

Vishnu Gupta vs The State Of Madhya Pradesh on 19 July, 2021

Equivalent citations: AIRONLINE 2021 MP 1169

Author: Prakash Shrivastava

Bench: Prakash Shrivastava

HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT
JABALPUR

Case No.	Writ Petition No.5720/2021
Parties Name	Vishnu Gupta vs. The State of Madhya Pradesh and others
Date of Order	19/07/2021
Bench Constituted	Division Bench : Justice Prakash Shrivastava Justice Virender Singh Justice Prakash Shrivastava
Order passed by	
Whether approved for reporting No	
Name of counsels for parties	For petitioner : Shri Sharad Verma, Advocate For respondents/State: Shri A.P. Singh, Dy. Advocate General
Law laid down	-
Significant paragraph numbers	-

ORDER

(19.07.2021) Per : Prakash Shrivastava, J.

By this petition, the petitioner has challenged the order dated 27.01.2021 for detaining the petitioner for a period of three months under Section 3(2) of the National Security Act, 1980 (hereinafter referred to as 'the Act'). The grounds of the detention served upon the petitioner indicate that the petitioner was alleged to have involved in the activity of manufacture of substandard Ghee.

2. The case of the petitioner is that he manufactures Ghee and Mawa at his residence and sells it from his shop. On 22.01.2021 inspection of the house of the petitioner was done wherein boxes of Dalda, Soyabean Oil and Ghee was found, hence Crime No.80/2021 for offence under Sections 420, 272 of IPC and Section 51, 52, 26(2) of Food Safety and Standards Act, 2006 was registered and the petitioner was arrested and taken in custody. Thereafter, the District Magistrate had passed the impugned detention order on 27.01.2021. The grounds of detention were served upon the petitioner.

The State Government vide order dated 02.02.2021 had approved the detention order. The Advisory Board had also found that sufficient ground exists for detention and the State Government vide order dated 08.03.2021 had confirmed the detention order.

3. The main ground raised in the petition is that the detaining authority has not applied his mind about the fact that the petitioner was already in custody and there was no possibility of his release.

4. Having examined the detention order and grounds of detention, it is noticed that though the detaining authority had taken note of the fact that Crime No.80/2021 was registered against the petitioner and he was taken in custody but there is no application of mind by the detaining authority in respect of the possibility of the petitioner for release on bail. This Court in the matter of Mayank Khatri through his wife Smt. Snehlata Korche (Khatri) Vs. The State of Madhya Pradesh and others vide order dated 30.06.2021 passed in W.P. No.3540/2021 taking note of the earlier judgments on the point has held that :

"10. So far as the next ground is concerned, learned counsel for the State has not disputed the fact that the petitioner was taken in custody on 22.12.2020 and he had not applied for bail and he is still in custody.

11. The Supreme Court in the matter of Binod Singh Vs. District Magistrate, Dhanbad, Bihar and others, (1986) 4 SCC 416 has held that if the detenu is already in jail at the time of service of the order and detenu is released or prospects of his imminent release not considered then the continued detention is illegal on the ground of non-application of mind to the relevant factors even if detention order otherwise found to be justified.

12. In the matter of Abdul Razak Abdul Wahab Sheikh Vs. S.N. Sinha, Commissioner of Police, Ahmedabad and another, (1989) 2 SCC 222, it has been held that if the detenu is already in jail then the bald statement made by the detaining authority that the detenu was likely to be released on bail and thereafter there were full possibilities of continuance of prejudicial activities is not enough as the detaining authority was unaware that the bail application has been rejected and thereafter no further application for bail was moved by the detenu. In such circumstances, it has been held that subjective satisfaction of detaining authority was not reached on relevant materials, hence the detention order was found liable to be set aside.

13. In the matter of Anand Prakash Vs. State of U.P. and others, (1990) 1 SCC 291 and Sanjay Kumar Aggarwal Vs. Union of India and others, (1990) 3 SCC 309, it has been held that in respect of detenu who is in jail, there must be apprehension that he would indulge in prejudicial activity on being released on bail.

