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Court : Jammu and Kashmir

Decided On : May-03-1974

Reported in : 1974CriLJ1505

Judge : Jaswant Sinnh,;Syed Wasi-ud-Din and;D.D. Thakur, JJ.

Appellant : Chandoo Ram and ors.

Respondent : District Magistrate and ors.

Advocate for Pet/Ap. : Mr. Bhalgotra

Judgement :

Syed Wasi-ud-Din, J.

1. In these two writ petitions the learned Judge of his Court (Thakur J.) has referred three questions of law for consideration by a larger bench of the Court. As the facts in both the petitions are similar and questions of law are common in both, so with the consent of the parties and for their convenience both these petitions were heard together by us and are being 'disposed of by one judgment.

2. In writ petition No. 265, the petitioner is one Chandu Ram. His case is that on the Bight intervening 28th and 29th of November 1973, the Sub Inspector of Police, Hiranagar, arrested him from his place of residence in village Bhiaya Tehsil Hiranagar and at the time of arrest no warrant was shown to him. He was

thereafter taken to Kathua and according to him a false case against him was instituted under Sections 270/272, R. P. O., 36/13 D. I. R. 3/7 H. P.C. 0. 3/7 B. C. Act. 4-A E. G. C. O. and 28/ 32 J. and K. Security Act. The petitioner filed an application under Section 497. Criminal P. O. before the Chief Judicial Magistrate, Kathua, on December 1 1973. The prayer for bail by the petitioner was allowed by the said Magistrate on December 10, 1973 and the petitioner was ordered to be released. As soon as the order of release was communicated to the police authorities at detention where the petitioner was lodged, the petitioner was again brought out and sent to the Central Jail, Jammu where he was served with a notice of detention under Section 3 of the Maintenance of Internal Security Act. 1971 and also with the grounds of detention. As regards the grounds of detention communicated to him, the petitioner submitted that he had not committed any offence and he was not a partner in the alleged carrying on of the unlawful trade of preparing and selling unlawful spurious turmerics within of outside the State of Jammu and Kashmir and that the grounds are those which were the subject matter of criminal investigation in respect of the casein which the petitioner had been already released on bail on December, 10, 1973. There were other denials also and inter alia it was also alleged in the petition that the grounds of detention are vague and cannot form the basis of detention of the petitioner under the Maintenance of Internal Security Act.

3. In Writ Petition No. 268 of 1973 there are two petitioners viz. Sarban Kumar and Hansraj. They have stated in their petition that on the night intervening 28th and 29th of November 1973, they were sleeping in their respective houses. Sarban was not taken into custody on that night and Hansraj petitioner was taken from his house by the Police-to Kathua. The petitioner Hansraj was how-ever arrested on the subsequent day from his-house and a false case has been registered against the petitioner along with others in which the petitioner along with other persons were ordered to be released on bail on December 10, 1973. But as soon as the order of release of the petitioners had reached the police station Kathua, the police authorities put the petitioner in the police wagon and took them to Central Jail, Jammu where they were served with an order of detention under Section 3 of the Maintenance of Internal Security Act. 1971. In this case also there was a denial of the allegations in the grounds of detention and then it was also pleaded that the

grounds were vague and they were not such which could attract the provisions of the Maintenance of Internal Security Act.

4. Both those petitions came up for hearing before the learned Single Judge and it appears from his order dated March 20, 1974 that on a perusal of the record, the learned Judge his found that the Superintendent of Police, Kathua, had made a report on December 8, 1973 against the petitioners and in para 2 of that report all that was stated was that the petitioners were carrying on illicit manufacturing and sale of adulterated turmaric in the State of Punjab for the period extending over 40 years In para 3 of this report there was no allegation that the petitioners had done anything in the State of Jammu and Kashmir which could suggest that the petitioners are guilty of profiteering black marketing or hoarding punishable under any statute of the State of Jammu and Kashmir; and that in para 1 of the grounds of detention it has been stated by the District Magistrate, Kathua, that in the recent past the petitioners and their partners hare further activated the production and supply of adulterated turmeric and indulged in illicit trade of adulteration, hoarding) profiteering and black marketing. The Additional Advocate General who appeared for the State had placed the file containing all the relevant papers and the learned Judge found that but for the report of the Supdt of Police, Kathua, there is no material in these files on the basis of which it could be inferred that the petitioners were indulging in illicit trade of hoarding black marketing and profiteering; and that no particulars in respect of any of these grounds have been given in the grounds of detention. The learned Judge consequently found the position rather perplexing as to how the District Magistrate had assumed that the petitioners were indulging in the illicit trade of hoarding, profiteering and black-marketing in the recant past. The learned Judge in the circumstances after hiving heard the learned Counsel for both the parties on the point, found that it would be worthwhile to summon the District Magistrate and examine him in respect of the obscurity in the proceedings taken by him. The learned Counsel for both the parties agreed that this is a fit case in which the District Magistrate should be called in the court and examined on this question. The learned Judge therefore, summoned the District Magistrate and his statement was recorded. After recording of the statement of the District Magistrate, Mr. Bhalgotra appearing for the petitioners contended before him that the learned Judge has no jurisdiction to rely on the statement of the District Magistrate and to

ascertain from him at this stage as to whether the sole ground of adulteration would have been sufficient for his satisfaction for the purpose of passing an order for detention and the learned Additional Advocate General on the other band contended that even if the ground regarding hoarding, profiteering and black-marketing is held vague or non existent, the intention cannot be interfered with as the District Magistrate has stated that the ground of adulteration would have been sufficient for his satisfaction for passing the order of detention. The learned Judge in view of the facts stated above was of the opinion that the following questions arise for consideration:

1. What are the powers of this Court in a petition for a writ of habeas corpus in regard to examination of detaining authority generally?

