in the localities.

4. Separate counter affidavits have been filed by respondent No.2 wherein he has reiterated the contents of the detention orders and the grounds of detention. It is also mentioned that based on the nature of the activities indulged in by the detenus and the material collected during investigation, respondent No.2 has arrived at subjective satisfaction that the activities of the detenus disturbed public order and are creating a situation of panic and fear among the common public and that as held by the Courts the subjective satisfaction reached by the detaining authority is not justiciable and the Court cannot substitute its own opinion to that of the detaining authority.

5. Before proceeding further, it needs to be noted that the detention orders were approved by respondent No.1, vide G.O. Rt.No.3414, and G.O. Rt. No.3415, dt.28.12.2015 respectively, and during the pendency of the writ petitions, on the basis of the report of the Advisory Board, the detention orders were also confirmed by respondent No.1, vide G.O. Rt. No.596 and G.O. Rt. No.604, dt.9.3.2016 respectively. The petitioners have filed W.P.M.P. Nos.12517 of 2016 and 12562 of 2016

in the respective writ petitions seeking inclusion of the prayer in the main writ petitions, declaring the detention orders contained in the afore-mentioned G.O.s, directing the detenus to undergo preventive detention for a period of twelve months from the date of the detention orders passed by the Commissioner of Police, as arbitrary and illegal, and consequently to set the detenus free and direct their release from the prison forthwith. The said W.P.M.Ps were ordered by separate orders passed today.

Submissions

6. Mr. Vedula Venkata Ramana, learned Senior Counsel appearing for the detenus, argued that to sustain the impugned orders of detention, two essential conditions must be satisfied, namely (i) that one must be a 'goonda' within the definition of Section 2(g) of 1986 Act, and (ii) that the alleged acts of the detenus must be prejudicial to public order. He has further argued that as the respondents have failed to satisfy the said two conditions, in that, out of the five cases registered against the detenus three cases alone formed basis for the detention and that in the absence of material to show that the detenus are habitual offenders, solitary instances howsoever serious they may be cannot constitute valid ground for detention. The learned Senior Counsel further argued that respondent No.2 has not produced any material from which he could arrive at the satisfaction that the alleged activities of the detenu are creating large-scale fear and panic among public and adversely affecting the public order and that except the names of the three complainants, the names of the other alleged victims have not been placed before the Court to show that the activities of the detenus have crossed the proportions of law and order and assumed the magnitude of public order. The learned Senior Counsel further submitted that the distinction between 'law and order' and 'public order' is well-defined by the Apex Court and that unless the activities of the detenu disturbed the even tempo of public life, the detention order cannot be sustained in law. In support of his submissions, the learned Senior Counsel has placed reliance on *K.K.*

Saravana Babu v. State of Tamil Nadu^[1], and *Rekha v. State of Tamil*

Nadu^[2]. The learned Senior Counsel further submitted that the alleged confessional statements of the detenu which are self-inculpatory are inadmissible under Section 25 of the Indian Evidence Act and that when such statements cannot constitute basis for conviction of the accused in ordinary criminal law, on the same analogy they cannot be relied upon to justify preventive detention.

7. The learned Government Pleader for Home (TS) while opposing the above submissions submitted that the nature of the activities of the detenus not only attracts the definition of Section 2(g) of the 1986 Act, but also it disturbs the public order as opposed to law and order. He has further submitted that following registration of five criminal cases, an investigation team visited Delhi and recorded confessional statements of the detenus and also the statements of the some of the employees of the detenus under Section 161 of the Code of Criminal Procedure, 1973 (CrPC) and that from the identical complaints of the victims and the statements recorded during investigation, respondent No.2 has arrived at the satisfaction that the activities of the detenus disturbed public order and public peace. He has further argued that satisfaction under Section 3(2) of the Act 1986 is held to be subjective satisfaction and that the same is not justiciable in a Court of law. In support of his submissions, the learned Government Pleader placed reliance on the judgments in *Rameshwar Shaw v. District Magistrate, Burdwan*^[3], *Arun Ghosh v. State of West Bengal*^[4] and *Ashok Kumar v. Delhi Administration*^[5].

