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Court : Guwahati

Decided On : Apr-04-1983

Judge : B.L. Hansaria and T.C. Das, JJ.

Appellant : Bikash Narayan Sarma

Respondent : State of Assam and ors.

Judgement :

B.L. Hansaria, J.

1. 'Law deals with the facts of life. In law, as in life, there are no invariable absolutes. Neither life nor law can be reduced to mere but despotic formulae'. These observations had fallen from Chinnappa Reddy, J. in Ummu Saleema v. B.B. Gujaral : [1981]3SCR647 , while dealing with the question as to whether there was any reasonable delay in considering the representations of the detenu. It had been observed earlier that the occasional observations made by the Court that each day's delay must be explained were meant to emphasize the expedition required in such a matter, and not that it is a magical formula, the slightest breach of which must result in release of the detenu. Thinking on the same wave length, may we say that though the procedural safeguards must be made available to a detenu to the greatest extent, at the same time the inner object and intent behind the framing of such laws which are sanctioned by the Constitution itself cannot be allowed to be totally frustrated by overplaying the safeguards too much.

2. These thoughts have occurred to us because in this application challenging the detention of the petitioner under National Security Act (for short, the Act) as unconstitutional and illegal, one of the points urged is that as the petitioner was under arrest when the order of detention had been passed, the same has to be struck down showing either non-awareness of this fact, or because of non-supply of vital facts to the detaining authority. It is impressed upon us by referring to three recent decisions of the Supreme Court in *Biru Mahato v. District Magistrate* : 1982 CriLJ2354 ; *M. Satyanarayana v. State of Andhra Pradesh* : 1982 CriLJ2357 , and *Devi LaL Mahto v. State of Bihar* : 1982 CriLJ2363 , that where a person is already in jail or under detention, the detaining authority must show awareness of this fact and must further consider that a preventive detention order is yet a compelling necessity. An alternative argument is that if the fact of arrest is not made known to the detaining authority, the same would amount to withholding of vital fact which is not permissible on the part of the 'machinery of detention'. To support the latter aspect in particular, reference has been made by Sri Goswami to a Bench decision of this Court in *Joynath Sharma v. State of Assam* Civil Rule (HC) No. 13 of 1983 disposed of on 7-3-83 reported in 1984 Cri LJ 92.

3. The facts relating to the arrest of the petitioner as revealed from the two affidavits filed by the Officer-in-charge of Panbazar Police Station and Officer-in-charge of Jalukbari Police Station are that the petitioner was taken in custody on 27-1-83 when he was kept in the Thana lock-up at Panbazar Police Station. On the following day he was sent to Gauhati Medical College for examination and was discharged therefrom the next day, that is, on 29-1-83. On that day the petitioner was released from custody on the strength of an order passed by the Court. Immediately after his release, the detention order which had been passed on 28-1-83, was served on him. As such, it is correct that when the detention order had been passed the petitioner was in custody. The question is whether on the ratio of the aforesaid decisions, the detention order can be set aside on the twin grounds urged by Sri Goswami in this connection.

4. Reference to the aforesaid three decisions, all of which are by a Division Bench of Desai and Misra, JJ. would show that the rationale behind requiring the detaining authority to show awareness of the fact of earlier confinement and of the

compelling necessity is that if a person is already in jail or under detention he is not a free man to indulge in any prejudicial activity. To put it differently, such a person is sufficiently prevented from acting in a prejudicial manner. Despite this, an order of preventive detention may be necessary where it is known that a person undergoing imprisonment would soon be released in which case a valid order of detention can be made a few days before the person is likely to be released as was stated in *Rameswar Shaw v. District Magistrate* : 1964 CriLJ257 . It may be stated that this decision has been relied on in the aforesaid pronouncements, *Vijay Kumar v. State of J. & K.* : [1982]3SCR522 has also accepted this position, though it has been added that in such a situation there must be compelling reasons for a preventive detention order to be made.

5. In the instant case the order of detention was made on 28-1-83. The petitioner had been taken in custody only on 27-1-83, and he came to be released on 29-1-83. Thus, though technically speaking the petitioner was in detention when the impugned order had been passed, the question is whether in cases where the period of arrest or detention is very short, say only a few hours, can the detention orders be set aside on the ground that the order of the affidavit did not show awareness of the above fact and did not disclose compelling reasons for passing of detention order nonetheless. It is felt that such an approach would take the heart out of the aforesaid pronouncements, and would confine the logic to 'despotic formula'. It may be stated that in all the three decisions mentioned above, the petitioners were in detention prior to the passing of the impugned order for quite a substantial period of time. This was for about three weeks in *Biru Mahato*, about two months and one month four days in the two cases covered by *Mr. Satyanarayana*; and one month 18 days in *Devi Lal*. According to us, a few hours' confinement just before the passing of the order of detention followed by a release within hours thereafter, should not, and cannot, see the burial of the detention order. Law cannot be stretched to a breaking point. It has a purpose behind it, and we cannot make law lifeless and purposeless. No doubt the Courts have to zealously guard the personal liberty of a person, but it is saddled with an equally important responsibility the same being protection of social order. An even balance between the two has to be struck. As preventive detention law is draconian in nature, the Court would undoubtedly protect persons from its clutches where they

read unfairness, casualness, cavaliness, etc. But such laws, framed as they are for preserving orderliness in the society, have also to be allowed their play within the field of their operation, of course, after ensuring that the Courts act as referees.