2. is it legally permissible to search the mind of the detaining authority and ascertain whether one of the grounds of detention alone would have been sufficient for his satisfaction to warrant an order of detention in ease other grounds of detention are held to be vague or non-existent.

3. Whether the detention order can be upheld in a case in which one of the grounds is vague but the detaining authority states on oath that, the remaining ground or grounds alone were sufficient for his satisfaction in passing the order of detention.

It was also submitted before the learned Judge by counsel for the parties that there is no direct authority of the Supreme Court or of any Indian High Court available on the points. The learned Judge therefore, directed that the matter may be placed before the Hon'ble Chief Justice for constituting a Full Bench for deciding these questions. This is how this matter has come up before us.

5. We have heard the learned Counsel for both the parties in respect of these three questions referred to above and I will now proceed to record my opinion on the said questions.

6. The first question as it stands is restricted to the applications for issue of writ of Habeas Corpus and I will therefore confine myself to applications in which there is

a prayer for a writ of Habeas Corpus. Such applications before the High Court are made trader Art. 226 of the Constitution of India read with Section 491 of the Code of Criminal Procedure. Generally all matters which arise in such writs are decided on the basis of the affidavits filed by both parties and the documents which are filed as Annexure to the Affidavits. Generally in such petition oral evidence is not taken but in my opinion this is more on account of practice and not on account of law. There is nothing in law which restricts or limits the power of High Court in taking oral evidence for the determination of the points which may arise in a writ application of this nature. The question as to in what circumstances such evidence may be nacessary is naturally dependent on the facts and circumstances of each case. No hard and fast rule in my opinion in this respect can be laid down becouse the Court when it feels that some oral evidence may be taken then the Court is doing it in the exercise of its judicial discretion. There may be in my opinion many situations in which it may become necessary to allow oral evidence to be adduced such as :

(a) when there are disputed questions of fact which cannot be decided merely on affidavits;

(b) when the affidavits particularly the affidavits filed with the return do not give a clear picture and the court feels that there is the necessity in the ends of justice of allowing oral evidence to be taken;

(c) there can be also occasions when the Court may feel the necessity of permitting cross examination of the deponent who has filed an affidavit and such deponent may be in the Habeas Corpus application the detaining authority himself.

In the case of Kavalappara Kotharathil Kochuani v. State of Madras reported in : AIR 1959 SC725 , their Lordships were pleased to observe as follows:-.Further, questions of fact can and very often ace dealt with on affidavits. If the petition and the affidavits is support thereof are not convincing and the court is not satisfied that the petitioner has established his fundamental right or any breach thereof the court may dismiss the petition on the ground that the petitioner has not discharged the onus that lay on him. The Court may in some appropriate cas98 be incline to give an opportunity to the par tie to establish their respective cases by filing further

affidavits or by issuing commissions or even by setting She application down for trial on evidence as has often been done on the original sides of the High Courts of Bombay and Calcutta or by adopting some other appropriate procedure. Such occasions will be rare indeed and such rare cases should not in our opinion be regarded as cogent reason for refusing to entertain the petition under Article 32 on the ground that it involves disputed questions of fact

In another decision of the Supreme Court in the case of Barium chemicals Ltd. v. Company Law Board reported in : [1967]1SCR898 in Para 58 thereof it has been observed as follows: -

Can the High Court in these circumstances be said to have failed to exercise its discretion when it refused to take evidence in addition to the affidavit evidence by permitting the appellants to cross-examine the 2nd respondent and the Chairman of the Board and to compel production of documents which they desired to have produced In a petition tinder Article 223, there is undoubtedly ample power in the High Court to Order attendance of a . deponent in Court for being cross-examined. Where it is not possible for the Court to arrive at a definite conclusion on account of there being affidavits on either side containing allegation and counter allegations it would not only be desirable but in the interest of justice the duty also of the Court to summon a deponent for cross-examination in order to arrive at the truth....

There is also another decision of the Supreme Court is the case of Mohd. Ikram Husaain v. state of Uttar Pradesh reported is AIR 1964 SC 1625. That was an application for a writ of Habeas corpus under Section 491 of the Code of Criminal Procedure and Hidayatullah J. as he then was observed in para 19 as fallows;.It is wrong to think that in habeas corpus proceedings the court is prohibited from ordering an inquiry into a fact. All procedure is always open to a Court which is not expressly prohibited and no rule of the Court has laid down that evidence shall not be received if the Court requires it. No such absolute rule was brought to our notice....

In corpus Juris Secundum (Volume XXXIV) 39 S. Guardian and Wards 8 page 674 there is an observation on the basis of the decision of the Courts in United States

of America. The relevant portions can be quoted here with advantage:

Oral evidence is admissible in habeas corpus proceeding) but parole or extrinsic evidence is not admissible to contradict a record or to show error in a judicial proceeding, although extrinsic: evidence may be admissible in some instances, as where its purposes is to explain and support, rather than to contradict, the record....

At page 680 it is observed as under :

A habeas corpus proceeding is not a criminal trial in the sense requiring confrontation by witnesses, so that evidence may be taken by deposition and under general rules governing use of affidavits as evidence which rules are discussed in affidavits.' I may in this connection also refer to Halsbury's Laws of England, Vol II, Edition 1955, page 45 (Para 89) where there is a discussion about the evidence to controvert return. It appears from this that in cases other than criminal cases and cases of imprisonment for debt or otherwise the truth of the facts may be examined by affidavit or by affirmation. The relevant portion may be quoted here: -

In all other cases the Judge is by statute empowered to inquire into the truth of the facts set forth in the return. In such cases although the retain is good and sufficient in law it is lawful for the Judge before whom the writ may be returnable to proceed to examine into the truth of the facts Bet forth in the return by affidavit or by affirmation, in cases where an affirmation is allowed by law...

