

**HON'BLE THE CHIEF JUSTICE SRI RAGHVENDRA SINGH CHAUHAN
AND
HON'BLE DR. JUSTICE SHAMEEM AKTHER**

WRIT PETITION No.44185 OF 2018

ORDER: (Per The Hon'ble The Chief Justice Sri Raghvendra Singh Chauhan)

Sri R. Nagavardhan Reddy, who is the brother of the detenu, Reddammagari Niranjan Reddy, has filed the present writ petition challenging the detention order, dated 05.10.2018, passed by the Commissioner of Police, Rachakonda Commissionerate, the respondent No.2, and the order dated 18.12.2018 passed by the Chief Secretary, General Administration (Spl. (Law & Order) Department, the respondent No.1 passed under The Telangana Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders, Land Grabbers, Spurious Seed Offenders, Insecticide Offenders, Fertiliser Offenders, Food Adulteration Offenders, Fake Document Offenders, Scheduled Commodities Offenders, Forest Offenders, Gaming Offenders, Sexual Offenders, Explosive Substances Offenders, Arms Offenders, Cyber Crime Offenders and White Collar or Financial Offenders Act, 1986 (Act No.1 of 1986) ('The Act', for short).

Brief facts of the case are that on 5.9.2018 a case was registered against the detenu, namely Crime No.277 of 2018, for the offences under Sections 370 (1) (5), 372, 373, 366A of I.P.C., Section 17 of The Protection of Children from Sexual Offences (POCSO) Act, 2012, Sections 3, 4, 5, 6 and 7 of Immoral Traffic (Prevention) Act, 1956 (for short, 'PITA'), and Sections 75 and 81 of Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, 'J.J. Act') at the

Yadagirigutta P.S. The allegation against the detenu was that he was indulging in human trafficking for the purpose of prostitution to make easy money in a short time.

The further allegation is that previously two more criminal cases were registered against the detenu, namely Crime No.411 of 2010, registered for the offences under Section 302 of I.P.C. at Anantapur I-Town P.S., and Crime No.69 of 2014 under Section 323, 341, 506 read with Section 34 of I.P.C. at Peddappuru P.S. of Anantapur District, Andhra Pradesh. In the former case, the detenu was acquitted by judgment dated 21.06.2012. The latter case is still pending for trial.

In Crime No.277 of 2018 of Yadagirigutta P.S., the detenu was arrested on 5.9.2018, remanded to judicial custody, and was lodged in District Jail, Nalgonda. It was further alleged that on 22.9.2018 the detenu had moved a bail application for his release. But the same was dismissed by the Special Judge for Trial of Cases on POCSO Act, 2012-cum- I-Additional District & Sessions Court, Nalgonda. However, still the detaining authority was under the impression that there was every likelihood that in case the detenu were released on bail, he would revert back to and indulge in similar set of offences. Thus, he was preventively detained.

Subsequently, on 8.11.2018 the detenu was produced before the Advisory Board for hearing and for examining the grounds of detention order. Consequently, by order dated 18.12.2018 the detention order was confirmed by respondent No.1. Hence, this petition before this Court.

Mrs. B. Mohana Reddy, the learned counsel for the petitioner has raised the following contentions before this Court:

Firstly, a single case was considered for detaining the detenu. This case relates to the offences under Sections 370 (1) (5), 372, 373, 366A of I.P.C., offence under Section 17 of POCOSO Act, offences under Sections 3, 4, 5, 6 and 7 of PITA, and offences under Sections 75 and 81 of J.J. Act.

Secondly, a distinction has to be made between “law and order problem” and “public order problem”. Although, every fraction of law, does disturb the society, but not every criminal offence creates a ‘public order’ problem.

Thirdly, the offences allegedly committed by the detenu can easily be tackled by the regular criminal justice system by holding a trial. If the prosecution succeeds in establishing its case against the detenu, conviction and sentence can be recorded against him in accordance with law. Therefore, the detaining authority is unjustified in invoking the detaining power under the draconian Act.

Lastly, even according to the detaining authority, the detenu had filed a bail application, but was not granted any bail. Thus, as the detenu was in judicial custody, there was no cogent reason for passing the detention order. In order to buttress the plea, the learned counsel has relied on the case of **Rekha v. State of Tamil Nadu**¹.

¹ (2011) 5 SCC 244

On the other hand, Mr. Sharath Kumar, the learned Special Government Pleader, has vehemently pleaded that prostitution corrupts the lives of young girls, ruins the life of young men and women, and causes public health problems. Therefore, prostitution by itself is a menace to the society; it needs to be dealt with an iron hand. Wanting to end the menace of prostitution in the society, the detaining authority is well justified in invoking its power against the detenu under the Act. Therefore, the learned counsel has justified both the impugned orders.

