THE HON'BLE SRI JUSTICE RAGHVENDRA SINGH CHAUHAN
AND
THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

WRIT PETITION NO.37979 OF 2018

JUDGMENT: (Per Hon'ble Sri Justice Raghvendra Singh Chauhan)

The petitioner has challenged the detention order dated 19-06-2018, passed by the Commissioner of Police-cum-Additional District Magistrate, Rachakonda, the conformation order dated 14-07-2018, passed by Principal Secretary (Poll), the respondent No. 1, and the order dated 23-0-2018, also passed by the respondent No. 1, before this Court. By the first order the Commissioner of Police had directed that the petitioner's husband, Gandasiri Nagaraju, should be detained under Section 3 (2) of the Telangana Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders, Land Grabbers Act, 1986 ("the Act", for short); by the second order, the respondent No. 1 had confirmed the detention of the detenue; by the third order, the respondent No. 1 rejected the representation submitted by the detenue, Gandasiri Nagaraju, against his detention.

Briefly, the facts of the case are that it is alleged that the detenue was indulging in illegal transportation of contraband "*Ganja*". Hence, he is a "Drug Offender" as defined under the Act. It is further alleged that between 2013-2017 he was involved in four different criminal cases of trafficking "Ganja", namely in 1) Cr. No. 412/2013 for offence under Section 20 (C) of Narcotic Drugs and Psychotropic Substance Act ("the NDPS Act", for short). 2) Cr. No. 397/2015, for offences under Section 337 IPC and under Section 20 (b), 20 (a) of NDPS Act. 3) Cr. 113/2017, for offences under Sections 8(c) read with 20 (b) (ii) (c) of the NDPS Act. 4) Cr. No. 153/2017, for offences under Section 8 (c) read with Section 20 (b) (c) of NDPS Act. In 2018, he was involved in Cr. No. 110/2018 for offence under Section 20 (b) (ii) (c) of NDPS Act.

Further according to the petitioner, on an earlier occasion, the detenue was preventively detained by order dated 07-07-2017. However, the said detention order was set aside by this Court. But according to the respondents the said detention order was "revoked" in February, 2018. Be that as it may, according to the respondents, despite the "revoking" of the earlier preventive detention order, the detenue continued to indulge in drug trafficking. Hence, he has become a habitual offender. He is continuing to act in a manner prejudicial to the maintenance of public order. Therefore, on 19-06-2018, the Commissioner of Police passed the detention order under Section 3 (2) of the Act. Subsequently, by order dated 14-07-2018, the Government confirmed the detention order passed by the Commissioner of Police.

On 14.07.2018, the detenue submitted his representation to the Government against the detention order. Moreover, on 25.07.2018, the detenue's case was referred to the Advisory Board. On 26.07.2018, the Advisory Board submitted its report to the Government. By order dated 23-08-2018, the respondent No. 1 rejected the representation submitted by the detenue. Hence, this writ petition by the detenue's wife before this Court.

Mr. M.A.K. Mukhed, the learned counsel for the petitioner, has raised the following pleas: -

Firstly, although the Detention order dated 19.06.l2018 mentions the previous criminal cases in which the detenue was allegedly involved, the relevant papers dealing with the said criminal cases, mentioned hereinabove, were not supplied to the detenue. Thus, the detenue was denied the opportunity of making a effective representation to the Government under Section 8 of the Act.

Secondly, since the detenue was already arrested in Crime No.110/2018, since he was already in judicial custody, there was no necessity to pass the preventive detention order against the detenue.

Thirdly, even if the detenue had applied for a bail, even then "compelling reasons" have to be given by the detaining authority for passing the detention order. However, no such "compelling reasons" have been mentioned in the impugned detention order.

Fourthly, the only reason given for passing the detention order, while the detenue is in judicial custody, is an apprehension that he may be released on bail by the learned trial court. However, such an apprehension is highly misplaced. For, the grant of bail under Section 37 of the NDPS Act is extremely slim. For the said provision provides for stringent conditions which have to be fulfilled before a bail can be granted. Therefore, generally a bail is not granted in NDPS cases. Therefore, the preventive detention order is based on unfounded apprehension. Moreover, the passing of the detention order clearly reveals non-application of mind, as the detaining authority has ignored Section 37 of NDPS Act.

