(2011) 07 GAU CK 0026

Gauhati High Court (Imphal Bench)

Case No: Writ Petition (Cril.) No. 49 of 2011

Hatkhoneng	APPELLANT
Vs	
State of Manipur & Anr.	RESPONDENT

Date of Decision: July 18, 2011

Acts Referred:

- National Security Act, 1980 - Section 3(3), 3(3)

Citation: (2012) 1 GLR 348 : (2012) 1 GLT 139 : (2011) 5 GLT 233

Hon'ble Judges: B.P.Katakey, J and B.D.Agarwal, J

Bench: Division Bench

Advocate: Advocate appeared for the Petitioner: Mr. S.T. Kom., Advocate appeared for the Respondents: Mr. R. S. Reisang, GA., Advocates appearing for Parties

Judgement

B.D. Agarwal, J.

This writ petition under Article 226 of the Constitution of India has been filed by the mother of the detenue seeking a writ in the nature of Habeas Corpus by way of quashing the order dated 25.3.2011, issued by the District Magistrate, Impha West, whereby the said authority has detained the petitioner''s son David Letkholal Lalneo Touthang @ Laboy @Daniel @ Mamang @ Lalneo under the National Security Act,1980. The petitioner has also challenged the order dated 5.4.2011 issued by the Govt. of Manipur approving the preventive detention of the petitioner''s son.

2. Heard Mr. S.T. Kom, learned counsel for the writ petitioner and Mr. R.S. Reisang, learned Govt, Advocate appearing for the respondents.

3. The petitioner''s son was initially arrested on 14.3.2011 in connection with City PS Case No. 15(2)of 2011 under Section 365/368/34IPC read with Section 16(1)(b)/ 20 of the UA (P) Act. The said FIR was registered on the basis of an information of kidnapping a person namely, Jagjit Singh on 4.2.2011. The said missing person was subsequently recovered on 8.2.2011. After more than one month of the recovery of the missing person, the detenue was arrested from his own residence on 14.3.2011.

The records/ files of the preventive detention of the detenue do not reveal as to when the accused was produced before the Judicial Magistrate. This fact is relevant and to be noted since as per the impugned detention order, the detenue was in police custody, as on 25.3.2011. Since Article 22(2) of the Constitution of India as well as Section 57 of the Code of Criminal Procedure, 1973 mandates that if a person is arrested without warrant, he shall be produced before a Magistrate within 24 hours and, as such that the detenue must have been produced before a Magistrate by 15th March 2011, excluding the time of journey.

4. The preventive detention of the petitioner''s son has been assailed solely on the ground that there was no material before the District Magistrate to take a view that the detenue was likely to be released on bail. Shri S.T. Kom, learned counsel for the writ petitioner contended that there must be some material before the detaining authority to take a view that the detenue was likely to be released from the Court or that the accused was likely to indulge in prejudicial activities after his release, unless he is put under the preventive detention. Citing the judgment of Hon''ble Supreme Court rendered in the case of Rekha Vs. State of Tamil Nadu; reported in 2011(5) 5CC 244, the learned counsel submitted that the detention of the petitioner''s son is vitiated in law and as such the same should be quashed forthwith.

5. Per contra, learned Govt. Advocate submitted that the High Court''s power to examine the subjective satisfaction of the detaining authority is very limited. The learned counsel also submitted that the detaining authority''s satisfaction about prospective release of the accused by the Court on bail and his likelihood of engaging again in unlawful activities can be inferred from the grounds of detention. With regard to the High Court''s limited power to reasses the subjective satisfaction of the detaining authority, the learned Govt. Advocate relied upon the judgments of the Hon''ble Supreme Court rendered in the case of Kamrunnissa Vs. Union of India & Am.; reported in AIR 1991SC1640; Union of India Vs. Paul Manickam & Ann; reported in AIR 2003 SC 4622 and Senthamilselvi Vs. State of T.N. & Ann ; reported in (2006)5 SC 676.