6. We do not also think if not informing the detaining authority about such short period of detention would amount to suppressing of vital fact by the machinery of detention. A fact has to be regarded as vital, for the purpose at hand,' only if the same is likely to affect the decision of the detaining authority. It is extremely doubtful if any reasonable detaining authority would desist from passing an order of detention to prevent a person from acting in a prejudicial manner only because the person concerned was detained for a few hours, or for a day or two. May we also say that to require a detaining authority in every case to first ascertain whether the person to be detained is a free agent or not, will saddle the authority with a time-consuming and onerous task, which may ultimately turn out to be not material in all cases, in view of what we have stated above.

7. As reliance has been placed in this connection on a decision of this Court in *Bipul Mahanta v. State of Assam* Civil Rule (HC) No. 25 of 1982 disposed of on 4-3-83 : reported in 1984 Cri LJ 99, we may say a few words about that judgment. In that case, the arrest under Section 151 Cr. P. C. was on 5-1-83 and the detention order was passed on 7-1-83. So, the petitioner was in detention beyond 24 hours which is not permissible because of what is stated in Sub-section (2) of Section 151, unless it is authorised by other provision of the Code, to show which there was nothing on record. Thus, the Court was not fully satisfied about the momentary or fleeting nature of the detention, and it also felt that the petitioner must have been detained for 'some other offences'. Further, in the counter of the State, it had been stated that the detention under the Act was 'independent of the petitioner's arrest on 5-1-83 on other charges'. As other charges were not made known to the Court, the non-awareness was held as fatal to the order. The present case is somewhat different on facts. Then, the release of the petitioner on bail on 29-1-83 makes a vital difference according to us.

8. The present order cannot, therefore, be set aside on the above count. The next attack on the validity of the order is on the score of non-consideration of the report by the Central Government sent to it under Section 3(5) of the Act. Admittedly, in the present case the petitioner had not submitted any representation to the Central Government. The question is whether the Court can quash the order because of there being nothing on record to show that the Central Government had applied its mind to the aforesaid report. No affidavit has been filed on behalf of the Union of India to show as to how it had dealt with the report. Shri Goswami, therefore, submits that the order is likely to be set aside because of non-consideration of the report by the Central Government.

9. Shri Goswami has principally relied in this connection on *Sabir Ahmed v. Union of India* : [1980]3SCR738 . He has also referred to the decision of this Court in *Joynath Sarma* 1984 Cri LJ 92(supra). As to *Joynath* it may be pointed out that in that case a representation had been sent to the Central Government also, and as such, the ratio of that decision cannot assist the petitioner of the present case. It may be stated that there is no dispute, in view of the decisions of the Supreme Court in *Shyam Ambalal v. Union of India* : 1980 CriLJ555 and *Tara Chand v. State of Rajasthan* : 1980 CriLJ1015 , that if a representation is filed, the Central Government is under a legal obligation to consider the same and failure to do so would entitle the detenu to claim release inasmuch as that Government has also been conferred with the power of revoking detention order by Section 14 of the Act. Indeed, *Sabir Ahmed* was also a case where a petition had, in fact been submitted to the Central Government. But then this decision does contain some observations which are not confined to filing of petition/representation inasmuch as it has not stated in paragraph 12 that the power of revocation conferred on the Central Government is supervisory power, and is intended to be an additional check or safeguard against the improper exercise of the power by the detaining authority or the State Government. It was then stated that if 'this statutory safeguard is to retain its meaning and efficacy, the Central Government must discharge its supervisory responsibility with constant vigilance and watchful care', and therefore, the report received by the Central Government must be considered with reasonable expedition. When reference was made of *Mohd. Dhana Ali v. State of West Bengal* : 1976 CriLJ622 , the Division Bench stated that case 'stands

on its peculiar facts'; and held that in principle there was no conflict between the ratio of that case and two subsequent decisions in Shyam Ambalal and Tara Chand.