I have referred above to the Supreme Court decision in AIR 1959 SC 725 (Supra) and it may be argued that the decision in that case was in a proceeding under Article 32 of the Constitution of India. It is true that the observations made therein are in respect of that proceeding but there seems no reason why the principles laid there should not be applicable to a petition under Article 226, which has been brought for the enforcement of the fundamental right; for the duty of the High Court to protect fundamental right cannot in any way be lesser in a proceeding under Article 226.

7. It is also permissible for a High Court to frame rules in respect of proceedings under Article 226 of the Constitution of India. Under Section 491 (2) of the Code of Criminal Procedure the High Court may from time to time frame rules to regulate the procedure in cases under this section. It is therefore; permissible under Section 491 of the Code of Criminal Procedure also for the High Court to frame rules. In the event rules are framed by the High Court and if there are relevant rule with regard to the taking in evidence besides the affidavits; than naturally those rules will be the determining factor. In conclusion there, fore, I am of opinion that the High Court has the power to take oral evidence such &3 to examine the deponent, who may be the detaining authority but such a power has to be exercised in rare and exceptional cases. It should not be exercised in such manner that the proceeding is reduced to more or less an original trial in which witnesses on both sides are 'examined and there is a confrontation of the witnesses, It seems to me that this is based on a very reasonable and equitable view of the matter because the object of a proceeding under Article 228 and Section 491 of the Code of Criminal Procedure is that it should provide for a prompt and immediate remedy but this very object will be defeated if the course as indicated above is adopted i e., witnesses on both sides are allowed to be examined and cross, examined. Naturally a very important question here arises for consideration as to in what case Such a power should be exercised and I think it is not possible nor will be it advisable to predicate or lay down any rule with rigidity because the discretion of the High Court will have to be exercised in each individual case in light of the facts and circumstances of each case. I may a so mention here that I am also of the opinion that the power to enter into determination of the disputed questions would not mean going to the length of deciding a question of title to the property which can be investigated in a suit and that will be the proper forum. This question is accordingly answered on the lines indicated abo1 e.

8. I will now take up a discussion if question No. 3 before I take up question No. 2- The first question which arises four consideration here is whether the dentetion order can to regarded as invalid if one of the grounds is vague. I think the position in this respect is very clear as has been laid down in several decisions of the Supreme Court. I may refer to a few of them only such as in the case of

BameBhwar Lai v. State of Bihar, reported in : [1968]2SCR505 in the case of Moti Lai Jain v. State of Bihar reported in : 1969 CriLJ33 ; in the case of Susbanta Goswami v. State of West Bengal repotted !n AIR 1969 8 C 1004; in the case of Pushkar Mukherjee v, State of West Bengal retorted in AIR 1870 S 0 852 : 1970 Cri L J 852; and in a very recent decision of the Supreme Court in the case of Prabhu Dayal v. District Magistrate, Kamrup repotted in : 1974 CriLJ286 . According to these decision the detention order becomes invalid and vitiated even if one of the grounds of definition is held to be vague.

9. The question now arises for consideration is that if in a case as in the instant two petitions one of grounds is vague but the detaining authority viz. the District Magistrate, kathua, has on oath stated that the remaining ground or grounds alone were sufficient for his satisfaction in passing the order of detention. In my opinion such evidence at such a late stage In a proceeding under Art. 226 of the Constitution of India should not be permissible because it means saying something which did net exist before i. e. to say in the sense that it was not communicated to the petitioner. The petitioner is furnished with the grounds of detention and the object of furbishing the grounds is that he should be in a position to make effective representation. Effective representation is not possible if one of the grounds is vague because then it becomes uncertain on the face of grounds of detention as to which of the grounds weighed with the detaining authority in passing the impugned order of detention. I am also of the opinion that rectification of this defect by subsequent evidence would not be permissible because the law in view of the decision of the Supreme Court referred above has conferred a right in the petitioner and that right cannot and should not be taken away in this manner. It is also pertinent to note here that as to what weighed with the detaining authority and whether he could or he would have or have not passed the order of detention on other grounds in a matter which should have been at the time of the issue of the grounds of detention and not subsequently. This question is therefore answer el 01 the lines indicated above.

10. Now with regard to the second question I may first of all refer here to the provisions of Article 22(5) of the Constitution of India which lays down:

When any person is detuned in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as any be communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

These essential ingredients are there which should be complied with whenever an order of detention is passed an 1 these essential ingredients have been laid dawn by our Constitution for the protection of the cherished right of individual liberty of the citizens. The first ingredient is that it the grounds of detention should be communicated as soon as may be meaning thereby as early as possible and secondly that it should afford the person so detained the earliest; opportunity of making a re-presentation against the order. There is one thing also implied which is the third ingredient, that the earliest opportunity should be such as to allow the person not only to be able to make a representation but he should be able to make as effective representation. If one of the ground is vague then naturally it would mean that the earliest opportunity was not afforded to the petitioner to make effective representation. The grounds therefore should be such as to communicate to him at that time enabling him to make a representation. I may quote here the observation in : 1974 CriLJ286 (3upra) which is as follows:

The constitutional requirement of Article 22(5) will not be satisfied unless the detenu is given the earliest opportunity to make a representation against the detention and no opportunity to make the representation can be effective unless the detenu is furnished with adequate particulars of the grounds of detention. If one of the grounds communicated to the petitioners is found to be vague, the detention order must be pronounced to be bad...

