

ismail Vs. State of Maharashtra and Others

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Court : Mumbai

Decided On : Sep-18-1981

Reported in : (1982)84BOMLR20; 1982CriLJ582; 1982MhLJ359

Judge : Dharmadhikari and; S.W. Puranik, JJ.

Acts : Maharashtra Prevention of Dangerous Activities of Slumlords Bootleggers and Drug-offenders Ordinance - Sections 2, 3, 3(1), 14(2) and 17; [National Security Act, 1980](#) - Sections 3(2), 12(2), 13, 14 and 14(2)

Appeal No. : Criminal Appl. No. 1430 of 1981

Appellant : ismail

Respondent : State of Maharashtra and Others

Judgement :

Dharmadhikari, J.

1. The detenu Mohomed Umar alias Umar Pathan s/o. Jalaluddin alias Matiuzamkhan Pathan is detained vide order dated 3rd July, 1981 issued by the Commissioner of Police under the Maharashtra Prevention of Dangerous Activities of Slumlords Bootleggers and Drug-offenders Ordinance (Maharashtra Ordinance No. III of 1981) (hereinafter referred to as the Ordinance). With the order of detention the grounds of detention were also supplied. The said order of detention

is challenged, in this Criminal Application.

2. It is contended by the petitioner that prior to the issuance of the present order under the Ordinance, on 22nd February, 1981, the detenu was detained by the same authority i.e., the Commissioner of police Greater Bombay under a detention order issued under S. 3(2) of the [National Security Act, 1980](#) (Act 65 of 1980) hereinafter referred to as an Act practically on identical grounds. Against the said order issued under the Act, the petitioner had filed habeas corpus petition before this Court, bearing Criminal Application No. 588 of 1981 in which rule nisi was issued on 6th April, 1981. However before the said petition could come up for hearing on 7th April, 1981, the Government of Maharashtra revoked the order of detention under S. 12(2) of the Act in pursuance of the opinion expressed by the Advisory Board that there was no sufficient cause for the detention of the detenu. Since the detenu was already released, he withdrew the habeas corpus petition filed by him. In the present petition it is contended on behalf of the detenu that the grounds of detention and the allegations made in the present detention order issued under the Ordinance on 3rd July, 1981, are *pari materia* the same except the preamble and instances 1 to 3 which relate to the period between January and February, 1980 and ground No. 19. (sic) This position is not disputed by the Respondents. In view of this admitted position, Shri Karmali the learned Counsel appearing for the detenu contended before us that the impugned order of detention issued under the Ordinance directing the detention of the detenu on the same grounds is not only an abuse of statutory authority but is also *mala fide*. He also contended that by this order the detaining authority has set at naught the verdict given by the Advisory Board that there was no sufficient cause for the detention of the detenu under the Act. Shri Karmali also contended that under S. 14(2) of the Act it was not open to the detaining authority to pass a fresh order of detention on the basis of the same facts or grounds. What has been forbidden by S. 14(2) of the Act has now been sought to be achieved by the detaining authority by issuing an order of re-detention under the Ordinance. According to the learned Counsel even S. 14(2) of the Ordinance bars such a detention and therefore, the order of detention issued by the Commissioner of Police on 3rd July 1981 is wholly illegal. In support of his contention Shri Karmali has placed reliance upon the decisions of the Supreme Court in : 1969 CriLJ274 Hadibandhu Das v. District

Magistrate, Cuttack : 1973 CriLJ627 , Masood Alam v. Union of India : 1973 CriLJ1602 Har Jas Dev Singh v. State of Punjab : 1974 CriLJ449 Chotta Hembram v. State of West Bengal, : 1974 CriLJ811 Baidya Nath Mandi v. State of West Bengal and : 1970 CriLJ1404 , Kshetra Gogoi v. State of Assam.

3. On the other hand it is contended by Shri Kotwal the learned Public Prosecutor, that the bar contemplated by Section 14(2) of the Ordinance is qua the order issued under the Ordinance itself, and it has no application if the earlier order was issued under another legislation, i.e. National Security Act. Section 14(2) of the Ordinance in substance creates a bar for passing a fresh order of detention unless fresh facts have arisen after the date of revocation or expiry of the order. The term 'detention order' is defined under S. 2(c) of the ordinance, which means an order made under S. 3 of the Ordinance. Therefore according to Shri Kotwal S. 14(2) has no application to the facts and circumstances of the present case because earlier order was issued under the National Security Act and not under the Maharashtra Ordinance No. III of 1981. In support of this contention Shri Kotwal has placed reliance upon the decisions of the Supreme Court in : [1952]1SCR756 Ujagar Singh v. State of Punjab and : 1973 CriLJ667 Nagen Murmu v. State of West Bengal.

