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Delivered on 26.11.2021
AFR

Court No. - 39

Case :- HABEAS CORPUS WRIT PETITION No. - 782 of 2020

Petitioner :- Munvwar @ Razai @ Munvwar Ali And Another

Respondent :- Union Of India And 4 Others

Counsel for Petitioner :- Ajay Srivastava, Sadaful Islam Jafri, Shiv Bahadur Singh

Counsel for Respondent :- A.S.G.I., G.A., Kuldeep Singh Chauhan

Alongwith

(1) Case :- HABEAS CORPUS WRIT PETITION No. - 785 of 2020

Petitioner :- Shakil Ahmad And Another

Respondent :- Union Of India And 4 Others

Counsel for Petitioner :- Ajay Srivastava, Sadaful Islam Jafri, Shiv Bahadur Singh

Counsel for Respondent :- A.S.G.I., Deepmala Srivastava, G.A., K.S. Chauhan

(2) Case :- HABEAS CORPUS WRIT PETITION No. - 786 of 2020

Petitioner :- Mohd Rizawan And Another

Respondent :- Union Of India And 4 Others

Counsel for Petitioner :- Ajay Srivastava, Sadaful Islam Jafri, Shiv Bahadur Singh

Counsel for Respondent :- A.S.G.I., Deepmala Srivastava, G.A.

(3) Case :- HABEAS CORPUS WRIT PETITION No. - 787 of 2020

Petitioner :- Eklakh Ahmad And Another

Respondent :- Union Of India And 4 Others

Counsel for Petitioner :- Ajay Srivastava, Sadaful Islam Jafri, Shiv Bahadur Singh

Counsel for Respondent :- A.S.G.I., G.A., Kuldeep Singh Chauhan, Sanjay Kumar Yadav, Shashi Dhar Sahai

(4) Case :- HABEAS CORPUS WRIT PETITION No. - 817 of 2020

Petitioner :- Abdul Gani And Another

Respondent :- Union Of India And 4 Others

Counsel for Petitioner :- Ajay Srivastava, Sadaful Islam Jafri, Shiv Bahadur Singh

Counsel for Respondent :- G.A., A.S.G.I., Kuldeep Singh Chauhan

(5) Case :- HABEAS CORPUS WRIT PETITION No. - 40 of 2021

Petitioner :- Shaharyar

Respondent :- Union Of India And 3 Others

Counsel for Petitioner :- Sadaful Islam Jafri, Nazrul Islam Jafri (Senior Adv.), Sharique Ahmed

Counsel for Respondent :- A.S.G.I., G.A., Prem Narayan Rai

Hon'ble Mrs. Sunita Agarwal, J.

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

1. Since the issues raised in all the connected Habeas Corpus petitions are one and the same and hence they have been heard together and are

being decided by this common judgment.

Heard Sri Nazrul Islam Jafri learned Senior Advocate assisted by Sri Sharique Ahmed, Sri Ali Zamal Khan and Sri Sadaful Islam Jafri learned Advocates for the petitioners, Ms. Nand Prabha Shukla learned A.G.A. for the State-respondents and Sri Shashi Dhar Sahai learned Standing Counsel for the Union of India.

2. The petitioners herein have been detained under Section 3(2) of the National Security Act, 1980 (herein after referred to as “NSA”).

The prayer in the writ petitions is to quash the order dated 3.9.2020 passed by the District Magistrate, Mau invoking powers under Section 3(2) of the NSA as also the order dated 23.10.2020 passed by the State Government extending the period of detention for three months under Section 12(1) of the NSA.