6. To examine whether the satisfaction of the detaining authority about the imminent release of the detenue/accused on bail is ipsedixit or is based on materials, it would be apposite to reproduce the detention order in extenso, which is as under:

"IN THE COURT OF THE DISTRICT MAGISTRATE : IMPHAL WEST DISTRICT, MANIPUR ORDERS

Imphal, the 25 March, 2011 No. Cri 1 /NSA /No.34 of 2011:

Whereas, a police report has been laid before me that Mr. David Letkholal Lalneo Touthang @ Lalboy @ Daniel @ Maraang Lalneo (23 years) 5/0 Mr. John Touthang of Patsol PartI Lamkhai, P.S. Patso, DistrictImphal West, Manipur is acting in a manner prejudicial to the security of the State and maintenance of public order;

Whereas, I. K. Radhakumar Singh, District Magistrate, Imphal West, Manipur am satisfied that his activities are prejudicial to the security of the State and maintenance of public order under Section 3(2) of National Security Act, 3 980;

Whereas, it is considered necessary to detain Mr. David Letkholl Lalneo Touthang @ Lalboy Daniel @ Mamang Lalneo (23 years) S/ o Mr. John Touthang of Patsoi PartI Lamkhai, PS. Patso, DistrictImphal West, Manipur with a view to prevent him from acting in any manner prejudicial to the security of the State and maintenance of public order;

And whereas, I am satisfied from the police report that Mr. David Letkholal Lalneo Touthang @ Lalboy @ Daniel @ Mamang Lalneo (23 years) S/0 Mr. John Touthang of Patsoi PartI Lamkhai, P.S. Patsoi, DistrictImphal West, Manipur who is now in Police custody, is likely to be released on bail in the near future by the normal criminal Court as bails are granted in similar cases by the criminal Courts.

Now, therefore, I, K. Radhakumar Singh, District Magistate, Imphal West, Manipur in exercise of the powers conferred under subsection3 of Section 3 of the National Security Act, 1980 read with Home Department''s Order No. 17(I)/49/80H(PtI)dated07.02.2011 make this order directing that the above said person who is now in Police custody be detained under Section 3(2) of the National Security Act, 1980 until further orders. Given under my Hand and Seal of the Court on this twentyfifth day of March, 2011. (K. Radhakumar Singh) District Magistrate, Imphal West,"

7. On 29.3.2011, the detenue was supplied with the grounds of detention as required under Section 8 of the NSA, 1980. In the said Memo a brief history as to how the detenue joined the militant organization has been narrated. It has also been alleged that the accused/detenue was involved in extortion of money and that he was also involved in the kidnapping of Jagjit Singh.

8. From the documents annexed with the aforesaid documents dated 29.3.2011, it appears that after arrest of the accused on 14.2.2011 he was detained in police custody and on 16.2.2011, one empty magazine of .32 Pistol was recovered at the instance of the accused. Apparently, no statement of any witness was annexed with the grounds of detention to show that he was either involved in the activities prejudicial to the national security or about his random involvement in kidnapping and extortion etc. Apparently, the accused was put under NSA after ten days of his arrest and despite that no materials were produced by the police authority to the District Magistrate in this regard. From the documents annexed with the "grounds of detention" it is also not clear that the accused was at all produced before the Judicial Magistrate. Strangely, the respondents are also silent in this regard in their affidavit. If that be so, the detention of the petitioner''s son became illegal after 15.3.2011, since as per the detention order, the detenue was still in police custody on 25.3.2011.

9. Coming to the issue whether a person can be detained under the NSA on mere suspicion that the accused may be released by Court on bail, we would like to discuss few authorities of the Hon''ble Supreme Court in this regard.

10. In the case of Ramesh Yadav Vs. District Magistrate, Elah & Ors. reported in AIR 1986 SC 315 as well as in the case of Binod Singh Vs. District Magistrate, Dhanbad, Bihar & Ors; reported in AIR 1986 SC 2090, the Hon''ble Supreme Court took a view that before forming an opinion that the accused was likely to be released on bail, the detaining authority could have opposed the bail application as well as the bail order could have also been challenged before any higher court. Since these steps were not taken by the detaining authority, the detention orders were declared unsustainable in law. This principle of law was again approved in the case of Dharmendra S. Chelawat & Anr. Vs. Union of India & Ors. reported in AIR 1990 SC 1196. In this case also, the detenu was released holding that the view of the detaining authority that the accused was likely to be released on bail was not supported by any material. In this cited authority, the bail application of the accused was rejected only a few days prior to the passing of the order of detention and in the opinion of the Hon''ble Apex Court, the ground of detention did not show that the detaining authority apprehended that further remand of the accused would not be granted by the Court.

11. The view taken by the Hon''ble Apex Court in the case of Ramesh Yadav and Binod Singh (supra) that proper course for the detaining authority, before taking a view that the accused was likely to be released on bail in near future, was to oppose the bail application or challenge the bail order before higher Court has somehow been diluted and negated in the case of Kamnmnissa (supra). However, fundamental principle that the detaining authority must have some materials before it that there is imminent possibility of the accused being released on bail, was still maintained. The valued legal principle laid down in the aforesaid case can also be profitably reproduced below:

"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 validly 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

(b) that on being so released he would in all probability indulge in prejudicial activity and

(3) if it is felt 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 was that ordinarily a detention order should not be passed merely to preempt or circumvent enlargement on bail in cases 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."

