MERUGU SATYANARAYANA ETC. ETC.

v.

STATE OF ANDHRA PRADESH AND OTHERS

October 18, 1982

[D.A. DESAI AND R.B. MISRA, JJ.]

National Security Act, 1980—Section 3(2), scope of—Passing a detention order under the Act, against persons who are under judicial custody and thereby lost their liberty, is bad in law—Writ of Habeas Corpus—The affidavit in opposition supporting the reply to show cause should be from the person who passed the detention order—The affidavit of a sub-inspector of police at whose instance the arrest was made cannot satisfy the constitutional mandate and will be treated as non-est—Detention in violation of—Assurance before the Supreme Court in an earlier case, that the preventive detention would not be taken against political opponents, whether would amount to flagrant violation thereof.

In both the Writ Petitions, when the petitioners were already in judicial custody and thus have been deprived of their liberty, the District Magistrate Adilabad passed the detention orders in exercise of the power conferred under Section 3(2) read with Section 3(3) of the National Security Act, 1980. The detenu in each of these petitions filed a petition for writ of *habeas corpus* in the Andhra Pradesh High Court and both the petitions were rejected.

In the present petitions, it was contended as follows :

(i) that in both the cases, the detenus being in judicial custody were already prevented from pursuing any activity which may prove prejudicial to the maintenance of public order and, therefore, no order of detention could be passed against each of them ;

(ii) that the affidavit-in-opposition was filed by a sub-inspector of police and not by the detaining authority, i.e. the District Magistrate had completely abdicated his powers ; and

(iii) that in flagrant violation of the assurances given at the hearing of *A.K. Roy's* case, that the drastic and draconian power of preventive detention will not be exercised against political opponents, the affidavit in opposition would show that the power of preventive detention was exercised against political opponents because the detenu in each case was a member and organizer of C.P.I. (M.L.) (Peoples War Group), a political party operating in this country.

Allowing the petitions, the Court

A HELD : 1:1. A preventive action postulates that if preventive step is not taken the person sought to be prevented may indulge into an activity prejudicial to the maintenance of public order. In other words, unless the activity is interdicted by a preventive detention order the activity which is being indulged into is likely to be repeated. That this is the postulate, indisputably transpires from the language employed in sub-section (2) of Section 3, which says that the detention order can be made with a view to preventing the person sought to be B detained from acting in any manner prejudicial to the maintenance of public order. If it is shown that the man sought to be prevented by a preventive order is already effectively prevented, the power under sub-section (2) of Section 3, if exercised, would imply that one who is already prevented is sought to be further prevented which is not the mandate of the section, and would appear tautologous. [640 F-H, 641-A]

C 1:2. The detaining authority before exercising the power of preventive detention would take into consideration the past conduct or antecedent history of the person and as a matter of fact it is largely from the prior events showing the tendencies of a man that an inference could be drawn whether he is likely even in the future to act in a manner prejudicial to the maintenance of public order. If the subjective satisfaction of the detaining authority leads to this D conclusion it can put an end to the activity by making a preventive detention order. If the man is already detained a detaining authority cannot be said to have subjectively satisfied himself that a preventive detention order can be made. [641 A-C]

Ujagar Singh v. *State of Punjab*, *Jagir Singh* v. *State of Punjab* [1952] S.C.R. 756 and *Rameshwar Shaw* v. *District Magistrate, Burdwan and Anr.* [1964]4 E S.C.R. 921 referred to.

1:3. The subjective satisfaction of the detaining authority must comprehend the very fact that the person sought to be detained in jail is under detention and yet a preventive detention order is a compelling necessity. If the subjective satisfaction is reached without the awareness of this very relevant F fact the detention order is likely to be vitiated. But, it will depend on the facts and circumstances of each case. [642 D-F]

Vijay Kumar v. *State of J & K and Ors.* A.I.R. 1982 S.C. 1023, applied.

