

Mohd Sohel Patel vs Ministry Of Home Affairs on 24 June, 2021

Equivalent citations: AIRONLINE 2021 MP 1897

Author: Sujoy Paul

Bench: Sujoy Paul, Shailendra Shukla

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W.P. No.9529/21 & 3 Ors.

HIGH COURT OF MADHYA PRADESH:
BENCH AT INDORE

WP No.9529/2021

Smt. Monica Tripathi

Vs.

State of M.P.

..... Pet

.....Res

WP No.9561/2021

Mohammad Irshad Qazi

Vs.

State of M.P.

..... Pet

.....Res

WP No.9564/2021

Yusuf Khan

Vs.

State of M.P.

..... Pet

.....Res

WP No.9566/2021

Mohammad Sohel Patel

Vs.

State of M.P.

..... Pet

.....Res

.....
Coram:

Justice Sujoy Paul, Judge
Justice Shailendra Shukla, Judge

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Presence :

Shri Abhinav Dhanodkar, Advocate for the petitioners.
Shri Pushyamitra Bhargav, learned Additional Advocate
General along with Shri Amit Singh Sisodiya, learned Govt. Advocate
for the respondent/State.

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Whether approved for reporting : No
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Heard on :22/06/2021 through video conferencing

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W.P. No.9529/21 & 3 Ors.

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ORDER

(Passed on this 24th day of June, 2021) Sujoy Paul, J. :

Regard being had to the similitude of the questions involved, on the joint request of the parties, these writ petitions were analogously heard and are decided by this common order.

2) This petition is filed under Article 226 of the Constitution. The petitioner has assailed the order dated 12/05/2021 (Annexure P/1) whereby the District Magistrate, Indore by invoking the provisions of National Security Act, 1980 (NSA Act) detained the husband of petitioner namely, Dr. Vinay Shankar Tripathi. The stand of petitioner is that petitioner's husband was arrested on 15/04/2021 for allegedly committing offences under Section 420, 274, 275, 276, 188 of IPC and Section 18A, 18a(i), 18(a)(iv) and Section 27 of Drug and Cosmetic Act, 1940 r/w Section 3 of Epidemic Diseases Act 1987.

The allegation against the corpus is that he was illegally possessing and black marketing 400 remdesivir injections.

3) Shri Abhinav Dhanodkar, learned counsel for petitioner submits that if the act of Corpus is punishable under various provisions of the enactments on which offences are registered and he was arrested, he cannot be detained under the NSA Act. Reliance is placed on para-48 of Full Bench judgment passed in WP No.22290/2019 (Kamal Khare vs. State of MP & Ors.) Since alleged offence committed by Corpus is punishable under the provisions of aforesaid enactments, his detention under the NSA Act is wholly impermissible.

4) The second attack on the impugned order is that in the detention order, the District Magistrate has not mentioned the period of detention. This runs contrary to the judgment of Supreme Court

reported in (2017) 13 SCC 519 (Lahu Shrirang Gatkhal vs. State of Maharashtra) and another judgment reported in (2018) 12 SCC 150 (Sama Aruna vs. State of Telangana & Anr.). He submits that a Division Bench of this Court in WP No.2695/2019 (Shri Akash Yadav vs. State of MP) took the same view and opined that if detention order passed under NSA Act does not mention the period of detention, the order stands vitiated.

5) Criticizing the detention order, learned counsel for the petitioner urged that the operative reason for invoking NSA Act and detaining the Corpus is the apprehension of District Magistrate that the Corpus may get bail from the Court of competent jurisdiction. This singular reason makes the order vulnerable.

6) On merits, Shri Dhanodkar, learned counsel for petitioner submits that in the detention order, it is mentioned that sizable number of remdesivir injections were found in possession of the Corpus, but it is not mentioned as to whom, where and in which amount he intended to black-market the same. The Corpus is a highly educated person running a pharmaceutical business. He intended to get the remdesivir injections patented in his name for which he preferred application before the Competent Authority namely, Controller General of Patent, Designs and Trade Marks. A receipt thereof (Annexure P/3) shows that a process for synthesis of remdesivir was going on. Form 2 prepared under The Patents Act, 1970 (page 46) is also relied upon for this purpose. In this view of the matter, the detention of Corpus is bad-in-law.