4. For properly appreciating the controversy raised before us it is necessary to make a reference to certain provisions of the present Ordinance. The present Ordinance was promulgated by the Governor on 11th June, 1981. The Ordinance was promulgated having regard to the resources and influence of the persons by whom the large scale on which and the manner in which the dangerous activities are being clandestinely organised and carried on in violation of law by slumlords bootleggers or drug-offenders. To deal with the persons belonging to this special class, this special law was enacted under entry 3, of list III of Seventh Schedule. The National Security Act is also enacted in exercise of the same power by the Parliament. It is neither disputed nor it could be disputed that the area and field covered by the present Ordinance is to some extent also covered by the National Security Act. Therefore to avoid the possibility of the arbitrary action of pick and choose, by S. 17 of the Ordinance, it is made clear that the detention orders against any slumlords bootleggers or drug offenders should be made under this

Ordinance and not under the National Security Act. Section 17 of the Ordinance reads as under :

'17. Detention orders against any slumlord, bootlegger or drug-offender to be made under this Ordinance and not under the National Security Act. On and after the commencement of this Ordinance, no order of detention under the [National Security Act, 1980](#), shall be made by the State Government or any of its officers under that Act, in respect of any slumlord, bootlegger or drug-offender in the State of Maharashtra, on the ground of preventing him from acting in any manner prejudicial to the maintenance of public order, where an order of detention may be or can be made against such person under this Ordinance.'

5. Therefore it is quite clear that after the commencement of the Ordinance no order of detention under National Security Act could be made by the State Government or any of its officer under the National Security Act in respect of the person specified therein, on the ground of preventing them from acting in any manner prejudicial to the maintenance of public order. In the present case it is an admitted position that on identical grounds an order of detention was issued under the National Security Act, and that too for preventing the detenu from acting in any manner prejudicial to the maintenance of public order. Therefore this is one of those cases where the grounds stated in the detention order are covered by both the legislations. The ultimate objects sought to be achieved by the present detention order is to prevent the detenu from acting in any manner prejudicial to the maintenance of public order, which was also the object sought to be achieved by the earlier order issued under the National Security Act. If S. 17 of the Ordinance was not there then it was open to the Police Commissioner to pass a fresh order under the National Security Act obviously subject to the terms and conditions incorporated in S. 14(2) of the said Act. Section 14(2) of the National Security Act reads as under. -

'14(2). The revocation or expiry of a detention order shall not bar the making of a fresh detention order under Section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Central Government or a State Government or an officer mentioned in sub-section (3) of

Section 3, as the case may be, is satisfied that such an order should be made.'

6. Section 14(2) of the Ordinance also reads as under :-

'14. (2) The revocation or expiry of a detention order shall not bar the making of a fresh detention order under S. 3 against the same person, in any case, where fresh facts have arisen after the date of revocation or expiry, on which the State Government or an officer, as the case may be, is satisfied that such an order should be made.'

7. If these two sub-sections are read together then, it is more than clear that both these sections create a bar for making a fresh detention order unless fresh facts have arisen after the date of revocation or expiry of the order. Unless fresh facts had arisen, it was not open to the Police Commissioner to pass a fresh order under the National Security Act in view of sub-section (2) of S. 14 of the said Act. Therefore the only question which requires consideration in this petition is to find out as to whether the same object could be achieved indirectly by the Police Commissioner under Ordinance i.e. Ordinance No. III of 1981, or whether the Police Commissioner can get over the bar created by S. 14(2) of the Act by issuing an order under S. 3(1) of the present Ordinance. In the case before us the grounds of detention are such that the detenu could be detained both under the National Security Act as well as the Ordinance. The detention contemplated is also for the maintenance of public order only. This is a case where grounds are over-lapping and the person concerned could have been detained on the same grounds under both the enactments, i.e. National Security Act and Ordinance No. III of 1981. However in view of S. 17 of the Ordinance the legislation has made it clear that such a person could only be detained under the present Ordinance. This salutary provision has been made so as to avoid arbitrary action of pick and choose. The object of the Act to some extent is also over-lapping. Therefore in our opinion the authorities cannot be permitted to achieve indirectly, what has been directly forbidden by S. 14(2) of the Act.

