Shri Anil S/O Damodhar Paunipagar vs State Of Maharashtra And Ors. on 21 October, 1999

Equivalent citations: (2000)102BOMLR500

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Bench: J.N. Patel, S.G. Mahajan

JUDGMENT

J.N. Patel, J.

1. By this petition of habeas corpus, the petitioner seeks quashing and setting aside of the detention order passed by the respondent Commissioner of Police, Nagpur.

2. On 16.4.1999 Shri Ulhas Joshi, the Commissioner of Police, Nagpur City passed an order that the petitioner be detained under the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-offenders and Dangerous Persons Act, 1981 (Amendment of 1996) (Mah. LV of 1981) (for short "M.P.D.A. Act of 1981) in order to prevent him from acting in any manner prejudicial to the maintenance of public order. The detention order came to be passed by the Commissioner of Police in exercise of powers conferred on him under Sub-section (1) of Section 3 of M.P.D.A. Act of 1981 read with Government Order, Home Department (Spl.) No. DOS. 1399/4/SPL-3 (B), dated 3rd February, 1999.

3. The Detaining Authority in the grounds of detention dated 16.4.1999 communicated to the petitioner found that the petitioner was a dangerous person defined under the provisions of M.P.D.A. Act of 1981 on the basis of 14 cases committed by the petitioner since the year 1989 in the jurisdiction of Sitabuldi and Sadar Police Stations. The Detaining Authority found that inspite of the arrest of the petitioner and various prosecutions launched against him in the said cases along with the three detentions under the National Security Act, 1980, the petitioner's criminal activities have increased blatantly without any remorse and he has no respect for law and that he restarts his violent criminal activities with renewed vigour once the petitioner is released from custody or from detention, thereby creating terror and a sense a insecurity in the minds of the people of the locality where the petitioner resides and operates.

4. The Detaining Authority found that the recent activities of the petitioner are such that his detention under the M.P.D.A. Act of 1951 was in the interest of the society as the petitioner was found acting in a manner prejudicial to the maintenance of public order. The grounds of the detention relied upon by the Detaining Authority are the offences committed by the petitioner in the jurisdiction of Sitabuldi Police Station under Section 392 read with 34 Indian Penal Code registered

vide Crime No. 61/99 on the complaint of Shri Ram s/o Satyanarayan Sharma who is running Ankur Wine Shop at Dharampeth, Nagpur.

The facts of the case are that on 21.1.1999 at about 2200 hrs. when the complainant closed his shop and collected that day's earning of Rs. 23.000/- into a polythene carry bag, kept it into the dicky of his scooter and was going towards Madhushala Bar near Jagat Restaurant to meet his brother Ravi Sharma who is running Madhushala Bar, and while he was going towards Buldi via Amravati Road, at that time near Hislop College Hockey Ground at 2230 hours, the petitioner and his two associates suddenly came before the complainant from behind on scooter and tried to stop him. Due to fear, the complainant drove his scooter fast but was accosted near Mafco Daily Needs Corner, Maharajbagh Canal Road. The petitioner and his associates got down from the scooter and asked the complainant to open the dicky and take out the money by whipping out knives. Out of fear, when the complainant opened the dicky, the petitioner snatched the carry bag containing money and threatened him, "Turn Dukan se Nikle aur Paise Dicky me Rakhe, Tabse Ham Tumhara Picha Karte Aye". He was further threatened, "Mai Tumhe Do-tin Mahine Se 3000/- Rs. Pratimah Dene Ko Bola Tha. Tumne Diya Nahi, Abhi 1 Tarikh Se 5 Tarikh Tak Her Mahine 3000/- Rs. Meri Lottery Ke Dukan Me Jama Karna" and left the spot on their scooter. Out of fear, the complainant did not report the matter to the Police Station immediately because of apprehension of grave danger to his life, but after gathering courage complainant reported the matter to Sitabuldi Police Station on 29.1.1999. The Sitabuldi Police Station was able to arrest the petitioner on 30.1.1999 and produce the petitioner before the Judicial Magistrate First Class Court No. II, Nagpur and came to be released in the case on bail, whereas the associates of the petitioner Joney alias Anil Vaidya and Umesh were found to be absconding till date.