7) Per contra, Shri Pushyamitra Bhargav, learned AAG submitted that under Section 3(3) of NSA Act, the District Magistrate is under no obligation to mention the period of detention. Non-mentioning of period will not vitiate the detention order. Reference is made to (1990) 2 SCC 456 (T. Devki vs. Govt. of T.N.) and order of this Court passed in WP No.8212/2014 (Narendra Verma vs. State of MP) decided on 13/02/2015. It is submitted that judgment of Akash Yadav passed in WP No.2695/2019 cannot be pressed into service because it is passed without taking into account the binding judgment of Supreme Court in T. Devki and Division Bench judgment in Narendra Verma (supra).

8) The conditions on which NSA can be imposed are reiterated by Shri Bhargav, learned AAG by contending that necessary ingredients for invoking NSA Act are very much available. A wholesome reading of detention order will show that the singular reason for detention is not the apprehension of District Magistrate about release of Corpus on bail. He has taken into account the relevant factors while invoking Section 3(3) of NSA Act.

9) The learned AAG placed reliance on relevant portions of the FIR and pointed out and urged that 400 vials of remdesivir were recovered from the Corpus. In each vial, the manufacturing license number, batch number, manufacturing date etc. were specifically mentioned. The defence put forth by petitioner/Corpus is not trustworthy on the face of it because before getting the patent in the name of Corpus, there was no occasion to mention the batch number, manufacturing date, expiry date etc. It is further informed that in furtherance of said FIR, the Corpus is already facing a criminal case where prosecution will produce the entire material against the said person.

10) No other point is pressed by the learned counsel for the parties.

11) We have heard the parties at length and perused the record.

12) A Division Bench of this Court in Akash Yadav (supra) came to hold that in absence of mentioning the period of detention, detention order becomes illegal. A careful reading of the order of Akash Yadav shows that the authoritative pronouncement of Supreme Court on this aspect in T. Devki (supra) was not brought to the notice of the Division Bench. In T. Devki (supra), Apex Court held as under:-

"12. Section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drug Offenders Act, 1981 is identical in terms to Section 3 of the Tamil Nadu Act. Section 3 of Maharashtra Act does not require the State Government, District Magistrate or a Commissioner of Police to specify period of detention in the order made by them for detaining any person with a view to preventing the detenu from acting in any manner prejudicial to the maintenance of public order. Section 3(1) which confers power on the State Government to make order directing detention of a person, does not require the State Government to specify the period of detention. Similarly, sub-sections (2) or (3) of Section 3 do not require the District Magistrate or the Commissioner of Police to specify period of detention while exercising their powers under sub-section (1) of Section 3. The observations made in Gurbux Bhiryani case [1988 Supp SCC 568 : 1988 SCC (Cri) 914] that the scheme of the Maharashtra Act was different from the provisions contained in other similar Acts and that Section 3 of the Act contemplated initial period of detention for three months at a time are not correct. The scheme as contained in other Acts providing for the detention of a person without trial, is similar. In this connection we have scrutinised, the Preventive Detention Act, 1950, the Maintenance of Internal Security Act, 1971, COFEPOSA Act, 1974, National Security Act, 1980, but in none of these Acts the detaining authority is required to specify the period of detention while making the order of detention against a person."

Emphasis supplied

13) Pertinently, the judgment of Akash Yadav (supra) was pressed into service before another Division Bench of this Court in the case of Narendra Verma (supra). The Division Bench opined as under:-

"16. From the discussion herein before, it is evident that T. Devki's case was earlier in point of time and it is a decision of Apex Court by three Hon'ble Judges holding that it is not necessary to specify the period of detention in the detention order. The subsequent decision of Apex Court is also delivered by two Hon'ble Judges but there is no reference or mention of the earlier decision of T. Devki's case therein. It appears that the same was not brought to the notice of Hon'ble Judges of the Apex Court. As stated herein before that in case of conflict as held in the case of Jabalpur Bus

Operator (supra), the earlier decision will prevail hence as per decision in T. Devki's case, we hold that it is not necessary to specify the period in the detention order and detention order cannot be held illegal for not specifying the period of detention in detention order."