10. It would, therefore, be only appropriate to see what was stated in Dhana Ali. That case had dealt with a detenu under MISA under whose Section 14 it was open to the Central Government to revoke the order of detention after receipt of a report. When it was argued that there must be some materials to show that the Government of India had applied its mind under Section 14, the Court observed in para 5 that:

Section 14 merely confers a discretion on the Central Government to revoke or modify the order of detention made by the State Government. It does not confer any right or privilege on the detenu. It is for the Central Government to revoke or modify the order of detention after the report is submitted to it. The mere fact that the Central Government does not choose to revoke or modify the order of detention without anything more cannot necessarily lead to the irresistible inference that the Central Government failed to apply its mind.

It is submitted by Shri Goswami that even on the ratio of Dhana Ali, the detention order has to be undone because in that case there were nothing to show that the Central Government had not applied its mind. This is not the position, according to the learned Counsel, in the instant case inasmuch as even after giving reasonable opportunity to the Central Government, it has failed to enlighten the Court as to how it had dealt with the matter, which would only show that the Government of India had not at all considered the report. It is pointed out that in Dhana Ali, the Central Government was perhaps not a party and it is because of this it was observed in the penultimate sentence of para 5 that there was 'no material before us to show that the Central Government did not apply its mind at all under Section 14 of the Act.'

11. From the facts of the present case as on record, we would think that it would not be wrong to hold that the Central Government had not applied its mind to the report. Still, it has to be considered whether a legal grievance could be made of the non-consideration by the petitioner, and whether the order can be set aside on

this ground alone. As presently advised we are of the opinion that it cannot be so done. Though on receipt of the report it is open to the entral Government to revoke an order if it thinks fit to do, the question of 'discretion coupled with duty' mention of which has been made in Sabir Ahmed will arise only when a petition/representation has been made; indeed, Sabir Ahmed has used this expression in the context of dealing with a petition/representation; otherwise, it would be a case of 'complete discretion' and not reviewable by a Court of law.

12. We have taken this view for these reasons. First, the question of non-consideration of a representation would amount to violation of Article 22(5) of the Constitution, which will be absent in the case of non-consideration of a mere report. It may be pointed out that much of the procedural safeguards now available to a detenu have been woven by the Courts around Article 22(5), and more particularly on its mandate to make available the right of effective representation. Secondly, Sabir Ahmed was a case where representation had in fact been made; and so its ratio has to be confined to such a case. Thirdly, if the power of revocation is not invoked, the question of non-considering this aspect cannot in equity be agitated by the non-applicant. Finally, there is a distinction in law between 'discretion coupled with duty' and 'complete discretion', if we may use a dichotomy, which, it seems to us, brings home this aspect.

13. The last reason ascribed by us needs some elucidation. We would start with *Julius v. Bishop of Oxford* (1880) 5 AC 214, which can be given the distinction of giving us the phrase 'discretion coupled with duty'. In that case, the House of Lords was seized with finding out the true purport of the expression 'it shall be lawful' finding place in the 3rd section of the Church Discipline Act. That section made it lawful for a Bishop to issue a commission for making some enquiry 'on the application of any party' or 'of his own mere motion'. The Bishop of Oxford was approached by Dr. Julius to issue a commission. This was declined. The Court examined the matter on these broad facts. Earl Cairns, L. C. observed the following while explaining the meaning of the word 'it shall be lawful':

They are plain and unambiguous. They are words, merely making that legal and possible which there would otherwise be no right or authority to do. They confer a

faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.

(Emphasis supplied)

14. We may also note what Blackburn, C. J. had to say in this regard :

I do not think the words 'it shall be lawful' are in themselves ambiguous at all. They are apt words to express that a power is given; and as, *prima facie*, the donee of a power may either exercise it or leave it unused, it is not inaccurate to say that, *prima facie*, they are equivalent to saying that the donee may do it; but if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it for the benefit of those who have that right, when required on their behalf.

(Emphasis ours)

15. Thus, the historic decision of *Julius* itself makes it clear that the question of reading a duty really arises when the donee is either 'called upon' to exercise the power, or when it is required on behalf of those for whose benefit power has been given. When the question of exercising the power 'of his own mere motion' arises as it would be when under the Act the Central Government examines the report on its own, we would think it would be case of 'complete discretion' and the power could be exercised if the Central Government 'chooses to do so' (see page 228 of *Julius*); and in that contingency no duty towards the detenu can be read, at least none about which a grievance could be made in Court of law. May we say that *Padfield v. Minister of Agriculture* 1968 AC 997, another landmark decision on the nature and extent of discretionary power, has not laid down any different proposition. It deserves mention that in *Padfield* also the Minister had been approached to take action under the law. Before leaving this aspect, reference

may be made to Halsbury's Laws of England, (Fourth Edition) Vol. I in para 99 of which it has been stated on the basis of Julius that '(p) prima facie the words 'it shall be lawful' occurring in a statute are permissive and enabling only, and will not therefore impose a duty in respect of which mandamus will lie.' The connected footnote adds a rider saying that '(e) exceptionally, however, permissive language may be held to impose a duty to act.' Though for the day on this aspect.

