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ORISSA HIGH COURT, CUTTACK

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W.P.(CRL.) NO.82 OF 2020

(In the matter of an application under Articles 226 & 227 of the Constitution of India).

Sk.Mabud @ Mamud @ Madud Petitioner

-Versus-

State of Odisha & another Opp. Parties

For Petitioner : M/s. Debasis Sarangi,
B. S. Dasparida, S.K.Dash,
S. Mohapatra, K. Mohanty
and M.K. Agrawala

For Opp. Party Nos.1 & 2 : Mr. Janmejaya Katikia
Additional Govt. Advocate

P R E S E N T :

THE HONOURABLE KUMARI JUSTICE SANJU PANDA

AND

THE HONOURABLE MR. JUSTICE S.K. PANIGRAHI

Date of Hearing : 11.11.2020 Date of Judgment : 16.12.2020

S.K. PANIGRAHI, J.

1. The present Criminal Writ Petition has been filed by the petitioner invoking Articles 226 and 227 of the Constitution of India challenging the order of detention dated 12.02.2020 passed by the District Magistrate, Balasore under Section 3(2) of the National Security Act, 1980.

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2. Brief facts of the case are stated hereunder so as to appreciate the rival legal contentions urged on behalf of the parties:

(a) The petitioner was under judicial custody in the District Headquarters Jail Balasore in connection to P.S. Case No.319 dated 17.10.2019 held under Section 395 of IPC and Sections 25 and 27 of the Arms Act. The Superintendent of Police, Balasore in his letter No.7586/1B dated 26.12.2019 addressing the District Magistrate appealed for the detention of the petitioner under Section 3(2) of the National Security Act. He contended that the present petitioner has been indulging in antisocial activities prejudicial to public order in town, Sahadevkhunta, Sadar, Industrial PS's areas and throughout the district of Balasore and also bordering area of West Bengal since 2013. He further emphasized that the petitioner does not have any ostensible means of livelihood and only depends upon extortion, robbery and other criminal activities. Further, he contended that the people in the above-mentioned regions are in a state of constant fear due to the continuous atrocious activities of this petitioner who is a dreaded criminal. The Superintendent of Police has then attached a list

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of 20 cases, while detailing those he has mentioned that out of 14 cognizable cases, 8 cases have been charge sheeted and the rest 6 are under investigation and will be charge-sheeted soon.

(b) Acknowledging the Letter No.7586/1B, District Magistrate, Balasore ordered for detention of the petitioner on 12.02.2020 and consequently provided the grounds of detention to the petitioner on 16.02.2020. The District Magistrate has stated that there is every possibility that his release on bail will lead to the probabilities of his indulgence in more and more criminal activities. He has further stated that upon thorough perusal of materials of criminal cases registered against him, it is clear that the petitioner is a die-hard anti-social and criminal who has scanty regard for the law of the land. Hence, his detention under Section 3(2) of the NSA Act is necessary in the interest of the maintenance of public peace as well as upholding public order in the locality.

(c) The aforesaid order of detention was approved by the State Government on 20.02.2020 and subsequently based on the report of the Advisory Board, the same was confirmed on 06.04.2020 for a period of three months. Thereafter the

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period of detention has been extended on 06.05.2020 and 30.07.2020 pursuant to which the petitioner continues to be in detention.

3. Learned Counsel for the petitioner submits that the detaining authority while presenting the report against the detainee has not disclosed the basic facts, material particulars which led to passing an order of detention. It has further not been disclosed that what is the basis and circumstances which led the District Magistrate to come to a conclusion that the detainee is terrorizing the innocent general public. Further, he has contended that the order of detention was passed on 12.02.2020 whereas the grounds of detention was served on 16.02.2020 which indicates that the order of detention was passed without considering the materials on record. It is therefore sufficient to activate this Court into examining the legality of detention.

4. He has further contended that the Superintendent of Police and the District Magistrate have relied on stale cases as the detainee has been acquitted in quite a few of them, the same has not been brought on record. Moreover, the cases relied upon by the detaining authority are cases

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affecting individuals and none of them in any manner affects the tempo of life. It has also been contended that there were no particulars for the detinue to make his representation and the details for the same was also not provided. Therefore, the information being incomplete and misleading does not satisfy the requirements of law. This Court has consistently shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention. The detaining authority ought to have produced contemporaneous evidence to show that the authority had applied its mind to arrive at subjective satisfaction regarding such detention.