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

3. In an incident occurred on 16.12.2019 at about 6:30 PM, a first information report was lodged against 85 named persons and 600 unnamed on 17.12.2019, by the informant namely S.H.O. Nihar Nandan Kumar at the Police Station Dakshin Tola, District Mau. The report of the sponsoring authority namely S.H.O., Police Station Dakshin Tola, District Mau addressed to the Superintendent of Police, District Mau was submitted on 27/28.8.2020. Pursuant thereto, by the letter dated 31.8.2020, the Superintendent of Police, District Mau had requested the District Magistrate, Mau to detain the petitioners by invoking powers under Section 3(2) of the NSA. On 3.9.2020, separate orders for detention of the petitioners were passed by the District Magistrate, Mau recording his satisfaction that the detention of the petitioner(s) was necessary in order to prevent them from acting in any manner prejudicial to the maintenance of the public order. At the time of the passing of the detention order, the petitioners herein were already in custody in the

District Jail, Mau.

4. The grounds of detention were communicated to the petitioners on 3.9.2020 itself. On 14.9.2020, the petitioners made representations (separately) for presentation of the same before the State Advisory Board. The said representations were forwarded by the Superintendent, District Jail, Mau to the office of the District Magistrate, Mau on 15.9.2020. The District Magistrate, Mau had sent the representations of the petitioners to the State Government on 24.9.2020. On 11.9.2020, the detention orders passed by the District Magistrate, Mau were approved by the State Government exercising powers under Section 3(4) of the National Security Act.

Soon after the receipt of the representations, the District Magistrate had rejected them on the ground that the detention orders were already approved by the State Government before the representations were received in his office. On 6.10.2020, the representations of the petitioners were rejected by the State Government and the orders were communicated on 7.10.2020. On 13.10.2020, the petitioners were produced before the State Advisory Board through Video Conferencing. The State Advisory Board had submitted its report on 19.10.2020 in accordance with Section 11(1) of the NSA through the Registrar, State Advisory Board. On the basis of the said report, the State Government had confirmed the order of detention under Section 12(1) of the National Security Act on 23.10.2020 and extended the period of detention for further three months.

In the meantime, the Union of India had also rejected the representations of the petitioners and information was given to the petitioners by wireless messages. On 24.11.2020 and 24.2.2021 and lastly on 31.5.2021, the detention orders were extended for three months (each time), making total period of detention being 12 months from 3.9.2020, the date of detention.

5. In the counter affidavit filed on behalf of the State/respondent no. 2,

it is stated that the copy of the representations of the petitioners alongwith parawise comments were received in the concerned section of the department of the State Government on 28.9.2020 alongwith the letter of the District Magistrate, Mau dated 24.9.2020. The State Government, thereafter, sent the representations and parawise comments thereon to the Central Government, New Delhi and to the Advisory Board (Detentions) vide separate letters dated 28.9.2020.

6. The argument of learned Senior Advocate appearing for the petitioners are two folds:- firstly the delay of nine days caused by the District Magistrate in forwarding the representations of the petitioners to the State Government has not been explained and secondly that the satisfaction recorded by the District Magistrate, the detaining authority was not based on any cogent material. It is contended that as per Section 10 of the NSA, the grounds of detention in every case where the detention order has been made under the Act as also the representations, made by the affected person alongwith the report of the officer concerned under Section 3(3) and (4), have to be placed before the State Advisory Board with three weeks from the date of detention of the said person. As per own admission of the State/respondent no. 2, the representations moved by the petitioners on 14.9.2020 were sent to the State Advisory Board on 28.9.2020. The period of three weeks from the date of detention order (3.9.2020) had expired on 24.9.2020. The delay in sending the representations of the petitioners to the State Advisory Board had occurred at the ends of the detaining authority, i.e. the District Magistrate who admittedly had forwarded the representations only on 24.9.2020, the date when the period of three weeks prescribed under Section 10 of the Act was expiring. No explanation is forthcoming as to why the delay of nine days had occurred in forwarding the representations to the State Government. As per the requirement of the Act, the representations submitted by the detenues were to be forwarded to the State Government in such a manner that the entire report submitted by the District

Magistrate under sub-sections (3) and (4) of Section 3 of the NSA alongwith the representations of the detenu, if made, are placed before the State Advisory Board by the State Government within the prescribed period under Section 10 of the Act. The unexplained delay at the ends of the District Magistrate has resulted in placing the matter before the State Advisory Board beyond the period of three weeks.

