A.F.R.

Reserved on 5.1.2022

Delivered on 18.2.2022.

Court No.-46

Case :- HABEAS CORPUS WRIT PETITION No. - 310 of 2021

Petitioner :- Kamlesh Pathak

Respondent :- Union Of India And 3 Others

Counsel for Petitioner :- Anurag Yadav,Mahendra Pratap

Counsel for Respondent :- A.S.G.I.,G.A.,Raj Kumari Devi

Hon'ble Mrs. Sunita Agarwal,J.

Hon'ble Mrs. Sadhna Rani (Thakur),J.

(Delivered by Hon'ble Mrs. Sadhna Rani (Thakur),J.)

Heard the learned counsel for the petitioner, learned A.G.A. for the State and perused the record.

Law was set into motion with lodging of the first information report on 15.3.2020 by Sri Ashish Kumar, registered as case crime no. 189 of 2020 under Section 147, 148, 149, 307, 302, 506 I.P.C. and Section 7 Criminal Law Amendment Act, police station Kotwali Auraiya, District Auraiya.

As per the allegations of the first information report, the petitioner Kamlesh Pathak along with other co accused persons armed with licensee and illegal weapons tried to grab the land of Panchmukhi Hanuman Mandir. When the local people resisted, the present petitioner and his aids started indiscriminate firing due to which Advocate Manjul Chaubey and his sister Sudha Chaubey were killed and three other persons got injured. Earlier also, the petitioner had illegally grabbed the land of Kaleshwar Bhole Baba

Dev Kali Mandir and forcibly appointed his younger brother as Mahant of the said temple. On the same day, i.e. on 15.3.2020 the petitioner was arrested and case crime no. 190 of 2020 under section 25 Arms Act and case crime no. 196 of 2020 under sections 147, 148, 149, 353, 307 I.P.C. and Section 7 Criminal Law Amendment Act were registered against him and co-accused. Later on case crime no. 462 of 2020 under section 3(1) of **U.P.** Gangsters and Anti-Social Activities (Prevention) Act, 1986 was also registered against the petitioner and others.

On the recommendation reports of the Station House Officer, police station Kotwali Auraiya, Circle Officer police station Auraiya, Additional Superintendent of Police and Superintendent of Police Auraiya all dated 9.1.2021, the detention order was passed on 10.1.2021 by the District Magistrate, Auraiya exercising the power under section 3(2) of the National Security Act, 1980.

The instant Habeas Corpus Petition has been filed under Article 226 of the Constitution of India to quash the impugned detention order passed by the respondent no. 3, the District Magistrate, Auraiya vide no. 10/J.A.-N.S.A./2021 dated 10.1.2021 and orders dated 4.3.2021, 5.4.2021, 5.7.2021 and 1.10.2021 extending detention of the petitioner.

It is settled principle that preventive detention is preventive and not punitive. To prevent the misuse of this potentially dangerous power, the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however technical, is mandatory and vital.

Certain dates of the proceedings undertaken against the petitioner are relevant to be noted at the outset.

On the basis of occurrence dated 15.3.2020, the first information report as case crime no. 189 of 2020 was lodged against the petitioner and co-accused. Later on case crime no. 190 of 2020, 196 of 2020 and 462 of 2020 mentioned above were also registered against the petitioner and others. After that on the recommendation reports of the Station House Officer Kotwali Auraiya, Circle Officer Kotwali Auraiya, Additional Superintendent of Police, Auraiya and Superintendent of Police Auraiya all dated 9.1.2021, the detention order dated 10.1.2021 was passed by the Detaining Authority which was approved on 19.1.2021 by the State Government. On 21.1.2021, the petitioner submitted 9 copies of representations addressing to four authorities. The jail authority sent those representations to the District Magistrate Auraiya on the same day, which were received in the office of the District Magistrate, Auraiya on 22.1.2021. After obtaining police reports on 25.1.2021 the representation of the petitioner was rejected by the District Magistrate and said order was communicated to the petitioner through the jail authority on 25.1.2021 itself. On 27.1.2021, the State Government received the representation along with the letter of the District Magistrate Auraiya dated 25.1.2021. On 28.1.2021, the State Government sent the representation to the Central Government and Advisory Board.