G 2:1. The awareness of the detaining authority must be of the fact that the person against whom the detention order is being made is already under detention. This would show that such a person is not a free person to indulge into a prejudicial activity which is required to be prevented by detention order. And this awareness must find its place either in the detention order or in the affidavit justifying the detention order when challenged. The absence of this H awareness would permit an inference that the detaining authority was not even aware of this vital fact and mechanically proceeded to pass the order which would

unmistakably indicate that there was non-application of mind to the most relevant fact and any order of such serious consequences resulting in deprivation of liberty, if mechanically passed without the application of mind is liable to be set aside as invalid. [643 D-G]

3:1. A sub-inspector of police cannot arrogate to himself the knowledge about the subjective satisfaction of the District Magistrate on whom the power of detention is conferred by the National Security Act. If the power of preventive detention is to be conferred on an officer of the level and standing of a sub-inspector of police, we would not be far from a police state. [644 E-F]

3:2. Parliament has conferred power primarily on the Central Government and in specific cases, if the conditions set out in sub-section (3) of section 3 of the Act are satisfied and the Notification is issued by the State Government to that effect, this extra-ordinary power of directing preventive detention can be exercised by such highly placed officers as District Magistrate or Commissioner of Police. [644 F-G]

3:3. In this case, (a) the District Magistrate, the detaining authority has not chosen to file his affidavit, (b) the affidavit in opposition filed by the sub-inspector would imply either he had access to the file of the District Magistrate or he had influenced the decision of the Magistrate for making the detention order and in any case the District Magistrate completely abdicated his functions in favour of the sub-inspector of Police because (i) the sub-inspector does not say in the affidavit how he came to know about the subjective satisfaction of the District Magistrate or that he had access to the file, and (ii) the file was not made available to the Court. If the District Magistrate is to act in the manner he has done in this case by completely abdicating his functions in favour of an officer of the level of a sub-inspector of Police, the safe-guards noticed by the Supreme Court are likely to prove wholly illusory and the fundamental right of personal liberty will be exposed to serious jeopardy. Hence the affidavit in opposition cannot be taken notice of, here. [644 G-H, 646 A-C]

A.K. Roy v. *Union of India & Ors.* [1982] 1 SCC 271, referred to.

4. The affidavit-in-opposition filed in the present case would show that the power conferred for ordering preventive detention was exercised on extraneous and irrelevant consideration in respect of each detenu he being a member of and organiser of C.P.I. (M.L.) (People War Group), a political party operating in this country which fact motivated the order and, therefore, a flagrant violation of the assurances given on the floor of Parliament and while hearing the case of *A.K. Roy* wherein the constitutional validity of the Act was challenged that the drastic and draconian power of preventive detention will not be exercised against political opponents. But it is unnecessary to examine this aspect on merits, in view of the fact that the detention orders have been found to be invalid for more than one reason. Non-examination of the contention need not lead to the inference that the contention is rejected but kept open to be examined in an appropriate case. [646 D-E, 647 A-B]

A ORIGINAL JURISDICTION : Writ Petition (Criminal) No. 1166 of 1982.

(Under article 32 of the Constitution of India)

AND

Writ Petition (Criminal) No. 1167 of 1982

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(Under article 32 of the Constitution of India)

Gobinda Mukhoty, N.R. Choudhury and *S.K. Bhattacharya* for the Petitioners.

C *P. Ram Reddy* and *G.N. Rao* for the Respondent.

The Judgment of the Court was delivered by

DESAI, J. On October 8, 1982, we quashed and set aside the detention order dated December 26, 1981 in respect of detenu D Merugu Satyanarayana s/o Ramchander, deferring the giving of the reasons to a later date.

On the same day we quashed the detention order dated February 13, 1982, in respect of detenu Bandela Ramulu @ Lehidas @ Peddi Rajulu @ Ramesh, s/o Venkati, deferring the giving of the E reasons to a later date.

Identical contentions were raised in both these petitions and, therefore, by this common order we proceed to give our reasons on the basis of which we made the aforementioned orders.

F WP. 1166/82.

