

AFR**Court No. - 42****Case :-** HABEAS CORPUS WRIT PETITION No. - 562 of 2019**Petitioner :-** Aashif**Respondent :-** State Of U.P. And 4 Others**Counsel for Petitioner :-** Sunil Singh, Chandrakesh Mishra**Counsel for Respondent :-** G.A., A.S.G.I., Annapurna Singh,
Kuldeep Singh Chauhan, R.P.S. Chauhan

and

Case :- HABEAS CORPUS WRIT PETITION No. - 564 of 2019**Petitioner :-** Adil**Respondent :-** State Of U.P. And 4 Others**Counsel for Petitioner :-** Sunil Singh, Chandrakesh Mishra**Counsel for Respondent :-** G.A., Annapurna Singh**Hon'ble Manoj Misra,J.****Hon'ble Mrs. Manju Rani Chauhan,J.**

These two habeas corpus petitions have been filed by uncle (Aashif) and nephew (Adil) questioning their detention under the provisions of the National Security Act (for short the Act, 1980) under separate detention orders dated 16th April, 2019, passed by the District Magistrate, Ghaziabad in exercise of powers under Section 3(2) read with Section 3(3) of the Act, 1980.

As the impugned orders seeking detention of the petitioners are based on identical grounds and the arguments advanced by learned counsel for the parties are same in both the petitions, with the consent of learned counsel for the parties, these petitions are being decided by a common judgment and order.

We have heard Sri Daya Shanker Mishra, learned senior counsel, assisted by Sri Sunil Singh and Sri Chandrakesh Mishra, for both the petitioners; Sri Deepak Mishra, learned A.G.A. for the State as well as the other State-Officers including

the detaining authority in both the petitions; Sri G.P. Singh holding brief of Sri R.P.S. Chauhan for the Union of India in Habeas Corpus Petition No. 262 of 2019; and Ms. Annapurna Singh for the Union of India in Habeas Corpus Petition No. 564 of 2019; and have perused the record.

The impugned detention orders dated 16th April, 2019 would reveal that the District Magistrate, Ghaziabad (the Detaining Authority) has passed the order of detention by taking notice of an incident dated 25.05.2019 relating to a clash between two group of persons, namely, the petitioners along with seven named associates and others on the one side and Ata Ilahi and his seven named associates on the other side, at Rawali Surana Main Road near Bilal Masjid, which had breached public order. The order of detention was passed to prevent repeat of such activity so as to ensure maintenance of public order and essential services as well as civil supplies.

A perusal of the grounds of detention would show that on 25.3.2019 the police received an information that at Rawali Surana main road, near Bilal Masjid, two group of persons were indulging in exchange of fire and brickbats to establish their authority and hold over the area thereby causing utter confusion and panic in that area. Upon receipt of that information, the police reached the spot. The perpetrators, upon seeing the police, dispersed and escaped. From the spot few cartridge empties were recovered. Upon enquiry from persons found there, information was gathered regarding involvement of the petitioners and others in the incident. FIR was lodged naming 20 persons including the petitioners, though five or six others were left unnamed. FIR was registered as Case Crime No. 262 of 2019 at P.S. Muradnagar, District Ghaziabad, under Sections 147, 148, 149, 307, 341, 336, 504, 188 I.P.C. and

section 7 Criminal Law Amendment Act, 1934. It was alleged that by the said activity of the petitioners, despite prohibitory orders issued under section 144 CrPC in view of impending Lok Sabha elections, there had been a breach of public order including disruption in movement of vehicles as well as civil supplies. The grounds of detention drew support not only from the police reports but also newspaper reports dated 26.03.2019 published in Hindustan; Dainik Jagran; and Amar Ujala. The news daily Hindustan reported that in the middle of the road for half-an-hour there was exchange of brickbats and fire between two groups. The news daily Dainik Jagran reported that at Muradnagar there had been indiscriminate firing. News daily Amar Ujala reported that there was exchange of fire and brickbats between two groups on account of money dispute.