Fifthly, the detenue had submitted his representation on 14.07.2018. The Advisory Board had met on 25.07.2018; it had submitted its report to the Government on 26.07.2018. Yet, even after having received the report of the Advisory Board, for twenty-three days the petitioner's representation was not decided by the respondent No.1. The inordinate delay of twenty-three days has not been explained by the respondents. Hence the continued detention of the detenue has become illegal. In order to buttress this plea, the learned counsel has relied on the Constitutional Bench decision in the case of **K.M. Abdulla Kunhi and B.L. Abdul Khader v. Union of India and Others**[1], and on the case of **D.M. Nagaraja v. Government of Karnataka and Others**[2] and on a Division Bench judgment of this Court in the case of **P. Surendra v. The State of Andhra Pradesh**[3].

On the other hand, Mr. T. Srikanth Reddy, the learned Government Pleader for Home, has raised the following counter-arguments:-

Firstly, since the previous criminal activities, in the form of the criminal cases pending against the detenue from 2013 till 2017, have been mentioned only as "a reference" to indicate his criminal history, since these cases do not form the basis for the detention, there is no need to supply the relevant papers of the said cases to the detenue. Moreover, since the detenue is the alleged accused in these cases, the detenue is well aware of the existence and the outcome, if any, of these cases. Hence, no prejudice was caused to the detenue in case the relevant documents of the earlier criminal cases were not supplied to the detenue. Relying on the cases of **Powanammal v. State of Tamil Nadu**[4], and **E. Subbulakshmi v. State of Tamil Nadu**[5], the learned counsel has pleaded that a distinction has always

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[1] (1991) 1 SCC 476
[2] (2011) 10 SCC 215]
[3] 2016 (1) ALD Crl. 605
[4] [(1999) 2 SCC 413
[5] (2017) 1 SCC 757

been maintained between a document which has been relied upon by the detaining authority in the grounds of detention for preventively detaining the detenue, and the documents which find merely a reference in the grounds of detention. The non-supply of the relevant papers of the former category would be fatal to the detention order. But the non-supply of the relevant papers of the latter category would not vitiate the detention order. According to the learned counsel, the detention order, dated 19.06.2018 clearly reveals that the previous criminal cases in which the detenue was involved has been mentioned merely as a reference. These cases do not form the basis for passing of the detention order. In fact, the detention order was been passed on the basis of the present criminal case viz., Crime No.110/ 2018. Hence there was no need to furnish the relevant documents of the previous criminal cases recorded against the detenue. Thus, the non-supply of the relevant papers of those criminal cases would not adversely affect the legality of the detention order.

Secondly, there is clear-cut distinction between preventive detention and a punitive one. Preventive detention is based on the previous conduct of a person, and is based on a suspicion that if the person were not prevented from continuing his/her illegal activities, then he/she is likely to continue to do so. Moreover preventive detention order is passed when the detaining authority comes to a subjective satisfaction that the alleged illegal acts have become a menace to the society at large. Hence the case has graduated from "law and order problem" to a "public order" problem. In the present case the detenue was already involved in four different criminal cases under the NDPS Act between 2013 to 2017. All these cases related to drug trafficking. The wide spread of drugs in the society is playing havoc with the lives of the young and old. Even in the previous cases, the detenue was granted bail by the trial courts. But even after being released on bail, the detenue has continued to engage in his nefarious activities. Therefore, the detaining authority was well justified in entertaining a bona fide apprehension that not only the detenue may be granted bail, but he would also continue to indulge in cases of drug trafficking. Therefore, the detaining authority is legally justified in passing the detention order, even while the detenue was confined in judicial custody.