Detenu M. Satyanarayana was working in Belampalli Coal Mines. According to him he was arrested on October 22, 1981, but was kept in unlawful custody till October 31, 1981, when he was produced before the Judicial Magistrate who took him in judicial G custody and sent him to Central Jail, Warangal. According to the respondents detenu was arrested on October 30, 1981, and was produced before the Judicial Magistrate on October 31, 1981. When he was thus confined in jail a detention order dated December 26, 1981 (in the counter-affidavit the date of the detention order is shown H to be December 28, 1981) made by the District Magistrate, Adilabad, in exercise of the power conferred by sub-s. (2) read with sub-s. (3) of s. 3 of the National Security Act, 1980 ('Act' for short)

was served upon him on December 29, 1981. The District Magistrate also served upon the detenu grounds of detention on January 2, 1982. It is not clear from the record or from the counter affidavit filed on behalf of respondents 1 to 3 whether any representation was made by the detenu and when the matter was disposed of by the Advisory Board.

WP. 1167/82.

Detenu Bandela Kamulu according to him was arrested on January 1, 1982, and he was produced before the Judicial Magistrate on January 11, 1982. The dates herein mentioned are controverted by the respondents and they assert in the counter affidavit that the detenu was arrested on January 8, 1982, and was produced before the Judicial Magistrate on January 9, 1982. During the period of his incarceration the District Magistrate, Adilabad in exercise of the power conferred by sub-s. (2) read with sub-s. (3) of s. 3 of the Act made an order of detention which was served on the detenu in District Jail, Nizamabad, on February 14, 1982. Even in this case it is not clear from the record whether the detenu made any representation or how his case was dealt with by the Advisory Board.

The detenu in each of these petitions filed a petition for writ of *habeas corpus* in the Andhra Pradesh High Court. It appears both the petitions were rejected. Thereafter the present petitions were filed.

It may be stated at the outset that there is some dispute about the date of arrest of detenu in each case. But in order to focus attention on the substantial contention canvassed in each case we would proceed on the assumption that the date of arrest given in each case by the respondents is correct. We do not mean to suggest that the averment of the respondents with regard to the date of arrest is correct but that would be merely a presumption for the purpose of disposal of these petitions.

Mr. Gobinda Mukhoty, learned counsel who appeared for the detenu in each petition urged that on the date on which the detention order came to be made against each detenu he was already deprived of his liberty as he was already arrested and was confined in jail and, therefore, he was already prevented from pursuing any activity which may prove prejudicial to the maintenance of public order. Hence no order of detention could be made against him.

A The impugned detention order in each case recites that the detaining authority, the District Magistrate of Adilabad, made the impugned detention order with a view to preventing the detenu from continuing to act further in the manner prejudicial to the maintenance of public order.

B The fact situation in each case as transpires from the counter-affidavit filed on behalf of the respondents is that detenu Merugu Satyanarayan was in jail since October 31, 1981, and the detention order in his case was made on December 28, 1981, meaning thereby that the detenu was already confined in jail for a period of nearly two months prior to the date of the detention order. Similarly, in the C case of detenu Bandela Ramulu according to the counter-affidavit he was arrested on January 8, 1982, and was confined to jail under the orders of the First Class Magistrate from January 9, 1982. The detention order in his case was made on February 13, 1982, meaning thereby that the detenu was already confined to jail for a period of D one month and four days prior to the date of the detention order. It is in the background of this fact situation in each case that the contention canvassed on behalf of the detenu by Mr. Mukhoty may be examined.