If it is made permissible that the detaining authority be examined in Court in the course of the proceeding with a view to search his mind whether one of the grounds of detention alone would have beta sufficient for his satisfaction then in would mean that a ground Challenging the validity of the order & available to the petitioner at the time he filed a petition is taken away from him. In view of the facts stated above. I am of the opinion that the subjective satisfaction and the applicant

on of the mind by the detaining authority with regard to the ground must all relate to the relevant point of time i e. to say the date on which he passed the order communicated and the grounds of detention and not subsequently.

11. I may also here quote the observations of their Lordships of the Supreme Court in AIR 1968 S O15O9 : 1969 Cri L J 33 (Supra) which are as follows :. Individual liberty is a cherished right; one of the most valuable fundamental rights guaranteed by our Constitution to the citizens of this country. If that right is invaded excepting strictly in accordance with law the aggrieved party is to appeal to the Judicial power of the State for relief. We are not unaware of the fact that the interest of the society is no less important than that of the individual. Our Constitution has made provisions for safe-guarding the interests of the society. Its provisions harmonies the liberty of the individual with social interests. The authorities have to act solely on the basis of those provisions. They cannot deal with the liberty of the individual in a casual manner as has been done in this case. Such an approach does not advance the time social interest. Continued Indifference to individual liberty is bound to erode the structure of our democratic society....

It has also been urged during the course of the argument that no prejudice can be said to have bean caused to the petitioners because if any of the grounds was vague they could have asked for further particulars but I think the position in this respect has also now become very clear in view of the recent decision of the Supreme Court in AIR 19T4 SC 183 : 1971 Ori L J 286 (Sapra) where it has been held that:

If a ground communicated to the detenu is vague, the fact that the detenu could have but did not ask for farther particulars is immaterial. That would be relevant only for considering the question whether the ground is vague or not.

To me it also appears that when the grounds are communicated with the primary object that the person detained can make a representation in light of the grounds so communicated ' to him then neither equity nor law can confer any right on the detaining authority to make a selection that is pick and choose and to say that this particular ground did not weigh with ' aim or that excluding such grounds which are

vague. he was still satisfied on the remaining ; grounds. It is true that in matters of detention the question whether that should be a detention for the reasons communicated is : solely a matter of subjective satisfaction of the detaining authority and it is expected that he would apply his mind to the material, before him but this should be done at the relevant point of time and not subsequently the question as to what ground is vague or is not vague is a matter which has to be decided and determined in each individual case in light of the facts and circumstances of each . In view of these facts I am of the opinion that it would not be permissible to examine the detaining authority to search his mind and to ascertain whether one of the grounds of detention would have been alone sufficient for his satisfaction to warrant an order of detention in case other grounds of detention are held to be vague or non-existent. This question is accordingly answered in .' negative.

12. In both these petitions as canvassed during the course of hearing before the learned Single Judge and here before us also the main ground in that one of the grounds was vague. As I have held that it will not be permissible to search the mind of the Detaining Authority so the statement made by him in the court has to be excluded from consideration with the result that the grounds as noted in the grounds of detention are vague. The detention orders are therefore bad in law so instead of tending back the case to be put up before the learned Single Judge. I think the final order on these petitions should be passed here. Both the petitions are allowed and it is hereby ordered that the petitioners In both these case be set at liberty forthwith. No order for costs.

Jaswant Singh, J.

13. I have had the Advantage of going through the elaborate judgment prepared by our learned brother Syed Wasi-ud-Din J. and agree with the reasons given and the order proposed to be passed by him. I would however like to add a few words of my own.

14. So far as the first question formulated by our learned brother Thakur J. is concerned, it is difficult to answer it in absolute J terms. Generally speaking the

procedure regarding a remedy is to be looked for in the law creating it or in the rules framed under the law. Bat neither Article 226 of the Constitution of India, nor Section 103 of the Constitution of Jammu and Kashmir nor Section 491 of the Code of Criminal Procedure lays down the procedure to be followed in a petition for issue of a writ of Habeas Corpus Even Supplementary Rules of Court frame vide Notification No. 67 dated 9th December 1957. which came into force on the 1st of January 1953, are not helpful in solving the difficulty. Rule 1 of the Rules provides that an application for a writ of Habeas Corpus shall be accompanied by an affidavit of the person restrained setting out the nature and circumstances of the restraint and where the person restrained is unable to make the affidavit the application shall be accompanied by an affidavit to the like effect made by some other person which shall state the reason why the person restrained is unable to make the affidavit himself. Rule 6 of the Rules indicates that a return shall be filed by the person against whom the writ is sought showing why an order granting the application by not made. There is no other rule regulating the procedure to be followed in dealing with such, like applications. In the circumstances the procedure that is normally followed in proceedings for issue of writs of other kinds has to be kept as a guide and pursued. It is now well settled that is a proceeding under Article 226 of the Constitution the normal rule is to decide disputed questions on the basis of affidavits and that it is within the discretion of the High Court whether to allow a person who has s worn an affidavit before it to be cross examined or not to permit. (See State of Bombay v. Purushottam Jog Naik : 1952 CriLJ1269 & Barium Chemicals Ltd. v. Company Law Board : [1967]1SCR898 . As, therefore rightly observed by our learned brother Syed Wasi ud.Din a petition for issue of a writ of Habeas Corpus and the matters arising therein; are ordinarily decided and determined on the basis of affidavits and documents forming annexure thereto In some cases however for instance where the return suffers from; ambiguity or is evasive, it may be necessary; for the Court to summon the deponent of an affidavit including the detaining authority for the purpose of arriving at the truth of the matter. Cases may also arise where a party may justifiably ask the court to summon the person who has sworn an affidavit before it for cross examination. Though as observed in 39 Cropus Juris Seonndum S.100 a Habeas Corpus proceeding is not a criminal trial in the sense requiring confrontation by witnesses

(T) that evidence may be taken by deposition there is as observed by Hidayatullah J. (as his Lordship then was) in AIR 1964 80 1H25, no rule of the court which lays down that evidence shall not be taken. The power to take evidence by affirmation is Habeas Corpus proceeding is however to be exercised sparingly with great caution and circumspection I would therefore answer the first question accordingly

15. The other two questions which are closely inter-linked do not present much difficulty.

16. It is now well settled that the grounds of detention the purpose of which is to enable the datenu to make an effective representation should be supplied to him at the earliest opportunity. It is equally well settled that if one of the grounds is vague or non-existent the detention will become illegal.