14. The Supreme Court in the matter of Kamarunnissa Vs. Union of India and another, (1991) 1 SCC 128 after taking note of the earlier judicial pronouncements on the issue has reached to the conclusion that even in a case where a person is in

custody, the detention order can be passed but has laid down the circumstances when such an order can be passed. In the case of Kamarunnissa (supra), it has been held that :

"13. From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question it before a higher Court. What this Court stated in the case of Ramesh Yadav was that ordinarily a detention order should not be passed merely to pre-empt or circumvent enlargement on bail in cases which are essentially criminal in nature and can be dealt with under the ordinary law. It seems to us well settled that even in a case where a person is in custody, if the facts and circumstances of the case so demand, resort can be had to the law of preventive detention. This seems to be quite clear from the case law discussed above and there is no need to refer to the High Court decisions to which our attention was drawn since they do not hold otherwise. We, therefore, find it difficult to accept the contention of the counsel for the petitioners that there was no valid and compelling reason for passing the impugned orders of detention because the detenus were in custody."

15. In the present case, the ground of detention does not reflect that the detaining authority was aware of the fact that the petitioner was actually in custody at the time of passing of the impugned order. The detaining authority has also not applied his mind in respect of the petitioner's possibility of being released and on being so released his possibility or probability of indulging into prejudicial activities, hence, the order passed by the detaining authority suffers from the defect of non-application of mind to that extent. Counsel for the respondents/State has referred to the FIR and has submitted that mere registration of FIR indicates that the authority was aware of the custody of the petitioner but such a contention cannot be accepted because this awareness must be shown in the grounds of detention and order of detention."

5. In the present case though the detaining authority was aware of the fact that the petitioner was in custody at the time of passing the detention order but he has not applied his mind if there is a real possibility of the petitioner being released on bail and that on being so released, he would in all probability indulge in the prejudicial activity, hence the order of detention has rightly been faulted on that ground. The record further reflects that the offence under the provisions of Food Safety and Standards Act has already been registered against the petitioner. In normal circumstances, the violation of provisions of Food Safety and Standards Act would affect law and order but to attract the provisions of NSA the respondents are required to show that it is a case affecting public order.

6. This Court in the matter of Vijay Gupta Vs. State of M.P. and others vide order dated 07.06.2021 passed in W.P. No.2452/2021 while taking note of the earlier judgment of the Full Bench in the case of Kamal Khare Vs. State of M.P. and others has held that :

"6. Section 3(2) of the NSA inter alia permits detention of a person to prevent him from acting in any manner prejudicial to the maintenance of public order. The Supreme Court in various pronouncements had laid down the clear distinction between 'law and order' and 'public order'. Expression 'Law and Order' is wider in scope because contravention of law always affect 'law and order'. Public order has narrow ambit as it can be effected by only such contravention which will affect the community at large. The public order is the even tempo of the community taking the country as a whole or even a specified locality. If a contravention effects only a few individuals directly involved then it is an instance of 'law and order' but if it causes disturbance to even tempo of life then it would be a case of 'public order' [2004 (7) SCC 467 (Commissioner of Police and others vs. C. Anita) and 1992 (2) SCC 177 (Harpreet Kaur vs. State of Maharashtra and another)]. In normal circumstances, violation of the provisions of Food Safety Standard Act is a case affecting 'law and order'. It can be a case of 'public order' if even tempo of life of a society or a locality is affected on account of such violation. In the former case, registration of offence under the FSSA is sufficient and invoking the provisions of NSA may not be sustained but later may be a case where invocation of provisions of NSA may be justified. The Full Bench of this Court also in the case of Kamal Khare vs. State of M.P. and others in WP No.22290/2019 order dated 22nd of April, 2021 has considered the issue if in case of violation of FSSA, 2006, the provisions of NSA can be invoked and has held as under:

"35. Adverting now to the question whether the offence committed under Food Safety and Standards Act, 2006, which contains penalty clause, under no circumstances can form basis to make an order of preventive detention of the offender whose activities are prejudicial to maintenance of public order under the National Security Act, 1980, the question referred to the larger Bench itself contains the answer to it that if an offence committed by an accused under Food Safety and Standards Act, 2006 whose activities are prejudicial to maintenance of public order, can be detained under NSA. It would however depend on the facts and situation of a given case. What has been argued before us in the present case is that the petitioner - Kamal Khare was booked for committing an offence under Section 26(2)(ii) and Section 52 of the FSSA on the basis of solitary incident in which certain sample of cottage cheese (Paneer) collected from his shop as per the report of food analyst was found not confirming to the prescribed standard. In facts like this, it could be then for the detaining authority to arrive at the subjective satisfaction whether the activities of the person sought to be detained under the NSA are prejudicial to maintenance of public order. In other words, whether the material grounds on which such inference is sought to be drawn is really so compelling as to arrive at the subjective satisfaction which is envisaged in sub-section (2) of Section 3 of NSA that with a view to preventing him from acting in

any manner prejudicial to the maintenance of public order, his detention would be necessary."

