

Sushil Vs. State of U.P. and ors.

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Court : Allahabad

Decided On : Feb-05-1998

Reported in : 1998CriLJ2848

Judge : S.K. Phaujdar and ;N.S. Gupta, JJ.

Acts : [National Security Act, 1980](#) - Sections 3, 3(2), 3(3), 3(4), 3(5), 9, 10, 11 and 12; [Constitution of India](#) - Article 226; Indian Penal Code (IPC) - Sections 147, 148, 149, 302, 307, 336, 427 and 436

Appeal No. : C.M. Habeas Corpus Writ Petn. No. 25292 of 1997

Appellant : Sushil

Respondent : State of U.P. and ors.

Advocate for Def. : Mahendra Pratap, A.G.A.

Advocate for Pet/Ap. : R.K. Awasthi, Adv. and ;Ravi Kiran Jain, Sr. Adv.

Disposition : Petition dismissed

Judgement :

ORDER

1. Heard Sri R.K. Awasthi and Sri R.K. Jain for the petitioner and Sri Mahendra Pratap, learned AGA, for State.

2. Through this writ petition under Article 226 of the [Constitution of India](#) the petitioner had prayed for a writ or order or direction in the nature of Habeas Corpus for his production before the Hon'ble Court and for his being set at liberty from detention under the National Security Act (for short the Act). The petitioner was detained under an order of the District Magistrate, Haridwar, dated 21-5-97 in exercise of its powers under Section 3(2) read with Section 3(3) of the Act for preventing him to act in a manner prejudicial to the maintenance of public order.

3. Certain dates are relevant for a decision on the present petition. The order of detention was passed against him on 21-5-97 and he was served with the grounds of detention along with the detention order. A copy of the detention order is annexed to the writ petition as annexure-1 and the grounds therefor are there in annexure-4 to the writ petition. The order of detention was confirmed by the State Government on 30-5-97, as per document in annexure-2 to the writ petition. The matter was referred to the Advisory Board and the report of the Advisory Board was accepted on 11-7-97. The present writ petition was filed on 31-7-97. It was stated that the petitioner was already in jail in connection with case Crime No. 81 of 1997 for different offences including one under Section 302 IPC relating to P.S. Laksar, District Haridwar. The grounds of detention were supplied to him in jail. The District Magistrate had acted upon the report of the senior Supdt. of Police, Haridwar and the Deputy Supdt. of Police and lower police officers, as per annexures 5, 6 and 7 to the writ petition. It was stated that the District Magistrate had accepted the recommendations mechanically and had not applied his mind at all. After recording the detention order the District Magistrate wrote to the Home Secretary, Govt. of Uttar Pradesh on that very date for confirming the order of detention and this letter of the District Magistrate was annexed as annexure-8 to the writ petition. A representation was made by the petitioner on 4-6-97 which, according to the petitioner, was pending on the date of presentation of the writ petition and a copy of the representation was annexed as annexure-9. A representation was also made to the State Government on 4-6-97 itself and a copy of that representation was annexed as annexure-10 to the writ petition. It was contended by the petitioner that two other persons were also detained by the District Magistrate on identical grounds by passing order of detention on the same day (21-5-97). Upon their representation to the State Government, these persons,

Ram Kumar and Rakesh, were released. It was urged that five accused persons including the petitioner and the aforesaid Ram Kumar and Rakesh were released on bail by an order of the IInd Addl. Sessions Judge, Haridwar, by his order dated 23-7-97 and the bail order was annexed as annexure-11 to the writ petition. It was contended by the petitioner that the detaining authority was informed that the petitioner was in jail and was likely to be released on bail and, if so released, he would indulge in same activities affecting public order, but there was no material on record before the detaining authority to come to such a conclusion. It was also contended that even if the criminal case against the petitioner was taken to be true, it was not a ground by itself to invoke the provisions of the Act as the detaining authority had no material before it to conclude that in case the detenu came out of Jail, he would again indulge in serious offence causing threat to public order. In the petition itself, reference was made to certain decisions of the Supreme Court on this point. Reliance was also placed on the decision in the case of Rajiv Bharti to say that the allegations in the FIR and the im-; pact of the alleged offence upon the public could at best be a question of disturbance of law and order. It was contended further that as the detenu was in jail, the mere possibility of his release would not have given a tool to the District Magistrate for initiation of a proceeding for preventive detention as materials should have been there to justify an apprehension that the detenu would, after his release, indulge in activities prejudicial to the maintenance of public order.