In rejoinder, the learned counsel for the petitioner submits that although prostitution, at times, is seen as a menace in the society, but there is a change in the public perception. According to the learned counsel, prostitution is part of the underbelly of the society. However, there is a growing demand, throughout the world, that prostitution not only needs to be legalized, but the sex-workers also need to be reformed by the State, need to be weaned from the oldest profession, and need to be brought back into the mainstream of society.

Secondly, if reformatory theory of punishment is applicable to penal punishment, there is no reason for the State in not trying to reform those who are allegedly involved in prostitution, instead of preventively detaining such persons like the detenu and the sex-workers. The State needs to play both a pro-active and reformist role. Therefore, preventive detention is not the answer to the menace of prostitution.

Lastly, preventive detention, termed as 'draconian law', such law adversely affect the personal liberty of the detenu. The detenu is

incarcerated without a fair trial. Therefore, preventive detention law should be used as the last resort to tackle crime in the society. Too frequent a use of preventive detention laws not only undermine the faith of the people in the rule of law, but also turn the State from a democratic one to a fascist one. Therefore, detaining authorities should sparingly use preventive detention powers. Such powers, generally, should be used in order to tackle the problems of disturbance of 'public order'. However, according to the learned counsel, the present case is not a case of disturbance of 'public order'.

Heard the learned counsel for both parties, perused the impugned orders, and considered the case-law cited by the counsel.

Preventive detention cases bring to the forefront two conflicting interests: firstly, the interest of individual regarding his personal liberty. Secondly, the duty of the State to tackle crime within the society, and to maintain peace and tranquility in the State. In order to balance these two conflicting interests, the Constitution has armed both the individual and the State. The Constitution has armed the individual with certain fundamental rights; it has armed the State with different powers, both punitive and preventive, to effectively carry out its duties. However, while bestowing different powers on the State, the law continues to maintain a clear-cut distinction in the nature of power, and the circumstances under which the power can be invoked. For, the foremost endeavour of the Constitution, under the concept of constitutionalism, is to protect the individual from the might of the State. Therefore, Part-III

of the Constitution of India demarcates an area where the State is not permitted to enter into, except in accordance with law. Even, when the State is permitted to affect personal liberty of individual, the State is required to do so strictly in accordance with law.

Law maintains a clear distinction between punitive power of the State, and the preventive power of the State. Needless to say, the State has a complete machinery to deal with the offences which have been defined both under the I.P.C. and other specialized criminal laws. Therefore, if there is a violation of criminal law either under the I.P.C. and/or under the specialized criminal acts, the State, at the first instance, is expected to tackle such infraction of law by utilizing the normal Criminal Justice System.

It is only when an offence has a grave impact on the public at large, it is only when a crime disturbs the even tempo of life, only then the preventive powers may be invoked by the State. Since preventive powers are harshest and gravest in the hands of the State, the power is meant to be used sparingly by the State as far as possible.

While keeping in mind the distinctions mentioned above, the Hon'ble Supreme Court, in **Ram Manohar Lohia v. State of Bihar**², has distinguished between “law and order problem” and “public order problem”. The Hon'ble Supreme Court has observed as under:

“54. We have here a case of detention under Rule 30 of the Defence of India Rules which permits apprehension and detention of a person likely to act in a manner prejudicial to the maintenance of public order. It follows that if such a person is not detained public disorder is the apprehended

² AIR 1966 SC 740

result. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. Does the expression 'public order' take in every kind of disorders or only some of them? The answer to this serves to distinguish "public order" from "law and order" because the latter undoubtedly takes in all of them. Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival communities and one of them tried to raise communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act but disturbances which subvert the public order are. A District Magistrate is entitled to take action under Rule 30(1)(b) to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances."

Every violation of criminal law does cause a ripple in the society. But the ripples can be calmed down by use of normal Criminal Justice System. It is only when an offence strikes the society, like a tsunami, that as a weapon of the last resort, namely the preventive laws need to be brought into force.

Therefore, while invoking the magical formula of preventive detention, the detaining authority is required to firstly consider whether the offences, allegedly committed by the detenu, can be dealt within the normal course of Criminal Justice System or not? The detaining authority should also examine whether the release of the detenu can be

prevented by opposing his bail applications or not? If bail were granted, whether an application for cancellation of bail can be filed or not? Whether his detention under judicial custody can be ensured or not? It is only after assessing these circumstances, and after being satisfied that the answer of all these issues is in the negative, that the detaining authority may be justified in passing the detention order.

It has repeatedly come to the notice of this Court that the investigating agencies, especially the police, instead of furnishing complete details about the offender to the public prosecutor, fail to do so. Therefore, the public prosecutor is not armed with the complete criminal record of the offender. Hence, the public prosecutor is not in a position to vehemently oppose the bail application. Resultantly, many a times, the alleged offender is granted bail by the courts. Even thereafter, the State does not move a petition for cancellation of bail. Instead, it lets the offender go scott free. Therefore, the State fails to perform its duty within the arena of criminal justice system.

