

Allahabad High Court

Kishor And Etc. vs State Of U.P. And Ors. on 13 February, 1998

Equivalent citations: 1998 CriLJ 2792

Bench: S Phaujdar, N Gupta

ORDER

1. The two applications have been taken up together as the basis for detention of these two persons originates from the same single act although they were proceeded against under the provisions of the National Security Act on different dates under different orders. The grounds of detention for each indicates the afore-, said incident, to be described below in details, as also of the satisfaction of the detaining authority as to what is apprehended of the petitioners in case they get out on bail.

2. The alleged incident which is the basis of on two detention orders took place on 7-4-97. A date prior to this incident, an established advocate Sri Dheeraj Singh Bhati was unanimously elected the President of the Bulandshai Sayan Garh Bugrasi Motor Union. Mahendra Sagar and his associates, including Kishor and Pappan, did not take part in the election and due to threat from Mahendra Sagar and his associates the said election had to be conducted under the supervision of the Additional District Magistrate, Sayana Mahendra Sagar and others tried to forestall the election but due to administrative strictness they could not do it. After the election of Sri Bhati, Mahendra Sagar and others declared that Sri Dheeraj Singh Bhatia's election as President had caused monetary loss to them and they would not allow him to see the light of the next day. When he knew these threats, Sri Bhatia prayed for personal security and when he was coming back from the Collectorate on 7-4-97 alongwith his brother Fateh Singh on a Scooter driven by Fateh Singh, three persons came on a motorcycle from behind and showered shot on Sri Bhati from automatic weapons and Sri Bhatia and his brother fell down. Sri Fateh Singh was not hurt and he got up to see what happened to his brother. Mahendra Sagar was waiting in a Fiat Car at a close distance. Mukesh was also there and they asked the three assailants to finish Bhati and Fateh Singh. These persons again came to the victims and shot at them. Fateh Singh could escape that act but Bhati died as a result of the fire. The motorcycle was being driven by Pappan while firing was done by Kishor and Nanak. They committed these acts under the directions of their mentor Mahendra Sagar under a conspiracy. After killing, the three motorcyclists and the Fiat Car went ahead and the killers thereafter boarded the car had drove away. Pappan also drove away his motorcycle.

3. The alleged incident was seen by so many persons. The killing of Shri Bhati created a panic in the area and with great difficulty the administration could balance the situation but the whole town was under the shadow of grief. The deadbody of Bhati was taken to the hospital and people assembled in large number and started an agitation affecting the maintenance of public order. The administration had to post police force at sensitive points. The assailants and the aforesaid Mahendra and Mukesh absconded and police started a vigorous search for them. Mahendra was apprehended on 29-4-97. Kishor was on bail before a Court in Ghaziabad. He surrendered in the said case of 14-5-97 and went to custody while Pappan surrendered before a Court in Faridabad (Hariyana) on 5-5-97 under an assumed name Amar Dutt whereafter he was transferred to Bulandshahr.

4. So far Kishor is concerned, the detention order was recorded on 21-5-97 by the district Magistrate, Bulandshahr, indicating his satisfaction that it was necessary to detain Kishor under the provisions of Section 3(2) of the N.S. Act for preventing him from acting in any manner prejudicial to the maintenance of the public order. For Pappan the detention order was based on a similar satisfaction on 28-7-97. Both the detention orders were appended with grounds of detention.

5. In the grounds relating to the detention order of Kishor, it was indicated that he was an associate of Mahendra in illegal accumulation of money as capturing the Unions of bus workers and spread a reign of terror in the area and nobody dared to stand as witness against them. It was stated that for such acts of goondaism and other offences, public order was disturbed and after the murder of Dheeraj Singh Bhati the situation further worsened. The criminal activities were described. The first one spoke of the alleged incident of murder of Shri Bhati and the consequence thereof. The second point covered the alleged cease work by the members of the bar-association for about three weeks and a bund observed in Bulandshahr and about strike by private buses in Bulandshahr Sayan Garh highway. People suffered, revenue was lost and the public in general felt insecure. During investigation the witnesses and the affected parties were so much panic stricken that they were feeling insecure. The third point indicated the alleged commission of murder of one Durga on 7-7-95 which also created a panic in the locality. Reference was made to an offence allegedly committed in 1988. The fourth point indicated that the detenu Mahendra and Mukesh had access to influential criminals of the locality and under that cover they would avoid arrest. Under this point the arrest of Pappan on 5-5-97 was also indicated. It was indicated further under this point that Kishor was trying his best to get out on bail and there was every possibility that he would get bail and once he came out he and his associates would pressurise the witnesses and would commit serious acts. Upon these facts the satisfaction of the District Magistrate was based.