4. The petitioner further asserted that on 18-5-97 one Chandra Shekhar Yadav was the Station Officer of Laksar Police Station and he had not made any report against the petitioner. This police officer was suspended on the ground of negligence and was replaced by Jagdamba Prasad Joil who had made a report on 20-5-97 which was transmitted onwards by his superior officers, finally to reach to the District Magistrate for the proposed detention. The petitioner also asserted that the allegations in the detention order made it clear that the men of the Muslim community had made efforts to take the Moharram procession through a predominantly Hindu residential area and the police used force against them and scuffle ensued between the police and the processionists. Only with a view to save their own skin, the police had rendered a preventive detention proceedings against the petitioner and others. It was urged that the petitioner was not given a copy of

the proceedings of the Advisory Board and the State Government had accepted the report of Advisory Board behind the back, of the petitioner. On these very grounds, the grounds of detention were challenged and the prayer for quashing the initial order dated 21-5-97, the confirmation order dated 30-5-97 and the order dated 11-7-1997 accepting the Advisory Board's report was made.

5. The State of U.P., the District Magistrate, Haridwar and the Superintendent of Roorkee Sub-jail were made the respondents Counter-affidavits were filed on behalf of these respondents. In the counter affidavit of the District Magistrate, Sri K.M. Sant,, the officer who recorded the detention order, it was stated that he was the District Magistrate of Haridwar at the relevant time and was empowered to act under Section 3(2) of the Act. It was asserted that the order of detention dated 21-5-97 was rightly passed to, prevent repetition of activities prejudicial to the maintenance of public order. This order was duly communicated to the State Government and was approved on 30-5-97 and due information of this confirmation was given to the petitioner through the jail authorities. Report was made to the Advosory Board, as required and the Advisory Board had submitted its report and the State Government thereafter confirmed the detention order for a period of 12 months from the date of actual detention and this order was issued by the State Government on 11 -7-1997. The petitioner was again informed of these a_velopments through the jail authorities. The ground of detention and other materials were served upon the petitioner while he was in Sub-jail, Roorkee, District Haridwar. The materials that were placed before the District Magistrate were considered by him independently and after being fully satisfied it was found necessary to proceed against the petitioner under the provisions of the Act to prevent him from engaging himself in activities prejudicial to the maintenance of public order. There was no delay on the part of the District Magistrate to make a report to the State Government. A representation was submitted by the petitioner on 4-6-97 through the jail authorities and after receipt of the same, comments were called for from the sponsoring officers and after receiving report from them, the District Magistrate prepared his comments and sent the representation of the petitioner along with his comments to the State Government on 17-6-97. These representations were rejected by the State Government as also by the Central Government and after receipt of information of rejection, the petitioner was

informed through the jail authorities. So far co-accused Ram Kumar and Rakesh were concerned, the District Magistrate accepted that they too were served with detention orders but, it was asserted, that the case of the petitioner was not identical to the cases of these two persons as the petitioner had played the main role in provoking the persons of one community against the other. The petitioner was leading the persons of his community and a communal riot broke out in village Mohammadpur Kunheri, P. S. Laksar. In that communal riot, one Akhleem was killed and a number of other persons were seriously injured and properties were also destroyed and damaged. Subsequently, one constable was also killed in a retaliatory measure by the persons of the Muslim community. The District Magistrate asserted in his affidavit that he was fully aware of the detention of the petitioner in Roorkee Sub-jail in a criminal case, but he had every reason to believe that the petitioner was likely to get bail and after such release he was likely to indulge in similar activities prejudicial to the maintenance of public order. It was asserted that the aforesaid case crime No. 81 of 1997 had an impact on public peace and tranquillity of the area. It was further asserted that for the present preventive action the antecedents and activities of petitioner were taken into consideration and it was not necessary under the law to wait for repetition of a particular act before taking a preventive action. The petitioner was produced personally before the Advisory Board for personal hearing and the State Govt. had confirmed the detention order after the report of the Advisory Board and there was no requirement of any further hearing before confirmation of the detention order.