Emphasis supplied

14) We are in respectful agreement with view taken by Division Bench in Narendra Verma (supra) because it is based on the binding judgment of 3 Judges Bench of Supreme Court in the case of T. Devki. Interestingly, the judgment of T. Devki was not brought to the notice of subsequent Benches in the case of Lahu Shrirang Gatkhal and in Sama Aruna. These two judgments are delivered by two Judges Bench of Supreme Court. In both these matters, on which heavy reliance is placed by Shri Dhanodkar, a different statute was subject matter of interpretation. NSA Act was not the subject matter nor the judgment of T. Devki in which NSA Act was interpreted was considered. Thus, we are unable to hold that for not mentioning the period of detention, detention order will vanish in thin air. In R.P. No.1372/2019 (State vs. Sahil Khan), the Division Bench further held as under:-

"7. In light of the aforesaid and also keeping in view the judgment delivered in the case of Secretary to Government of Tamil Nadu Public (Law and Order) Revenue Department (supra), as the judgement delivered in the case of Gurbux Anandram Bhiryani (supra) was overruled and the aforesaid fact was not brought to the attention of this Court by either side, order passed in W.P. No.17650/2019 is hereby recalled.

8. The writ petition No.17650/2019 is restored to its original number. The same be listed on 04.11.2019.

9. The review petition stands disposed of accordingly."

15) In view of foregoing analysis, the detention order cannot be interfered with for not mentioning the period of detention. Thus, this contention of Shri Dhanodkar must fail.

16) Our understanding about the Sub-section 3 of Section 3 of NSA Act is that this provision deals with delegation of power of State Government to the District Magistrate or Commissioner of Police for the purpose of detention. The expression "during such period as may be specified in the order", in our opinion talks about the period during which the order delegating the power shall remain alive. In other words, Sub-section 3 of Section 3 deals with the period relating to the order of delegation and not a period to be mentioned in the order of detention.

17) A careful reading of detention order shows that argument of learned AAG has substantial force. By no stretch of imagination, it can be said that singular and operative reason for detaining the Corpus is the apprehension of District Magistrate regarding grant of bail in future to the Corpus. On the contrary the grounds of detention shows that District Magistrate has taken care of grave situation because of Covid-19 pandemic. He recorded that Indore is the worst affected town in the

State. The whole city is under Lock-down and curfew. Govt. and private offices are closed. In this difficult situation, there is serious problem of supply of remdesivir injections. Since 400 injections were found in possession of Corpus, who intended to black- market it, it has caused serious dent to the 'public order'. Since action of Corpus was prejudicial to the maintenance of 'public order' and maintenance of 'supplies essential to the public', the District Magistrate decided to pass the detention order. We are unable to persuade ourselves with the line of argument of Shri Dhanodkar that singular reason to detain the petitioner is the apprehension that detenue may get the bail. This argument, therefore, deserves rejection.

18) A question of law cropped up before the Larger Bench which reads as under:-

"Where the offence is committed under Regulatory Act such as Food Safety and Standards Act, 2006 which contains penalty clause, under no circumstances, an action can be taken against a person whose activities are prejudicial to maintenance of public order under the National Security Act, 1980."

19) Learned counsel for the petitioner placed reliance on para-48 of the Full Bench decision wherein it was held that personal liberty is a cherished and valuable right flowing from Article 21 of the Constitution. This right cannot be taken away in a manner which is unknown to law. However, the Full Bench in para-18 opined as under:-

"18. Before embarking on the examination of the arguments advanced by learned counsel for both the sides on the referred questions, we must clarify that the invocation of the principle *generalia specialibus non derogant* by one of the learned Judges (Mr. Justice Atul Sreedharan) in paragraph No.8 of the dissenting order that the general law shall not prevail over the provisions of the special law, on the basis of what was held in paragraph No.19 of the judgment of Sudeep Jain Vs. State of Madhya Pradesh and others (W. P. No.21768/2019) decided on 8.11.2019, does not stand on sound legal foundation and has no relevance to the question that we are dealing with. That principle, in our considered opinion, would not be attracted to the facts of the present case. The order of preventive detention under NSA does not overlap with the panel provisions under the FSSA as it is not in lieu of that but is rather in addition to that. The preventive detention law can operate side by side the law which makes the offences punishable under the substantive offences under the IPC or the FSSA. The preventive detention under the NSA is only anticipatory action and is not a punitive measure. The law that is generally applied to the cases of preventive detention is that if an offence committed by an offender, which merely effect the law and order situation, can be dealt with under ordinary penal laws, the extraordinary provisions of preventive detention ought not to be invoked, but it cannot deduced from this that the ordinary penal laws, would for that purpose, be considered general law and the relevant laws of the preventive detention, which in this case would be NSA, would be considered as a special law or vice versa. While FSSA only provides for penalty for the offence made out under the provisions of the said Act, the NSA provides for the preventive detention if parameter enumerated in