17. In 1951 SOB 167 - : 1951 CriLJ373 , the majority decision assumed that the requirement of Article 22(5) of the Constitution will not be satisfied unless the detenu is given the earliest opportunity to make a representation against the detenu and that no opportunity to make the representation can be effective unless the detenu is furnished with adequate particulars of the grounds of detention.

18. In Shiban Lai v. State of U. P. : [1954]1SCR418 . where one of the two grounds of detention served on the detenu was found to be can existent the contention of the State that the detention of the detenu should not be held to be illegal because the other ground was a good ground was rejected by their Lordships with the observations that to say that the other ground which still remains is quite sufficient to sustain the order would be to substitute an objective judicial test for the subjective decision of the executive authority which is against the legislative policy underlying the statute and in such cases the position would be the same as if one of these two grounds was irrelevant for the purpose of the Act or was wholly illusory and that would vitiate the detention order as a whole.

19. Again in : 1957 CriLJ316 . Dwarka Das v. State of Jammu and Kashmir it was reiterated that if some of the reasons on which the detention is based are found to be non-existent or irrelevant the Court cannot predicate what the subjective satisfaction of the authority would have been on the exclusion of those reasons.

To uphold the order on the remaining reasons would be to substitute the objective standards of the Court for the objective satisfaction of the authority.

20. In Ram Mauohar Lohia v. State of Bihar : 1966 CriLJ608 , it was held that an order of detention based on valid and invalid groan is has to beheld illegal and it cannot be said in what manner and to what extent the valid and invalid grounds operated on the mind of the-authority concerned and contributed to the creation of his subjective satisfaction which formed the basis of the order

21. Again in : 1969 CriLJ33 , where two-of the grounds supplied to the detenu were found to be defective, it was held that the order of the detention would become invalid as it was not possible to hold that those grounds could not have influenced the decisions of the detaining authority.

22. In Mohammad Akbar Kichloo v. District Magistrate Doda AIR 1971 J and K j2 I held as follows :

A detenu is entitled under Art. v2 (5) to obtain particulars of the grounds of his detention sufficient to enable him to make a representation which on being considered may afford relief to him. Even if one of the grounds, is vague the detention is rendered invalid.

The case law on the matter has been Crystallised in a recent decision of the Supreme Court in Prabhu Dayal Deorah v. District Magistrate kamrup Alt 1974 SC 183, who & the majority of the Judges constituting the bench declared one of the grounds of detention namely that the petitioners were responsible for unauthorised milling of paddy in their rice mill and smuggling the resultant rice to Magalyia for selling it for undue profit to be vague for want of particulars so as to vitiate the order of detention under Section 3 of the Maintenance of Internal Security Act 1971. The Majority of the Hon'ble Judges constituting the bench held in that case that the constitutional requirement of Article 22(5) will not be satisfied unless the detenu is given the earliest opportunity to make a representation against the detention and non opportunity to make the representation can be effective unless the detenu is furnished with adequate particulars of the grounds of detention. Their Lordships were also pleased to hold that if one' of the grounds communicated to

the petitioner is found to be vague the detention order mast be pronounced as bad. It was further held by their Lordships that if a ground communicated to the detenu is vague the fast that the detenu could have but did not ask for ether particulars is immaterial. Their Lordahips also observed in that case that one of the grounds of detention being vague and petitioners were denied the constitutional right to make an effective representation against the order of their detention.

23. Having been furnished with grounds some of which as pointed our by learned brother Syed Wasi ud-Din J., were either nonexistent or locking in essential particulars, the petitioners, were deprived of their constitutional right to make an effective representation and thus acquired a valuable right to be released from detention. To hold that it is permissible in such circumstances to search the mind of the detaining authority to ascertain whether one of the grounds of detention alone would have been sufficient for his satisfaction to warrant an order of detention in case other grounds of detention are held to be vague of non-existent would tantamount to defeating his right and acting in violation of the settled law on the matter. To put it a little differently if the order of detention cannot be sustained and has to be pronounced as bad in law even if one of the grounds is vagus or non-existent then a fortiori it is not possible to say that you can search the mind of the detaining authority to find out whether one of the grounds of detention alone could have been sufficient for his satisfaction to warrant an order of detention. In this connection the following observations made in Keshav Talpade v. Emperor 1943 FOR 88 : 4i Ori L J 719 : AIR 1943 FO 72 are very apposite :.The detaining authority give here two grounds for detaining the petitioner. We can neither decide whither these grounds are good or bad nor can be attempt to assess in what manner and to what extent each of these grounds operated on the mind of the appropriate authority and contributed to the creation of the satisfaction on the basis of which the detention order was made. To say that the other ground which still remains is quite sufficient to sustain the order would be to substitute an objective judicial teat for the objective decision of the executive authority which is against the legislative policy under lying the statute. In such cases we thick the position would be the same as if one of these two grounds was irrelevant for the purpose of the Act or was wholly illusory and this would vitiate the detention order as a whole.