If on these very grounds an order of detention under the Act could not have been issued because of the revocation of the earlier detention order under Section 12(2) of the Act, then on the same grounds, without there being any fresh facts in the

field the detention order could not have been issued even under the Ordinance. When the enactments are over-lapping, which is also clear from the Section 17 of the Ordinance, then they will have to be construed harmoniously more so when they cover the same area and field.

8. In this context a reference could usefully be made to the decision of Supreme Court in *Hadibandhu Das v. District Magistrate, Cuttack*, : 1969 CriLJ274 . While considering somewhat similar provisions namely S. 13(2) of the Prevention of Offenders Act, 1950 this is what the Supreme Court has observed in paras 11 and 12 of the judgment :

'11. Relying upon these cases the Solicitor-General contended that it was settled law before S. 13(2) was amended by Act, 61 of 1952 that a detaining authority may issue a fresh order after revocation of an earlier order of detention if the previous order was defective in point of form or had become unenforceable in consequence of failure to comply with the statutory provisions of the Act, and that by the Amending Act it was intended merely to affirm the existing state of law, and not to enact by implication that revocation of a defective or invalid order attracts the bar imposed by S. 13(2). There is, in our judgment, nothing in the language used by the Parliament which supported that contention. The power of the detaining authority must be determined by reference to the language used in the statute and not by reference to any predilections about the legislative intent. There is nothing in S. 13(2) which indicates that the expression 'revocation' means only revocation of an order which is otherwise valid and operative; apparently it includes cancellation of all orders invalid as well valid. The Act authorised the executive to put serve restrictions upon the personal liberty of citizens without even the semblance of a trial and makes the subjective satisfaction of an executive authority in the first instance the sole test of competent exercise of power. We are not concerned with the wisdom of the Parliament in enacting the Act, or to determine whether circumstances exist which necessitate the retention on the statute book of the Act which confer upon the executive extraordinary power of detention for long period without trial. But we would be loath to attribute to the plain words used by the Parliament a restricted meaning so as to make the power more harsh and its operation more stringent. The word 'revocation' is not, in

our judgment, capable of a restricted interpretation without any indication by the Parliament of such an intention.

12. Negligence or inaptitude of the detaining authority in making a defective order or in failing to comply with the mandatory provisions of the Act may in some cases enure for the benefit of the detenu to which he is not entitled. But it must be remembered that the Act confers power to make a serious invasion upon the liberty of the citizen by the subjective determination of facts by an executive authority, and the Parliament has provided several safeguards against misuse of the power. The very fact that a defective order has been passed, or that an order has become invalid because of default in strictly complying with the mandatory provisions of the law bespeaks negligence on the part of the detaining authority, and the principle underlying S. 13(2), is, in our view the outcome of insistence by the Parliament that the detaining authority shall fully apply its mind to and comply with the requirements of the statute and of insistence upon refusal to countenance slipshod exercise of power.'

This decision was subsequently followed and reaffirmed in subsequent decisions of the Supreme Court. In Masood Alam v. Union of India, : 1973 CriLJ627 after making a reference to the earlier decisions in : 1969 CriLJ274 Hadibandhu v. District Magistrate and : 1970 CriLJ1404 Kshetra Gogoi v. State of Assam as well as to S. 14 of the Maintenance of Internal Security Act, the Supreme Court observed in para 7 of the judgment as under :