After narrating the incident as above, in paragraph 8 of the grounds of detention, on the one hand it was stated that the petitioner and his family members are habitual criminals whereas, on the other hand, it was stated that no other case is reported against them. Though it was added that no one dares to lodge a complaint against them. The criminal history of Aas Mohd., who is brother of Aashif and Uncle of Adil, comprising 42 cases relating to abduction; murder; attempt to murder; Goonda Act; Arms Act; Gangster Act; and Extortion, was cited.

After completing the narrative, as above, by showing awareness that the petitioner(s) is/are in jail in connection with case crime no. 262 of 2019 (supra) and are striving for bail, it was observed that as there is likelihood of they being released on bail and indulge in activity that would disturb public order, with a view to prevent them from acting in a manner that might be prejudicial to the public order, it was necessary to detain them under the Act, 1980.

The grounds of detention were accompanied by reports of the Deputy Inspector General of Police, Ghaziabad/ Senior Superintendent of Police, Ghaziabad; Superintendent of Police, Rural, Ghaziabad; Circle Officer, Sadar, Ghaziabad; and Prabhari Nirikshak, P.S. Muradnagar, Ghaziabad as also photocopies of the Act, 1980 and Article 22 of the Constitution of India.

The report of the Superintendent of Police, Rural, Ghaziabad disclosed that the petitioners had filed CrI. Misc. Writ Petition No. 8099 of 2019 for pre-arrest protection which stood disposed off on 01.04.2019 by giving protection to the petitioners for a specified period with liberty to move for bail within that period. It was also reported that pursuant to the order dated 01.04.2019 the petitioners had surrendered on 10.04.2019 in the Court of Additional Chief Judicial Magistrate, VIth and had applied for bail which was rejected but, on the same day, bail application was moved in the Court of District & Sessions Judge, which was pending. The report also indicated that the Additional District & Sessions Judge-II, Ghaziabad, after hearing both sides on the bail prayer, had rejected the prayer for interim bail but had fixed 16.04.2019 for consideration of prayer for regular bail. With that background, it was reported that there was real possibility of the petitioners being released on bail.

The order of detention dated 16.04.2019 was approved by the State Government, under Section 3(4) of the Act, 1980, and, thereafter, upon receipt of positive report from the Advisory Board, by order dated 24.05.2019, the same was confirmed and detention was directed, provisionally, for a period of three months. This detention period has been extended up to six months, starting from the date of initial detention, vide order

dated 12.07.2019.

Learned counsel for the petitioner has urged that the detention order passed against the petitioners is discriminatory. It has been submitted that the incident which forms the basis of the detention order is in respect of exchange of fire and brickbats between two group of persons in which no person received injury of any kind. Moreover, as per allegations in the FIR, the moment the police force arrived, the accused persons dispersed without offering any resistance to the police. The police, thereafter, named as many as 20 persons, including the petitioners, and left 5-6 other accused unnamed. But, except the two petitioners, detention order was not imposed against anyone else which suggests that the petitioners have been maliciously picked up for depriving them of their liberty.

In paragraph 7 of both the writ petitions, it has been stated that brother of the petitioner (Aashif), namely, Sri Vahab Chaudhari, who is uncle of the other petitioner (Adil), is MLA from Bahujan Samajwadi Party. It is stated that for Lok Sabha Elections 2019, the voting at Ghaziabad was in the first phase and, therefore, prohibitory order, under Section 144 Cr.P.C, was in existence. The petitioners along with family members were campaigning in support of the Mahagathbandhan (opposition) candidate, that is against the ruling party. The alleged incident was shown with a view to implicate the petitioners so as to exert pressure upon them.

It has been urged that if the incident had the potentiality to disturb the public order then all the persons named ought to have been detained. But the detention order is only against the petitioners, which is clearly reflective of misuse and abuse of executive power.

It has also been submitted that even assuming that the

incident narrated had the potentiality to disturb the public order, detention could be justified only if there was any material to show or suggest that upon being released on bail, the petitioners would have repeated such activity that would be prejudicial to the maintenance of the public order. It has been submitted that the petitioners admittedly had no previous criminal history and the extraneous material relating to the criminal history of Aas Mohd, the brother of Aashif (petitioner of H.C. Petition No. 562 of 2019) and uncle of Adil (petitioner of H.C. Petition No. 564 of 2019), is completely irrelevant so as to infer that the petitioners would indulge in repeat of the act if let out.