Thirdly, relying on the case of **K.M. Abdulla Kunhi** (supra), the learned Government Pleader submits that there is no constitutional mandate under clause (5) of Article 22 of the Constitution of India, much less any statutory requirement to consider the detenue's representation before confirming the order of detention. Thus there is no justification for imposing the restriction on the power of the Government that it must consider the detenue's representation within a short span of time. Moreover, according to the proviso in Section 3(2) of the Act, the Government is empowered to preventively detain a person for a maximum period of three months at the first instance. Even thereafter, the Government can extend the period of preventive detention, but not exceeding three months at any one time. Therefore, even if the Government has maintained a studied silence over the representation submitted by the detenue for a period of twenty-three days, even then the constitutional and the legal statutory rights of the detenue have not been violated by the Government. Therefore, his continued detention is legally valid.

Lastly, that neither the detention order passed by the detaining authority, nor the confirmation order passed by the respondent No.1, nor the order rejecting the detenue's representation suffer from non-application of mind. In fact, the three impugned orders have been passed after holistically considering the criminal track record of the detenue. Since the illegal activities of the detenue had become a menace to the public at large, since his acts had begun to disturb the public order, the impugned orders are legally justified. Hence, the learned Government Pleader has supported the impugned orders.

Heard the learned counsel for the petitioner and the learned Government Pleader for the respondents, perused the impugned orders, and examine the record available with the court.

Undoubtedly the torch of liberty burns brightly in the heart of every individual. Revolutions and battles have been fought for liberty throughout the world history. The spirit of Man instinctively wants to be free and unfettered both mentally and physically. Liberty was the clarion call not only of the American and the French Revolutions, but also for the freedom fighters of our country. Therefore the Founding Fathers have written liberty, in golden letters, in the preamble of our Constitution. Further, Article 21 of the Constitution of India is considered to be "the heart and soul of the Constitution of India" as it contains the word "personal liberty". Therefore, the ideal of Liberty runs through the Constitution of India like a golden thread.

However, like any other fundamental right, "liberty" is not an unruly horse. It can be cribbed, cabined, and confined by a procedure established by law. Article 22 of the Constitution of India permits preventive detention of individuals who are likely to disturb public order, thereby endangering the life and liberties of others. In catena of cases the Hon'ble Supreme Court has emphasised that while dealing with a case of preventive detention, the courts are required to delicately balance the interests and the rights of the detenue to be at liberty, with the interests and rights of the society at large to ensure that his liberty is curtailed and confined. In order to balance these conflicting interests, the Apex Court has stressed that while preventive detention may be permissible under the law, but the detaining authority must exercise its powers carefully, meticulously, and strictly in accordance with law. For, the draconian power of preventive detention cannot be used lightly in order to violate the liberty of an individual. After all, the individual is pitched against the colossal power of the State. Therefore, according to the Hon'ble Supreme Court, while the satisfaction to preventively detain a person may be subjective in nature, but nonetheless the procedures prescribed by the law and as interpreted by the Hon'ble Supreme Court have to be followed zealously. If the procedure is ignored or violated by the detaining authority, such action or omission may either vitiate the detention order, or render the continued detention of the detenue an illegal one.

The present case raises the following issues before this Court:

(1) Whether the non-supply of documents relating to the criminal cases in which the detenue was involved between 2013 to 2017 would vitiate the detention order or not?

(2) Whether the passing of the detention order while the detenue was already in judicial custody would vitiate the detention order or not?

(3) Whether the detaining authority is legally justified in passing the detention order while the detenue is in custody or not?

(4) Whether a duty is imposed upon the Government to consider the detenue's representation as expeditiously as possible or not?

(5) Whether the Government is legally required to explain the delay in consideration of the representation or not?

(6) Whether the Government is justified in its stand that it need not consider the detenue's representation till the three months of detention are almost over, or not?

(7) Whether the delay in considering the detenue's representation would make the continued detention an illegal one or not?