6. A counter-affidavit was filed by the Jailor of the concerned jail and the affidavit indicates that initially the petitioner was detained in the jail in relation to case Crime No. 81 of 1997 and the detention order dated 21-5-97 was received in the jail on 22-5-97 was served on the petitioner on that very date along with the documents and grounds that were received for service. It was asserted that the confirmation order of the State Government dated 30-5-97 was received through a radiogram and the petitioner was immediately informed of this confirmation order. After the report of the Advisory Board the State Government confirmed the detention of the petitioner a period of 12 months and this order was communicated to the jail by a radiogram dated 11-7-97 and on the very next day it was communicated to the petitioner. The written order was received on 19-7-97 which

was also communicated to the petitioner. The Jailor further asserted that the petitioner had submitted representations on 4-6-97 which were sent to the District Magistrate and the rejection of the representations by the State Government was communicated by a radiogram on 27-6-97 and was communicated to the petitioner. The information of rejection of the representation by the Central Government was also received on 20-8-97 and was communicated to the petitioner. The petitioner was sent to Lucknow for personal hearing before the Advisory Board and there was no infraction of the requirements of the provisions of the Act at the end of the jailor. A counter-affidavit was brought on record on behalf of the State Government also through an assistant in the Confidential Section-7 of the U. P. Civil Secretariat. It was asserted that immediately after the detention order was made by the District Magistrate, a communication was sent to the State and the detention was approved by the State Government on 28-5-97, within the stipulated period of 12 days. This approval was communicated to the petitioner through the district authorities and on the same day the detention order, grounds of detention and other relevant papers were reported to the Central Government as required under Section 3(5) of the Act. The petitioner's representations dated 4-6-97 addressed to the Home Secretary, Govt. of Uttar Pradesh and the Secretary, Government of India were forwarded by the District Magistrate with his comments on 12-6-97 was served in the concerned section of the State Government on 21-6-97. The same were placed before the Advisory Board on 23-6-97 and the representation meant for the Central Government was also sent on the same date along with the parawise comments. The State Government also proceeded to decide the representation at its level. A note was put up on 23-6-97. The Secretary, Confidential Section, examined it on 25-6-97 and then it went to higher authorities and on that very date the representation was rejected by the State Govt. Communication of this rejection was duly made. The petitioner was actually detained under the Act on 22-5-97. It was referred to the Advisory Board on 30-5-97 and the papers were also forwarded within the stipulated period. The petitioner's case was heard by the Board on 19-6-97. He was given a personal hearing. The report of the Advisory Board was received by the State Government on 5-7-97. The matter was examined once again and the order was confirmed for 12 months by an order dated 11 -7-97. Regarding the

other two co-accused persons Ram Kumar and Rakesh, it was indicated in the affidavit on behalf of the State Government that no specific role was attributed to them although there was a specific role of leading the mob attributed to the present petitioner, Sushil.

7. In course of his arguments, Sri R.K. Jain, appearing on behalf of the petitioner, submitted that the grounds on page 27 of the paperbook did not indicate what were the materials for which the detention of the petitioner was proposed. It was argued that a mere statement that he petitioner was leading the men of the Hindu community and was instigating them were allegatio. too vague to act upon. It was also argued that the District Magistrate had failed to record a satisfaction that the petitioner, if released on bail, would again indulge in activities prejudicial to the maintenance of public order. The learned counsel urged that the present petitioner had been discriminated against as his two associates, standing on the same footings, were discharged although initially they were proceeded against. The learned counsel also took us through certain case-laws in support of his contention.