8. We have carefully considered the respective submissions of the learned counsel for the parties with reference to the material on record.

Relevant Statutory Provisions of the 1986 Act

9. The long title of the 1986 Act discloses the object and the purpose for which the same was enacted, namely, to provide for preventive detention of bootleggers, dacoits, drug-offenders, goondas,

immoral traffic offenders and land grabbers, for maintenance of the public order. Clause (a) of Section 2, which defines goonda, reads as under:

“ ‘Goonda’ means a person, who either by himself or as a member of or leader of a gang, habitually commits, or attempts to commit or abets the commission of offences punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Penal Code.”

Section 3 of the Act 1986 empowers the Government, the District Magistrate, or the Commissioner of Police to make an order of detention of any bootlegger, dacoit, drug-offender, goonda, immoral traffic offender or land-grabber, if they are satisfied that having regard to the circumstances prevailing or likely to prevail in any area within the local jurisdiction, that they are acting in any manner prejudicial to the public order.

Procedural Safeguards

10. Article 19 guarantees all citizens, of various kinds of freedom including freedom of speech and expression, to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India and to practice any profession, or to carry on any occupation, trade etc. However, clauses (2) to (6) provided for reasonable exceptions to the various facets of freedom referred to in sub-clause (a) to (g) of Article 19.

Article 21 of the Constitution of India guarantees protection of life and liberty and ordains that no person shall be deprived of his life and personal liberty except according to the procedure established by law. Article 22 provided for certain safeguards to every person in the matter of arrest and detention. Under clause (1) thereof, whenever a person is arrested he shall not be detained in custody without being informed of the grounds for such arrest and he shall not be denied the right to consult and to be defended by a legal practitioner of his choice. Under clause (2) every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary

for the journey from the place of arrest to the court of the Magistrate, and no such person shall be detained in custody beyond the said period without the authority of a Magistrate. Clause 3(b) excludes application of clauses (1) and (2) and to any person who is arrested and detained under any law providing for preventive detention. Clause (4) provided for various safeguards for the detenu, such as the maximum period of detention not exceeding three months, unless the Advisory Board consisting of persons who are, or have been or are qualified to be appointed as Judges of a High Court has reported, before the expiry of the period of three months in its opinion, there is sufficient cause for detention subject to a maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7). Under clause (5), the authority passing the detention order shall as soon as may be communicate to the detenu the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation.

Case Law

11. The law of preventive detention manifested in various forms promulgated by the Union of India and various States was subject matter of consideration by the Supreme Court in a slew of cases.

Preventive detention - punitive detention

A Constitution Bench of the Supreme Court in *Haradhan Saha v.*

The State of West Bengal and others^[6] has succinctly explained the scope and concept of preventive detention vis-à-vis the constitutional rights guaranteed under Article 22 of the Constitution of India, and the distinction between the preventive detention and punitive detention, in paragraphs 31 and 32 of the judgment as under:

“31. Article 22 which provides for preventive detention lays down substantive limitations as well as procedural safeguards. The principles of natural justice insofar as they are compatible with detention laws find place in Article 22 itself and also in the Act. Even if Article 19 be examined in regard to preventive detention, it does not increase the content of reasonableness required to be observed in respect of orders of preventive detention. The procedure in the Act provides for fair consideration to the representation. Whether in a particular case, a detenu has not been afforded an opportunity

of making a representation or whether the detaining authority is abusing the powers of detention can be brought before the court of law.

32. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution."

-

In *G. Reddaiah v. Government of Andhra Pradesh*^[7], the Supreme Court referred to the Constitution Bench judgment in *Haradhan Saha* (6 supra) and reiterated the view that the purpose of preventive detention is not to punish the detenu for something he has done, but to prevent him from doing it.