The contention is that the failure on the part of the detaining authority to strictly comply with the provisions of the National Security Act (NSA) has rendered the detention of the petitioners illegal. However, during the pendency of the present petition, the total period of detention (of twelve months) has expired and hence no effective relief can be granted to the petitioners herein. However, as the right of the petitioners guaranteed under Article 22(5) of the Constitution of India has been seriously infringed for the action of the detaining authority, the detention order dated 3.9.2020 is liable to be quashed noticing that the detaining authority has acted in an irresponsible and negligent manner.

7. Reliance is placed on the decisions of the Apex Court in **Rajammal vs. State of Tamil Nadu**¹, **Devendra Kumar Goel alias Babua vs. State of U.P.**², **Surya Prakash Sharma vs. State of U.P. and others**³, **Pebam Ningol Mikoi Devi and State of Manipur and others**⁴ and of this Court in **Afsar vs. State of U.P. and 4 others**⁵ and **Aftab Alam alias Noor Alam alias Hitler vs. Union of India**⁶ on various points dealing with the validity of the detention order. The detail discussion with regard to the decisions placed by the learned Senior Counsel for the petitioners would be made at the appropriate stage in the judgment.

8. Ms. Nand Prabha Shukla learned A.G.A. for the State-respondents and Sri Shashi Dhar Sahai learned Standing Counsel appearing for the

1 (1999) 1 SCC 417

2 1985 Supreme (All) 27

3 1994 Supp (3) SCC 195

4 (2010) 9 SCC 618

5 Habeas Corpus Writ Petition No. 893 of 2019

6 Habeas Corpus Writ Petition No. 468 of 2020

Union of India have defended the action of the sponsoring authority, detaining authority, the State and the Central Government.

The counter affidavits on behalf of the respondent nos. 1, 2 and 3 have been placed before the Court 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 detaining authority may not be interfered with.

9. Having heard learned counsels for the parties and perused the record, we may, at the outset, note the stand of the respondents in the affidavits filed on their behalf.

The respondent no. 3 namely the District Magistrate, Mau in his affidavit dated 5.2.2021 has submitted that the petitioners/detenues alongwith other accused persons have participated in the violent demonstration against the N.R.C./C.A.A., which was imposed by the Government and in order to restore the peace and to maintain public order, the provisions of the National Security Act (NSA) were imposed.

The Circle Officer, City, Mau, after perusal of the report of the Incharge Inspector, Police Station Dakshin Tola, District Mau where the first information report of the incident dated 16.12.2019 was lodged, recommended for forwarding the said report to the Higher Authority by the communication dated 29.8.2020 addressed to the Additional Superintendent of Police, Mau. The said report was, then forwarded to the District Magistrate, Mau by the Superintendent of Police with his recommendation for taking action under the NSA. The District Magistrate, Mau after considering the entire material and recording his subjective satisfaction had passed the detention orders dated 3.9.2020 invoking power under Section 3(2) of the National Security Act. The grounds of detention alongwith other relevant material were served upon the petitioners/detenues on 3.9.2020 through the Superintendent, District

Jail, Mau. The representations of the petitioners/detenues dated 14.9.2020 was received in the office of the District Magistrate on 15.9.2020 and the parawise comments in respect of the representations alongwith the representations were sent to the concerned authority on 24.9.2020.

The contention, thus, is that at the time of hearing, complete record including the parawise comments in respect of the representations of the petitioners were before the State Advisory Board which had granted personal hearing to the petitioners/detenues on 13.10.2020 through Video Conferencing.