5. The police has also initiated preventive action against the petitioner under Section 110 of the Code of Criminal Procedure on 3.2.1999. It was also found that after the petitioner was released on bail, he had threatened the complainant and therefore police picket was deployed in front of petitioner's house to have check on him. This offence of robbery committed by the petitioner has caused apprehension in the minds of the shopkeepers of Dharampeth area of grave danger to their lives and property at the hands of the petitioner, and therefore, they submitted an application on 25.2.1 999 against the petitioner for taking stern action against him. The Detaining Authority also found that the petitioner has been continuously terrorising the people of nearby locality/local residents to deter them from going against the petitioner by threatening them with dire consequences and as the witnesses are afraid of the petitioner due to grave danger to their lives and property at the hands of the petitioner, they are not willing to come forward and lodge complaint against the petitioner. But the police with much efforts could trace out these witnesses and after taking them into confidence have recorded their statements in camera after giving them assurance that their anonymity will be maintained and they will not be called upon to give evidence in any Court of law or any other forum. The statements of witnesses are recorded by the police in the form of witness 'A', 'B', 'C', 'D', & 'E'. On the basis of this the Detaining Authority was subjectively satisfied that the activities of the petitioner are prejudicial to the maintenance of public order, and therefore, a dangerous person as defined under the MPDA Act of 1981 and as such the activities of the petitioner as a dangerous person are causing harm, alarm, danger and feeling of insecurity amongst the people residing in the areas and localities of Dharampeth, Sitabuldi Police Stations, Nagpur and they are living under a

constant shadow of fear, and therefore, the activities of the petitioner as a dangerous person are prejudicial to the maintenance of public order in the said areas in Nagpur. The Detaining Authority was further satisfied that the petitioner is likely to indulge in activities prejudicial to the maintenance of public order in future and that it is necessary to detain him under the said Act to prevent him in acting in prejudicial manner in future and proceeded to pass the impugned order of detention.

6. Mr. S.A. Jaiswal, the learned Counsel for the petitioner has challenged the detention order basically on the ground that the detention order suffers from the vice of non-application of mind by the Detaining Authority and in order to show and demonstrate it is contended that the Detaining Authority has not mentioned in its impugned order of detention or the grounds of detention furnished to the petitioner the provision under the M.P.D.A. Act of 1981 which authorises the Commissioner of Police to exercise his powers conferred on the State Government under Section 3(1) of the M.P.D.A Act of 1981. It is further submitted that the non-application of mind is also evident from the fact that the respondent Detaining Authority has taken into consideration 14 old cases, 3 detention orders, externment order and preventive proceedings so as to form an opinion that the petitioner is a dangerous person which according to Mr. Jaiswal vitiates the order as none of the cases relied upon by the respondent in para 2 of the grounds can be the subject-matter of consideration in order to form an opinion that the petitioner is a dangerous person. It is submitted that all these cases were considered by the Detaining Authority while passing earlier orders of detention against the petitioner under the National Security Act as well as while taking preventive action, and therefore, reconsideration of this material for passing a fresh order of detention was uncalled for. Mr. Jaiswal submitted that though in their affidavit in reply, the respondents have tried to make out a case that these old cases were not considered while passing the detention order, but it cannot be ruled out that these old cases have influenced the mind of respondent Detaining Authority on the basis of these cases and previous detention order have formed an opinion that the petitioner is a dangerous person as observed in para 3 of the grounds of detention. Mr. Jaiswal has further assailed the consideration of old cases by the respondent Detaining Authority on the ground that the respondent Detaining Authority have not bothered to verify whether any of these cases have resulted in either conviction or acquittal and hence demonstrate that the very fact that out of the old cases relied upon by the Detaining Authority the case at Sr. No. 15 of the Index Crime No. 408/92 registered against the petitioner for having committed offence under Section 307 read with Section 34 of the Indian Penal Code on 4.8.1992 has been shown as pending which is contrary to the record as the petitioner has been acquitted by a judgment and order dated 15.1.1999 by the 5th Additional Sessions Judge, Nagpur in Sessions Trial No. 429/90 and further that the order dated 31.3.1999 detaining the petitioner under Section 3 of the National Security Act, 1980 have been quashed by the High Court by its judgment and order dated 17.1.1995 in Writ Petition No. 161/95. Mr. Jaiswal, therefore, submits that if this order of acquittal and quashing of the detention order was considered by the Detaining Authority probably it would have affected its decision for detaining the petitioner. It is, therefore submitted that the impugned order stands vitiated on this ground alone as held in the case of Dharamdas Shamlal Agrawal v. The Police Commissioner and Anr. in which the Hon'ble Supreme Court has found that the order of detention would stand vitiated if the fact of acquittal in 2 of the cases mentioned in the table appended to the grounds are not placed before the Detaining Authority. Mr. Jaiswal further submitted that the Detaining Authority was influenced by irrelevant

and extraneous material which were placed before him and found place in para 2 in the grounds of detention and on this count also the order of detention is liable to be set aside.

