Balraj Madhok vs The Union Of India Through Its Secretary ... on 18 November, 1966

Author: Chief Justice

Bench: Chief Justice

JUDGMENT

(1). In each of these nine criminal Writ Petitions (Nos. 2 to 10 of 1966) under Article 22 and 226 of the Constitution of India and under section 491 of the Code of Criminal Procedure, the petitioner therein prays that this court may be pleased to issue a writ of habeas corpus calling upon the respondents to produce him Court and to show on what authority they have detained him and, if they fail to show lawful authority for doing so, to set him at liberty.

(2) The facts of these cases are more or less identical. Common questions of law arise for decision in these petitions. Hence they are consolidated together. After the ugly incidents in Delhi on 7th of this month, the petitioner were arrested between the 7th and 13 of this month. They are now detained in prison. They allege that they were not informed whey they were arrested, nor were they produced before any Magistrate Their case is that they are unlawfully detained.

(3) The case for the respondents is that the petitioners were arrested under Section 197 read with section 151 of the Code. Thereafter they were produced before one or the other f the magistrates in Delhi, who had ordered them to be released on bail, but as they failed to give the security ordered, they had been ordered to be kept in judicial custody. For giving to relief to the petitioners in these petitions, it is not necessary to find out which one of the two versions is the correct version, as I am of the opinion that on the very facts put forward by the respondents, it is clear the detention f the petitioners is not in accordance with law.

(4) The police officers, who arrested the petitioners have filed affidavits in these case. According to them , arrested the petitioners under section 107 read with section 151 of the code. The Magistrates, who are said to have ordered their detention, have also filed their affidavits, in these cases. In their affidavits they say that when the petitioners were produced before them, they have directed their release on bail on their furnishing security, as ordered, but as they failed to furnish, security, they have been remanded to judicial custody (5) The first question that arises for decision is whether on the facts stated by the respondents, the arrest of any of the petitioners can be considered legal. For deciding this question, t is necessary to examine the reason given by the officers, who arrested the petitioners, for arresting them/ As the reason given in all the cases is more or less identical. It would be sufficient if I quote the relevant passages from the affidavit filed in one of these petitions. Shri Bhim Singh, Inspector Police, who arrested Shri Balarj Madhok, the petitioner in Writ Petition No. 2 of 1966 had stated thus in his affidavit.

That on 9th November, 1966, I arrested Shri Balraj Madhok, the petitioner, and Sarvashri Amrit Lal son of Shri Lackhman dass, mela Ram son of Ladha Ram and Ram Saroop son of mangal sain, all residents of new Rajinder nagar, new Delhi under S 107/151 of the Code of Criminal Procedure, on apprehension of imminent danger of breach of peace from then and informed them the reason for their arrest. The question is whether any arrest under Section 151 of the Code, could have been made for the aforementioned reason. That section says:

> " A police officer knowing of a design of commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission can not be otherwise prevented".

The power given under this provision impinges on one of the important liberties of an individual. Hence it is necessary that exercise of that power, there should be strict compliance with the requirements, of the law. In these cases, as mentioned earlier, the arrests of the petitioners were said to have been made under section 107 of the code, S. 107 does not deal with any offence. That provides for taking preventive steps to restrain a person from committing breach of the peace or from disturbing the public tranquillity, or doing any wrongful act that may probably occasion a breach of the peace. Or disturb the public tranquillity. Proceedings under section 107 of the code cannot be considered as prosecutions for offence. The term 'offence' is defined in section 4 of the Code thus -

> "offence means any act or omission made punishable by any law for the time being in force."

Section 107 does not provide for any punishment. A person proceeded against under that provision cannot be said to be prosecuted for an offence, nor any action taken under that provision can be considered as a punishment. What is required under section 151 of the code is that the officer concerned must know that the person to be arrested is designing to commit a cognizable offence. An "apprehension" that he may commit an offence is not sufficient under that provision, apprehension is not the same thing as knowledge. The former is a mere feeling. Latter is a definite conclusion. Further eve, mere knowledge that the person concerned would endanger peace or tranquillity need not result in a cognizable offence. Again, the possibility of the commission of a cognizable offence does not mean that he is designing to commit such an offence. Lastly, it is not said that it appeared to the officer concerned that the commission of the offence could be otherwise prevented. From the facts proved, it is clear, there was enough time to seek orders from Magistrate. From whichever angle we see, it is clear that the arrests of the petitioner were not in accordance with law.