It is contended that the petitioners/detenues were making efforts to get bail in the criminal cases lodged against them under the Gangster Act by moving bail applications in the High Court at Allahabad and noticing the material on record and the reports, it was found that the petitioners/detenues had incited the mob to create violence and their action had led to violent demonstration against N.R.C./C.A.A. The act of the detenues was found prejudicial to maintenance of the public order. The provisions of the National Security Act were invoked on being satisfied on the relevant material before the District Magistrate, Mau. In addition to the first information report, the reports of the sponsoring authority also referred to the L.I.U. report wherein serious apprehension were raised regarding possibility of repetition of such type of activity by the detenues, in case, they were released on bail. The detention orders, therefore, cannot be said to be illegal.

10. In the counter affidavit filed on behalf of the State, it is submitted that the State Government had approved the detention orders on 11.9.2020 and the approval order was communicated to the detenues/petitioners within the period of twelve days specified in Section 3(4) of the NSA. The copy of the detention orders, grounds of detention and all other relevant documents received from the District Magistrate, Mau were sent to the Central Government within the period of seven days from the date of approval, i.e. 11.9.2020, as required under Section 3(5) of the NSA. The

copy of the representations dated 14.9.2020 alongwith parawise comments of the detaining authority were received in the concerned section of the department of the State Government on 28.9.2020 alongwith the letter of the District Magistrate, Mau dated 24.9.2020. It was then forwarded to the Central Government and the State Advisory Board vide separate letters dated 28.9.2020 itself.

Thereafter, the representations of the petitioners were considered at the ends of the State Government and final order rejecting the same was passed on 6.10.2020. It was immediately communicated to the petitioners on 7.10.2020 thorough radiogram. The State Advisory Board vide letter dated 6.10.2020 had informed the State Government that the case of the petitioners would be taken up for hearing on 13.10.2020 and directed that the petitioners be informed that if they desired, they can appear personally through their next friend. The said information was given to the petitioners on 9.10.2020. Personal hearing was accorded to the petitioners and the State Advisory Board having found sufficient grounds for preventive detention of the petitioners under the NSA had submitted its report on 19.10.2020, which was received in the office of the State Government on 20.10.2020. The report of the State Advisory Board was, thus, submitted within the prescribed period of seven weeks from the date of the detention of the petitioners, as per Section 11(1) of the NSA. Accordingly, the decision was taken by the State Government to confirm the detention orders as per the report of the State Advisory Board on 23.10.2020 in accordance with Section 12(1) of the NSA. It is then contended that in view of the report/recommendation received from the District Magistrate, Mau and after consideration of the facts and circumstances of the case, the State Government, was satisfied that there was requirement of extension of the detention order and hence the extension orders were passed from time to time.

11. The respondent no. 1/Union of India in its affidavit in reply to the averments in the writ petition stated that the representations dated

14.9.2020 of the detenues were forwarded by the Under Secretary, Government of U.P. to the Central Government through the Ministry of Home Affairs on 28.9.2020 and was received in the concerned section in the Ministry of Home Affairs on 7.10.2020. The same was processed on 8.12.2010 and after consideration of the material on record, the representations of the detenues was rejected by the Central Government and information in this regard was forwarded through wireless message dated 19.10.2020.

12. Having perused the stand of the respondents in the affidavits filed by them, it would be pertinent, at this stage, to go through the relevant provisions of the Act namely the National Security Act and the Constitution of India.

Article 22(5) provides that 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.

Article 22(5) has two facets:- (i) communication of the grounds on which the order of detention has been made; (ii) opportunity of making a representation against the order of detention.

Section 3(2) of the NSA confers power on the District Magistrate to pass detention order under sub-section (2), under authorization of the State Government by an order in writing. Sub-section (4) of Section 3 states that when an order is made under sub-section (3), the officer concerned shall forthwith report the fact to the State Government alongwith the grounds on which the detention order has been made and such other particulars which have a bearing on the matter. The order passed by the officer under sub-section (3) of Section 3 can remain in force for twelve days from the date of the order unless approved by the

State Government. The period of 12 days, however, can be extended upto fifteen days if the circumstance as per proviso to sub-section (4) of Section 3 exist. A reading of sub-section (2) of Section 3 shows that the detention order can be passed on satisfaction to be recorded in writing that it is necessary to detain a person with a view to prevent him from acting in any manner prejudicial to the maintenance of the public order.