7. Mr. Jaiswal, the learned Counsel for the petitioner has also raised a contention that the Detaining Authority ought to have taken note of the previous detention orders passed by the authorities which have been quashed and set aside by this Court and also ought to have examined the progress of the cases pending against the petitioner and in the absence of such consideration, the impugned order would stand vitiated on the ground of non-application of mind.

8. Mr. Jaiswal also raised a contention that the affidavit in reply is not filed by the Detaining Authority and on the other hand it is sworn by the present Commissioner of Police Shri Omprakash Bali who has not passed the impugned order, and therefore, the respondent No. 2 has failed to justify the detention order before this Court. It is further submitted that there is no explanation on the part of the Detaining Authority as to what prevented him from filing affidavit in reply before this Court. It is submitted that it was obligatory on the part of the Detaining Authority to have filed an affidavit in reply, particularly when the detention order is challenged on the ground that there is no application of mind in the making of the preventive detention as held in the case of Mrs. Tsering Dolkar v. Administrator, Union Territory of Delhi and Ors. . Mr. Jaiswal submitted that the same view has been taken in the case of Mohinuddin v. Distt. Magistrate, Heed and followed by our High Court in the case of Rapa Dulichand Khare v. District Magistrate, Jalna and Ors. 1990 (1) Mah. L.R. 307 and the detention order came to be quashed and set aside on the ground that the affidavit is filed by the concerned District Magistrate who had not passed the order of detention and further it does not show any reason as to why the District Magistrate who passed the order cannot file affidavit. The affidavit, therefore, suffers from material irregularity and fails to explain the subjective satisfaction which is required for passing the order of detention under Section 3 of the National Security Act. In sum and substance, it is the contention of Mr. Jaiswal that the detention order deserves to be quashed and set aside for non-application of mind by the Detaining Authority in arriving at the subjective satisfaction that it is necessary to detain the petitioner as contemplated under Section 3(1) of M.P.D.A. Act of 1981.

9. Mrs. Wandile, the learned A.P.P. strongly supports the detention order and submits that in so far as the grounds raised by the petitioner that the affidavit is not filed by Shri Ulhas Joshi, the then Commissioner of Police, who has passed the detention order, cannot be held to be fatal to the sustenance of the order of detention, unless the petitioner comes up with a case of personal allegation against the Detaining Authority of mala fides or bias. It is submitted that the petitioner has mainly challenged the detention order on the ground of non-application of mind, and therefore, this contention of the petitioner deserves to be rejected in view of the decision of the Hon'ble Supreme Court in the case of Madan Lal Anand v. Union of India and Smt. Victoria Fernandes v. Lalmal Sawma The learned A.P.P. has also relied upon the case of State of Punjab v. Sukhpal Singh in order to show that the purport and object of preventive detention is anticipatory and precautionary action by the State and it can be ordered notwithstanding that no criminal case is registered against any person and in the present case, the petitioner's antecedents do show that he is in the habit of indulging in offences under Chapters XVI and XVII of the Indian Penal Code and also Chapter V of the Arms Act, and therefore, it is submitted that the petition deserves to be dismissed.

10. As regards the subjective satisfaction of the Detaining Authority, it is submitted by the learned A.P.P. that mere consideration of the past history of a detenu of the fact that he was thrice detained under National Security Act cannot be said to have in any manner influenced the respondent Detaining Authority. It is submitted that this material is only placed on record in order to arrive at a subjective satisfaction as regards the antecedents of the petitioner and considering the fact that the petitioner is involved in 14 cases in the past and was required to be detained thrice under the National Security Act would rather go to show that the petitioner is a dangerous person and habitual offender. It is submitted that in the grounds of detention, it has been clearly specified by the respondent Detaining Authority that the material which weighed in the mind of the Detaining Authority was the offence of robbery committed by the petitioner and his associates which resulted in apprehension in the mind of shopkeepers of Dharampeth locality that they do not find safe and secure due to unlawful activities of the petitioner and the examination of the five witnesses in camera who have in terms said that the petitioner indulges in terrorising people of the locality in order to extort money and the fact that they are afraid to come forward and give evidence against the petitioner for fear of their lives and property was sufficient to arrive at a subjective satisfaction that the activities of the petitioner are prejudicial to the maintenance of public order. It is submitted that what is required to be examined is that the detenu and his associates are involved in serious crimes like robbery, extortion and assault which is bound to create fear psychosis in the minds of the residents of the locality who have been made victims of extortionate demands by the detenu and his associates and if the grounds of detention are scrutinised, they specifically attribute to the detenu his acts of robbery, extortion and assault which has a potentiality to affect the even tempo of life which activities are prejudicial to the maintenance of public order, and therefore, the subjective satisfaction of the Detaining Authority cannot be said to be without any material. The learned A.P.P. as relied upon the case of Smt. Dagadibai Anand Jadhav v. S.C. Maihotra 1998 Cr. L.J. 1376 : 1998 All M.R. Cri 362 : 1998 Bom. C.R. Cri. 702 in support of her contention and submits that the impugned order does not call for any interference and petition deserves to be dismissed.