16. There is no force in the third grievance advanced by Shri Goswami as well the same being vagueness in the grounds. Though it is submitted that the statement in the ground that the printed leaflets were secretly distributed 'in the neighbouring areas of Gauhati Medical College Hospital Campus, Panbazar' is vague, we are not in a position to accept this submission inasmuch as the areas where the leaflets had been allegedly distributed have been sufficiently indicated to enable the petitioner to make an effective representation.

17. Despite all the above, the impugned order does not merit its continuance because the leaflets which were stated to have been secretly distributed on 23-1-1983 were aimed at the election which was impending when the distribution had been made. Now that election is practically over, to continue detention would be more punitive than preventive; and as stated in A. K. Roy : 1982 CriLJ340 : 'Whatever smacks of punishment must be scrupulously avoided in matters of preventive detention.' This aspect has been dealt with by this Court in many of the recent decisions, and in following the view taken therein, we would hold that to continue the detention of the petitioner really amounts to an act of punishment which can be awarded on a person following a trial only. Apart from what has been stated in A. K. Roy (supra) about the minimal use of preventive detention power, we may appropriately refer to Francis Coralie v. Union Territory of Delhi AIR 1981 SC 746 : 1981 Cri LJ 306 which has proclaimed that apart from Article 22, the restrictions on the power of preventive detention are to be read in Article 21 also. After referring to the vital distinction between 'preventive detention' and 'punitive detention', it was pointed out that the restrictions placed on a person preventively detained must, consistently with the effectiveness of distinction, be minimal.

18. We, therefore, set aside the order on the ground that the detention of the petitioner now will not be in the spirit of Articles 21 and 22. In coming to the conclusion, we have also borne in mind the fact that the petitioner has been in detention by now for more than two months and the order is grounded on a solitary instance of distribution of objectionable leaflets. The confirmation of the order for a period of 12 months on these facts, without any indication at all in the records as to why the maximum period visualised by the Act was prescribed, has to be regarded as a result of non-application of mind to a vital fact. This Court had occasion to point out that the power conferred by Section 12(1) of the Act dealing with period of detention also requires due application of mind. This is besides the contention that the order of detention could not have been passed at all on the basis of this solitary incident to which aspect of the matter we are not addressing ourselves, though it is debatable whether the nature of the act and the attendant circumstances could have permitted the use of preventive law in the case at hand, The petition accordingly succeeds and the respondents are directed to release the petitioner forthwith if he is not wanted in connection with any other case.

19. Before parting we have two observation to make. The first is about suppression of the fact of release on bail by the petitioner. Where an approach is made to this Court under its writ jurisdiction where matters are decided on the basis of affidavits, suppression of material fact is more objectionable. Secondly, we have to put on record our unhappiness at the casualness, if nothing more, which we have noticed in a part of the affidavit of the District Magistrate. To bring home this aspect, we have to advert to some background facts. As the petitioner had stated in para 5 of this petition that he was under arrest on and from 27-1-1983 till the time of passing of the order, and as the District Magistrate in his affidavit had characterised these statements as 'not correct'; but as he had not dealt with the averment in para 11 that the petitioner was under detention when the impugned order was passed, we had directed vide our order passed on 16-3-1983 the Officers-in-charge of Jalukbari and Panbazar Police Station to file their affidavits in this regard. From their affidavits it is absolutely clear that the petitioner had been arrested on 27-1-1983 and was in detention till the afternoon on 29th January. Though in these two affidavits the allegation of severe beating by C. R. P. F. personnel made in paragraph 5 of the petition had been denied, which was

said to be 'absolutely incorrect' in the affidavit of the District Magistrate, other averments made by the petitioner in paragraph 5 have to be regarded as correct. But the District Magistrate has characterised them as 'not correct', which definitely shows casualness, to put it at the lowest. It may not be said that if any fact averred in a petition is not known to the deponent, he has either to enquire about the same if time permits, or has to say that these are not known to him, if he wants to meet the averments. But without making enquiries and without knowing about them otherwise, the statements cannot be said to be 'not correct' without any further qualification.

20. Though the petitioner has been ordered to be released, as he has been appointed as a Special Officer under the provisions of Section 17 of the Police Act, 1861, the petition would be set down for hearing the grievances relating to that appointment. It may, however, be added that though according to us a separate, petition ought to have been filed for this purpose, but as the averments relating to it have been traversed by the State also, we are ordering further hearing of this aspect in this case itself.

T.C. Das, J.

21. I agree.

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