At the ends of the State Government, on 29.1.2021, the representation was examined by the Under Secretary. On 30.1.2021 and 31.1.2021, it was holiday. The representation was examined before the Joint Secretary, on 2.2.2021, it was placed before the Special Secretary. On 3.2.2021 it was considered by the Secretary Govt. of U.P. and the Additional Chief Secretary

and finally on 4.2.2021, the representation was rejected by the State Government. This order was communicated on 5.2.2021 to the petitioner through the District Magistrate by Radiogram.

On behalf of the Union Government, it is brought on record that the representation along with the letter dated 28.1.2021 of the State Government was received in the concerned Section of Ministry of Home Affairs on 3.2.2021 and after going through the representation along with para-wise comments thereon of the Detaining Authority and the report as envisaged under section 3(5) of the National Security Act, 1980 were put up to the Under Secretary (NSA) on 5.2.2021. On 6.2.2021 and 7.2.2021 there was Saturday and Sunday. Thereafter, with the comments of the Under Secretary (NSA), the file was forwarded to the Deputy Legal Adviser on 8.2.2021 who sent it to the Joint Secretary (Internal Security II) on 8.2.2021. The Joint Secretary (Internal Security II) with his comments forwarded the same to the Union Home Secretary on 9.2.2021 and after due consideration, the representation was rejected by the Union Home Secretary on 9.2.2021. The file reached back to the concerned Section on 11.2.2021 through the aforesaid levels and a wireless message was sent on 11.2.2021 to the Home Secretary Government of U.P. at Lucknow, Jail Superintendent, Agra U.P., District Magistrate, Auraiya, Uttar Pradesh and the petitioner informing the said decision. On 13.2.2021, the jail authority communicated the decision to the petitioner.

Further, on 23.2.2021, the petitioner appeared before the Advisory Board. The Advisory Board submitted its report on 3.3.2021 to the State Government after hearing the petitioner in

person stating that there was sufficient cause for the preventive detention of the petitioner under the National Security Act, 1980.

On receipt of the said report, the case was fresh examined by the State Government and the detention order was confirmed on 4.3.2021 keeping the petitioner under detention for a period of three months at the first instance from the date of actual detention of the petitioner i.e. since 10.1.2021. On 5.4.2021, 5.7.2021 and 1.10.2021 the detention order was extended for six months, 9 months and 12 months; respectively. The total period of one year of detention of the petitioner had come to an end, accordingly, on 10.1.2022.

The arguments of the learned counsel for the petitioner are of two fold; firstly, that the satisfaction recorded by the District Magistrate was not based on cogent material and the material facts were suppressed by the sponsoring authorities; secondly, that the period between 28.1.2021, the date of sending the representation by the State Government and 3.2.2021 the date when representation was received by the Central Government, the delay of 7 days in considering the representation of the petitioner by the Central Government, has not been explained, either by the State Government or the Central Government.

The contention is that the delay on the part of the concerned Authority in strictly complying with the provisions of the National Security Act, 1980 has rendered the detention of the petitioner illegal. It is submitted that though on the date of hearing of this petition the total period of detention was almost about to expire, but since by the detention of the petitioner, his right guaranteed under Article 22 (5) of the Constitution of India has

been seriously infringed, the detention order dated 10.1.2021 as such is liable to be quashed.

Separate counter affidavits filed on behalf of the respondent nos. 1 to 4 have been placed before us to substantiate the stand of the respondents, to assert that there was no irregularity much less illegality in the entire decision making process and the detention order having been passed after recording satisfaction of the competent authorities may not be interfered with.

To deal with the rival contentions of the parties, it would be apposite to look into the relevant provisions as under:-

Section 3(2) (3) of the National Security Act, 1980

(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

(3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section: Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.

Authorization notification no. 111/1/1-80-CX-7 T.C.III issued by the Home Secretary, Government of U.P. dated 15.10.2020 under section 3(3) of National Security Act conferring powers on the District Magistrate, Auraiya under section 3(2) of National Security Act is placed on record.