5. Learned Counsel for the Opposite Party No.2 submits that the order of detention of the petitioner was given only after thorough consideration and judicious application of mind. He has contended that there are chances of the petitioner getting bail in Sahadevkhunta P.S. Case No.319 dated 17.10.2019 and there is a chance of resumption of the said antisocial activities after his release. Further, upon preparation of the grounds of detention, the same was

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issued to the detainee on 16.02.2020 which is very well within the statutory period. It is further submitted that according to Section 3(4) of the NSA Act, the grounds of detention should be provided after 5 days and within 15 days and therefore there has been no violation of the Act. Further he has submitted that the bare reading of the application dated 26.12.2019 of the Superintendent of Police, Balasore, it is evident that the activities of the detainee has not only affected individuals but the whole community disrupting peace and public order. Hence, the present petition should be dismissed.

6. Learned Counsel for the Opposite Party No.2 submits that on the basis of the materials available on record against the petitioner showing his anti-social and criminal activities in different cases for a considerable period which are prejudicial to the interest of the public at large and as the fact remains when the normal law of the land failed to curb the anti-social activities of the petitioner, the detaining authority was compelled to take recourse under the provision contained in the NSA Act. The detention of the petitioner has been made according to the procedure

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established by law. It is neither illegal nor unwarranted. Hence, the present petition should be dismissed.

7. Heard Mr. Debasis Sarangi, learned counsel appearing for the petitioner and Mr. Janmejaya Katikia, learned Additional Government Advocate for Opposite Party Nos.1 and 2 and perused the case records.

8. Preventive detention is not to punish a person for something he has done but to prevent him from doing it. Therefore, since the detention order passed on the allegation of involvement of the detenu in a number of criminal cases without disclosing any material in the report of the Superintendent of Police or materials available before the Detaining Authority that there is likelihood of breach of public order, the detention order cannot be sustained. The detaining authority at the time of passing the order of detention as well as the State Government while confirming the same should take into consideration the nature of allegations and offences alleged in the grounds of detention to examine whether the same relates to 'public order' and the normal law cannot take care of such offences and that the acts of the detenu mentioned in the grounds of

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detention are prejudicial to maintenance of public order or they only relate to "law and order". While interpreting the provisions this Court has pointed out in a number of cases that this Court rigidly insist that preventive detention procedure should be fair and strictly observed. The detaining authorities should exercise the privileges sparingly and "in those cases only where there is full satisfaction".

9. The Hon'ble Supreme Court in the case of ***Yumman Ongbi Lembi Liema Vs. State of Manipur***¹, referring to the earlier decision of the Hon'ble Supreme Court in ***Haradhan Saha Vs. State of West Bengal***², held that the extraordinary powers of detaining an individual in contravention of the provisions of Article 22(2) of the Constitution where the grounds of detention do not disclose any material which was before the detaining authority other than the fact that there is every likelihood of the detenu being released on bail in connection with the cases in respect of which he had been arrested to support the

¹2012 (I) OLR (SC) 550.

²(1975) 3 SCC 198.

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order of detention. It is also held that preventive detention is not to punish a person for something he has done but to prevent him from doing it. Only on the apprehension of the detaining authority that after being released on bail, the petitioner-detenu will indulge in similar activities, which will be prejudicial to public order, order under the Act should not ordinarily be passed.

10. The Supreme Court in ***Alpesh Navinchandra Shah v. State of Maharashtra***³; ***State of Maharashtra v. Bhaurao Punjabrao Gawande***⁴; and ***Rekha v. State of Tamil Nadu***⁵, wherein the detention orders were set aside on the ground that the purpose for issuance of a detention order is to prevent the detenu from continuing his prejudicial activities for a period of one year, but not to punish him for something done in the remote past. Further, there would have to be a nexus between the detention order and the alleged offence in respect of which he was to be detained and in absence of a live link between the two, the detention order could not be defended.

³(2007) 2SCC 777.

⁴(2008) 3 SCC 613.

⁵(2011) 5 SCC 244.