In case of **E. Subbulakshmi** (supra), the Hon'ble Supreme Court dealt with the issue whether the non-supply of documents would vitiate the detention order or not? Relying on the case of **Powanammal** (supra), the Hon'ble Supreme Court opined as under:

However, this court has maintained a distinction between a document which has been relied upon by the detaining authority in the grounds of detention and a document which finds a mere reference in the grounds of detention. Whereas the non-supply of a copy of the document relied upon in the grounds of detention has been held to be fatal to be continued to detention, the detenue need not show that a prejudice is caused to him. This is because the non-supply of such a document would amount to denial of the right of being communicated the grounds and of being afforded the opportunity of making an effective representation against the order. But, it would not be so, where the document merely finds a reference in the order of detention or among the grounds thereof. In such a case, the detenue's complaint of non-supply of document has to be supported by prejudice caused to him in making an effective representation.

A bare perusal of the detention order dated 19.06.2018, clearly reveals that it merely refers to the previous criminal history of the detenue as reflected in his involvement in four different criminal cases under the NDPS Act, between 2013 to 2017. When it comes to the grounds for detention, the only criminal case which is taken as the basis for passing the detention order is Crime No.110/ 2018 for offence under Section 20(b)(ii)(C) NDPS Act. Keeping in mind, the principle enunciated in the case of **E. Subbulakshmi** (supra), keeping in mind, the fact that the previous criminal cases have been mentioned only in reference, and do not form the basis for detention, the learned counsel for the petitioner is unjustified in claiming that non-supply of relevant documents relating to the previous criminal cases would vitiate the detention order. Furthermore, since the detenue is involved in these four cases, the detenue cannot claim that he is unaware of their existence. In fact, the learned counsel for the petitioner has not pleaded that the non-supply of the relevant papers of these criminal cases has caused prejudice to the detenue. Therefore, the first contention raised by the learned counsel is unacceptable.

The passing of a preventive detention order while the detenue is already in custody creates a ticklish situation. For, on the one hand the detenue is already confined, thus preventing him/her from indulging in anti-social activities. Yet, on the other hand, the detaining authority may entertain a bona fide apprehension that if the detenue were released on bail, he may continue to indulge in his anti-social activities. Thus, his liberty may pose a threat the public order. Therefore, even if the person is in custody, a detention order necessarily has to be issued against the detenue.

In the cases of **N. Meera Rani v. State of Tamil Nadu**[6] and **Kamarunnissa v. Union of India**[7], the Apex Court has observed that as preventive detention is intended to prevent a detenue from acting in any manner prejudicial to public order, ordinarily it need not be resorted to, if the detenue is in custody, unless the detaining authority has reason to believe that the subsisting custody of the detenue may soon terminate on his being released on bail. And having regard to his recent antecedents the detenue is likely to indulge in similar prejudicial activities, unless he is prevented from doing so by an appropriate order of preventive detention.

Moreover, the Hon'ble Supreme Court has insisted that the detention order must indicate firstly that the detaining authority is well aware of the fact that the detenue is already in a subsisting custody. Secondly, compelling reasons must be stated for passing the detention order while the detenue is already in custody. In case of **Dharmendra Suganchand Chelawat**[8], the Apex Court defined the expression "*compelling reasons*" as there must be cogent reasons before the detaining authority on the basis of which it may be satisfied that (a) the detenue is likely to be released from custody in the near future, (b) taking into account the nature of the antecedent of the activities of the detenue, it is likely that, after he is released from custody, he would indulge in prejudicial activities, and (c) it is necessary to detain him to prevent him from engaging in such activities. In the case of **Kamarunnissa** (supra), the Apex Court has held that if the authority passes an order, after recording his satisfaction, such an order cannot be struck down ostensibly on the

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[6] (1989) 4 SCC 418
[7] (1991) 1 SCC 128
[8] (1990) 1 SCC 746

ground that the proper course for the authority was to oppose the bail, and if bail were granted notwithstanding such opposition, the detaining authority could question it before a higher court .

In the case of **Ahmed Nassar v. State of TN**[9], the Hon'ble Supreme Court interpreted the words "*likely to be released*", and opined that it connotes 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. Therefore, the detaining authority must deal with the type of crime to be dealt with under the criminal law, and the contents of the bail application. These factors, separately and collectively, would constitute "*relevant material for arriving at a subjective satisfaction*".

