

Vijay Kukreja vs Union Of India on 24 May, 2021

Author: Prakash Shrivastava

Bench: Prakash Shrivastava

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WP. No.4859/2021

HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT
AT JABALPUR

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| Case No. | WP No.4859/2021 |
| Parties Name | Vijay Kukreja Vs. Union of India and others |
| Date of Order | 24/05/2021 |
| Bench Constituted | Division Bench: Justice Prakash Shrivastava Justice Vijay Kumar Shukla Justice Prakash Shrivastava |
| Judgment delivered by | No |
| Whether approved for reporting | No |
| Name of counsels for parties | Shri Dheeraj Kumar Tiwari, learned counsel for the petitioner. Shri Ajay Pratap Singh, learned Deputy Advocate General and Shri Rahul Deshmukh, Panel Lawyer for the respondents. |
| Law laid down | - |
| Significant paragraph numbers | - |

ORDER

24.05.2021 Per: Prakash Shrivastava, J.

By this petition, the petitioner has challenged the order dated 18.02.2021 in respect of the preventive detention under Section 3(2) of the National Security Act, 1980 (for short 'NSA') for a period of three months.

2. The case of the petitioner is that he is lawfully engaged in the business of making 'deep liquid' which is used for the purpose of religious activities, prayers and offering in religious rituals. It is not an edible item and is only meant for non-human consumption. The petitioner is registered

manufacturer who has obtained the trademark and has also obtained all the necessary permissions and licences in this regard. Further case of the petitioner is that on 17.02.2021, he was taken into custody by the respondents at Gwalior from Govind Ashram and he was produced before the Magistrate on 19.02.2021 and has been sent to jail. On 19.02.2021, the impugned order was supplied to the relatives of the petitioner. Further case of the petitioner is that earlier an unauthorised inspection of the petitioner's premises was done by the concerned respondents, therefore, the petitioner had filed application under Section 102 of the Cr.P.C. before the Chief Judicial Magistrate, Jabalpur on 23.01.2021. On that application, the Chief Judicial Magistrate had passed the order dated 30.01.2021 which is partly in favour of the petitioner. Further allegation of the petitioner is that the respondents during the search and seizure had misappropriated certain amount and had committed irregularities.

3. The respondents have filed their reply stating that on 09.02.2021 SHO Police Station Madhotal had forwarded the report to Superintendent of Police, Jabalpur mentioning about the information received from Food Safety Administration in respect of manufacturing of adulterated ghee in the name of 'deep liquid' by the petitioner. The Superintendent of Police thereafter had submitted the report to the District Magistrate on 11.02.2021. The District Magistrate on reaching the subjective satisfaction has passed the impugned detention order dated 18.02.2021 and had served the same alongwith the grounds of detention to the petitioner. It has further been disclosed that the State Government has approved the order of detention on 24.02.2021 and 25.02.2021.

4. Learned counsel appearing for the petitioner submits that the allegation of making adulterated ghee is only an assumption and the petitioner is only manufacturing deep liquid which is used for offering prayers and in this regard he has referred to the licences and permissions obtained by the petitioner. He further submits that during the search of the premises, various irregularities have been committed and in this regard has referred to the order passed by the Chief Judicial Magistrate under Section 102 of the Cr.P.C. and has also submitted that it is a clear case of colourable exercise of power. He has also submitted that earlier a case was registered in the year 2012 and; thereafter, the present case has been registered and the subjective satisfaction has wrongly been arrived at by the District Magistrate.

5. Learned counsel for the State has opposed the writ petition by submitting that in the year 2012 also similar samples were taken and the samples were not found to be of ghee but of mixture of Vanaspati Oil and flavour etc. and that the petitioner is manufacturing adulterated ghee in the name of 'deep liquid' and he has criminal antecedents as earlier also similar offences were registered against the petitioner. He has also informed that the authorities have recommended for the extension of the detention period of the petitioner.