In his reply, the detaining authority, i.e. the District Magistrate Auraiya has submitted that taking into consideration the double murder committed by the petitioner Kamlesh Pathak, his attempt to grab the land of Panchmukhi Hanuman Mandir, his previous act of grabbing the land of Bhole Baba Dev Kali Mandir and forcibly appointing his younger brother as Mahant of the aforesaid temple, terror and fear were spread in the society and law and public order was seriously disturbed. The residents of the locality hid themselves in their houses on and after the date of the incident. After getting the reports of LIU/ police and views of Advocates association, merchants, local public and considering the criminal history of 32 cases against the petitioner, considering the probability of repetition of crime and the probability of release of the petitioner on bail, it was found necessary to detain the petitioner in order to restore and maintain peace and normalcy in the area. On the written recommendations of the Station House Officer, Kotwali Auraiya, Circle Officer Auraiya, Additional Superintendent of Police, Auraiya and Superintendent of Police Auraiya, the District Magistrate, Auraiya while recording his subjective satisfaction exercising powers under Section 3(2) of the National Security Act, 1980 passed the detention order dated 10.1.2021 in accordance with law which was also approved by the State Government on 18.1.2021 and later recommended by the Advisory Board on 3.3.2021. The representation of the

petitioner was rejected by the detaining authority, by the State Government and the Central Government, on consideration of all attending circumstances of the case.

It is vehemently argued by the learned counsel for the petitioner that when a person is already in jail the detention order can only be passed if the detaining authority is aware of all the necessary and material facts to record his subjective satisfaction which must be based on the grounds:

(I) The detenu is in jail, (ii) He is trying for his release from the jail, (iii) There is real possibility of his being released from jail and (iv) After his release from jail, he will repeat similar activity disturbing the public order at large.

After recording such satisfaction on the above stated grounds on consideration of relevant cogent material, the detaining authority can pass the order detaining a person under the National Security Act.

It is contended that from the averments made in the detention order it is evident that the sponsoring authorities did not place any relevant material as to whether any bail application in case crime no. 190 of 2021, case crime no. 196 of 2021 and 462 of 2021 have been moved or not. In fact, the detaining authority was not aware at all about the status of the other three criminal cases while passing the detention order on 10.1.2021.

It is also argued that out of criminal history of 32 cases in 13 cases the petitioner has been acquitted whereas three cases have been withdrawn. In 12 cases, final report has been submitted by the police. Thus, 28 cases have been disposed of and only four cases, namely, case crime no. 189 of 2020, 190 of 2020, 196 of 2020 and 462 of 2020 are pending against him. On

the date of the detention order, bail application only in case crime no. 189 of 2020 under section 147, 148. 149, 307. 302 and 506 I.P.C. and 7 Criminal Law Amendment Act, moved before the High Court was pending. The bail application in case crime no. 196 of 2020 was allowed after the detention order was passed. Till that date, no bail application was moved in case crime no. 190 of 2020 and Case crime no. 462 of 2020. All these four cases have been slapped upon the petitioner on the basis of one incident dated 15.3.2020 and there was no link to connect the incident dated 15.3.2020 and the detention order dated 10.1.2021 as it was passed almost after ten months of the alleged incident.

It may be noted at this juncture, that in a catena of decisions on the issue, it has been settled that even if a person is in custody, detention order can validly be passed. The legal proposition is that a person can be detained under the National Security Act even if he is languishing in jail. However, to record satisfaction, which obviously is a subjective one, that such a person is to be detained it is necessary that the authority passing the detention order must be aware of the fact that; (1) the detenu is actually in custody; (2) 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 thus to demonstrate that it was felt essential to detain such person to prevent him from so doing.

In Kumail Vs. State of U.P. and others decided on 1.8.2019 in Habeas Corpus Petition No. 437 of 2019, a Division Bench of this Court has summarized the legal position as under'

The reason to believe that there is likelihood or real possibility of the person being released on bail must be based on cogent material

and not mere ipse dixit of the authority. Such satisfaction can be drawn on the basis of reports of the sponsoring authority, the nature of the offences in connection with which the detenu is in jail as also the facts and circumstances of that case including grant of bail to co-accused or general practice of courts in such matters. But once challenge is laid with regard to existence of such satisfaction, then the detaining authority in its return / affidavit must disclose existence of such satisfaction and the materials on the basis of which it has been drawn. However, if in the return it is demonstrated that satisfaction was drawn and there existed material to draw such satisfaction, the same cannot ordinarily be interfered with on the ground of insufficiency of material.