12. In the case of Manickam (supra), an identical view was taken with regard to the subjective satisfaction of the detaining authority the observations, relevant for the present case, are extracted below:

"12. So far as this question relating to procedure to be adopted in case the detenue is already in custody is concerned, the matter has been dealt with in several cases. Where detention orders are passed in relation to persons who are already in Jail under some other laws, the detaining authorities should apply their mind and show their awareness in this regard in the grounds of detention, the chances of release of such persons on bail. The necessity of keeping such persons in detention under the preventive detention laws has to be clearly indicated. Subsisting custody the detenue by itself does not invalidate an order of his preventive detention, and decision in this regard must depend on the facts of the particular case. Preventive detention being necessary to prevent the detenue from acting in any manner prejudicial to the security of the State or to the maintenance of public order or economic stability, etc. ordinarily, it is not needed when detenue is already in custody. The detaining authority must show its awareness to the fact of subsisting custody of the detenue and take that factor into account while making the order. If the detaining authority is reasonably satisfied on cogent materials that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time, he must be detained in order to prevent him from indulging such, prejudicial activities the detention order can be validly made. Where the detention order in respect of a person already in custody does not indicate that the detenue was likely to be released on bail, the order would be vitiated....."

13. The law expounded by the Hon''ble Supreme Court in the case of Kamarunnissa (supra) and Manickam (supra), still holds the field and the judgment of the Apex Court rendered in the case of Senthamilselvi (supra) relied upon by the Govt. counsel also does not support the State''s contention that even if the subjective satisfaction of the District Magistrate is ipsedixit, the detention order cannot be interfered with. The relevant passage from the judgment of Senthamilselvi (supra) is

also reprodueed herein far ready reference:

"10. It was also submitted that since the detenu had not filed any bail application, the detaining authority could not have inferred that there was possibility of his being released on bail. Strong reliance is place of on several dedsions of this Court. It has to be noted that whether prayer for bail would be accepted depends on circumstances of each case and no hard and fast rule can be applied. The only requirement is that the detaining authority should be aware that the detenu is already in custody and is likely to be released on bail. The conclusion that the detenu may be released on bail cannot be ipsidixit of the detaining authority. On the basis of materials before him, the detaining authority came to the conclusion that there is likelihood of detenu being released on bail. That is his subjective satisfaction based on materials. Normally, such satisfaction is not to be interfered with. On the facts of the case, the detaining authority has indicated as to why he was of the opinion that there is likelihood of detenu being released on bail It has been clearly stated that in similar cases orders granting bail are passed by various Courts. Appellant has not disputed correctness of this statement. Strong reliance was placed on Rajesh Gulati Vs. Government of NCT of Delhi and Ann, [(2002) 75CC 129]. The factual scenario in that case was entirely different. In fact, five bail applications filed had been already rejected. In that background this Court observed that it was not "normal" case. The High Court was justified in rejecting the stand of the appellant."

14. The judgment of the Apex Court, given in the case of Rekha Vs. State of T. Nadu (supra) is latest in the series, reiterating that there must be some materials before the detaining authority before coming to a conclusion that the accused would be likely to be released by the normal Criminal Court. In the said case also one of the grounds of detention was that the accused was likely to be released by the Court. Hence, it would be just and proper to look at the relevant facts and the view taken by the Apex Court in that regard, which are quoted below for easy reference;

"In para 4 of the grounds of detention, it is stated:

4. I am aware that Thiru Remakrishnan, is in remand in P6, Kodungaiyur Police Station Crimi No 132/2010 and he has not moved any bail application so far. The sponsoring authority has stated that the relatives of Thiru Ramakrishnan are taking action to take him on bail in the above case by filing bail applications before the Higher Courts since in similar cases bails were granted by the Courts after a lapse of time. Hence, there is real possibility of his coming out on bail in the above case by filing a bail application before the higher courts. If he comes out on bail he will indulge in further activities, which will be prejudicial to the maintenance of public health and order. Further the recourse to normal criminal law would not have the desired effect of effectively preventing him from indulging in such activities, which are prejudicial to the maintenance of public health and order. On the materials placed before me, I am fully satisfied that the said Thiru Ramakrishnan is also a Drug offener and that there is a compelling necessity to detain him in order to

prevent him from indulging in such further activities in future which are prejudicial to the maintenance of public order under the provisions of Tamil Nadu Act 14 of 1982." In the factual backdrop of para 4 of the grounds of detention, the Apex Court also held that: A perusal of the above statement in para 4 of the grounds of detention shows that no details have been given about the alleged similar cases in which bail was allegedly granted by the concerned Court. Neither the date of the alleged bail orders have been mentioned therein, nor the bail application number, nor whether the bail orders were passed in respect of other coaccused in case on the same footing as the case of the accused. All that has been stated in the grounds of detention is that "in similar cases bails were granted by the Courts." In our opinion, In the absence of details this statement is mere ipse dixit, and cannot be relied upon.