'The principle underlying this section has its roots in the vital importance attached to the fundamental right of personal liberty guaranteed by our Constitution. The Act fixes the maximum period of detention to be 12 months from the date of the detention with the proviso that the appropriate Government can revoke or modify the detention order at any earlier time : Sec. 13. It is to effectuate this restriction on the maximum period and to ensure that it is not rendered nugatory or ineffective by resorting to the camouflage of making a fresh order operative soon after the expiry of the period of detention, as also to minimise resort to detention orders that S. 14 restricts the detention of a person on given set of facts to the original order and does not permit a fresh order to be made on the same grounds which were in

existence, when the original order was made. The power of preventive detention being an extraordinary power intended to be exercised only in extraordinary emergent circumstances the legislative scheme of Sections 13 and 14 of the Act suggests that the detaining authority is expected to know and to take into account all the existing grounds and make one order of detention which must not go beyond the maximum period fixed. In the present case it is not urged and indeed it is not possible to urge that after the actual expiry of the original order of detention made by the District Magistrate, which could only last for 12 days in the absence of its approval by the State Government, any fresh facts could arise for sustaining the fresh order of detention. The submission on behalf of the State that the petitioner's activities are so highly communal and prone to encourage violent communal activities that it was considered absolutely necessary to detain him in the interest of security of the State and maintenance of public order cannot prevail in face of the statutory restrictions and the guaranteed constitutional right which is available to all persons. The rule of law reigns supreme in this Republic and no person on the soil of free India can be deprived of his personal liberty without the authority of law. As observed by this Court in *Manu Bhusan v. State of West Bengal*, W.P. No. 252 of 1972, D/-31-10-1972 : (Reported in : 1974 CriLJ401) :

'..... The Act encroaches on the highly cherished right of personal liberty by conferring on the executive extraordinary power to detain persons without trial by coming to subjective decisions. The detaining authority in exercising this power must act strictly within the limitations this Act places on its power so that the guarantee of personal liberty is not imperilled beyond what the Constitution and the law strictly provide. The limited right of redress conferred on the detenu under the law deserves to be construed with permissible liberality with the provisions of the Act and the constitutional guarantee.'

To the similar effect are the observations in : 1974 CriLJ449 *Chotta Hembram v. State of West Bengal* and : 1974 CriLJ811 *Baidya Nath Mandi v. State of West Bengal*. We have already made a reference to the provisions of S. 14(2) of the Act as well as S. 14(2) of the Ordinance. The National Security Act as well as the Ordinance create a bar for making a fresh order of detention unless fresh facts have arisen after the date of revocation or expiry of the earlier order. We have

already held that the area and field covered by the National Security Act as well as the present Ordinance is to some extent the same. This position is further clear from S. 17 of the Ordinance. Therefore if the submissions of Shri Kotwal are accepted it will mean that on the same grounds a person could be detained even beyond the maximum period prescribes a maximum period of detention to be of six months, under S. 13. On the same grounds the detenu was already under detention, though under the National Security Act and if he is now again kept under detention under the Ordinance for a period of six months, then the total period will obviously exceed the maximum prescribed. The detenu was also detained under the provisions of National Security Act for his activities which according to the detaining authority were prejudicial to the maintenance of public order. Under the impugned order he is again detained for the same activities also for the same purpose. Therefore the area and field covered by the earlier order and the present order is the same. Under National Security Act fresh order of detention could be issued if fresh facts have arisen after the date of revocation. Similar is the position under S. 14(2) of the Ordinance.

9. Instances Nos. 1, 2 and 3, in para 3 of the grounds relate to his activities in January and February 1980, that is during the period prior to the issuance of detention order D/- 21st February, 1980. Therefore it cannot be said that the instances mentioned in paras 1, 2 and 3 of the impugned order are fresh facts which have arisen after the date of revocation of the earlier order. The ground No. 12 is wholly irrelevant for the purpose of detention as it relates to a non-cognizable offence which might at the most involve a question of law and order and not public order. Therefore it could safely be said in the present case that the impugned order has been issued in a colourable exercise of power by the Commissioner of Police to overcome the bar created by S. 14(2) of the National Security Act. It is no doubt true that past proximate conduct of a person is a relevant factor for ordering detention if it has a rational connection with the necessity of detention (See : 1973 CriLJ667) Nagen Murmu v. State of West Bengal). But this is not a case of that type. It is equally true that to some extent this must depend on facts and circumstances of each case, and no general rule can be laid down in that behalf. However, we have already held that the alleged fresh facts have no nexus with the object sought to be achieved by the detention order i.e. maintenance of public

order.

10. In this view of the matter, we have no alternative but to allow the petition. Hence petition is allowed. Rule is made absolute. Detenu is directed to be set at liberty, if not required in any other case.

11. Petition allowed.

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