'Law and order' and 'public order' - distinction

12. In *Dr. Ram Manohar Lohia v. State of Bihar*^[8], in a separate but concurring judgment, Hidayatullah, J, described law and order as comprehending disorders of less gravity than those affecting public order. His Lordship has drawn three imaginary concentric circles where 'law and order' represents the largest circle within which the next circle representing 'public order' and the smallest circle representing the 'security of State' fall. It was held that 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'. The Supreme Court while striking down the detention order passed on satisfaction that the act of Dr. Manohar Lohia affected law and order and not public order, held that it was capable of being controlled by ordinary criminal law, as distinct from public order for prevention of which power of detention could be exercised. This view was reiterated in the judgments of the Supreme Court in *Nagendra Nath Mondal v. State of West Bengal*^[9] and *Sudhir Kumar Saha v. Commissioner of Police, Calcutta*^[10].

In *Haradhan Saha* (6 supra) the Supreme Court has prescribed tests to determine whether the alleged acts affect 'law and order' or 'public order'. The Court held that it is the potentiality of the act to disturb the even tempo of life which makes it prejudicial to the maintenance of public order and that it is the degree and extent of the each of the objectionable activity on the society which is vital for consideration. Considering the question whether a person has committed only breach of law and order or has acted in any manner likely to cause disturbance to public order, it was held that an order of detention under the Act would be valid if the activities of the detenu affect public order, but could not be so where the same affects only the maintenance of law and order and that the facts of each case have therefore to be carefully scrutinized to test the validity of the detention.

In *Arun Ghosh* (4 supra), Hidayatullah, J, while speaking for the Bench, illustratively explained the difference between 'public order' and 'law and order' and held that it is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. The Court has taken illustration of two cases; one case where a man stabbing another and another case where there is a communal tension and a man stabbing a member of the other community. The Court held that the former case falls under law and order and the latter case affects the even tempo of life and thereby it jeopardizes public order. The Court has taken another illustration of assault on girls where a guest at a hotel may kiss or make advances to half a dozen chamber maids, in distinction to a man molesting women in lonely places. The Supreme Court held that in the first mentioned case he may be annoying the girls and also the management, but he does not cause disturbance of public order and in the second mentioned case, as a result of activities of the man the girls going to colleges and schools are in constant danger and fear and therefore it disturbs public order. The Court has framed the question and given the answer as under.

The question to ask is: Does it lead to disturbance of the current

of life of the community so as to amount 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.

Referring to the judgments in *Dr. Ram Monohar Lohia* (8 supra), *Nagendra Nath Mondal* (9 supra) and *Sudhir Kumar Saha* (10 supra), the Supreme Court in *T. Devaki v. Government of Tamil Nadu*^[11] held that any disorderly behaviour of a person in the public or commission of a criminal offence is bound to some extent affect the peace prevailing in the locality, that the act of disturbing law and order is directed against individuals which does not disturb the society to the extent of causing a general disturbance of public peace and tranquillity and that it is the degree of disturbance and its effect upon the life of the community in the locality which determines the nature and character of breach of public order.

In *Ashok Kumar* (5 supra) while referring to the earlier case law the Supreme Court has reiterated the principle that it is the potentiality of the act to disturb the even tempo of life of the community which makes the act prejudicial to the maintenance of public order.

In *K.K. Saravana Babu* (1 supra), the Supreme Court undertook the extensive survey of the case-law and reiterated the principles laid down in the afore-mentioned and various other judgments, a reference to which is not necessary in order to avoid burdening this judgment with multiplication of case-law.

Satisfaction of the detaining authority – whether subjective or objective?

-

13. In *The State of Bombay v. Atma Ram Sridhar Vaidya*^[12], the Supreme Court while dealing with Section 3(1) of the Prevention Detention Act, 1950, which to the extent of satisfaction is *in pari materia* with the 1986 Act, held that the satisfaction referred to therein is subjective satisfaction and so is not justiciable and that therefore it

would not be open to the detenu to ask the Court to consider the question as to whether the said satisfaction of the detaining authority can be justified by the application of objective tests.

In *Rameshwar Shaw* (3 supra) the Constitution Bench while reiterating the afore-mentioned view, however, pointed out an exception to this principle by holding that in cases where the detenu challenges the validity of his detention on the ground of mala fides and in support of the said plea urged that along with other facts which show mala fides, the Court may also consider his grievance that the grounds served on him cannot possibly or rationally support the conclusion drawn against him by the detaining authority, such question can be considered only in incidental manner and in support of the plea of mala fides, and that in such cases the subjective satisfaction can become justiciable and that otherwise the reasonableness or propriety of the said satisfaction contemplated by the Act cannot be questioned before the Courts.