Sub-section (2) of s. 3 of the Act confers power on the Central Government or the State Government to make an order of detention E with a view to preventing any person from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order, etc. In this case the detaining authority has made the order on being satisfied that it is necessary to detain the detenu with a view to preventing him from F acting in any manner prejudicial to the maintenance of public order. A preventive action postulates that if preventive step is not taken the person sought to be prevented may indulge into an activity prejudicial to the maintenance of public order. In other words, unless the activity is interdicted by a preventive detention order the activity which is being indulged into is likely to be repeated. This is the G postulate of the section. And this indubitably transpires from the language employed in sub-s. (2) which says that the detention order can be made with a view to preventing the person sought to be detained from acting in any manner prejudicial to the maintenance of public order. Now, if it is shown that the man sought to be prevent-H ed by a preventive order is already effectively prevented, the power under sub-s. (2) of s. 3, if exercised, would imply that one who is already is sought to be further prevented which is not the mandate

of the section, and would appear tautologous. An order for preventive detention is made on the subjective satisfaction of the detaining authority. The detaining authority before exercising the power of preventive detention would take into consideration the past conduct or antecedent history of the person and as a matter of fact it is largely from the prior events showing the tendencies or inclinations of a man that an inference could be drawn whether he is likely even in the future to act in a manner prejudicial to the maintenance of public order. If the subjective satisfaction of the detaining authority leads to this conclusion it can put an end to the activity by making a preventive detention order. (see *Ujagar Singh* v. *State of Punjab*, and *Jagir Singh* v. *State of Punjab*)(1). Now, if the man is already detained, can a detaining authority be said to have been subjectively satisfied that a preventive detention order be made ? In *Rameshwar Shaw* v. *District Magistrate, Burdwan & Anr.*(2), this Court held that as an abstract proposition of the law detention order can be made in respect of a person who is already detained. But having said this, the Court proceeded to observe as under :

> "As an abstract proposition of law, there may not be any doubt that s. 3(1)(a) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail, but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail. Take for instance, a case where a person has been sentenced to rigorous imprisonment for ten years. It cannot be seriously suggested that soon after the sentence of imprisonment is pronounced on the person, the detaining authority can make an order directing the detention of the said person after he is released from jail at the end of the period of the sentence imposed on him. In dealing with this question, again the consideration of proximity of time will not be irrelevant. On the other hand, if a person who is undergoing imprisonment, for a very short period, say for a month or two or so, and it is known that he would soon be released from jail, it may be possible for the authority to consider the antecedent history of the said person and decide whether after he is released from jail, and if the authority is *bona fide* satisfied that such detention is necessary, he can make a

(1) [1952] SCR 756.
(2) [1964] 4 SCR 921.

A valid order of detention a few days before the person is likely to be released. The antecedent history and the past conduct on which the order of detention would be based would, in such a case, be proximate in point of time and would have a rational connection with the conclusion drawn by the authority that the detention of the person after his B release is necessary. It may not be easy to discover such rational connection between the antecedent history of the person who has been sentenced to ten years' rigorous imprisonment and the view that his detention should be ordered after he is released after running the whole of his sentence. Therefore, we are satisfied that the question as to C whether an order of detention can be passed against a person who is in detention or in jail, will always have to be determined in the circumstances of each case."

One can envisage a hypothetical case where a preventive order may have to be made against a person already confined to jail or D detained. But in such a situation as held by this Court it must be present to the mind of the detaining authority that keeping in view the fact that the person is already detained a preventive detention order is still necessary. The subjective satisfaction of the detaining authority must comprehend the very fact that the person sought to E be detained is already in jail or under detention and yet a preventive detention order is a compelling necessity. If the subjective satisfaction is reached without the awareness of this very relevant fact the detention order is likely to be vitiated. But as stated by this Court it will depend on the facts and circumstances of each case.

F The view herein taken finds further support from the decision of this Court in *Vijay Kumar* v. *State of J & K and Ors.*(1), wherein this Court recently held as under :

"Preventive detention is resorted to, to thwart future action. If the detenu is already in jail charged with a serious G offence, he is thereby prevented from acting in a manner prejudicial to the security of the State. Maybe, in a given case there yet may be the need to order preventive detention of a person already in jail. But in such a situation the detaining authority must disclose awareness of the fact that

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(1) AIR 1982 SC 1023.

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the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made. There is nothing to indicate the awareness of the detaining authority that detenu was already in jail and yet the impugned order is required to be made. This, in our opinion, clearly exhibits non-application of mind and would result in invalidation of the order."