sub-Section (2) of Section 3 are attracted. These two Acts have been enacted to achieve different object and for difference purpose. The provisions which makes the offence punishable under the FSSA is intended to punish the offender for the offence committed by him, but the object which the NSA seeks to achieve is to put the person concerned in detention so as to prevent him from doing an act but not to punish him for something which he has done. While the former is based on the act already done by him, the latter is based on the likelihood of his acting in a manner similar to his past acts and preventing him from repeating the same. We are therefore not persuaded to approve of the line of reasoning taken by the Division Bench in paragraph No.19 of the judgment in Sudeep Jain (supra) to that effect and paragraph No.8 of the dissenting order by one of the Hon'ble Judges referred to above."

Emphasis supplied

20) A bare reading of this para makes it clear that preventive detention is a different facet than the punishment under a penal provision. Both operate in different fields. It cannot be said as a Rule of thumb or as a State Jacket Formula that if a person is tried for committing an offence under a penal provision, in no circumstances, he can be detained under the NSA Act. Thus, this argument of petitioner cannot cut any ice and deserves to be rejected.

21) Indisputably, in both the waves of Corona, Indore was the worst affected town in the province. There was scarcity of beds, hospitals, oxygen and medicines. The administration was struggling to ensure proper supply of medicines and for providing other medical facilities to the citizen.

22) The scope of interference against detention order is limited. It is the subjective satisfaction of detaining authority which matters. Unless it is shown that decision making process adopted by said authority is vitiated or runs contrary to the provisions of the Act, no interference is warranted. It cannot be forgotten that the detention under the NSA Act is an exercise for prevention and not for punishment. Whether Corpus has actually committed any offence or not will be subject matter of adjudication and decision by the criminal Court. We are satisfied that necessary ingredients for invoking NSA Act were available in the instant case and no flaw in decision making process could be established. Thus, question of interference by this Court does not arise.

Petition fails and is hereby dismissed.

23) In this petition, the detention order dated 06.05.2021 is called in question, whereby corpus is detained for possessing Remdesivir injection without licence and authority. It is mentioned that the corpus was trying to black-market the injection in Rs.28,000/-.

24) In this petition, the challenge is mounted to the detention order dated 06.05.2021, whereby corpus - Yusuf Khan was detained for the same reason the corpus of connected matter, Arshad was detained.

25) Shri Abhinav Dhanodkar borrowed the arguments which was advanced in W.P. No.9529/2021 relating to period of detention etc. In addition, it is submitted that the detention order is passed without any justifiable reasons. A corpus cannot be detained because alleged offences are punishable under the different enactments. He placed reliance on para - 48 of the Full Bench Judgment for this purpose.

26) In both the matters, the contentions of the petitioners are that the Remdesivir injection was in fact prescribed by the doctor which was required for treatment of family member. The corpus were possessing said injection for that purpose. Hence, NSA has wrongly been invoked.

27) Shri Pushyamitra Bhargav, learned Additional Advocate General opposed the contentions and borrowed his previous arguments advanced in W.P. No.9529/2021.

28) As noticed, the detention order cannot be set aside because (i) it does not mention the period of detention (ii) the corpus are liable to be punished under other provisions of the Act.

29) No fault could be established against the decision making process by the petitioners. This Court is not obliged to sit in appeal against the detention order and examine the factual aspects of the matter. If decision making process is not defective, no interference is warranted. We see no merits in these petitions.

30) The petitions fail and are hereby dismissed.

31) This petition takes exception to the detention order dated 07.05.2021 Annexure P/1, whereby the petitioner's brother is detained under the NSA Act for illegal possession and black marketing of Remdesivir Injection, Fabiflue medicine strips and Meropenem Injections. This order is also criticized by contending that the corpus cannot be detained by invoking NSA Act because the said offence allegedly committed by him are triable and punishable under different penal provisions.

32) In addition, it is urged that in absence of mentioning the period of detention in the detention order, the impugned order deserves to be interfere with.

33) We have already dealt with these aspects in great detail hereinabove.

34) Hence, no interference can be made on these counts. The petitioner has miserably failed to show any defect in the decision making process adopted by the District Magistrate.

35) No case is made out for interference on the merits of the case.

The petitions fail and are hereby dismissed.

(SUJOY PAUL)
JUDGE

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(SHAILENDRA SHUKLA)
JUDGE