In such a scenario, faced with a raising crime rate, the State turns to the use of preventive detention laws to tackle the menace of crime in the society. Therefore, even for petty cases, the offenders are being preventively detained by the State. Needless to say, such a use of preventive powers amounts to colourable exercise of power, which cannot be sustained in the eye of the law.

The entire political structure, which deals with democracy, the Constitution, and the rule of law, is based on the bedrock foundation of

the faith of the people in the systems created by the law. It is, thus, faith of the people which needs to be strengthened by the State. Too frequent misuse of preventive laws would naturally undermine the faith of the people in the administrative system of the State. Instead of seeing the State as a protector, the State would be seen as a persecutor by the people. When personal liberty is invaded at the drop of a hat, the State ceases to be a democratic one. Rather, it transforms itself into a fascist regime. In such a scenario, misuse of preventive detention leads to oppression of the people. However, the constitutional mandate does not permit the State, that too a welfare state, to change its colour and transform itself into a Frankstein monster. Therefore, even in the Constitutional scheme, although Article 22 of the Constitution of India permits preventive detention, even then it requires that the power should be used as sparingly as possible, and strictly in accordance with law.

While the reformatory theory of punishment holds the field for punitive punishment, the State should seriously consider ways and means of reforming those who are threat to the peace and tranquility of the society at large. Therefore, instead of preventively detaining such persons, a scheme should be prepared to wean away those who violate the provisions of PITA, and indulge in prostitution. Already the Central Government has floated the scheme called “Ujjawala”. Hence, even the State Government should also contemplate in framing a similar scheme for the benefit of those who are caught in human trafficking, and are forced into prostitution.

In the present case, the detenu was alleged to have indulged in running brothel house and allegedly has committed the offences under Sections 370 (1) (5), 372, 373, 366A of I.P.C., offence under Section 17 of POCSO Act; offences under Sections 3, 4, 5, 6 and 7 of PITA; and offences under Sections 75 and 81 of J.J. Act.

So far as the offence under Section 370 (1) of I.P.C. is concerned, if it involves a 'trafficking of person' punishment is not less than seven years imprisonment, but which may extend to ten years; under Section 370 (5) of I.P.C., if it involves 'person convicted of offence of trafficking of minor or more than one occasion', punishment is imprisonment for life which shall mean the remainder of that person's natural life. Under Section 372 of I.P.C., imprisonment is for ten years if it involves 'selling or letting to hire a minor for purposes of prostitution, etc'. Under Section 373 of I.P.C., imprisonment is for ten years if it involves 'buying or obtaining possession of a minor for the same purposes'. Under Section 366A of I.P.C., imprisonment is for 10 years if it involves 'procurement of minor girl'.

So far as the offence under Section 17 of POCSO Act is concerned, the punishment prescribed is imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or both.

So far as the offence under Section 3 of PITA is concerned, the punishment prescribed is, if it is first conviction, with rigorous imprisonment for a term of not less than one year, and not more than three years, and also with fine, which may extend to two thousand rupees; in the event of a second or subsequent conviction, with rigorous imprisonment for a term of not less than two years and not more than five years, and also with fine which may extend to two thousand rupees.

So far as the offence under Section 4 of PITA is concerned, the punishment is imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both; where earnings relate to the prostitution of a child or a minor, he shall be punishable with imprisonment for a term of not less than seven years and not more than ten years. So far as the offence under Section 5 of the PITA is concerned, the punishment is rigorous imprisonment for a term of not less than three years and not more than seven years, and also with fine which may extend to two thousand rupees; if the offence is committed against the will of any person, the punishment is imprisonment for a term of seven years shall extend to imprisonment for a term of fourteen years. So far as the offence under Section 6 of the PITA is concerned, the punishment prescribed is imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine. So far as the offence under Section 7 of the PITA

is concerned, the punishment prescribed is imprisonment for a term which may extend to three months.

So far as the offence under Sections 75 of J.J. Act is concerned, the punishment prescribed is imprisonment for a term of which may extend to three years or with fine of one lakh rupees or with both. So far as the offence under Section 81 of J.J. Act is concerned, the punishment prescribed is rigorous imprisonment for a term which may extend to five years and shall also be liable to fine of one lakh rupees.

Therefore, the State can easily deal with the criminal case within the folds of normal Criminal Justice System. Hence, there was no need for the detaining authority to invoke its powers under the Act.

Moreover, the detaining authority has over-looked the fact that the detenu was under judicial custody as his bail application was already dismissed. Being in judicial custody, the detenu is already “prevented” from committing further offences. Hence, the detaining authority was unjustified in passing the impugned detention order.

For the reasons stated above, this writ petition is allowed. There shall be no order as to costs.

As a sequel thereto, Miscellaneous Applications, if any, pending in this Writ Petition shall stand closed.

RAGHVENDRA SINGH CHAUHAN, CJ

DR. SHAMEEM AKTHER, J

July 04, 2019.
Gbs/pln