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Mr. Mukhoty next contended that even if a hypothetical case can be envisaged as contemplated by the decision of this Court in *Rameshwar Shaw* that a preventive detention order becomes necessitous in respect of a person already confined to jail, the detaining authority must show its awareness of the fact that the person in respect of whom detention order is being made is already in jail and yet a detention order is a compelling necessity. It was urged that this awareness must appear on the face of the record as being set out in the detention order or at least in the affidavit in opposition filed in a proceeding challenging the detention order. Otherwise, according to Mr. Mukhoty, the detention order would suffer from the vice of non-application of mind. The awareness must be of the fact that the person against whom the detention order is being made is already under detention or in jail in respect of some offence or for some reason. This would show that such a person is not a free person to indulge into a prejudicial activity which is required to be prevented by detention order. And this awareness must find its place either in the detention order or in the affidavit justifying the detention order when challenged. The absence of this awareness would permit an inference that the detaining authority was not even aware of this vital fact and mechanically proceeded to pass the order which would unmistakably indicate that there was non-application of mind to the most relevant fact and any order of such serious consequence resulting in deprivation of liberty, if mechanically passed without application of mind, is obviously liable to be set aside as invalid. And that is the case here.

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Coming to the facts of each case, the detention order refers to the name of the detenu and the place of his residence. There is not even a remote indication that the person against whom the detention order is being made is already in jail in one case for a period of roughly two months and in another case for a period of one month and four days. The detenu is referred to as one who is staying at a

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A certain place and appears to be a free person. Assuming that this inference from the mere description of the detenu in the detention order is impermissible, the affidavit is conspicuously silent on this point. Not a word is said that the detaining authority was aware of the fact that the detenu was already in jail and yet it became a compelling necessity to pass the detention order. Therefore, the B subjective satisfaction arrived at clearly discloses a non-application of mind to the relevant facts and the order is vitiated.

The next contention urged by Mr. Mukhoty was that the detaining authority has not filed an affidavit in opposition but the same has been filed by one Sub-Inspector of Police and it speaks about C the subjective satisfaction of the detaining authority viz., the District Magistrate and this would show that the District Magistrate had completely abdicated his functions in favour of the Sub-Inspector of Police. The affidavit in opposition on behalf of respondents 1 to 3 who are the State of Andhra Pradesh, the District Magistrate, Adilabad and the Jailor, Central Prison, Hyderabad, has been filed D by M. Venkatanarasayya who has described himself as Sub-Inspector of Police. The same Sub-Inspector has filed affidavit-in-opposition in both the cases. In para 1 of the affidavit in opposition it is stated that the deponent as a Sub-Inspector of police is well acquainted with all the facts of the case. In para 7 of the affidavit in opposition E in writ petition 1166/82 he has stated that : 'Only after deriving the subjective satisfaction, the detaining authority passed order of detention against the detenu, as his being at large, will prejudice the maintenance of public order. We are completely at a loss to understand how a Sub Inspector of Police can arrogate to himself the knowledge about the subjective satisfaction of the District Magistrate F on whom the power is conferred by the Act. If the power of preventive detention is to be conferred on an officer of the level and standing of a Sub-Inspector of Police, we would not be far from a Police State. Parliament has conferred power primarily on the Central Government and the State Government and in some specific cases, if the conditions set out in sub-s. (3) of s. 3 are satisfied and G the notification is issued by the State Government to that effect, this extra-ordinary power of directing preventive detention can be exercised by such highly placed officers as District Magistrate or Commissioner of Police. In this case the District Magistrate, the detaining authority has not chosen to file his affidavit. The affidavit H in opposition is filed by a Sub-Inspector of Police. Would this imply that Sub-Inspector of Police had access to the file of the District Magistrate or was the Sub-Inspector the person who influenced the