It was urged that the incident, as reported in the first information report, did not disclose any organized activity from which it could be inferred that there was likelihood of the petitioners repeating such activity.

In addition to above, it has been submitted that as the first information report discloses that the moment the police arrived on the spot the accused persons escaped, without offering any resistance to the police, the incident did not have the potentiality to disturb the public order and was a mere breach of law and order. It has been urged that the statement that doors were shut and shutters of shops were downed is only to add color to the case for detaining the petitioner.

In addition to above, various other submissions were made by learned counsel for the petitioners, which are being noticed, in brief, below:-

- (i) That before extension of the period of detention, which was initially for a period of three months only, a report was obtained from the District Magistrate but copy of that report was not supplied to the petitioners

to enable them to effectively represent against the order extending the period of detention.

(ii) That the sponsoring authority though furnished the criminal history of Aas Mohd, the brother of petitioner (Aashif) and uncle of petitioner (Adil), but the criminal history was incomplete as it did not provide complete information regarding the current status of those cases and, otherwise also, papers relating to those cases were not provided, which has affected the right of the petitioners to make an effective representation against the order of extension of detention.

(iii) That the Sponsoring Authority in his report though disclosed about filing of CrI. Misc. Writ Petition No. 8099 of 2019 but copy of that writ petition was not supplied to the detaining authority and its copy was also not provided to the petitioners even though the same was a relevant document inasmuch as it contained the defence of the petitioners.

Per contra, the learned A.G.A. submitted that the grounds of detention reflect that the detention order was passed upon consideration of the activity of the petitioners with reference to the incident dated 25.03.2019 which had clearly disturbed public order inasmuch as parties had exchanged brickbats as well as fire on a busy street near Bilal Masjid. Hence, as the detention order was passed after showing awareness that the petitioners were in jail and striving for bail and on being released on bail they would indulge in similar activity which had the potentiality to disturb the public order, the satisfaction of the detaining authority, having been arrived at on the basis of relevant material, cannot be questioned and, therefore, no case for interference is made out. It has also been

urged that the satisfaction of the detaining authority cannot be questioned on the ground that no detention order has been passed against co-accused. It was also urged that the copy of the Crl. Misc. Writ Petition No. 8099 of 2019 was not relevant as it sought quashing of the FIR which prayer was not accepted by the writ court. Otherwise, copy of the order passed therein was supplied by the sponsoring authority to the detaining authority.

Learned A.G.A. also urged that mere mentioning of criminal history of relative of the detenu would not vitiate the detention order on the ground that extraneous material had been taken into consideration because the detention order can be sustained on a solitary ground in view of Section 5-A of the Act, 1980.

It was also submitted that once the Advisory Board opines that the grounds of detention are sufficient and germane to detain a person under the Act, 1980, the period for which the detenu is to be detained is in the exclusive domain of the State Government and, therefore, if, for taking decision, to review the period of detention, the State Government considered report of detaining authority, which is confidential in nature, such report need not be supplied to the detenu. It has been submitted that Article 22 (5) of the Constitution of India provides for supply of grounds of detention to afford earliest opportunity to the detenu to make a representation. The material relating to the period for which a detenu is to be detained would not fall within the meaning of the phrase “the grounds of detention”, therefore such material need not be supplied/shown to the detenu. It has thus been argued that neither the detention order suffers from any infirmity nor the continued detention has been rendered illegal, hence the petition is liable to be dismissed.

We have considered the rival submissions and have carefully perused the record.

Although several submissions have been noticed by us but since we propose to allow both the petitions on ground hereinafter stated, we do not propose to deal with the merits of the other submissions raised.