Thus it is clear that it is incumbent on the detaining authority to demonstrate that it was aware of all those circumstances which were material and relevant in connection with which the detenu is to be detained at the time of passing of the order of preventive detention. A fortiori, the sponsoring authority is under obligation to provide complete information to the detaining authority of all those cases in connection with which the detenu is already in jail, so that the detaining authority has all the material before it to draw the satisfaction whether an order of preventive detention is required or not.

In this connection when we go through the recommendation reports of the sponsoring authorities namely the Station House Officer Kotwali Auraiya, Circle Officer, police station Auraiya, Additional Superintendent of Police, Auraiya and Superintendent of Police, Auraiya which are appended with the writ petition, in none of them, it was mentioned that the petitioner was about to be released on bail in case crime no. 190 of 2020 and 462 of

2020. On the date of submitting the recommendation reports dated 9.1.2021, the bail order in case crime no. 196 of 2020 was also not in existence as it was passed on 28.1.2021. In all these reports there is mention of applying bail by the petitioner only in case crime no. 189 of 2020 under sections 147, 148, 149, 302, 307 and 506 I.P.C. and Section 7 Criminal Law Amendment Act only. On the basis of these reports, the detaining authority has also mentioned in its order that 'bail application in case crime no. 189 of 2020 of the petitioner was pending in the Court vide bail application no. 46390 of 2020 and further that it was the talk of the town that the petitioner was by all means trying to get himself released on bail; repetition of the crime and possibility of disturbances of the public order by the petitioner thus, could not be ruled out.

It is admitted fact that till the date of the order dated 10.1.2021 no bail application had been moved by the petitioner in case crime no. 190 of 2020 under section 25/27 Arms Act, police station Kotwali Auraiya, District Auraiya and case crime no. 462 of 2020 and under Section 3(1) of the Gangster Act, 1986. So recording of the satisfaction that there was likelihood or possibility of the petitioner being released from jail was not possible.

In **Rekha Vs. State of Tamil Nadu and another (2011) 5 SCC 244** the Apex Court has held that where a detention order is served on a person already in jail there should be a real possibility of release of the said person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that If no bail application is pending, then there is no likelihood of the person in custody being released

on bail, and hence the detention order will be illegal. However, there can be exception to this rule that is where a co-accused whose case stands on the same footing had been granted bail. In such cases the detaining authority can reasonably conclude that there is likelihood of the detenue being released on bail even though no bail application of his is pending since most Courts normally grant bail on this ground.

In the instant case, neither in the recommendation report nor in the detention order it has been noted that the detenu had moved bail application in case crime no. 190 of 2020 and 462 of 2020 and admittedly, the sponsoring authority was supposed to be aware of the fact that these two cases were registered against the detenu, it can not but be concluded that the sponsoring authority had withheld relevant material / information from the detaining authority. The detaining authority at its own end without making proper inquiry to record its satisfaction on the facts that since bail application had not even been moved in two aforesaid cases, could not have been recorded satisfaction of likelihood of the petitioner being released on bail. The order of detention, on the ground that it is vitiated on account of suppressing or withholding of relevant material and information by the sponsoring authority and as such the subjective satisfaction of the detaining authority being recorded on incomplete and insufficient facts and material deserves to be quashed.

Now the second ground of delay of 6 days i.e. from date 28.1.2021 to 3.2.2021, the period between sending the representation by the State Government and receipt by the Central Government is to be appreciated. The attention of the

Court is drawn towards Article 22(5) of the Constitution of India in this regard.

The Article 22 (5) of the Constitution of India reads as under;

" (5):- When any person is detained 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.

It is argued that Article 22(5) of the Constitution casts obligation upon the authority making the detention order to afford the earliest opportunity of making representation against the order of detention. The preventive detention curtails personal liberty of a person guaranteed under the Constitution of India. It is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay. The right of detenu to make a representation and expeditious consideration of the same would be an empty formality without a corollary right of the detenu to receive a timely communication from the appropriate government on the status of his representation-be it an acceptance or a rejection.

