Dharmendra Singh Vs. the District Magistrate and anr.

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Court : Madhya Pradesh

Decided On : Feb-22-1983

Reported in : 1983CriLJ1196

Judge : G.L. Oza and ;S.K. Seth, JJ.

Appellant : Dharmendra Singh

Respondent : The District Magistrate and anr.

Judgement :

G.L. Oza, J.

1. This is a petition filed by the petitioner against an order of detention passed by respondent 1 and confirmed by respondent 2 against one Sardar Singh alias Brijendra Singh who is the brother of the petitioner.

2. The order of detention was passed on 21-12-1982 Under Section 3(2) of the National Security Act, 1980, The order as well as the grounds of detention were furnished to the detenu in jail at Nagod district Satna. The grounds of detention are also dated 21-12-1982.

3. It is alleged by the petitioner that the detenu was taken in custody Under Section 151, Criminal P.C. on 7-12-1982 by the police of police station, Rampur-Baghelas. He was produced before the Sub-Divisional Magistrate, Raghurajgar, Satna on 9-12-1982 where he was called upon to furnish security and as he did not furnish the security, he has been sent to Nagod jail. It is, therefore, alleged that on the date on which this order of detention was passed, the detenu was already in custody for about 12 days and the District Magistrate while passing this order of detention did not consider this aspect of the matter as there is nothing in the order to indicate that he even knew that the detenu is now in jail. It was also alleged in the petition that the grounds alleging activities against the detenu do not indicate that the detenu was in any manner acting prejudicial to maintenance of public order.

4. It is also alleged that the detenu submitted his representation to the State Government on 25-1-1983.

5. learned Counsel appearing for the petitioner contended that on the date on which this order was passed the detenu was already in custody and the learned District Magistrate did not even consider this circumstance and failure to notice this fact and to consider it itself vitiates the order of detention. The learned Counsel, in support of his contention, placed reliance on the decisions reported in Biru Mahato v. District Magistrate, Dhanbad : 1982CriLJ2354 , Merugu Satyanarayana v. State of Andhra

Pradesh : 1982CriLJ2357 and Devi Lal Mahato v. State of Bihar : 1982CriLJ2363 and it was contended that on this short ground alone this order deserves to be quashed.

6 In the return filed on behalf of the respondents, it is alleged that on the date of the order no doubt, the detenu was in custody but he was in custody as he did not furnish bail and he could have come out any moment after furnishing the security as directed by the Sub-Divisional Magistrate and, therefore, merely on that ground, the order could not be said to be bad. The return, however, does not disclose that before passing the order of detention, the District Magistrate knew about the arrest of the detenu nor it appears that this aspect of the matter was considered by him, although along with the return some proceedings before the Sub-Divisional Magistrate Under Sections 107 and 116 have been filed in which it appears that an order was passed by the Sub-Divisional Magistrate on 9-12-1982 calling upon the detenu to furnish two securities of Rs. 10,000/- each Under Section 116(3), Cr. P.C. and as he did not furnish the security, he has been sent to jail.

7. It is also interesting that even in a petition under habeas corpus where it is alleged that the District Magistrate did not apply his mind to the fact that the detenu was already in jail when the order was passed, still the affidavit of the District Magistrate is not filed but the affidavit of some one who was appointed as offlcer-in-charge has been filed and even this affiadivit does not state that the District Magistrate considered this aspect of the matter that on the date he was passing the order of detention, the detenu was already in jail and proceedings Under Sections 107 and 116(3) were also pending and an interim order Under Section 116(3) has already been passed against him and on failure to furnish security, he has already been sent to jail.

8. Learned Deputy Advocate General appearing for the respondents contended that his being in jail as he was not able to furnish bail is not a matter on which the order passed by the District Magis-strate could be quashed as the order for furnishing security had already been passed and he could come out any moment after furnishing the security. Whereas the learned Counsel for the petitioner contended that the proceedings under Sections 107 and 116 Cr. P.C. is also a preventive action and the order under Clause (3) of Section 116 itself contemplates that the detenu is being bound down for maintenance of peace and not acting in a manner prejudicial to public tranquillity and, therefore, when there is already an order under Section 116(9) and in pursuance of that order, the detenu is already in custody even before the order of detention is passed, it was contended that the order of the District Magistrate must disclose that this aspect of the matter was before the District Magistrate.