Before we deal with the ground on which we propose to allow the petition, it would be useful for us to notice the legal position as to when an order of preventive detention can lawfully be passed on a solitary act of the detenu. In this regard, it would be useful for us to notice the decision of nine-judges Bench of the Apex Court in ***Attorney General For India vs Amratlal Prajivandas and others reported in 1994 (5) SCC 54***. In paragraph 48 of the judgment, as reported, the apex court has held as follows:-

“48. Now, it is beyond dispute that an order of detention can be based upon one single ground. Several decisions of this Court have held that even one prejudicial act can be treated as sufficient for forming the requisite satisfaction for detaining the person. In Debu Mahato v. State of W.B. it was observed that while ordinarily-speaking one act may not be sufficient to form the requisite satisfaction, there is no such invariable rule and that in a given case one act may suffice. That was a case of wagon-breaking and having regard to the nature of the Act, it was held that one act is sufficient. The same principle was reiterated in Anil Dey v. State of W. B. It was a case of theft of railway signal material. Here too one act was held to be sufficient. Similarly, in Israil SK v. District Magistrate of West Dinajpur. and Dharua Kanu v. State of W.B. single act of theft of telegraph copper wires in huge quantity and removal of railway fish-plates respectively was held sufficient to sustain the order of detention. In Saraswati Seshagiri v. State of

Kerala , a case arising under COFEPOSA, a single act, viz., attempt to export a huge amount of Indian currency was held sufficient. In short, the principle appears to be this: Though ordinarily one act may not be held sufficient to sustain an order of detention, one act may sustain an order of detention if the act is of such a nature as to indicate that it is an organised act or a manifestation of organised activity. The gravity and nature of the act is also relevant. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in similar prejudicial activity. That is the reason why single acts of wagon- breaking, theft of signal material, theft of telegraph copper wires in huge quantity and removal of railway fish-plates were held sufficient. Similarly, where the person tried to export huge amount of Indian currency to a foreign country in a planned and premeditated manner, it was held that such single act warrants an inference that he will repeat his activity in future and, therefore, his detention is necessary to prevent him from indulging in such prejudicial activity. If one looks at the acts the COFEPOSA is designed to prevent, they are all either acts of smuggling or of foreign exchange manipulation. These acts are indulged in by persons, who act in concert with other persons and quite often such activity has international ramifications. These acts are preceded by a good amount of planning and organisation. They are not like ordinary law and order crimes. If, however, in any given case a single act is found to be not sufficient to sustain the order of detention that may well be quashed but it cannot be stated as a principle that one single act cannot constitute the basis for detention. On the contrary, it does. In other words, it is not necessary that there should be multiplicity of grounds for making or sustaining an order of detention.”

(Emphasis Supplied)

In ***Surya Prakash Sharma v. State of U.P and others : 1994 (Supp.) (3) SCC 195***, the petitioner was already in jail in connection with a murder case. The petitioner had no criminal history though there was a solitary case of broad day light murder registered against him. The argument raised before the apex court was that on the basis of that solitary case against the detenu, there could be no apprehension in the mind of the detaining authority that the detenu on being released would indulge in any such activity that would be prejudicial to the maintenance of public order. The apex court found that there was no cogent material placed before the court or before the detaining authority to enable an inference that the detenu on being released on bail would indulge in such offence that would be a threat to public order. The apex court, accordingly, quashed the order of detention and, while doing so, in paragraphs 5 and 6, as reported, observed as follows:

“5. The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in custody has had been engaging the attention of this Court since it first came up for consideration before a Constitution Bench in Rameshwar Shaw v. District Magistrate, Burdwan, [1964] 4 SCR 921. To eschew prolixity we refrain from detailing all those cases except that of Dharmendra Suganchand Chelawat v. Union of India, AIR (1990) SC 1196 wherein a three Judge Bench, after considering all the earlier relevant decisions including Rameshwar Shaw (supra) answered the question in the following words:

“The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of

detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention: and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implied that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

6. When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be sustained. Though the grounds of detention indicate the detaining authority's awareness of the fact that the detenu was in judicial custody at the time of making the order of detention, the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support of the averment: made in grounds of detention that if the aforesaid Surya Prakash Sharma is released on bail 'he may again indulge in serious offences causing threat to public order', (emphasis supplied), To put it differently, the satisfaction of the detaining authority that the detenu might indulge in serious offences causing threat to public order, solely on the basis of a solitary murder, cannot be said to be proper and justified."