decision of the District Magistrate for making the detention order? From the very fact that the respondents sought to sustain the order by filing an affidavit of Sub-Inspector of Police, we have serious apprehension as to whether the District Magistrate completely abdicated his functions in favour of the Sub-Inspector of Police. The file was not made available to the Court at the time of hearing of the petitions. But number of inferences are permissible from the fact that the District Magistrate though a party did not file his affidavit justifying the order and left it to the Sub-Inspector of police to fill in the bill. And the Sub-Inspector of Police does not say how he came to know about the subjective satisfaction of the District Magistrate. He does not say that he had access to the file or he is making the affidavit on the basis of the record maintained by the District Magistrate. Therefore, the inference is irresistible that at the behest of the Sub-Inspector of Police who appears to be the investigating officer in some criminal case in which each of the detenu is implicated, the District Magistrate completely abdicating his responsibilities, made the detention order. This Court in *A.K. Roy* v. *Union of India & Ors.*[1], while upholding the validity of the National Security Act, repelled the contention that it is wholly unreasonable to confer upon the District Magistrate or Commissioner of Police the power to issue orders of detention for reasons mentioned in sub-s. (2) of s. 3, observing that the District Magistrate or the Commissioner of Police can take the action under sub-s. (2) of s. 3 during the periods specified in the order of the State Government only. This Court also noticed another safeguard, namely, that the order of the State Government under sub-s. (3) of s. 3 can remain in force for a period of three months only and it is during this period that the District Magistrate or the Commissioner of Police, as the case may be, can exercise power under sub-s. (2) of s. 3. The further safeguard noticed by this Court is that both these officers have to forthwith intimate the fact of detention to the State Government and no such order of detention can remain in force for more than 12 days after the making thereof unless, in the meantime, it has been approved by the State Government. The Court observed that in view of these inbuilt safeguards it can not be said that excessive or unreasonable power is conferred upon the District Magistrate or the Commsisioner of Police to pass orders under sub-s. (2) (see para 72).

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(1) [1982] SCC 271.

If the District Magistrate is to act in the manner he has done in this case by completely abdicating his functions in favour of an officer of the level of a Sub-Inspector of Police, the safeguards noticed by this Court are likely to prove wholly illusory and the fundamental right of personal liberty will be exposed to serious jeopardy. We only hope that in future the District Magistrate would act with responsibility, circumspection and wisdom expected of him by this Court as set out earlier. However, the conclusion is inescapable that the errors pointed out by the petitioners which have appealed to us remain uncontroverted in the absence of an affidavit of the detaining authority. We refuse to take any notice of an affidavit in opposition filed by a Sub-Inspector of Police in the facts and circumstances of this case.

The last contention canvassed by Mr. Mukhoty is that even though assurances were given on the floor of Parliament as well as while hearing the case of *A.K. Roy* wherein constitutional validity of the Act was challenged that the drastic and draconian power of preventive detention will not be exercised against political opponents, in flagrant violation thereof the affidavit in opposition would show that the power of preventive detention was exercised on extraneous and irrelevant consideration, the detenu in each case being a member and organiser of CPI (ML) (People's War Group), a political party operating in this country. In the affidavit in opposition in writ petition 1166/82, the relevant averments on this point read as under :

> "In reply to para 7 of the petition these answering respondents submit that it is not correct to say that the grounds of detention failed to disclose any proximity with the order of detention and underlying purpose and object of the Act inasmuch as the detenu is one of the active organisers of CPI (ML) (People's War Group) believing in violent activities with the main object to overthrow the lawfully established Government by creating chaotic conditions in rural and urban areas by annihilating the class enemies, went underground to preach the party ideology and to build up the cadres by indoctrinating them for armed struggle".

There is a similar averment in the affidavit in opposition in the connected petition also. We would have gone into this contention

but for the fact that having found the detention order invalid for more than one reason, it is unnecessary to examine this contention on merits. Non-examination of the contention need not lead to the inference that the contention is rejected. We keep it open to be examined in an appropriate case. A

These were the reasons for which we quashed and set aside the order of detention in each case. B

S.R. *Petitions allowed.*