9. It is not in dispute that the order passed by the District Magistrate detaining the detenu does not indicate that the District Magistrate applied his mind to the fact that this detenu was already in jail and further that he was in jail in pursuance of an order Under Section 116(3) for failure of furnishing the bond. It is also not in dispute that there is no affidavit of the District Magistrate slating the fact that before passing of this order, he knew about this fact and he did consider this aspect of the matter. What has been stated in the return appears to be only an argument that as the detenu was in jail for his failure to furnish bail, he could have been released on any moment after furnishing the security and, therefore, on this ground the order could not be challenged. But it is not even clearly stated in the return that this aspect of the matter was before the District Magistrate before he passed the order of detention.

10. In Devi Lal Mahato v. State of Bihar AIR 1982 SC 1549: 1982 Cri LJ 2363 their Lordships considered this aspect of the matter and observed:

5. Undoubtedly, for a period of one month and 18 days the detenu was in jail, his bail application having been rejected nearly 25 days before the date of the impugned detention order. It is difficult to appreciate how the District Magistrate was subjectively satisfied that a detention order in respect of the detenu was necessary with a view to preventing him from acting in a manner prejudicial to the maintenance of public order. This aspect we have most meticulously examined in four decisions of this Court, and therefore, we need not examine the same again. As early as in Rameshwar Shaw v. District Magistrate, Burdwan : 1964CriLJ257 and as late as Vijay Kumar v. State of J. & K. : [1982]3SCR522 , the two recent most decisions in Biru Mahato v. District Magistrate, Dhanbad : 1982CriLJ2354 and M. Satyanarayana v. State of Andhra Pradesh : 1982CriLJ2357 it has been held that one can envisage a hypothetical case in which a preventive detention order may have to be made against a person already deprived of his personal liberty by being confined or detained in jail but in such a situation the detaining authority must show awareness of this fact that the person against whom the detention order is proposed to be made is already in jail and is incapable of acting in a manner prejudicial to the maintenance of public order and yet for the reasons which may appeal to the District Magistrate on which his subjective satisfaction is grounded a preventive detention order is required to be made. It is further held that this awareness must appear either in the order or in the affidavit justifying the impugned detention order when challenged. Neither in the order nor in the affidavit we find even a whimper of this aspect being present to the mind of the detaining authority while making the detention order. Therefore, it clearly discloses non-application of mind and following the aforementioned decisions it must be held that the order of preventive detention having been mechanically made and suffering from the vice of non-application of mind is vitiated.

It is clear that the order of the District Magistrate must show the awareness of this fact that the person against whom the order of detention is being passed is already in jail. Similar is the view expressed by their Lordships in Biru Mahato and Merugy Satyanarayana's cases (supra).

11. In the present case, an attempt was made on behalf of the respondent to contend that the detenu was in jail only because he was not in a position to furnish surety bonds as directed by the Sub-Divisional Magistrate. But he could have been released on his furnishing the bond at any moment. But it appears that after the detenu was arrested under Section 151, Cr. P.C. proceedings Under Sections 107 and 116 were launched against the detenu and in these proceedings, an interlocutory order has already been passed This interlocutory order is passed under Clause (3) of Section 116, Cr. P.C. Section 116(3) reads:

116 (3). After the commencement, and before the completion, of the inquiry under Sub-section (1) the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under Section 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded: Provided that

(a) no person against whom proceedings are not being taken under Section 108, Section 109, or Section 110 shall be directed to execute a bond for maintaining good behaviour;

(b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under Section 111.' This provision provides for a preventive action and if the Magistrate is satisfied then he can direct the person concerned for the prevention of a breach of the peace or disturbance of the public tranquillity to furnish a bond with or without sureties for keeping the peace or maintaining good beheviour.

12. This therefore, clearly indicates that when an order under Clause (3) of Section 116 is passed against a person, a preventive order for maintenance of public tranquillity is already in existence and in spite of this and in spite of the fact that the detenu did not furnish security and has been sent to jail, is a matter which ought to have been considered by the learned District Magistrate before passing an order of detention under Section 3(2), National Security Act. The copy of the proceeding before the Sub-Divisional Magistrate which has been filed although does not show that the order passed Under Section 116(3) has been clearly worked as required under Clause (3) but the order does refer to Clause (3) of Section 116 and as the District Magistrate did not apply his mind to these facts, the order of detention passed against the detenu could not be justified.

13. The petition is, therefore, allowed. The order passed by the District Magistrate, dated 21-12-1982 detaining the detenu is hereby quashed. He shall be released forthwith, if not wanted in connection with any other case.