24. Again in Saberuddio Shaikh v. State of West Bengal AIR 1961 Cal 23l it was held :

Where the detention order was made on the totality of the facts contained 1 in the particulars attached to the ground and it would not be right to take a particular ground and study it in isolation from the rest. It would be only necessary to take the particulars together and in order to see whether they could have reason ably produced the personal satisfaction of the authority making the order and whether all of them were such as to have enabled the detenu to make an effective representation against the order ' On the same parity of reasons, I am of the view that the detention order cannot be up. held in a case in which one of the grounds is vague but the detaining authority states on oath that the remaining ground or grounds were themselves sufficient for his satisfaction in passing the order of detention because the detention order is the cumulative effect of all the ground furnished to a detenu and as held in Moti Lal Jain's case AIR 1968 80 15(M - (1969 Cri l J 33) (Supra) it cannot be held in that case that the detaining authority was not influenced by the vague ground in making an order of detention. I would, therefore, answer the Second and Third questions in the negative.

Thakur, J.

25. I have had the advantage of going though the judgments prepared by learned brothers Syed Wasi-ud-Din and Jaswant Singh, JJ. The judgments are fairly exhaustive and I fully agree with what has been stated therein. I would however like to state a little of my own.

26. Both these petitions came up before me for hearing, sitting singly. I heard the argument and reserved judgment. Before dictating. the judgment when I examined the record of the case I found that the only material avail-able to the District Magistrate at the time of passing the detention orders was the report of the Superintendent of Police Kathua. No other relevant document was contained in the file produced by the Additional Advocate General before me. All that was state in para (iii) of the report of the Superintendent of Police. Kathua dated 8th December 19/3 was that the petitioners were carrying on illicit manufacturing and

sale of adulterated turmeric in the State of Punjab for a period of extending over 40 years. There was no allegation in para No. (iii) of the report that the petitioners had done anything in the State o Jammu and Kashmir which could suggest that they were guilty of profiteering black-marketing or hoarding punishable under any statute of the State of Jammu and Kashmir. In the ground of detention however it was stated by the District Magistrate that in the recent past the petitioners and their partners have further activated the production and supply of adulterated turmeric and indulged in the illicit: trade of hoarding, profiteering and black-marketing. I put it to the Additional Advocate General as to what material was available to the District Magistrate from which the grounds aforesaid could be made out. He categorically stated that to his know-ledge there was no other material except that was contained in the file produced by him before the court. This necessitated the examination of the District Magistrate as I thought that even though this court could not go it to the question of the sufficiency or otherwise of the material justifying detention the question whether a ground of detention was existent of non-existent was undoubtedly justifiable. -Counsel for the parties also in all fairness to the court agreed in the circumstances of the case to the District Magistrate being summon 4(1 and examined to remove the obscurity as to the availability of the material on which the grounds aforesaid were baaed.

27. The District Magistrate was summoned. He appeared and was questioned by the Court. His statement forms part of the record. The District Magistrate stated in his statement that he had received verbal reports against the petitioners being busy in hoarding profiteering and black-marketing but chose reports could not be accepted and were not la fact accepted by him as correct. Those reports stated the District Magistrate formal a basis for directing the Tahsildar Executive Magistrate Hiranagar to could not a raid on the mill belonging to the petitioners in collaboration with the polite which in fact was conducted on 27th June, 1973. In the course of the raid it was stated by the District Magistrate, samples of turmeric were taken and the same were sent later to the Public Analyst. The Public Analyst reported that the samples were adulterated. On that report another raid was organised on 23th November, 1973. During the (nurse of that raid the detenus were Caught red handed while busy in the process of adulteration 60 bags of coarse rice and 50 bags of adulterated turmeric and Bakhtu (non polish) were

seized. The seizure of these stocks according to the District Magistrate led him to the conclusion that the detenus were engaged in hoarding profiteering and black-marketing. From his statement it would appear that the ground that the detenus were engaged in hoarding profiteering and black-marketing was not based on any substantial material but the seizure of 60 bags of coarse rice and 50 bags of turmeric indirectly suggested that the petitioners were engaged in hoarding black-marketing and profiteering. Obviously therefore no particulars of the grounds could have been supplied to the detenus by the District Magistrate as he himself had hardly any. In view of this statement Mr. Amar Chand appearing on behalf of the respondent admitted -that the ground of hoarding profiteering and black-marketing as a basis for detention of the petitioners cannot be said to be existent and must be deemed to be nonexistent. In any case according to him the ground was vague and was not so specific as to enable the detenus to make an effective representation against the detention ordered by the District Magistrate. 1 could have passed an order setting aside the detention on that ground alone as the law that the detention is rendered invalid if one ground out of the grounds of detention is held to be vague or unspecific, was no more res integra but what necessitated a reference to the Full Bench was the fact that the District Magistrate in reply to another question of the Court had stated that even if the Court held that the ground of black marketing profiteering and hoarding was held to be vague and unspecific the ground of adulteration would have been sufficient for purposes of his satisfaction to warrant an order of detention against the detenus. The question whether the court could taking the account such a statement of District Magistrate the detaining authority and hold the order of detention valid was one of first impression on which, the counsel for the parties admitted there was no reported case directly applicable. Considering the importance of the points involved I referred the case to the Full Bench after formulating the three proposition of law reproduced by my brother Syed Wasi-ud-Din J. in his judgment. I have stated in not shell the fasts necessitating a reference to the Full Bench to appreciate precisely the points which fall for consideration in these petitions.