6. We have heard the learned counsel for the parties and perused the record.

7. The Full Bench of this Court in its recent judgment dated 22.04.2021 passed in WP No.22290/2019 in the case of Kamal Khare vs. State of M.P. and others, has considered the issue if in case of violation of Food Safety and Standard Act, 2006 (FSSA), the provisions of NSA can be invoked. The Full Bench has laid down that two Acts operate in different fields. Former is based on

the act already done by a person, the later is based on likelihood of his acting in a manner similar to his past acts and preventing him for repeating the same. The Full Bench has also reappreciated the distinction between law and order and public order and has laid down that the 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 the community that makes its prejudicial to the maintenance of public order. It has further been held that 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 act on even tempo of life of the people and the extent of its reach upon the society and its impact. In this regard, the Full Bench in the case of Kamal Khare(supra) has held that -

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.

36. What would constitute the prejudice to the maintenance of public order has been a matter of debate ever since the inception of the law of preventive detention. We shall now try to analyse the concept of public order by survey of the decided case law on the subject. In Dr. Ram Manohar Lohia Vs. State of Bihar AIR 1966 SC 740 it has been observed by the Supreme Court that :

"The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. There are three concepts according to the learned Judge (Hidayatullah, J) i.e. "law and order", "public order" and "security of the State". It has been observed that to appreciate the scope and extent of each of them, one should imagine three concentric circles. The largest of them represented law and order, next represented public order and the smallest represented the security of the State. An act might affect law and order but not public order just as an act might affect public order but not the security of the State."

38. In *S. K. Kedar Vs. State of West Bengal* (1972) 3 SCC 816 the Supreme Court has observed as under:-

"The question whether a person has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is one of degree and the extent of the reach of the act upon the society. An act by itself is not determinative of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. It is the degree of disturbance upon the life of the community which determines whether the disturbance amounts only to a breach of the law and order".

39. In *Kanu Biswas Vs. State of West Bengal* (1972) 3 SCC 831 while discussing the meaning of word 'public order' the Supreme Court held that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order, is a question of degree and extent of the reach of the act upon the Society. Public order is what the French call "ordre publique" and is something more than ordinary maintenance of law and order.

40. The Supreme Court in *Kanchanlal Meneklal Chokshi Vs. State of Gujarat and others* (1979) 4 SCC 14 on the issue observed thus:-

"The ordinary criminal process is not to be circumvented or short circuited by ready resort to preventive detention. But, the possibility of launching a criminal prosecution is not an absolute bar to an order of preventive detention. Nor is it correct to say that if such possibility is not present to the mind of the detaining authority the order of detention is necessarily bad. However, the failure of the detaining authority to consider the possibility of launching a criminal prosecution may, in the circumstances of a case, lead to the conclusion that the detaining authority had not applied its mind to the vital question whether it was necessary to make an order of preventive detention. Where an express allegation is made that the order of detention was issued in a mechanical fashion without keeping present to its mind the question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose, the detaining authority must satisfy the Court that question too was borne in mind before the order of detention was made. If the detaining authority fails to satisfy the Court that the detaining authority so bore the question in mind the Court would be justified in drawing the inference that there was no application of the mind by the detaining authority to the vital question whether it was necessary to preventively detain the detenu."

41. The Supreme Court has further observed in *Ashok Kumar Vs. Delhi Administration and others* (1982) 2 SCC 403 as under: -

"The true distinction between the areas of 'public order' and 'law and order' lies not in the nature of quality of the act, but in the degree and extent of its reach upon society. The distinction between the two concepts of 'law and order' and 'public order' is a fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order. The act by itself therefore is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order".

42. In State of U.P. Vs. Hari Shankar Tewari (1987) 2 SCC 490 the Supreme Court held as under:-

"Conceptually there is difference between law and order and public order but what in a given situation may be a matter covered by law and order may really turn out to be one of public order. One has to turn to the facts of each case to ascertain whether the matter relates to the larger circle or the smaller circle."