7. The Full Bench has taken note of the various pronouncements and has drawn the distinction between public order and law and order as under:

44. What can therefore be culled out from all the afore-discussed judgments is that whether an act would constitute simple breach of law and order, or breach of public order, would solely depend on the degree and extent of its reach and effect upon the society. Public order is even tempo of the life of the community of an area or even a locality, as a whole. Degree of disturbance upon the life of the community would determine whether it affects public order. An act by itself may not be a determinative factor of its gravity, but it is potentiality of its effect on the even tempo of the life of community that makes it prejudicial to the maintenance of public order. If the effect of act is restricted to certain individuals or a group of individuals, it merely creates a law and order problem but if the effect, reach and potentiality of the act is so deep and pervasive that it affects the community at large and disturbs the even tempo of the community that it becomes a breach of the public order. It therefore cannot be said that a single act would in all and every circumstances not be sufficient to affect public order or even tempo of the society. What is material is the effect of the act and not the number of acts and therefore what has to be seen is the effect of the act on even tempo of life of the people and the extent of its reach upon society and its impact."

The Full Bench in the case of Kamal Khare(supra) has also taken note of the personal liberty which is infringed by invoking the provisions of NSA in the cases which only relate to the law and order and has observed as under:

"48. While therefore keeping the above referred to principles of law in view, the detaining authority is under an obligation to ensure that personal liberty of an individual is the most precious and prized right guaranteed under the Constitution. The State has been granted the power to curb such rights under criminal laws as also under the laws of preventive detention which are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are indeed in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order. If the offences complained of against the person are of a nature which can be dealt with under the ordinary law of land, taking recourse to the provisions of prevention detention would be contrary to the Constitutional guarantees enshrined in Articles 19 and 21 of the Constitution of India. It is trite that personal liberty protected under Article 21 of the Constitution of India is so sacrosanct and so high on the scale of Constitution values that it casts an obligation on the detaining authority to show that the order of preventive detention it has passed meticulously accord with the procedure established by law. Individual liberty is a cherished right which is one of the most valuable fundamental rights

guaranteed by our Constitution to the citizens of the country. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established. Therefore, in the scheme of the Constitution, utmost importance has been given to life and personal liberty of the individual. In the matter of preventive detention there is deprivation of liberty, therefore, safeguards provided by Article 22 of the Constitution of the India have to be scrupulously adhered to."

8. The record of the present case reflects that from the house of the petitioner, one aluminium pot with 20 kg of Ghee was seized. The police had also seized some packets of half of Kg Ghee and 500 ml of essence, total value of the seized item was about Rs.11,500/- only. The seizure was from the residential house. No person has been found to be carrying out the manufacturing activity of the so-called artificial ghee. There is also no material to show that the petitioner was involved in any systematic activity of manufacturing of ghee. The petitioner does not have any criminal past. At the most, it can be a case of violation of the provisions of FSSA for which he is already prosecuted. Nothing has been shown to point out that the alleged activity of the petitioner has disturbed the even tempo of life or had caused any problem of public order. The petitioner has already remained in detention for about five months. Though the single act can be found the basis of passing the order of detention but the authorities are required to be satisfied that single act is of such a gravity and potentiality that it could effect the public order but nothing of such kind has been pointed out in the present case."

7. Though present is a case where petitioner has been found to be indulged in the same activity for the second time but that alone is not enough to bypass the mandatory requirement of application of mind by the authority in respect of possibility of release on bail in case if the detenu is already in custody.

8. In view of the above, in our considered opinion, the order of detention cannot be sustained and is hereby set aside.

9. The writ petition is accordingly allowed.

(PRAKASH SHRIVASTAVA)
JUDGE

(VIRENDER SINGH)
JUDGE

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