The requirement of Section 3, thus, is that:-

(i) The detaining authority shall record its satisfaction to pass preventive detention order; (ii) the detaining authority, if is an officer mentioned in sub-section (3) of Section 4, i.e. the District Magistrate or the Commissioner of Police authorized by the State Government, the detention order would not remain in existence beyond the period of twelve days [fifteen days as per the proviso to sub-section (4)], unless it has been approved by the State Government. (iii) Sub-section (5) of Section 3 states that the order approved by the State Government shall be reported to the Central Government within a period of seven days from the date of approval.

The grounds of order of detention are required to be disclosed to the affected person, as soon as possible, but not later than five days ordinarily and not later than ten days from the date of detention, in exceptional circumstances. On receipt of the communication of the order of detention, the affected person is at liberty to make representation against the detention order to the appropriate Government. The Advisory Board constituted under Section 9 of the NSA is empowered to make a scrutiny of the detention order made under the NSA as also the representation of the affected person.

Section 10 mandates the appropriate Government to place detention order alongwith the representation of the affected person as also the grounds on which the detention order has been made and the comments of the detaining authority to the Advisory Board constituted under Section 9

of the Act within three weeks from the date of detention of the person concerned.

Sections 11 and 12 relates to the report of the Advisory Board and the action taken by the State Government on the said report.

13. Under the scheme of the National Security Act, a deadline has been provided for each stage of the action. The Act mandates that the decision taken at each stage shall be communicated to the higher authority within the time bound period so that there is no delay in the final decision taken by the State Government on the report of the State Advisory Board under Section 12 of the Act. Section 12(2) provides that the appropriate Government shall revoke the detention order and release the person concerned, in case, where the Advisory Board has reported that there is, in its opinion, no sufficient cause for the detention of a person. The appropriate Government, thus, is bound by the report of the Advisory Board constituted under Section 9 of the Act. The reference to the Advisory Board after every decision of the appropriate Government for preventive detention of a person, in each case, within the time prescribed under Section 10 of the NSA, is mandatory. Further the mandatory period within which the detention order alongwith the representation of the affected person has to be placed before the Advisory Board is three weeks from the date of detention of a person.

14. In the instant case, though it could be demonstrated by the appropriate Government (State Government) that the report of the Advisory Board was submitted to the State Government within seven weeks from the date of the detention of the petitioners and action on the said report under Section 12(1) had been taken within the shortest possible time, i.e. three days of the receipt of the report, but the delay in sending the matter to the Advisory Board, i.e. beyond three weeks as against the mandate of Section 10 of the Act has not been explained.

15. From the analysis of the pleadings of the parties, it is evident that

the representations of the petitioners/detenues were forwarded by the District Magistrate, Mau alongwith his parawise comments thereon to the State Government on 24.9.2020 and it was then forwarded to the Advisory Board by the State Government on 28.9.2020. By 24.9.2020, three weeks from the date of detention under the orders of the District Magistrate, Mau had expired. Section 10 mandates that the appropriate Government shall place the detention order, the grounds on which the order has been made and the representation, if any, made by the affected person alongwith the report of the officer under sub-section (4) of Section 3 before the Advisory Board, within three weeks from the date of detention of a person. Article 22(5) of the Constitution cast obligation upon the authority making the detention order to afford the earliest opportunity of making representation against the order of detention. The authority under the NSA to consider the representation of the affected person is the Advisory Board constituted under Section 9 of the Act. 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 detainee without any delay.