43. The Supreme Court in State of U.P. and another Vs. Sanjai Pratap Gupta Alias Pappu and others (2004) 8 SCC 591 has held as under:-

"7. The crucial issue is whether the activities of the detenu were prejudicial to public order. While the expression 'law and order' is wider in scope inasmuch as contravention of law always affects order. 'Public order' has a narrower ambit, and public order could be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specified locality. The distinction between the areas of 'law and order' and 'public order' is one of the degree and extent of the reach of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it could raise problem of law and order only. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps to distinguish it as an act affecting 'public order' from that concerning 'law and order'. The question to ask is: "Does it lead to disturbance of the current life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed"? This question has to be faced in every case on its facts.

8. "Public order" is what the French call 'ordre publique' and is something more than ordinary maintenance of law and order. The test to be adopted in determining whether an act affects law and order or public order, is: Does it lead to disturbance of the current life of the community so as to amount to disturbance of the public order or does it affect merely an individual leaving the tranquility of the society

undisturbed? (See *Kanu Biswas v. State of West Bengal*) (supra).

9. "Public order" is synonymous with public safety and tranquility: "it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State". Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum, which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. (See *Dr. Ram Manohar Lohia v. State of Bihar and Ors* (1966 (1) SCR

709).

10. "'Public Order', 'law and order' and the 'security of the State' fictionally draw three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the State. Every infraction of law must necessarily affect order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act may affect public order, but not necessarily the security of the State. The true test is not the kind, but the potentiality of the act in question. One act may affect only individuals while the other, though of a similar kind, may have such an impact that it would disturb the even tempo of the life of the community. This does not mean that there can be no overlapping, in the sense that an act cannot fall under two concepts at the same time. An act, for instance, affecting public order may have an impact that it would affect both public order and the security of the State. [See *Kishori Mohan Bera v. The State of West Bengal* (1972 (3) SCC

845); *Pushkar Mukherjee v. State of West Bengal* (1969 (2) SCR 635); *Arun Ghosh v. State of West Bengal* (1970 (3) SCR 288); *Nagendra Nath Mondal v. State of West Bengal* (1972 (1) SCC 498)."

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."

It has further been held that -

"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 preventive 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. Examining the present case in the light of the aforesaid parameters, it is noticed that grounds of detention mentions that during the search and seizure on the spot manufacturing and packing of 'deep dravy' was found and the raw material for manufacturing 'deep dravy' such as palm oil, vanaspati flavouring essence was found and its samples were collected. The order reflects that a mere suspicion was expressed that since a mixture of these material gives the fragrance of ghee, therefore, there is a possibility of the users being confused. The petitioner has enclosed alongwith the petition Trademark Certificate in respect of 'Dhoop' and 'Agarbatti', 'Mehndi', 'Havan/Poojan Samagri' (material for worship purpose) non- edible fat made by mixture of hydrogenated vegetable oil, non- hydrogenated vegetable oil and flavouring substance and deep liquid for worship(pujan). The Registration Certificate under the Food Safety and Standard Act, 2006 in respect of food items fat and oils and fate emulsions has also been placed on record which have not been disputed by the respondents. Though there is an allegation that the petitioner was making adulterated ghee but nothing reliable has been pointed out by the respondents to show that the petitioner was

manufacturing anything other than the one for which he is registered and licenced. The order also does not reflect any instance when any user had confused the 'deep liquid' manufactured by the petitioner with pure ghee or anybody was found using it as pure ghee. Even otherwise, there is no material to show that the activity of the petitioner had disturbed the even tempo of life or had caused any disturbance in public order. The grounds of detention mentioned about the registration of similar case in the year 2012 but thereafter substantial period has lapsed. The counsel for the petitioner has also pointed out that out of the three cases of violation of food safety, two were registered on the same date and they have no link with the present case.

9. Having regard to the circumstances of the case, we are of the opinion that material pointed out in the matter may make out a case for taking action under the provisions of Food Safety Standard Act if any violation thereof has been found but it is not a case where the provisions of NSA should be invoked. The impugned order passed by the District Magistrate suffers from the lack of appropriate subjective satisfaction in respect of the detention of the petitioner. Hence, the impugned order of detention cannot be sustained and is accordingly set aside.

10. The writ petition is accordingly allowed.

(PRAKASH SHRIVASTAVA)
JUDGE

(VIJAY KUMAR)
JUDGE

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