6. In the grounds for Pappan the District Magistrate indicated at point No. 1 the incident dated 7-4-97, the background thereof as also the consequence, as already stated above, while describing the grounds for detention of Kishor. Under point No. 2 in the grounds of the detention also strike by the lawyers the bund in Bulandshahr, non-plying of buses were indicated. Under point No. 3 criminal history of Pappan and his associates was given, reference was made to an alleged murder committed on 18-6-92 and another on 7-11-88. At point No: 4, it was stated that Pappan was under the protection of political patronage for which he could not be arrested, but finally he surrendered on 5-5-97. It was indicated that Pappan was trying to get bail and there was every possibility that he would be out on bail and after coming out he and his associates would pressurise the witnesses and would commit serious offences. The murder of Shri Bhati was committed for gain under a programmed conspiracy and that was still affecting the maintenance of the public order.

7. In their written statements the petitioners indicated that the aforesaid Mahendra described as "don" of the criminal group and his brother Mukesh were also served with notice of detention under the National Security Act but their detentions were not as proved by the State and as such they were released. It was contended that when Mahendra was the brain behind the activity and was also allegedly present at the spot at the time of the alleged incident of murder of Dheeraj Singh Bhati and when his detention was cancelled, there was no reason to discriminate against the petitioners. It was argued that the gravity of the offence is not the reason for detention, it is the effect thereof on the

society that was relevant for recording a detention order. If at all Mahendra had a different role then that attributed to the two petitioners Kishor and Pappan, that would be a matter of trial, but his participation in the incident puts Mahendra and these two persons at par, so far the effect of the incident is concerned. As an alternative argument it was argued that the release of Mahendra and Mukesh was certainly a factor relevant to be considered by the Detaining Authority when recording the detention order against the present two petitioners and non-consideration of the release order of Mahendra and Mukesh vitiated the present two detention orders. In reply the learned A.G.A. submitted that equality may be claimed by a person equally situated and if on facts the case of Mahendra and Mukesh could be distinguished, then non-consideration of the cancellation order in their favour may not be a point for consideration in detaining the present two petitioners.

8. It was also contended by the petitioners that the Detaining Authority had passed the detention orders without being satisfied that there was any possibility on the part of the two petitioners to commit any act prejudicial to the maintenance of public order. Rather, it was clearly stated in the grounds that the petitioners were likely to get bail and once they got bail and come out, they would pressurise the complainant and the witnesses and would commit grave offences. It was not stated that the threat to the witnesses or commission of grave offences would result in acts prejudicial to the maintenance of public order.

9. Undisputedly, Mukesh was ordered to be detained on 16-4-97 and his order of detention was cancelled on 27-5-97 and Mahendra was detained on 7-5-97 and for him the detention order was cancelled on 26-6-97, both upon a report from the Advisory Board and the State had to accept it under Section 12(2) of the National Security Act. It was contended by the learned A.G.A. that the State had not discriminated against Mahendra and Mukesh on one hand and the present petitioners on the other. The dates were however mentioned by the learned counsel for the petitioners for another reason. The incident giving rise to proposed detention took place on 7-4-97 all the accused wherein were said to have absconded. Mukesh was the first to be apprehended and for him the Sponsoring Authority made a report and an action under Section 3(2) was taken on 16-4-97. For Mahendra such action was taken on 7-5-97, for Kishor on 21-5-97 and for Pappan 28-7-97. It was argued on behalf of the petitioners that all the materials for the detention orders were there before the District Magistrate, Bulandshahr, on 16-4-97 itself and the law never demanded that a person must be arrested, before being proceeded against under Section 3(2) of the National Security Act. There was no reason, according to the petitioners, as to why the detention orders came by instalments. It was argued that all these instalment orders were immediately preceded by some report of the Sponsoring Authority and the learned counsel for the petitioners concluded that it was the subjective satisfaction of the Sponsoring Authority that was reflected from the papers and not that of the Detaining Authority who had acted in a mechanical manner always nodding to the suggestion of the Sponsoring Authority. Had he been really subjectively satisfied about the necessity of a proceeding under the National Security Act he would have taken action against all these persons on 16-4-97 itself and would not have waited for them being arrested.