In our opinion, this itself is sufficient to vitiate the detention order."

15. What crystallizes from the aforesaid authorities is that the detaining authority''s subjective satisfaction should not ordinarily be questioned. At the same time, if the inference of the detaining authority that there is imminent possibility of the accused coming out on bail is ipse dixit of the detaining authority, unsupported by any material, whatsoever, the detention order can be struck down,

16. In the case before us, neither the records nor the affidavit of the respondents made it clear as to how the detenue was kept in the police even after ten days. At the same time, neither the grounds of detention nor the relevant facts nor the affidavit of the respondents discloses that any bail application was at all moved in the Court so that the detaining authority could have drawn a presumption that the accused may be released on bail nor any instance of granting bail to similarly situated accused person within a short period has been mentioned in the detention order or in the 6 grounds of detention''. This apart, as per the State amendment of Section 167 of the Code of Criminal Procedure, the accused could have been detained in judicial custody for another period of 180 days. However, the detaining authority had taken a view that the detenue was likely to be released on bail within period often days of his arrest and that too when the accused was in police custody and no bail application was moved in the Court.

17. In the case of Rajesh Gulati Vs. Government of NCT of Delhi, reported in (2002J 75CC 129, the Honble Supreme Court has emphasized the necessity to ensure compliance of the procedural safeguards provided to a detenu in the following words:

"We are of the view that the High Court erred in accepting the respondents'' submissions and rejecting the appellant''s writ application, This Court has repeatedly held that the law permitting a preventive detention must be meticulously followed both substantively and procedurally by the detaining authority." 18. Earlier to that also, in the case of Kamlesh Kumar Jshwardar Patel Vs. Union of India;

reported in (1995) 4 5CC 51, the Hon''ble Supreme Court made it clear in no uncertain words that the preventive detention should not be equated with detention under penal statutes. Their Lordships have held that since preventive detention infringes fundamental rights and personal liberty of a detenue, the detaining authorities have an obligation to adhere to the safeguards provided under such preventive law as well as under Article 22 of the Constitution. Their Lordships have further held that in case of violation of procedural safeguards by the detaining authority, the obligation to enforce the fundamental rights of the detenue shifts upon the Courts and any such untenable order of preventive detention has to be interfered with, oblivious to its consequences. The valued observations of the Hon''ble Apex Court can be profitably taken note of, which are as under:

"...We are not unmindful of the harmful consequences of the activities in which the detenus are to be alleged to be involved. But while discharging our constitutional obligation to enforce the liberty, we cannot allow ourselves to be influenced by these considerations. It has been said that history of liberty is the history of procedural safeguards. The Framers of the Constitution, being aware that preventive detention involves a serious encroachment on the right to personal liberty, took care to incorporate, in clauses (4) and (5) of Article 22, certain minimum safeguards for the protection of persons sought to be preventively detained. These safeguards are required to be zealously watched and enforced by the Court. Their rigour cannot be modulated on the basis of the nature of the activities of a particular person. We would, in this context, reiterate what was said earlier by this Court while rejecting a similar submission: (SCC para 4). May be that the detenu is a smuggler whose tribe (and how their numbers increase) deserves no sympathy since its activities have paralysed the Indian economy. But the laws of preventive detention afford only a modicum of safeguards to persons detained under them and if freedom and liberty are to have any meaning in our democratic setup, it is essential that at least those safeguards are not denied to the dentenus [See Rattan Singh Vs.StateofPunjab:(1981)45CC48]."

19. In the case before us, the subjective satisfaction of the District Magistrate that the accused was likely to be released on bail in near future is nothing but his ipse dixit satisfaction, sans any material. Hence, the detention order is liable to be set aside.

20. For the reasons assigned hereinabove, the writ petition stands allowed. The impugned detention orders are hereby set aside. It is ordered that the detenue namely, Mr. David Letkholal Lalneo Touthang @ Lalboy @ Daniel @ Mamang @ Lalneo shall be set at liberty forthwith, if his detention is not warranted in any other case.