In *Dr. Ram Monohar Lohia* (8 supra) a Constitution Bench of the Supreme Court held that it may be taken as settled that the satisfaction of the detaining authority cannot be subjected to objective tests that the courts are not to exercise appellate powers, over such authorities and that an order proper on its face, passed by a competent authority in good faith is a complete answer.

In *Union of India v. Paul Manickam*^[13] the Supreme Court while dealing with the aspect of the discretion of the detaining authority and its subjective satisfaction, observed that “preventive detention is an anticipatory measure and does not relate to an offence while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the executive is convinced on the materials available and placed before it that such detention is necessary in order to prevent the person detained from acting in a matter prejudicial to certain objects which are

specified by the law. The action of the executive in detaining a person being only precautionary, the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of conduct, the failure to conform to which alone should lead to detention.”

In *Pebam Ningol Mikoi Devi v. State of Manipur*^[14] a two-Judge Bench of the Supreme Court held that to decide the correctness or otherwise of the detention order, two issues of importance arise, i.e., the first is regarding the documents and material on which reliance was placed by the detaining authority in passing the detention order, and the second is that whether with those materials, the detaining authority was justified in arriving at a finding that the detenu should be detained under the extant Act without any trial. That the Court normally will not go into the correctness of the decision as such but will only look into the decision-making process and that judicial review is not an appeal from a decision but review of the manner in which the decision was made and the purpose of review is to ensure that the individual receives a fair treatment. The Court further added that there must be a reasonable basis for the detention order, and there must be material to support the same and that the Court is entitled to scrutinize the material relied upon by the authority in coming to its conclusion, and accordingly determine if there is an objective basis for the subjective satisfaction. It was further held that the subjective satisfaction must be twofold; one, that the detaining authority must be satisfied that the person to be detained is likely to act in any manner prejudicial to the security of the State or act in any manner prejudicial to the maintenance of the public order and two, the authority must be further satisfied that it is necessary to detain the said person in order to prevent him from so acting. That whether the grounds stated in the order of detention are sufficient or not to order prevention detention, is not within the ambit of the discretion of the court and it is the subjective satisfaction of the detaining authority which is implied. That however,

if one of the grounds or reasons which lead to the subjective satisfaction of the detaining authority is non-existent or misconceived or irrelevant, the order of detention would be invalid.

In *M.R. Subramanian v. State of Tamil Nadu*^[15] the Supreme Court has held that the subjective satisfaction reached by the detaining authority, except in exceptional and extremely limited grounds, cannot be interfered with and that the Court cannot substitute its own opinion to that of the detaining authority when the grounds of detention are precise, pertinent, proximate and relevant.

Procedural safeguards - parameters

14. The procedural safeguards provided by clauses (3) to (5) of Article 22 were discussed in detail while dealing with the Prevention Detention Act, 1950 by the Constitution Bench in *Haradhan Saha* (6 supra) and it would be profitable to reproduce the relevant portion of the judgment hereunder:

“24. The representation of a detenu is to be considered. There is an obligation on the State to consider the representation. The Advisory Board has adequate power to examine the entire material. The Board can also call for more materials. The Board may call the detenu at his request. The constitution of the Board shows that it is to consist of Judges or persons qualified to be Judges of the High Court. The constitution of the Board observes the fundamental of fair play and principles of natural justice. It is not the requirement of principles of natural justice that there must be an oral hearing. Section 8 of the Act which casts an obligation on the State to consider the representation affords the detenu all the rights which are guaranteed by Article 22(5). The Government considers the representation to ascertain essentially whether the order is in conformity with the power under the law. The Board, on the other hand, consider whether in the light of the representation there is sufficient cause for detention.

25. The representation is to be considered by the Advisory Board by following the substance of natural justice as far as it is consistent with the nature of the impugned Act, the nature of the relative jurisdiction of the Government and of the Advisory Board. Procedural reasonableness for natural justice flows from Article 19.. Article 22(5) speaks of liberty and making of representation. The combined result of Clauses (4), (5) and (6) of Article 22 is that a procedure which permits representation will give all the facts before the Board. Article 22(5) shows that law as to detention is necessary. The requirements of that law are to be found in Article 22. Article 22 gives the mandate as to what will happen in such circumstances.