In *Yogendra Murari v. State of U.P. and others* : (1988)

4 SCC 559, the apex court had the occasion to deal with a submission whether the detention order could be considered discriminatory on the ground of non-detention of co-accused in the same incident. Rejecting the claim of discrimination, raised on behalf of the petitioner, in paragraph 9 of the judgment, the apex court observed as follows:-

“9. There is no merit whatsoever in the petitioners grievance of discrimination on the ground that the other co-accused persons have not been detained. The role of the petitioner and that of the others are not identical and the reasonable apprehension as to their future conduct must depend on the relevant facts, and circumstances which differ from individual to individual. It would have been wrong on the part of the detaining authority to take a uniform decision in this regard only on the ground that the persons concerned are all joined together as accused in a criminal case.”

From the decisions noticed above, what is clear is that though ordinarily a solitary act may not be sufficient to sustain an order of preventive detention but where that act is of such a nature that it is reflective of, or has manifestation of, an organized criminal activity, or is so grave that it reflects the propensity of that person to repeat such an act, then even a solitary act could well be made basis for passing an order of preventive detention.

In the instant case, the incident which forms the basis of the detention order by no stretch of imagination can be taken as an incident of an organized crime. The incident appears to be a clash between two group of persons. The clash is not shown to be communal in nature. Though brickbats and fire is said to have been exchanged but no injury is shown to have been sustained by any one. In fact, a specific stand has been taken by the petitioners that not a single person had sustained injury

and no private person has made any complaint. Admittedly, the first information report was lodged by the police and a bare perusal of the first information report would indicate that as soon as the police arrived and challenged the persons, who were exchanging brickbats, all of them escaped without defying or challenging the authority of the police or even attempting to throw a single brick at the police. Under the circumstances, drawing an inference only against two participants, out of 25 odd persons who participated in that incident, that they were likely to repeat their act and be a threat to maintenance of public order, in our view, could not have been drawn merely on the basis of gravity of that incident/ act. Rather, it appears to us that it has been drawn on the basis of extraneous material that is the criminal history of Aas Mohd., a relative of the petitioners. Had the gravity of the incident been the reason to impose the order of detention not only the petitioners but other participants also would have been subjected to detention. Whereas, here, admittedly, the detention order has been passed only against the petitioners, which clearly reflects that the detention order has been passed on the basis of some other material which appears to be the criminal history of the relative of the petitioners.

Interestingly, in the grounds of detention as well as the report of the sponsoring authority, it is mentioned that there is not a single case registered against the petitioner except the one in respect of the incident dated 25.3.2018, yet, in paragraph 8 of the grounds of detention it is stated that the detenu and the members of his family are habitual criminals. In support of that statement criminal history of 42 cases of Aas Mohd., starting from the year 1995 and spread across two decades and a half, without any supporting documents in

respect thereto, has been cited.

In **Khudiram Das v. State of W.B., (1975) 2 SCC 81**, a constitutional bench of the apex court while examining the scope of judicial review of the court against a preventive detention order, in paragraph 9 of its judgment, as reported, had observed as follows:

“9. But that does not mean that the subjective satisfaction of the detaining authority is wholly immune from judicial reviewability. The courts have by judicial decisions carved out an area, limited though it be, within which the validity of the subjective satisfaction can yet be subjected to judicial scrutiny. The basic postulate on which the courts have proceeded is that the subjective satisfaction being a condition precedent for the exercise of the power conferred on the Executive, the Court can always examine whether the requisite satisfaction is arrived at by the authority : if it is not, the condition precedent to the exercise of the power would not be fulfilled and the exercise of the power would be bad. There are several grounds evolved by judicial decisions for saying that no subjective satisfaction is arrived at by the authority as required under the statute. The simplest case is whether the authority has not applied its mind at all; in such a case the authority could not possibly be satisfied as regards the fact in respect of which it is required to be satisfied. Then there may be a case where the power is exercised dishonestly or for an improper purpose : such a case would also negative the existence of satisfaction on the part of the authority. The existence of “improper purpose”, that is, a purpose not contemplated by the statute, has been recognised as an independent ground of control in several decided cases. The satisfaction, moreover, must be a satisfaction of the authority itself, and therefore, if, in exercising the power, the authority has acted under the dictation of another body.....the exercise of the power would be bad and so also would the exercise of the power be vitiated where the authority has disabled itself from applying its mind to the facts of each individual case by self-created rules of policy or in any other