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11. The Detaining Authority did not apply its mind before passing the order of detention so as to take the present petitioner to be a dangerous person and that he has become a threat to the public order and on overall consideration of the facts and circumstances it does appear that the Detaining Authority has failed to strike a balance between the Constitutional and the legal obligation charged upon him before passing the detention order and the manner in which the power of detention has been exercised in this case. It does not appear to have been exercised rationally. In fact, the District Magistrate has relied on a list of 20 cases provided by the Superintendent of Police while ordering for detention. However, he has not been taken into consideration that out of the 14 cognizable cases, there are 6 cases which have not yet been charge-sheeted yet including the one in which the SP is apprehensive that the petitioner may receive bail. Moreover, the learned Counsel for the petitioner has contended that out of the 20 cases, there are a few cases where the petitioner has been acquitted, which has not been brought on record by the SP. Further, the District Magistrate has

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failed to establish a proper nexus between alleged offence and order of detention under the grounds of detention.

12. In *Yumman Ongbi Lembi Leima v. State of Manipur and Ors.*⁶, the Hon'ble Supreme Court held that-

“Para 15. ...personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part III thereof. The State has been granted the power to curb such rights under criminal laws as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order.”

13. The Hon'ble Supreme Court in the case of *Huidrom Konungjao Singh Vs. State of Manipur*⁷, held that three cumulative and additive nature of requirements are to be satisfied to pass the order of detention; they are:

⁶(2012) 2 SCC 176

⁷(2012) 7 SCC 181.

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“Para 9.(i) The authority was fully aware of the fact that the detenu was actually in custody;

(ii) There was reliable material before the said authority on the basis of which it could have reason to believe that there was real possibility of his release on bail and being released he would probably indulge in activities, which are prejudicial to public order;

(iii) Necessity to prevent him for which detention order was required.”

In ***Rekha v. State of Tamil Nadu through Secretary to Govt. and Anr.***⁸, where the Supreme Court quashed the order of detention, while dealing with the issue held:

“Para 8. A perusal of the above statement in para 4 of the grounds of detention shows that no details have been given about the alleged similar cases in which bail was allegedly granted by the concerned court. Neither the date of the alleged bail orders has been mentioned therein, nor the bail application number, nor whether the bail orders were passed in respect of the co-accused on the same case, nor whether the bail orders were passed in respect of other co-accused

⁸(2011) 5 SCC 244.

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in cases on the same footing as the case of the accused.”

14. Preventive detention is an exception to the normal procedure and is sanctioned and authorized for very limited purpose under Article 22(3)(b) with good deal of safeguards. The exercise of that power of preventive detention must be with proper circumspection and due care. In a regime of constitutional governance, it requires the understanding between those who exercise power and the people over whom or in respect of whom such power is exercised. The legal obligation in this type of case, need to be discharged with great sense of responsibility even if the satisfaction to be derived is a subjective satisfaction such subjective satisfaction has to be based on objective facts. If the objective facts are missing for the purpose of coming to subjective satisfaction, in absence of objective facts the satisfaction leading to an order without due and proper application of mind will render the order unsustainable. In view of the above legal position, this Court has expected from the detaining authority that subjective satisfaction of the detaining authority should be based on objective facts.

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15. Similarly, in the instant case, the details of the alleged bail application have not been provided in the order of detention, ground of detention or in the application of the Superintendent of Police, Balasore. Further, no details have been given about the alleged similar cases in which bail was allegedly granted by the concerned Court. The only mention regarding bail is in the letter dated 26.12.2019 by the Superintendent of Police, Balasore wherein he had reported that it has come to his knowledge that the petitioner has arranged for his bail. However, this statement is entirely ambiguous and this Court cannot rely on the same. Considering the above submissions, we are of the view that this Court should not allow the petitioner-detenu to be kept in custody on the basis of order of detention which is illegal, bad in law hence amounts to illegal custody of the petitioner detenu.

16. In view of what is discussed hereinabove, this Writ Petition deserves to be allowed and accordingly it is allowed. Consequently, the order of detention approved by the State Government on 20.02.2020 is quashed. However,

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we make it clear that this will not affect the criminal cases pending against the petitioner.

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(S. K. Panigrahi, J.)

Sanju Panda, J. I agree.

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(Sanju Panda, J.)