It is an admitted fact that the State Government sent the representation to the Central Government on 28.1.2021 which is said to have been received in the concerned office of the Central Government on 3.2.2021. We sought clarification on this delay from the State Government at the time of hearing. The learned Government Advocate Sri Sayed Ali Murtaza filed a letter of the Special Secretary Home, Government of U.P. dated 10.1.2022 before us after the judgment was reserved. It has been stated

therein that the representation of the petitioner was sent by Speed Post on 29.1.2021 and was received in the office of the Union Government on 3.2.2021. It is also mentioned that Speed Post services of the postal department, Ministry of Communications, Government of India is the most trusted and fastest medium which provides express and time bound delivery of letters in India, having features of Internet based Track and Trace system, Delivery information on SMS, receive SMS etc. It is also submitted that so far as the delay in delivery of the said representation is concerned, though no official record is available but such delay appears probable due to the date being near the Republic Day, the adverse circumstances due to Covid-19 and the protest of the farmers at the relevant point of time.

Learned counsel for the petitioner placed reliance over the judgment of the Apex Court in **Rajammal Vs. State of Tamil Nadu and another, (1999) 1 SCC 417** wherein it is held that explanation for the delay and not the duration or range of delay is material. In **Aslam Ahmad Zahire Ahmad Shaik Vs. Union of India and others (1989) 3 SCC 277**, it was opined by the Apex Court that the unexplained delay of 7 days on the part of Jail Superintendent in transmitting the representation to the Central Government as a result of which the representation reached the Government 11 days after it was handed over to the Jail Superintendent had vitiated the detention. In case of **Pebam Ningol Mikoi Devi Vs. State of Manipur, (2010) 9 SCC 618,** the unexplained delay of 7 days in forwarding the representation to the Central Government was held to be fatal. In case of **Mst. L.M.S. Ummu Saleema vs B.B. Gujaral & Anr, (1981) 3 SCC 317,** it has been observed by the Apex Court that the time imperative

can never be absolute or obsessive and that the occasional observations made by this Court that each day's delay in dealing with the representation must be adequately explained are meant to emphasis the expedition with which the representation must be considered and not that it is a magical formula, the slightest breach of trust must result in release of the detenu. In case of **Sarabjeet Singh Mokha Vs. The District Magistrate, Jabalpur and others, 2021 0 Supreme (SC) 654**, the Apex Court held that failure in timely communication of the order of rejection of the representation is a relevant factor for determining the delay as the detenu is protected against under Article 22 (5). It was held that failure of the Central Government and State Government to communicate the rejection of the representation of the appellant in a time bound manner is sufficient to vitiate the order of detention.

In the present case, admittedly 9 copies of the representations addressed to the concerned authorities were submitted by the petitioner to the jail authority on 21.1.2021. These representations were forwarded by the jail authority to the District Magistrate where they were received on 22.1.2021 and since then through the District Magistrate via the State Government, the representation could reach the Central Government only on 3.2.2021. This delay is explained by the State Government with the assertion that it was sent through the most reliable mode, i.e. speed post and, on the other hand, the delay was probable because of intervening Republic Day, the adverse circumstance due to Covid-19 and the protest of the farmers at the relevant point of time.

The explanation for the delay is an eyewash. Considering the constitutional obligation of the decision making authority to consider the representation of the detenu without any delay it was required that the representation should have been sent through the special messenger to ensure timely and speedy delivery of it to the concerned offices. The casual attitude of the concerned office in sending representation through speed post shows complete lack of understanding or ignorance of the legal provisions and the constitutional obligation of the government, be it the State or Central Government. The explanation offered by the State Government for the delay occurred in receipt of the representation in the office of the Central Government cannot be comprehended.

Another aspect that during 28.1.2021 to 3.2.2021, the Covid-19 graph was very low and all emergency services were opened up. In what manner the protest of the farmers had affected the speedy delivery in sending the representation has not been explained. Thus, the clarification of the State Government is far from convincing.

For the reasons as aforesaid, the detention order is found to be vitiated, the decision making process being against the settled legal principles. As the detention order is vitiated itself, the extension orders are liable to be set aside.

Since the detention order has outlived its life for the fact that the writ petition could not be heard and decided within the period of 12 months, maximum period prescribed in Section 13 of National Security Act, 1980, no other direction has to be issued. However, it is held that the petitioner can not be kept under detention pursuant to the detention order passed under Section

3(2) of the National Security Act, 1980 by the District Magistrate, Auraiya.

The writ petition is accordingly, allowed. No order as to costs.

Order dated:- 18.2.2022

Gss