manner. The satisfaction said to have been arrived at by the authority would also be bad where it is based on the application of a wrong test or the misconstruction of a statute. Where this happens, the satisfaction of the authority would not be in respect of the thing in regard to which it is required to be satisfied. Then again the satisfaction must be grounded "on materials which are of rationally probative value". The grounds on which the satisfaction is based must be such as a rational human being can consider connected with the fact in respect of which the satisfaction is to be reached. They must be relevant to the subject-matter of the inquiry and must not be extraneous to the scope and purpose of the statute. If the authority has taken into account, it may even be with the best of intention, as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power or the manner or extent to which it should be exercised, the exercise of the power would be bad."

(Emphasis Supplied)

The practice of submitting reports to the detaining authority touching the character of the detenu, without supporting material, has been deprecated by the apex court, and in ***Vashisht Narain Karwaria v. State of U.P., (1990) 2 SCC 629***, the detention was held bad for consideration of such extraneous material.

In a recent decision of the apex court in ***Sama Aruna v. State of Telangana and another : (2018) 12 SCC 150***, the apex court upon finding that the detention order was based on stale grounds, while setting aside the order of detention, made certain observations, in paragraph 17 of the judgment, as reported, which are relevant and are accordingly extracted below:-

"The detention order must be based on a reasonable prognosis of the future behavior of a person based on his past conduct in light of the

surrounding circumstances.”

Thereafter, in paragraph 26 of the said judgment, the apex court further observed as follows:-

“The influence of the stale incidents in the detention order is too pernicious to be ignored, and the order must therefore go; both on account of being vitiated due to malice in law and for taking into account matters which ought not to have been taken into account.”

At this stage, we may revert to the averments made in paragraph 7 of the petition wherein it has been stated that the other brother of the petitioner, namely, Vahab Chaudhary was an MLA from Bahujan Samaj Party and the petitioners were supporting the political party other than the ruling party. The District Magistrate though in his counter-affidavit has stated that the sub-Inspector has not lodged the FIR under political pressure but the fact that the brother of the petitioner was MLA and that they were supporting the other party has not been denied.

When we take a conspectus of the facts and circumstances of the case, we are of the view that except for the criminal history of Aas Mohd., the brother of the petitioner (Aashif) and uncle of the petitioner (Adil), there is no material, cogent enough, to enable a logical inference, on the basis of a solitary incident, that on being released on bail, the petitioners would indulge in activity prejudicial to the maintenance of the public order or supplies and services essential to the community. The incident dated 25.03.2019 is not reflective of organized criminal activity and, admittedly, was not an incident where any person died or got seriously injured. Thus, in our

view, the incident was not such from which any inference could be drawn about the propensity of the petitioners to repeat, or indulge in, such activities. For the reasons stated above as also keeping in mind that no co-accused similarly situated have been preventively detained, we are of the considered view that the order of detention has been passed by being influenced with the criminal antecedents of petitioners' relative, which, in our view was extraneous and not a relevant consideration, particularly, in absence of further details as to how the petitioners were linked with him in his criminal activity. We are therefore of the considered view that on the basis of the solitary incident dated 25.3.2019 the detention order against the petitioners is not sustainable and as such the impugned detention orders are liable to be quashed.

Consequently, both the habeas corpus petitions are **allowed**. The detention orders dated 16th April, 2019, passed by the District Magistrate, Ghaziabad in respect of Aashif (petitioner in Habeas Corpus Petition No. 562 of 2019) and Adil (petitioner in Habeas Corpus Petition No. 564 of 2019) are hereby quashed. Both the petitioners shall be set at liberty forthwith unless wanted in any other case. There is no order as to costs.

Order Date :- 17.9.2019
Sunil Kr Tiwari