28. On all the three propositions the Court heard a full-fledged debats of the counsel for the parties. In view of the judgments of the Supreme Court referred to by my brother Syed Wasi.ud.Din J. in his judgment I feel that there can be no two

opinions that this Court while hearing a petition for a writ of Habeas Corpus has undoubtedly the power to Summon a deponent of an affidavit produced in the Court including the detaining authority which power to summon and examine can well be exercised even in respect of those persons who have not even sworn any affidavit is the case. A petition for a writ of Habeas Corpus being a remedy extraordinary in character has to be decided even if the decision of the petition involves the determination of a question of fact. In an ordinary writ petition the court may be loath in resorting to the procedure of recording evidence of affirmation to enable it to return a finding of fast and the Court may leave the parties to have the issue of fact comprehensively determined by an ordinary remedy of a suit in a civil court but that cannot be true in respect of the petitions for writ of Habeas Corpus. The power to issue such a writ vests exclusively in this court and in no other subordinate court either of civil or of criminal jurisdiction. It is therefore obvious that it cannot leave a question of fact in a petition for a writ of Habeas Corpus for a subordinate Court to be determined Whether or not in a given case this court could resort to recording of evidence on affirmation will depend upon the facts and circumstances of the case. If the Court finds itself in a position to come to a finding to its satisfaction of a question of fact on the basis of affidavits produced before it the necessity to record evidence on affirmation would obviously be obviated. In the event however of the court facing a difficulty to decide satisfactorily a question of fact on the basis of the affidavits the court may justifiably send for the deponent of an affidavit already filed before it and question him with a view to remove any obscurity, agueness or ambiguity in the affidavit. In the alternative or in addition, it may send for a person who in the circumstances of the case is most likely to enlighten the court on question of fact which is relevant for purposes of disposal of the petition and examine aim. The power to take resort to recording the evidence on affirmation though not expressly conferred on the High Court has to be presumed as no incidental to the primary power of determining the validity of a detention. There is no provision in the Constitution or in any Statute which expressly or impliedly takes away or abridges this inherent and incidental power of the High Court.

29. There is yet another principle and that is that a Court has power to do all that with out which it is not possible for it to do what it is expressly authorised to do.

Applying this principle to the proceedings arising out of a petition for a writ of Habeas Corpus it would appear that the Constitution gave the power to the High Court to issue a writ of Habeas Corpus and if in the course of determination of the question whether the writ should or should not issue the court needs to do something it must be presumed, on that principle, that it had the power to do all that, that was necessary to do to arrive at that conclusion.

30. For these reasons therefore I am in complete agreement with the views expressed by my brothers Syed Wasi-ud-Din and Jaswant Singh JJ., and the proposition No. 1 referred to the Full Bench must be answered in the affirmative of course subject to the condition that the powers has to be exercised sparingly and that it should not be exercised so long as the exercise of such a power is not tendered indispensable for a correct and satisfactory decision on a petition for a writ of Habeas Corpus.

31. Propositions Nos. 2 and 3 appear to me to be interlinked and can be considered together. The precise question which emerges from the combined reading of two propositions aforesaid is can the detaining authority at any time after an order of detention has been passed come forth in the court either at its own or on being summoned and make a statement on oath that even if one or some of the grounds leading to the detention of a detenu are held to be vague or non-existent the remaining ground or grounds alone were sufficient for hid satisfaction while issuing an order of detention under Section 3 of the Maintenance of Internal Security Act acid whether the court can rely on that statement and hold that since the detaining authority itself has expressed its mind before the court that one or some of the grounds alone were sufficient to warrant an order of detention the mere fact that one or some Of the grounds are held to be vague would not affect the validity of the detention. On this question agreeing with my brothers Syed Wasi-ud-Dio and Jaswant Singh JJ., I would say that it is not legally permissible to do so and I proceed, to assign my reasons for that conclusion.

32. Maintenance of Internal Security Act is a law in the nature of Preventive Detention spoken of in Clause 4 of Article 22 of the Constitution of India. The Act should and in fact it does conform to the requirements specified in the aforesaid

Article. A bare perusal of the provisions of Article 22 of the Constitution would show that the Constitution lays down the minimum safeguards to be jealously watched against Preventive Detention. The first safeguard is that no person arrested shall be detained in custody without being informed as soon as may be of the grounds for such arrest. If the detention is one under any law providing for preventing detention the authority making the order as soon as may be shall communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

33. Secondly Clause 4 (a) of Article 22 provides for the constitution of an Advisory Board consisting of persons who are or have been or are qualified to be appointed as Judges of a High Court, The said board is required to report to the Government before the expiration of a period of three months, that there is in its opinion sufficient cause for such detention.

34. A strict compliance with these requirements is a condition precedent for a valid detention. The Maintenance of Internal Security Act provides both for furnishing of grounds to the detenu as also for the consideration of the representation filed by the detenu by the Advisory Board. Article 21 specifically provides that no per-on shall be deprived of his life or personal liberty except according to the procedure established by law. From a combined reading of the provisions of Articles 21 and 22 of the Constitution and the provisions of Maintenance of Internal Security Act it is manifest that the detention has to be ordered and continued without the least infringement or effrontery to the provisions of either the Constitution or the Maintenance of Internal Security Act. It is in this back-ground that the question referred to above requires to be judged.

35. Judging the question in this background it would appeal that the direction contained in Clause 5 of Article 22 to furnish the grounds of detention to a detenu is intended to apprise him of the grounds with a view to enable him to make an effective representation to the Advisory Board constituted under the Act An order by the Government confirming a detention has to follow and not to precede the consideration by the Advisory Board As held by the Supreme Court in cases