In the cases of **Sashi Agarwal v. State of Uttar Pradesh**[10], and **Anand Prakash v. State of U.P.**[11], the Apex Court has opined that "*the mere possibility of court granting the bail is not sufficient, nor is a bald statement that the detenue would repeat his criminal activities enough to pass an order of detention unless there is a credible information and cogent reason apparent on record that the detenue, if enlarged form bail would act prejudicially*".

In the present case, admittedly the detenue was involved in four different cases under the NDPS Act between 2013 and 2017; in each of these cases he was granted bail by the court. But despite being granted the benefit of bail, the detenue continued to repeatedly violate the law, and to allegedly commit offences under the NDPS Act. The detaining authority has certainly noticed that the detenue has filed his bail application in Crime No.110/ 2018 which was pending before the trial court. Thus, the detaining authority was justified in

[9] (1999) 8 SCC 473
[10] (1988) 1 SCC 436
[11] (1990) 1 SCC 291

entertaining a bona fide apprehension that, even this time, if the detenue were granted the bail, he would continue to indulge in drug-trafficking. Hence the detaining authority was legally justified in passing the detention order, even when the detenue was in judicial custody. Therefore, the second contention raised by the learned counsel that the detention order should not have been passed while the detenue is in judicial custody is unsustainable.

Both Article 22(5) of the Constitution of India, and Section 8 of the Act impose a duty upon the Government to afford the earliest opportunity of making a representation to the detenue. Neither Article 22 of the Constitution of India, nor Section 8 of the Act prescribe any period within which the representation submitted by the detenue should be decided by the Government. However, the submission of the representation is not an empty formality to be performed. In fact, both Article 22(5) of the Constitution of India, and Section 8 of the Act grant a substantive right to the detenue to submit a representation, as soon as possible, against the detention order passed by the detaining authority. This right has to be granted, and has to be respected by the Government. For, while in a punitive detention, an offender has the right to a fair trial, and has the right to plead and prove his defence, no such right exists under the preventive detention. Therefore in order to protect the liberty of a detenue, Article 22(5) of the Constitution of India, and Section 8 of the Act bestow a substantive right upon the detenue to submit his representation at the earliest opportunity. However, the submission of representation is not the end point. In fact, it is the commencement of a process. Since the liberty of the detenue is deprived, the State cannot be permitted to silently sit over the representation for a long time. Therefore the contention raised by the learned Government Pleader, that the Government has three months time to decide the representation, as a detention at the first instance is for three months, the said argument is clearly unacceptable.

In the case of **Vijay Kumar v. State of J&K**[12], the Hon'ble Supreme Court has clearly opined that the word "earliest" which qualifies the opportunity must equally qualified the corresponding obligation of the State to deal with the representation, when made, as expeditiously as possible. Otherwise, the Constitution and the statutory obligation to provide the earliest opportunity of making a representation will lose both the purpose and the meaning. In the case of **Ramkrishna Bharadwarja v. State of Delhi**[13], the Apex Court has said "*the question [is] not whether the detenue will be prejudicially affected in securing his release by his representation, but whether his constitution safeguard has been infringed*".

In case of **K.M. Abdul Kunhi** (supra), while dealing with the duty of the Government to decide the representation, the Hon'ble Supreme Court has held as under:

The representation relates to the liberty of the individual, the highly cherished right enshrined in Article 21 of our Constitution. Clause (5) of Article 22 therefore, casts a legal obligation on the government to consider the representation as early as possible. It is a constitutional mandate commanding the concerned authority to whom the detenue submits his representation to consider the representation and dispose of the same as expeditiously as possible. <u>The words "as soon as may be" occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay.</u> However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. <u>The requirement however, is that there should</u>

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[12] (1982) 2 SCC 43
[13] AIR 1964 SC 334

not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal. This has been emphasised and re-emphasised by a series of decision of this Court. (Jayanarahyan Sukul v. State of W.M.:(1970) 1 SCC 219, Frances Coralie Mullin v. W.C. Khambra: (1980) 2 SCC 275, Rama Dhondu Borade v. V.K. Saraf, Commissioner of Police: (1989) 3 SCC 173, and Aslam Ahmed Zahire Ahmed Shaik v. Union of India: (1989) 3 SCC 277. (Emphasis added).