11. We will first examine as to whether the impugned order stands vitiated for non-filing of the affidavit by the Detaining Authority. In Mrs. Tsering Dolkar v. The Administrator, Union Territory of Delhi and Ors. and in the case of Mohinuddin v. Distt. Magistrate, Beed , the Apex Court has taken a view that, when the allegation is that there is no application of mind in the making of the preventive detention, the return should come either from the Detaining Authority or a person who was directly connected with the making of the order and not on the basis of the record of the case as otherwise it would vitiate the order. In return to a rule nisi issued by the Supreme Court or the High Court in a habeas corpus petition, the proper person to file the affidavit is the District Magistrate who had passed the impugned order of detention and he must explain his subjective satisfaction and the grounds therefore; and if for some good reason the District Magistrate is not available, the affidavit must be sworn by some responsible offcer like the Secretary or the Deputy Secretary to the Government in the Home Department who personally dealt with or processed the case in the Secretariat or submitted it to the Minister or the officer duly authorised under the Rules of Business framed by the Governor under Article 166 of the Constitution to pass orders on behalf of the Government in such matters in order to justify the detention order. The authority in Mohinuddin v. Distt Magistrate was followed by this Court in the case of Rupa Dulichand Khare v. D.M. Jalna 1990 (1) Man. L.R. 307 and the Court found that if the affidavit is not filed by the concerned District

Magistrate and it does not show any reason as to why the District Magistrate who has passed the order cannot file his affidavit and if in the return the authority fails to explain the subjective satisfaction which is required for passing the order of detention, the order would stand vitiated. As pointed out to us by the learned A.P.P., this view of the Apex Court in the two cases i.e. Mrs. Tsering Dolkar and Mohinuddin (cited supra) has now changed and in the recent decisions of the Hon'ble Supreme Court viz. in Madan Lal Anand v. Union of India and Smt Victoria Fernandes v. Lalmal Sawma the Apex Court is of the view that merely because the Detaining Authority has not sworn the affidavit, it will not in all circumstances be fatal to the sustenance of the order of detention and unless there are allegations that the order is tainted with mala fide or extraneous consideration, counter affidavit of authorities other than the authority passing the order of detention can be taken into consideration. Taking into consideration the subsequent view of the hon'ble Supreme Court on the point we find that the filing of the affidavit by the present Commissioner of Police in place of Shri Ulhas Joshi who had passed the detention order, though may not be fatal, but the least expected of the respondent is at least to explain to this Court as to why the affidavit of Shri Ulhas Joshi - the then Commissioner of Police who passed the impugned order of detention could not be filed. In absence of any such explanation, it will be very difficult for us to appreciate that the contentions made in the affidavit filed by Shri O.P. Bali who has sworn the affidavit on the basis of information received from the official record and believed to be true by him, and therefore, while considering the contention of the petitioner as to non-application of mind we left with the record of the case and if the record does not reflect proper application of mind and subjective satisfaction which remains unexplained by the respondent Detaining Authority, the detention order will have to be quashed and set aside.