8. On the question of detention order to be passed upon a person already in custody, the learned counsel took us through the decision of the Supreme Court in the case of Kamarunnissa, as reported in AIR 1991 SC 1640. The Hon'ble Court observed as follows :

13. From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validity be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail and (2) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is fell essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question it before a higher Court. What this Court stated in the case of Ramesh Yadav AIR 1986 SC 315

(supra) was that ordinarily a detention order should not be passed merely to pre-empt or circumvent enlargement on bail in case which are essentially criminal in nature and can be dealt with under the ordinary law. It seems to us well settled that even in a case where a person is in custody, if the facts and circumstances of the case so demand, resort can be had to the law of preventive detention. This seems to be quite clear from the case law discussed above and there is no need to refer to the High Court decisions to which our attention was drawn since they do not hold otherwise. We, therefore, find it difficult to accept the contention of the counsel for the petitioners that there was no valid and compelling reason for passing the impugned orders of detention because the detenus were in custody.

9. On this very point reliance was also placed on a further decision of the Supreme Court in the case of Surya Prakash Sharma as reported in (1994) 5 JT (SC) 102. Quoting an earlier decision of the apex Court in the case of Dharmendra Sugan Chand Chelawat, the Court observed that the detaining authority is to be satisfied that, the detenu was likely to be released from custody in near future and taking into account the nature of the antecedent activities of the detenu it was likely that after his release from custody he would indulge in prejudicial activities and it was necessary to detain him in order to prevent him from engaging in such activities. In the case under reference (Surya Prakash Sharma) the Court found on materials before it that the impugned order of detention could not be sustained as the detaining authority had not brought on record any cogent material and had not furnished any cogent ground in support of the averment made in the grounds of the detention that if the detenu Surya Prakash Sharma was released on bail, he might again indulge in serious offences causing threat to public order. The Court observed further that the satisfaction of the detaining authority that the detenu might indulge in serious offences causing threat to public order, solely on the basis of a solitary murder, could not be said to be proper and justified.

10. As to whether a simple solitary incident without anything more was suggestive of a tendency of recurrence of such incident in near future was discussed by the Supreme Court in the case of Lal Kamal Das, as reported in AIR 1975 SC 753. It was observed that it may be remembered that the power under Section 3 of the Act can be exercised only if the detaining authority on the basis of the past

prejudicial conduct of the detenu is satisfied about the probability of the latter acting similarly in future. This means the past activity of the detenu on the basis of which such prognosis is made must be reasonably suggestive of a repetitive tendency or inclination on the part of the detenu to act likewise in the future. In the concerned case before the Supreme Court, the Hon'ble Judges observed that they found it impossible to accept the fanciful plea set up in the counter affidavit for not following up the prosecution of the petitioner in the Court and the petitioner was directed to be released forthwith. However, in the same volume, the next reported case AIR 1975 SC 755 also dealt with a preventive detention order and the grounds of detention referred to only one incident of looting a house by using fire-arms indiscriminately involving loss of human lives and creating panic in the locality (Gandhi Sardar v. Union of India). In this case it was observed that the validity of the order could not be challenged on the ground that it had referred to only one incident. Reliance was placed on the decision of the Supreme Court in the case of Gora v. State of West Bengal, as reported in that volume of the AIR 1975 SC 473.

11. At page 1196 of AIR 1990 SC the aforementioned judgment of Dharmendra Sugan Chand Chelawat was reported. This also dealt with recording an order of detention against a person in custody and it was observed herein that for making a lawful order of detention against a person in custody it was necessary that the grounds should indicate that the detaining authority was aware of the fact that the detenu was already in detention, there were compelling reasons, justifying such reasons despite the fact that he was already in detention and the expression compelling reasons in the context of making an order of detention of a person already in custody implied that there must be cogent materials before the detaining authority on the basis of which he would be satisfied that the detenu was likely to be released from custody in near future and taking into account the nature of the antecedent activities of the detenu, it was likely that after his release from custody he would indulge in prejudicial activities. A similar question came up before the Supreme Court in the case of Meruge Satyanaraina, as reported in AIR 1982 SC 1543 and the absence of awareness on the part of the detaining authority that the applicant was in custody unmistakably indicated that there was non-application of mind, the most relevant fact and the order of detention was set aside.