26. The opinion of the Board as well as the order of the Government rejecting the representation of the detenu must be after proper consideration.

There need not be a speaking order. There is also no failure of justice by the order not being a speaking order. All that is necessary is that there should be real and proper consideration by the Government and the Advisory Board.

27. Section 14 of the Act clothes the authority with the power of revoking or modifying the detention order at any time. Such a power which is for the benefit of the detenu carries with it the duty to exercise that power whenever and as soon as changed or new factors call for the exercise of that power. This shows that the authorities can consider new factors or changed circumstances. This Court has already held in Fagu Shaw etc. v. State of West Bengal: (1974) 4 SCC 152, that when Parliament prescribed two years or until the expiry of the Defence of India Act, whichever is later, it satisfied the requirements of Article 22(7)(b) of fixing the maximum period. The further requirement of a six monthly review as contended for by the petitioners suggests a new provision. That does not go to reasonableness but to policy of Legislature and due process of law.

28. Section 8 of the Act follows the provisions of Article 22(5) of the Constitution. Article 22(5) enjoins upon the detaining authority obligation to afford the detenu earliest opportunity of making a representation against the order. An opportunity of making a representation cannot be equated with an opportunity of oral hearing or hearing before a Court and the procedure of judicial trial. As long as there is an opportunity to make a representation against the order of detection and as long as a representation is to be considered by the Advisory Board, there is no unreasonableness in regard to the procedure. The duty to consider the representation does not mean a personal hearing or the disclosure of reasons. Procedural reasonableness which is invoked by the petitioners cannot have any abstract standard or general pattern of reasonableness. The nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, all provide the basis for considering the reasonableness of a particular provision. The procedure embodied in the Act has to be judged in the context of the urgency and the magnitude of the problem, the underlying purpose of the restrictions and the prevailing conditions.

29. Principles of natural justice are an element in considering the reasonableness of a restriction where Article 19 is applicable. At the stage of consideration of representation by the State Government, the obligation of the State Government is such as Article 22(5) implies. Section 8 of the Act is in complete conformity with Article 22(5) because this section follows the provisions of the Constitution. If the representation of the detenu is received before the matter is referred to the Advisory Board, the detaining authority considers the representation. If a representation is made after the matter has been referred to the Advisory Board, the detaining authority will consider it before it will send representation to the Advisory Board.

30. Elaborate rules of natural justice are excluded either expressly or by necessary implication where procedural provisions are made in the statute or where disclosure of relevant information to an interested party

would be contrary to the public interest. If a statutory provision excludes the application of any or all the principles of natural justice then the Court does not completely ignore the mandate of the Legislature. The Court notices the distinction between the duty to act fairly and a duty to act judicially in accordance with natural justice. The detaining authority is under a duty to give fair consideration to the representation made by the detenu but it is not under a duty to disclose to the detenu any evidence or information. The duty to act fairly is discharged even if there is not an oral hearing. Fairness denotes abstention from abuse of discretion.

The Supreme Court after referring to the earlier case law in *Borjahan Gorey v. State of West Bengal*^[16], *Ashim Kumar Ray v. State of West Bengal*^[17], *Abdul Aziz v. D.M. Burdwan*^[18], and *Debu Mahato v. State of West Bengal*^[19] summed up the broad principles pertaining to preventive detention as under:

“First, merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Act.

Second, the fact that the Police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the code of Criminal Procedure and even lodges a first information report may be no bar against the District Magistrate issuing an order under the preventive detention.

Third, where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or the public order.

Fourth, the mere circumstances that a detention order is passed during the pendency of the prosecution will not violate the order.

Fifth, the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances.”

While holding that Article 22 of the Constitution of India cannot be read in isolation but must be read with Articles 19 and 21, in *Rekha* (2 supra), a three-Judge Bench of the Supreme Court reiterated the principle that if the detaining authority passes an order of preventive detention on subjective satisfaction, that the personal liberty protected under Article 21 is so sacrosanct and so high in the scale of

constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. It has further held that the procedural safeguards are required to be zealously watched and enforced by the court and their rigour cannot be allowed to be diluted on the basis of the nature of the alleged activities of the detenu.