(6) Now I come to the question whether their detention is in accordance with law. Strangely enough, the Magistrates, who ordered their detention, have chosen to put in the hands of the Government counsel their affidavits setting out the reasons for detaining the petitioners.. This conduct on their part is not likely to inspire confidence in the impartiality of the Magistrates. In these cases the petitioner's allegations is that they were never produced before any Magistrate; no Magistrate informed them of the offence with which they were charged; nor were any orders passed in their presence or to their knowledge. Even when such allegations were made it is surprising that the

Magistrate still chose to give their affidavits in the hands of the prosecuting agency. This act of the Magistrates is highly regrettable. I hope, such things will not be repeated. The High Court has a duty to see the magistrates discharge their judicial functions in a manner which would inspire confidence in the minds of the public (7) Now for pronouncing on the validity of the detention of the petitioners, it is necessary to refer to the affidavits of the Magistrates. It would be sufficient if I reefer to the affidavit of one of the magistrates because averments in all the affidavits are more or less similar, I shall again go back to Criminal Writ Petition No.2 of 1966, The Magistrate concerned is Shri N.K. Garg. This is what the learned magistrate says-

> "2. That on 9th November, 1966, Sarvashri Balraj Madhok, Amrit Lal, Mela ram Kapoor and Prof. Ram Sarrop were produced before me by Rajinder nagar, Police Delhi, under police custody together with a complaint under sections 107/151 of the Code of Criminal Procedure against them.
>
> 3. That the said Sarvashri Balraj Madhok, Amrit Lal, Mela Ram Kapoor and Prof. Ram Sarrop were apprised by me that they had been arrested. Under section 107/151 of the code of Criminal Procedure.
>
> 4. That I passed the order that all the four respondents be released on their furnishing two sureties of Rs.10,000/- each with a personal bond of like amount failing which they be remanded to judicial custody till 19th November, 1966.
>
> 5. That out of the four persons, Shri Mela ram offered, to sureties of Rs. 10,000/- each before Shri R.K. Anand, magistrate 1st Class, Delhi on 10th November, 1966 and was released.
>
> 6. That Shri Balraj Madhok and other two respondents did not produce any surety as ordered by me and on their failure to produce the required surety they were remanded to judicial custody till 19th November, 1966 and till that date the three respondents including Shri Balraj Maddhok have not offered any surety before me".

(8). Now I have to see whether the procedure adopted by the Magistrates is in accordance with the provisions contained in Chapter Viii of the code Sub-section (1) of section 107 says-

107. (1) Whenever a Presidency Magistrate, District Magistrate sub-divisional Magistrate or Magistrate of the first class in informed that any person is likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace. Or disturb the public tranquillity, the Magistrate, if in his opinion there is sufficient ground for proceeding, may, in manner herein after provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fir to fix".

(Sub-sections (2) (3) and (4) of section 107 are not relevant for our present purpose).

We may next go to section 112. That section reads-

> "112, when a Magistrate acting under section 107, section 108, section 109 or section 110 deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the terms for which it is to be in force, and the number, character and class of sureties, (if any) required".

Next the relevant provisions are those contained in sub-sections (1) and (3) of S. 117, Sub-section (1) of section 117 says-

> "117. (1) when an order under section 112 has been read or explained under section 113 to a person present in court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to enquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary"

Sub-section (3) of that section reads-

> "(3) Pending the completion of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 112 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behavior until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution untill the inquiry is conclued:* * *" (The remaining portion is not necessary for our present purpose).

Section 118 deals with the final order to be made in an inquiry under Chapter Viii, Sub-Section (1) of Section 123 says-

> "123. (1) if any person ordered to give security under section 106 or section 118 does not give such security on or before the date on which the period for which such security is to be given commences, he shall except in the case next hereinafter mentioned, be committed to prison, or if he is already in prison, be detained in prison until such period expires or untill within such period he gives the security to the Court or Magistrate who made the order requiring it".

(9) From a reading of these provisions, it is clear that when a person I proceeded against under section 107 of the Code, and he appears or is produced before a Magistrate, the first thing that a Magistrate has to do is, when he deems it necessary to require the person to show cause under the section, to make an order in writing, setting forth substance of the information received, the amount

of the bond to be executed, the term for which it is to be in force and the number, character an class of sureties (if any) required. This is a condition precedent for taking further steps under, chapter Viii of the code, An order under section 112 is the very basis of a proceeding under the chapter. Without such an order the Magistrate is incompetent to take further action. There is no question of granting bail in a proceeding under section 107 of the code.