10. It was argued that under the law approval was to be accorded by the State within 12 days of recording the detention order by the District Magistrate. The learned counsel submitted that this approval is not a mere formality and the State should have considered all the relevant factors before

approving a detention. The factum of detention of Mukesh and Mahendra and of cancelation of the orders in respect of them was not at all considered by the State while giving approval in respect of the detention of these two petitioners.

11. Article 22 of the Constitution of India gives a protection to every citizen against arrest and detention in certain cases. It requires that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such an arrest nor shall he be denied the right to consult and to be defended by, a legal practitioner of his choice. The Article further says about Constitution of the Advisory Board for consideration of the case of a preventive detention of any person and Clause (5) of this article requires that any person is detailed in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may 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. This article also indicates how a Parliament may by law prescribe Preventive detention of any person and what should be the maximum period for such detention.

12. The National Security Act, 1980, is an enactment for preventive detention as thought of under Article 22 of the Constitution. It empowers detention of a person if the Detaining Authority is satisfied in respect of that person that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. Once such order is made by the District Magistrate empowered under Section 3(3) of the National Security Act, the Detaining Authority is required forth with to report the fact to the State Government with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter. Such an order recorded by Detaining Authority shall not be in force for more than 12 days unless approved by the State Government. This suggests that not only the grounds of detention on which the order has been made ought to be sent to the State Government but also such other particular as in the opinion of the District Magistrate have a bearing to the matter should also be sent by the District Magistrate to the State Government. No doubt, the District Magistrate was not told about cancellation of the bail order but it was very much within knowledge while recording the detention order in respect of two petitioners that two other co-accused persons had already been proceeded against under the National Security Act. There is nothing on record to indicate that the District Magistrate in addition to the grounds of the detention of the present two petitioners had informed the State Government by way of supplying "other particulars" that two co-accused-person Mahendra and Mukesh had also been detained by him.

13. The grounds of detention may be spilt up under the three heads, (i) The act of commission of murder of Shri Dheeraj Singh Bhatia its consequence, (ii) past acts of offences allegedly committed by the petitioners and (iii) the chance of their committing acts prejudicial to maintenance of public order after being released on bail. So far the first past act is concerned, it is the same for the two petitioners and for the co-accused Mahendra and Mukesh. It is not the particular act which is relevant for determination whether it was one causing disturbance to law an order or public order. It is really the impact of the act on the society and when we look to this aspect the impact is created by the total incident and participation of the accused at different stages in difference roles loses its importance so far the effect is concerned. Moreover, in the concerned act it is clear that Mahendra

was allegedly present and had instigated the gunners and Pappan had carried the gunners on a motorcycle to the spot of killing and after the incident two gunners boarded the car of Mahendra and drove away. The situation was so grave that there was a spontaneous agitation by the public in general resulting in cease work in Court, stoppage of plying of buses and downing the shutters of shops and business premises. The incident in question that took place on 6-4-97 must, therefore, be described as one which affected maintenance of public order and it must also be stated that not only the two gunners, Kishor and Nanak, but their associates Pappan, Mukesh and Mahendra were equally liable for the effects of the incident although their participation and degree of participation is a question to be determined by the criminal Court taking up their trial. Public order was no doubt disturbed by the conjoint act of all these persons. The question is however whether that did persist even after their arrest.

14. The second part of the ground spoke of past acts. For Kishor these past acts were allegedly committed in 1995 and 1988. It was stated in respect the case of 1995 that the incident had created terror and panic in the locality. There is, however, nothing to show if any preventive action was taken at that point of time. The instant incident took place in 1997 and not only with the alleged act of 1988 but also with the alleged act the 1995 proximity may not be inferred. For Pappan the past acts were of 1992 and 1988 and here also no proximate of these acts may be found with the instant act.