Can solitary ground be taken into account?

15. In *State of Tamil Nadu v. Nabila*^[20], habeas corpus petition was made before the High Court of Madras mainly on the ground that the detenu was involved in a solitary case and has not filed any application for bail. The High Court has quashed the order of detention mainly on the ground that the detenu was in remand in connection with the solitary case when there was no material before the detaining authority to show that either the detenu himself or his relatives are taking steps to file application for bail in the solitary ground case. The Supreme Court, while relying upon the law laid down by it in *Shiv Ratan Makim v. Union of India*^[21] and *Union of India v. Chaya Ghoshal*^[22], to the effect that it is not the number of acts which is material and it is the impact and effect of the act which is determinative, has set aside the order of the High court observing that the view taken by the High Court cannot be sustained.

16. From the authoritative pronouncements as discussed above, the legal position could be summarized as under:

- (i) Preventive detention is different from punitive detention; while punitive detention could be enforced under ordinary criminal law, the law of preventive detention can be enforced against habitual offenders to prevent them from committing the further offences and the legal parameters for testing the validity of preventive detention fundamentally vary from that relating to punitive detention.
- (ii) 'Public order' is distinct from 'law and order'. While individual offences without affecting public at large could be

considered as violating 'law and order', the offences that affect larger public and disturbs the even tempo of public life fall under the category of disturbance to public order and only in the latter category of cases, the law of preventive detention must be enforced.

- (iii) The 'satisfaction' upon which the offender is detained is the subjective satisfaction of the detaining authority and such satisfaction is not justiciable except in cases where mala fides are alleged, the question of satisfaction could be raised and considered as a question incidental thereto.
- (iv) While considering the validity of the detention order, the Court will not sit in appeal and examine the material forming basis for detention order.
- (v) While whether the grounds stated in the order of detention are sufficient or not to order preventive detention, is not within the ambit of judicial review of the court and it is the subjective satisfaction of the detaining authority which is implied, however, if one of the grounds or reasons which lead to the subjective satisfaction of the detaining authority is non-existent or misconceived or irrelevant, the order of detention would be invalid.
- (vi) As the preventive detention is an exception to the fundamental rights of a person, the State and its functionaries must make strict adherence to the procedural safeguards as envisaged by clauses (3) to (6) of Article 22 of the Constitution of India and the order of detention is liable to be interfered with wherever the prescribed procedural safeguards are not complied with.
- (vii) While examining the validity of the detention order, the impact of the acts alleged against the detenu on the society is more relevant than the number of such acts.

-
17. Keeping in mind the law laid down by the Apex Court on various aspects as discussed above, we need to consider the submissions of the learned Senior Counsel.

(i) Whether the satisfaction is properly arrived at by the detaining authority?

That from the definition of the term 'goonda', under clause (g) of Section 2, the offences with which the detenus were charged under the three criminal cases referred to in the grounds of detention, fall within one or more of the chapters of the IPC mentioned in Section 2(g) of the Act 1986, is not disputed by the learned Senior Counsel. However, as noted above, his submission is that from mere registration of three or five cases the detenus cannot be treated as habitual offenders within the meaning of Section 2(g) of the Act 1986.

While arriving at the satisfaction that the detenus were habitual in committing offences, respondent No.2 has referred to the five cheating cases in the detention order out of which he has relied upon three such cases in the grounds of detention. If the parameters of law as discussed above are applied, the Courts cannot examine the facts in detail in order to find out whether the detenus are habitual offenders or not. As no mala fides are alleged, it is not permissible for this Court to examine whether the satisfaction of respondent No.2 that the activities of the detenus affect public order was based on proper and relevant material or not. However, even on peripheral examination of the facts referred to in the detention order as well as the grounds of detention, it is clear that the detenus are allegedly involved in cheating the innocent people on the pretext of providing loans in an organized manner. As could be seen from the nature of the three complaints referred to in the grounds of detention, the detenus are allegedly approaching the general public by establishing fake companies, such as M/s.Dial Easy Network Private Limited, M/s. Care India Foundation, M/s. Union Value Services, M/s. Money Cash Solution, M/s. Winner 10 International, M/s. Infra Ltd., etc., recruiting 70 employees as tele