12. Now we will take up for consideration the material which was considered by the Commissioner of Police while passing the detention order. As rightly submitted by Mr. Jaiswal, the learned Counsel for the petitioner, the Detaining Authority has taken into consideration extraneous material placed before it for arriving at a subjective satisfaction that the petitioner is a dangerous person defined under the provisions of M.P.D.A. Act of 1981. It is not disputed that in the 14 cases which were placed before the Detaining Authority at least in one of such case i.e. Crime No. 408/92 registered against the petitioner and his associates for committing offence under Section 307 read with Section 34 of Indian Penal Code on 3.8.1992 the petitioner came to be acquitted on 15.1.1999 much before the proposal for detention order came to be placed before the Detaining Authority. The learned Counsel for the petitioner as well as the learned A.P.P is not able to apprise us of the progress and development in all the remaining 13 cases even from the record available with the Detaining Authority. Not only this, the three detentions under the National Security Act, 1980 also weighed on the mind of the Detaining Authority out of which the petitioner could only place on record the quashing of the detention order passed on 31.3.1994 by the Commissioner of Police under Section 3 of the National Security Act in Writ Petition No. 161/94 dated 17.1.1995 which has also been not placed before the Detaining Authority. We further find that as in the earlier detention order which has been quashed by this Court on 17.1.1995 one of the cases listed in para 2 was also within the consideration of the Detaining Authority i.e. the case registered against the petitioner vide Crime No. 40/90 for having committed offence under Section 4/25 of the Arms Act read with Section 135 of the Bombay Police Act registered on 28.2.1994.

13. We, therefore, find that if the Detaining Authority could have examined the progress, stage arid the disposal of case if any in the lot of 14 cases, the result of the three detention orders passed under the National Security Act, 1980, probably it would have affected its subjective satisfaction in arriving at a decision that the detention of the petitioner is necessary or not. Therefore, non-examination of these cases by the respondent Detaining Authority and whether these cases were relied upon by the Detaining Authority in passing of the detention orders under the National Security Act or not, has vitiated the impugned order, when on the basis of this material, the Detaining Authority came to the conclusion that the petitioner is a dangerous person as defined under the M.P.D.A. Act. Therefore, we are of the opinion that the order passed by the Detaining Authority relying upon the past cases and the 3 detention orders considering the same as antecedents to the discredit of the petitioner is nothing but non-application of mind on the part of the Detaining Authority, and therefore, on this count alone the impugned order of detention deserves to be quashed and set aside.

14. Another contention of the petitioner that the Detaining Authority is not aware of his power under which it can pass order of detention as it has misquoted the section under which the impugned order of detention and grounds of detention came to be passed i.e. by referring to Section 3(1) of the M.P.D.A. Act in the order of detention and, whereas referring to Section 3(2) of the M.P.D.A. Act in the grounds of detention as the source of power under which the detaining authorities are vested with powers to detain persons under the M.P.D.A. Act. What we find is that, the impugned order of detention correctly records that the Detaining Authority in exercise of the powers conferred by Sub-section (1) of Section 3 of the said Act directs the petitioner to be detained, whereas in the grounds of detention the Detaining Authority has relied upon Sub-section (2) of Section 3 of the Act for issuing the detention order. This, according to the petitioner, is non-application of mind. This contention is vehemently opposed by the learned A.P.P. on the ground that there is no error on the part of the Detaining Authority in mentioning the two provisions in the respective orders and grounds of detention. The right to pass detention order flow from Sub-section (1) of Section 3 which is conferred on the Detaining Authority under Sub-section (2) of Section 3 of the M.P.D.A, Act. We do not accept the contention of the learned A.P.P. that it is Sub-section (2) of Section 3 of the M.P.D.A. Act which confers powers on the Detaining Authority to order the detention of the petitioner, butitis Sub-section (1) of Section 3. Sub-section (2) of Section 3 only authorises the State Government to delegate its power under Sub-section (1) of Section 3 of the M.P.D.A. Act to the District Magistrate or the Commissioner of Police and once such power has been delegated, the Commissioner of Police is authorised to exercise the powers vested in the State Government under Sub-section (1) of Section 3 of the M.P.D.A. Act, and therefore, the flow of authority to pass the detention order would be from Sub-section (1) of Section 3 and not Sub-section (2) of Section 3 of M.P.D.A. Act. We do not find this as a valid ground to challenge the order of detention because the learned A.P.P. has placed before us the Notification dated 3.2.1999 which vests in the Commissioner of Police the powers of the State Government as contemplated under Sub-section (1) of Section 3 of MPDA Act. The Notification clearly provides that the Commissioner of Police would be authorised to exercise powers conferred on the State Government by Sub-section (1) of Section 3 of the said Act for the period commencing from 3.2.1999 and ending on 2.5.1999, whereas the impugned order of detention is passed on 16.4.1999. In view of the aforesaid discussions and particularly we having found that the respondent Detaining Authority has passed the impugned order without application of mind, we are inclined to quash and set aside the order of

detention.

15. In the result, the order of detention dated 16.4.1999 passed by the respondent Detaining Authority under Sub-section (1) Section 3 of MPDA Act is quashed and set aside. The petitioner be released forthwith if not required in any other case. Rule is made absolute in the aforesaid terms.