12. A Division Bench of the Allahabad High Court had taken up the case of Rajiv Bharti concerning his detention under Section 3(2) of the National Security Act. The grounds of detention alleged that the detenu had committed murder of a person of different community to settle a personal score. There was no allegation that the offences were committed for creating communal tension or disturbing the public order. The grounds did not mention that if he came out of the jail, Rajiv Bharti was likely to indulge in same activities which were likely to disturb public order. The detention order was held to be not justified as it was found that his release on bail was not likely to result in disturbance of public order.

13. In the instant case, objections taken against the impugned order of detention have been indicated in the earlier paragraphs of this judgment. It was stated that the grounds were vague and in any case there was no satisfaction indicated in the grounds that if released on bail, the petitioner would again indulge in activities prejudicial to the maintenance of public order. It was further stated that the detaining authority and the State had discriminated against the petitioner as his two associates who stood on the same footing as per the FIR were discharged although initially they were proceeded against.

14. The ground of detention was there in annexure-4 to the writ petition. It appears that on 18-5-1997 at about 3-00 p.m. police personnel were busy in Law and order duty over a Moharram procession. The processionists proposed to leave the scheduled route and moved through the Hindu dominated locality and the police force tried to resist them. At that juncture of time, the petitioner allegedly came with a large number of members of the Hindu community. The petitioner allegedly led these people and allegedly instigated them which deteriorated the communal harmony and a communal riot ensued. In that riot, shops were looted and set on fire. Even police force was attacked and one Akhleen died as a result of injuries. The petitioner and his certain associates were arrested at the spot and case Crime No. 81 of 1997 for offences under Ss. 147, 148, 149, 307, 302, 436, 336 and 427, IPC relating to P. S. Laksar was registered. It was alleged in the ground No. 1 annexed with the detention order that the petitioner had instigated the men of the Hindu community which had disturbed the communal amity resulting in a communal riot and panic spread over the area affecting public order. It was further

stated that when these persons were being taken to the police station after arrest, the men of the Muslim community being agitated over the death of Akhleen attacked the police Jeep in which a police personnel died. The shop-keepers downed their shutters and public life and public order was seriously disturbed. It was asserted in the grounds of detention that the detenu was in custody in relation to the aforesaid criminal case and had prayed for bail on 20-5-1997 and there was every possibility of his being released on bail. The next paragraph of the grounds indicated that from the aforesaid materials the detaining authority was satisfied that the detenu was likely to act in such a manner which would be prejudicial to the main;-tenance of public order.

15. The learned counsel submitted that from the text of the grounds it appears that what was indicated as a satisfaction on the fact of chance of commission of acts by the petitioner against the maintenance of public order, was really an opinion and the basis for that opinion was not indicated. Learned AGA referred to page 44 of the annexure to the writ petition which was a report from the S.O. of the concerned police station and there was a clear suggestion therein that the detenu Sushil was trying to get out of Jail on bail and once he was out of Jail, there was every possibility for him to be engaged in acts prejudicial to the maintenance of public order. The learned AGA submitted that the material for the satisfaction was present before the detaining authority and the satisfaction on this score was also indicated and the copy of this material was also served on the petitioner. Considering the arguments and counter-argument on this point, it can only be held that material was really there before the detaining authority to infer recurrence: of activities prejudicial to maintenance of public order and the detaining authority was fully aware that the applicant was in custody and was likely to get bail. The detention order, therefore, may not be challenged on the assertion that there was lack of awareness on the part of the detaining authority about the petitioner being in custody, about his chances of being bailed out in near future and about possibility of his indulging in activities prejudicial to maintenance of public order.