I am in entire agreement with Shri C.B. Agarwala in his contention that without an order under section 112 of the Code, the magistrate had no competence to deal with the petitioners, In this connection, I may respectfully quote with approval some of the observations of the Allahabad High Court in Sharon Kumar Gupta v Supdt., District Jai, Mathura, . This is what Bharagava J. Seaking for the Court observed in that case-

> "7. The point that we have to consider then is what power the sub-Divisional Magistrate of Chhata had to direct the detention of these detenus in jail. When these are proceedings under Section 107 of the Code of Criminal Procedure or when proceedings under that provision are contemplated, the procedure to be adopted is laid down in sections 112 to 118 of the Code off Criminal Procedure. Section 112 lays down the first step that he has to be taken by the Magistrate.
>
> When the Magistrate acting under section 107 deems it necessary to require any person to show cause under that section, he has to mean order in writing setting forth the substance of the information received, the amount off the bond to be executed, the terms for which it is to be in force and the number, character and class of sureties (if any) required.
>
> The order made by the Magistrate has to be read over to the person in respect of whom such order is made if that person happens to be present, in Court under section 113 of the Code of Criminal Procedure. In case such person is not present in Court, the magistrate has to issue summons requiring him to appear, or when such person is in custody, a warrant directing the officer in whose custody he is, to being him before the court. Under Section 117 of the Criminal Procedure Code, when an order under section 112 has been read over or explained to a person under section 113 or section 114 of the Code of Criminal Procedure, the Magistrate is required to proceed to enquire into the truth of the information upon which action was taken by him, and to take such further evidence as may appear necessary.
>
> Sub-section (3) of section 117 in such circumstances empowers the Magistrate, if he considers that immediate measures are necessary for prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence the public safety, for reasons to be recorded in wiring to direct the person in respect of whom the order under section 112 has been made to execute a bond with or without sureties for keeping the peace or maintaining food behavior untill the conclusion of the enquiry and to detain him in custody, untill such bonds is executed or, in default of execution, until the inquiry is concluded.

These provisions of the Criminal Procedure Code thus lay down that, whenever proceedings under Section 107 of the code of Criminal Procedure are contemplated against any person the proceedings are to be initiated by preparing a notice under section 112 of the code and serving it on that person under section 113 or section 114 of the Code.

The present case is one which would be governed by these provisions of law. When these detenus were produced before the sub-Divisional magistrate at 10.15 a.m. on 9th August, 1956, and the report of the police indicated that they had been taken into custody for the purpose of taking proceedings under section 107, the magistrate should have then and there prepared a written order under section 112 of the code of Criminal Procedure and should have read over that order to these detenus and if they so desired should have explained the contents of that order to them.

Until he had done so, his powers of remanding the detenus to custody under sub-section (3) of section 117 of the code of Criminal Procedure did not vest in him and could not be exercised by him even if any order under section 112 of the Code had not been prepared by him earlier before these persons were taken in to custody by the police the magistrate should have summoned these persons so that they could be produced before him and the order could be read out to them under section 114 of the code of Criminal Procedure In either, case, no warrants for remanding these persons for custody in jail could have been issued by the Magistrate untill he had already made an order under section 112 of the Code and had read out the contents of it to the persons concerned under section 113 or section 114 of the code of Criminal Procedure. Even thereafter, it was incumbent on the Magistrate under sub-section (3) of Section 117 of the Code to come to a finding that immediate measures were necessary for prevent upon of the breach of the peace or disturbance of the public tranquillity and thereupon to direct these detnus to execute bonds with or without sureties for keeping the peace untill the conclusion of the enquiry..

After the Magistrate had taken all these steps, he could then direct detention of these persons in custody untill such bonds were executed or untill the conclusions of the enquiry in case no such bonds were executed."

(10) The learned Government counsel contended before me that it is likely that the police officers had arrested the petitioners as they knew that they had designed to commit some cognizable offence. The police officers do not say so. What they stated in their affidavits, runs counter to that contention. This is something totally new. I do not know how the government counsel is able to put forward that contention. Obviously he is somehow trying to justify the illegal detention of the petitioners.

(11) For the reasons, mentioned above, these petitions are allowed and the petitioners, are directed to be set at liberty forthwith.

CK/NRK./G.G.M. (12). Petition allowed.