referred to in the judgments of my brothers Syed Wasi-ud-Din and Jaswant Singh JJ the grounds which a detenu is entitled to have, got to be specific unmistakable and unambiguous and should be accompanied by the full particulars thereof. The fact that a detention where the grounds are vague or ambiguous is invalid cannot be disputed and has not in fact been disputed before us. The moment there fore a ground which is vague unspecific or non-existent and is not accompanied by requisite particulars is served upon a detenu the safeguard contained in Clause 5 of the Art. 22 of the Constitution of India is hit and affronted to the condition for a continued valid detention gives way which vitally jeopardises the premises on which the detention is based and an immediate and indefeasible right to restoration of personal liberty accrues to the detenu. As stated earlier what is needed is not only a valid order of detention but a strict compliance with the provision of the Constitution and those of the Maintenance of Internal Security Act in the whole chain of the proceedings, Commencing from the date of the order of detention till the detention is finally confirmed by the Government in accordance with the report of the Advisory Board The Constitution invalidates not only an order of detention repugnant to the provisions but also the continuation of a detention in total or even partial disregard to the command contained in it. Any act or omission of the detaining authority therefore which has even the semblance of a circumvention of any such dictate as is available from Articles 21 or 22 of the Constitution or any provision of the Maintenance of Internal Security Act leads to a direct consequence and that is that it invalidates the detention of a detenu. The power of the State to detain a person in the good of the State and the Society and the right of a citizen to his personal liberty both were in the deep contemplation of the Constitution-makes while drafting Articles 21 and 22 of the Constitution. Neither of the two was made to thrive at the cost of the other. This also supports the view that if the State wanted to exercise its power to detain it could do so but only in conformity with the limits laid down by the Constitution. What follow as therefore is that the moment the constitutional or the statutory safeguard ceases to remain available to a detenu the detention becomes invalid. A detention which thus become invalid cannot at any time thereafter be validated by a state. meat on oath of the detaining authority that even if one or some of the grounds of detention are vague it would have bean satisfied even on the basis of the remaining grounds

that a detention order under the Act was very well warranted. The legality and the validity of the detention in a petition for Habeas Corpus has to be judged not only of the date when the order of detention was passed but on all material dates from the date of the order to the date of the decision of the petition. If there is a break-down of any link in the process of the proceedings from the date of the order of detention till the date of confirmation of the detention by the Government pursuant to the report made by the Advisory Board the detention 13 rendered invalid and no amount of extraneous evidence in the form of statement on oath or affirmation by the detaining authority can result in legalising and validating the detention. It is for this reason that the High Court in the course of the proceedings in a petition for Habeas Corpus is not entitled to take into consideration the state of mind of the detaining authority expressed not at the time of the passing of the detaining order but long after the date of service of the ground of detention on the detenu.

36. There is another respect of the matter and that is that on account of the service on the detenu of a ground which is vague his right to make an effective representation to the Board through which permeates the judicial mind of the persons who are or are qualified to be appointed as Judges of the High Court is usurped if not directly at least indirectly the right therefore which a detenu has under the provisions of the Constitution and the Maintenance of Internal Security Act to make an effective representation and obtain an opinion against his detention from the Board becomes wholly illusory and unreal. Such a situation is consequence brings about a substantial violation of the constitutional site guard provided is Article 22 the compliance with which otherwise constitutes a condition precedent for a valid detention. The failure to comply substantially with the requirements of the Constitution and the Maintenance of internal security Act, therefore gives an unimpeachable right to the detenu to claim restoration of his liberty and that light cannot stand defeated by a statement on oath or affirmation of the detaining authority.

37. There is yet another aspect of the matter which requires a reference It is true that the opinion of the detaining authority alone is a factor id determining the necessity of a detention under the provisions of the Maintenance of Internal Security Act its is equally true that the High Court in exercise of its extraordinary

power unties Art. 226 of the Constitution of India has no power what so ever to substitute its own opinion for that of the detaining authority but the privilege and the power of the detaining authority to formulate its opinion is restricted only to tint point of time when the order of detention is passed. That power and privilege cannot be conceded to a detaining authority at any sub-sequent stage. The detention must stand or fall on the basis of satisfaction expressed at the time of the passing the order of detention and at no subsequent date, The reason for that conclusion is apparent and that is that it would of highly hypothetical for the court to enquire as also for the detaining authority to state something in respect of the state of mind which the detaining authority passed at the time of pissing the order of detention. It is true that the satisfaction of the detaining authority under a law of preventive detention may he wholly subjective but not with standing that the subjectivity cannot permeates the pro-Case of proceedings commencing from the date of detention till the date of confirmation of the detention by the Government in accordance with the recommendation made by the Advisory Board. If such a power or privilege was to be conceded in a detaining authority extremely unhappy and arbitrary results would follow. What may be considered to be a satisfaction on the date of detention may not be a satisfaction at any subsequent stage before the date of confirmation of the order by the Government, and the vice versa.. It could never be the intention either of the legislature while framing the Maintenance of Internal Security Act or the Constitution-makers while drafting Art 22 of the Constitution of India. It has to be borne in mind that a light to life and personal liberty is the most valuable of all the rights which the Constitution has guaranteed to the citizens of India. The fate of such rights of fundamental importance could not have been intended to be made dependent on the opinion of the detaining authority expressed not at the time of passing the order of detention but long after that. If on the date of passing the order of detention the detaining authority mentions five grounds for its satisfaction to sustain, an order of detention borrowing a mixed and an integrated support from all of them together leaving no touchstone to the court for determining as to which of the grounds a weighed with the detaining authority, more than the others. It would be highly speculative if the detaining authority comes forth and states that excluding one or some of the grounds the remaining grounds would have been sufficient for its satisfaction. The

High Court cannot in a case of such nature place reliance on the opinion of the detaining authority as to the sufficiency or otherwise of the ground of detention and hold that since one or more grounds of detention served upon the detenu were sufficient for the satisfaction of the detaining authority, the detention was valid. It would really amount to drawing a support from a straw for upholding a detention which otherwise due to the non observance of the Constitutional requirements is not countenanceable.

38. For these reasons therefore while agreeing with my brothers Syed Wasi ud-Din and Jaswant Singh JJ. I reply the question in the negative. Petitions allowed.

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