16. As regards the main incident, it was argued that the allegations were too vague against the petitioner. It was not sufficient, according to the learned counsel, to say that the petitioner was leading or instigating the men of Hindu

community unless it was indicated as to what particular overt act he was doing to infer that he was leading them or what words were used by him to infer that he was instigating them. The action and the words are certainly not there in the FIR, but the very fact that in the FIR two sets of persons were described, one the leader and the other led. If somebody comes in front of the mob, if he speaks out words to arouse the sentiments of a particular community and if the others follow him, the first man could be depicted the leader. As to what is leading is understood in common parlance and if the FIR or the grounds had stated that this particular detenu was leading the Hindu community, it carries sufficient meaning to give him an indication as to what acts he might have committed. Similar could be the arguments for the actual words used as instigation (in Hindi, 'Uttejti Kiya') also suggests that words were used which had a particular effect on the followers. The grounds, therefore, may not be termed as vague for non-indication of the actual acts and words as leading and instigating a mob would carry sufficient meaning to give an idea to the petitioner concerning his alleged activities. The situation as indicated in grounds is of a very sensitive nature. Certain persons of a particular community were trying to lead their procession through a route not scheduled while certain other persons were out to resist them at any cost. The result was an inevitable communal riot and the acts were committed by the present petitioner, as alleged, not due to personal vengeance. There cannot be any doubt that the act amounted to disturbance of public order and not of mere disturbance of Law and order. For a party to be detained under a preventive detention not only the past act should be one affecting the public order but there should be a possibility of repetition of the same. The nature of the incident indicates that members of two communities live in neighbouring localities and it is further indicated that the incident occurred due to adamant attitude of both the communities. This in itself suggests that communal flare-up could have been there on the slightest provocation in future and materials, as already observed, were there before the detaining authority that the petitioner was likely to commit similar acts in future.

17. A question was raised that the two associates of the petitioner although initially proceeded against were subsequently discharged and the petitioner was to get the same treatment otherwise it would amount to discrimination against him. The nature of the allegations indicated that it was the petitioner who had led the mob

and had instigated his followers. There was no such definite, specific allegation against his alleged associates who were also arrested at the spot. Equality before the law may be given to persons equally placed and it may not be stretched to cover persons against whom unequal allegations are there. The petitioner, in our view, may not claim parity with the two other persons whose order of detention stood cancelled on the ground that there were no specific allegations against them.

18. A question was also raised by the petitioner that he was not given the copy of the proceedings of the Advisory Board and the State Government had accepted the report of the Advisory Board without giving him a further hearing. The counter affidavits, however, indicated that a copy of the order of the Advisory Board was made over to the petitioner. On the question if the State Government was bound to hear the petitioner again before accepting the report of the Advisory Board, we may refer to the relevant sections of the Act, Advisory Boards are to be constituted under Section 9 of the Act and a reference to the Advisory Board has been made compulsory, under Section 10. On receipt of the materials as per Section 10, the Advisory Board is to proceed according to Section 11 and is to submit a report to the appropriate government within 7 weeks from the date of detention of the person concerned. When such report is received, the actions to be taken by the State Government are indicated in Section 12. In any case where the Advisory Board reports that there was in its opinion sufficient cause for the detention of the person, appropriate government was left with two options, either to confirm the detention order, or not to confirm it. The law does not require that the State is to hear the petitioner again. If the Advisory Board reports that there was no such sufficient cause for detention the appropriate government had no other option than to revoke the detention order. The State is no doubt liable to look to the grounds of detention before its approval, as required under Section 3(4) of the Act and to consider it afresh after receipt of the opinion of the Advisory Board recommending detention as also in disposing of any representation, but the law nowhere makes it incumbent upon the State to hear the petitioner, especially after receipt of the report of the Advisory Board. The objection in this regard must be rejected.

19. For the aforesaid reasons, we are of the view that the detention order was rightly passed and the procedure as required under the law for actions subsequent to the initial detention order were rightly followed and neither on the ground of vagueness nor on the ground of discrimination nor even on the ground of absence of awareness, as observed by the Supreme Court in the decisions referred to, the order of detention could be interfered with. The writ petition accordingly stands dismissed.

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