15. Regarding the third point in the grounds regarding the alleged possibility on the part of the petitioners to commit certain acts, we may look to the provisions of Section 3(2) of the National Security Act again. It is a provision for detaining a person with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. It is not a provision for punishing a past act. There must be a satisfaction on the part of the Detaining Authority that a person who was in custody was likely to come out on bail and once on bail, he would act in a manner prejudicial to the maintenance of public order. The grounds of detention have been indicated in the earlier paragraphs of this judgment and the only satisfaction that the Detaining Authority had indicated was that once out on bail the petitioners would threaten the eye-witnesses of the case and would commit serious offences. No satisfaction has been indicated that the petitioners were likely to commit an act prejudicial to the maintenance of public order. This lack of mentioning of this satisfaction in the grounds, when the applicant was already in custody, in our view, takes away the jurisdiction from the Detaining Authority to record a detention order.

16. Public order was disturbed and arrested by the alleged act of the petitioners and others dated 7-4-97. The proceeding against these two persons were taken up on 21-5-97 and 28-7-97 and as a ground for this delay it was indicated that they were absconding and police was having a vigorous search for them. There is no reason why the District Magistrate acted for their apprehension first before proceedings under Section 3(2) of the National Security Act against them. He knew fully well what was the impact of the incident on the society and he was informed as early on 16-4-97 about the situation when taking action against Mukesh. He repeated the action against Mahendra on 7-5-97 and then on Kishor on 21-5-97 and finally on Pappan on 28-7-97. This suggests that he was already aware of this situation in early April, but the District Magistrate acted only on the promoting of the Sponsoring Authority against one or the other co-accused. When the learned counsel

submitted that this action of the District Magistrate reflected only non-application of mind, the submission may not be discarded.

17. So far Kishore is concerned, it was argued that cancellation of the detention order of Mukesh was communicated to the District Magistrate subsequent to the recording of the present detention order and he may not, therefore, be blamed for non-consideration of the cancellation order. This argument is not available so far Pappan is concerned as admittedly both the orders of cancellation concerning Mukesh and Mahendra were before the District Magistrate long prior to 28-7-97. On this point it was contended that the orders were not at all relevant as Mahendra and Mukesh stand absolutely, on different footings and the orders were cancelled not at the volition of the State, but on the report of the Advisory Board, with which the State had no option to disagree. When it was a decision of the Advisory Board which was binding on the State to release Mahendra and Mukesh it was more necessary for the District Magistrate to have considered such order of release/cancellation and to distinguish the case of the present petitioners from the one of Mahendra and Mukesh and a distinction sought to be made in the counter affidavit may not be sufficient.

18. At any rate when the State was apprised, of the two detention orders in question, the District Magistrate should have informed the State about the earlier two proceedings against Mahendra and Mukesh, when forwarding the report of Kishor and of the cancellation of the; orders of Mahendra and Mukesh when forwarding report of Pappan as materials covered by "other particulars" as required in Section 3(4) of the National Security Act. Even though the cancellation orders of Mahendra and Mukesh were not forwarded to the State, the State knew fully well that orders in respect of Mahendra and Mukesh were cancelled prior to the approval of the orders of Kishor and Pappan and that was done under the advice of the Advisory Board. The State, however, failed to look to this aspect while approving the detention orders of the present two petitioners and there was thus a non-consideration of relevant materials and the approval was given mechanically.

19. As indicated in the earlier paragraphs of the judgment, the incident in question had disturbed the even tempo of the society for which public order was thought to have been affected and prejudiced and the allegations indicate that so far as disturbance of even tempo of the society all the accused persons therein were equally liable. At least, looking from the angle of the actual participation, Mahendra and the petitioners must be deemed to be on the same footing. When the Don of the gang, namely Mahendra, was proceeded against for preventive detention and the detention order in respect of him was revoked, there may not be any ground for not revoking the order in respect of the two petitioners as according to the allegations whatever they had done, was done in compliance of directions of Mahendra who was present there. The allegation of discrimination is also, therefore, well founded.

20. Under all these circumstances, we are of the view that the detention orders dated 28-7-97 and dated 21-5-97 against Pappan and Kishor may not be sustained and ought to be quashed.

21. The two writ petitions stand allowed. The detention orders dated 21-5-97 and 28-7-97 in respect of Kishor and in respect of Pappan are hereby quashed. If these persons are not to be detained in respect of any other criminal case, they must be set at liberty forth with.