callers, team leaders etc., and luring them to deposit money in the accounts of the fake companies by promising loans. While the truth or otherwise of these allegations could be adjudicated in the pending criminal cases, there could be no doubt whatsoever that the activities of the detenus, if proved, would certainly affect public at large and disturb the even tempo of public life. Though in strict sense, it is wholly unnecessary for this Court to even record its *prima facie* finding, this aspect is examined at cursorily, to satisfy the Court's conscience that the nature of the activities alleged against the detenus would definitely disturb the public order.

(ii) Whether the detention order is based on legal material ?

One of the submissions of the learned Senior Counsel as noted above is that the confessional statements of the detenus and the statements of their alleged employees cannot constitute legal evidence. No doubt in a criminal trial, the confessional statements of an accused do not constitute proof of commission of offence under Section 25 of the Indian Evidence Act, as the criminal law jurisprudence does not recognize the self-inculpation in the presence of Police. The only exception to this Rule is contained in Section 27 of the Indian Evidence Act, to the limited extent of admissibility of the portion of the confession leading to the discovery of the material used in the commission of offence. Similarly, the statements under Section 161 of CrPC do not constitute evidence and they can be used only for the purpose of contradictions by the accused. It would be well to remember that this material is not being relied upon by the State for securing the conviction of the detenus and they only constitute *prima facie* material for the detaining authority to arrive at its subjective satisfaction. Since the law is well-settled that the subjective satisfaction is not justiciable, the Court cannot even look into the material based on which the detaining authority has arrived at the decision.

(iii) Whether High Court can not sit in appeal and examine the material in detail

This Court while examining the detention orders, will not sit as an Appellate Court and sift the material and arrive at a different conclusion on the satisfaction of the detaining authority. The limited extent to which this Court could go is to examine whether the grounds of detention are sustainable in law and the procedural safeguards provided to the detenu under Article 22 of the Constitution of India, as explained by the Constitution Bench in *Haradhan Saha* (6 supra) and the extant statutory provisions, if any, have been strictly adhered to or not and to interfere with the orders of detention wherever there is failure of such compliance. Neither the writ petitions raised the grounds touching the procedural illegalities, nor the learned Senior Counsel has advanced any submissions thereon.

Conclusion and the result

18. On the analysis as above, we do not find any constitutional or procedural infirmity in the impugned detention orders and therefore they are not liable to be interfered with.

19. In the result, the writ petitions are dismissed.

As a sequel to dismissal of the writ petitions, W.P.M.P. No.54289 of 2015 in W.P. No.42090 of 2015 and W.P.M.P. No.54290 of 2015 in W.P. No.42092 of 2015 shall stand disposed of as infructuous.

C.V. NAGARJUNA REDDY, J

G. SHYAM PRASAD, J

13-07-2016

bnr

Note: LR copies to be marked.

(B.O)

bnr

-
- [1] (2008) 9 SCC 89
- [2] (2011) 5 SCC 244
- [3] (1964) 4 SCR 921 : AIR 1964 SC 334
- [4] (1970) 1 SCC 98
- [5] (1982) 2 SCC 403
- [6] (1975) 3 SCC 198
- [7] (2012) 2 SCC 389
- [8] AIR 1966 SC 740 : 1966 SCR (1) 709
- [9] (1972) 1 SCC 498
- [10] (1970) 1 SCC 149
- [11] (1990) 2 SCC 456
- [12] AIR 1951 SC 157
- [13] (2003) 8 SCC 342
- [14] (2010) 9 SCC 618
- [15] (2012) 4 SCC 699
- [16] (1972) 2 SCC 550
- [17] (1973) 4 SCC 76
- [18] (1973) 1 SCC 301
- [19] (1974) 4 SCC 135
- [20] (2015) 12 SCC 127
- [21] (1986) 5 SCC 404
- [22] (2005) 10 SCC 97