In the case of **Jayanarayan Sukul v. State of West Bengal**[14], the Apex Court held that the fundamental right of the detenue to have his representation considered by the Government would be rendered meaningless if the Government does not deal with the matter expeditiously, but at its own sweet well and convenience. It is imperative that when the liberty of a person is in peril, immediate action should be taken by the authorities concerned. In the case of **Pebam Ningol Mikoi Devi v. State of Manipur**[15] and in the case of **Union of India v. Laishram Lincola Singh**[16], the Hon'ble Supreme Court has expressed that when the delay is caused because of indifference or avoidable reasons, the detention becomes vulnerable. In case of **Abdul Nasar Adam Ismail v. State of Maharashtra**[17], the Apex Court has emphasised that the authority, empowered to make an order of detention, should adopt a procedure calculated towards expeditious consideration of the representation. The representation must be taken as soon as it is received, and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenue. Moreover, in the case of **Kundanbhai Dulabhai**

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[14] (1970) 1 SCC 219
[15] (2010) 9 SCC 618
[16] (2008) 5 SCC 490
[17] (2013) 4 SCC 435

Shaik v. District Magistrate, Ahmedabad[18], the Apex Court has stressed that reasons for the delay must be indicated to the court. Unexplained delay or unsatisfactory explanation in the disposal of the representation would fatally affect the order of detention. In that situation, the continued detention would be rendered illegal. Similar views were also expressed in the case of **Abdul Nasar Adam Ismail** (supra).

Therefore, the principles mentioned above can be summarised as under:

1. The detenue has a right to submit his representation. The earliest opportunity to submit his representation must be given to the detenue by the Government.

2. Once the representation is submitted before the Government, the Government cannot maintain a studied silence over the representation.

3. It is only when relevant documents or reports are required to be considered by the Government, such as the report of the Advisory Board, that the Government would be justified in waiting for the same and deciding the representation only after receiving the relevant documents and reports.

4. The Government must decide the representation as expeditiously as possible.

5. The delay in deciding the representation, if any, should be explained to the court by giving cogent and convincing reasons for the delay.

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[18] (1996) 3 SCC 194

6. If no such reasons are stated by the Government, the continued detention of the detenue would become illegal.

Admittedly, the detention order was passed on 19.06.2018; undoubtedly, the detenue submitted the representation on 14.07.2018; admittedly, the Advisory Board submitted its report to the Government on 26.07.2018; undoubtedly, the representation filed by the detenue was rejected on 23.08.2018. Thus, clearly even after twenty-three days of having received the report of the Advisory Board, the Government did not decide the representation filed by the detenue. In fact, the Government maintained a studied silence over the representation for the said period.

Moreover for the said delay of twenty-three days, the only explanation offered by the respondent is that the Government was under the impression it could legally detain the detenue for a maximum period of three months at the first instance. Hence, there was no need for the government to expeditiously decide the representation. However, the position being taken by the respondent is clearly untenable in the light of the principles enunciated by the Hon'ble Supreme Court.

Further, in the counter-affidavit filed by the respondents, they have failed to reveal any cogent and convincing reasons for the delay in deciding the representation. Therefore, in the absence of such an explanation, the continuation of the detention of the detenue becomes illegal.

For the reasons stated above, the Writ Petition is allowed and the detention order dated 19.06.2018, the confirmation order dated 14.07.2018 and the order dated 23.08.2018 rejecting the representation of the detenue are set aside. It is, hereby, directed that the detenue, Gandasiri Nagaraju, s/o Somaiah, lodged in the Central Jail, Cherlapalli, Medchel District should be released forthwith, if the detenue is not required in any other criminal case. The miscellaneous petitions pending, if any, shall stand closed. No order as to costs.

RAGHVENDRA SINGH CHAUHAN, J

M. SATYANARAYANA MURTHY, J

Date: 04.12.2018

MRKR