16. The constitution Bench of the Apex Court in **K.M. Abdulla Kunhi and B.L. Abdul Khader vs. Union of India and others State of Karnataka and others**⁷ has held that it is a constitutional mandate commanding the concerned authority to whom the detainee submits his representation to consider the representation and dispose of the same as expeditiously as possible. Though no period is prescribed by Article 22 of the Constitution for the decision to be taken on the representation but the words “as soon as may be” occurring in Clause 5 of Article 22 convey the message that the representation should be considered and disposed of at the earliest.

The observations of the Constitution Bench are to be noted as under:-

⁷ (1991) 1 SCC 476

“12. xxxxxxxxxxxx The words "as soon as may be" occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard it depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. The requirement however, is that there should not be supine indifference slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal xxxxxxxx.”

Relying upon the aforesaid decision, the Apex Court in **Rajammal**¹ has held that the legal position is that if delay was caused on account of any indifference or lapse in considering the representation such delay will adversely affect further detention of the person. It is observed in paragraph '9' of the said decision that it is for the authority concerned to explain the delay in disposing the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned.

17. It has been argued before us by the learned Senior Counsel for the petitioners that taking consideration of the above decisions, in similar situation, the Division Bench of this Court in the above noted decision had held the detention order illegal.

In **Afsar**⁵, the delay of nineteen days in deciding the representation was found without explanation. Whereas in **Aftab Alam**⁶, the detention order was held illegal on the ground that the representation of the petitioners therein was not placed before the Advisory Board within three weeks as required under Section 10 of the NSA.

In **Devendra Kumar Goel alias Babua**², the detention order was held illegal as the representation was placed by the State Government

¹ (1999) 1 SCC 417

⁵ Habeas Corpus Writ Petition No. 893 of 2019

⁶ Habeas Corpus Writ Petition No. 468 of 2020

² 1985 Supreme (All) 27

before the Advisory Board after expiry of the period stipulated under Section 10 of the NSA.

18. Further, in **State of Rajasthan vs. Talib Khan**⁸, the Apex Court observed that:

“8.what is material and mandatory is the communication of the grounds of detention to the detenu together with documents in support of subjective satisfaction reached by the detaining authority.”

(emphasis supplied)

In a recent decision in **Pebam Ningol Mikoi Devi and State of Manipur and others**⁴, it was considered that Article 22(5) of the Constitution of India mandates in preventive detention matters that the detenu should be afforded the earliest possible opportunity to make a representation against the order. With regard to the importance of delay in preventive detention matters under the National Security Act, the decision of the Apex Court in **Union of India vs. Laishram Lincola Singh**⁹ has been noted, wherein following observations had been made:-

“34.....xxxxxxx.... 6. There can be no hard and fast rule as to the measure of reasonable time and each case has to be considered from the facts of the case and if there is no negligence or callous inaction or avoidable red-tapism on the facts of a case, the Court would not interfere. It needs no reiteration that it is the duty of the Court to see that the efficacy of the limited, yet crucial, safeguards provided in the law of preventive detention is not lost in mechanical routine, dull casualness and chill indifference, on the part of the authorities entrusted with their application. When there is remissness, indifference or avoidable delay on the part of the authority, the detention becomes vulnerable.

(emphasis supplied)”

In paragraph '35' of the said judgment, it was noted that:-

“35. On the specific ground of delay in forwarding the representation under the National Security Act, it has been observed by

⁸ (1996) 11 SCC 393

⁴ (2010) 9 SCC 618

⁹ (2008) 5 SCC 490

this Court in Haji Mohammad Akhlaq vs. District Magistrate, Meerut, 1988 Supp (1) SCC 538, that:

"3. ...There can be no doubt whatever that there was unexplained delay on the part of the State Government in forwarding the representation to the Central Government with the result that the said representation was not considered by the Central Government till October 16, 1987 i.e. for a period of more than two months. Section 14(1) of the Act confers upon the Central Government the power to revoke an order of detention even if it is made by the State Government or its officer. That power, in order to be real and effective, must imply a right in a detenu to make representation to the Central Government against the order of detention. Thus, the failure of the State Government to comply with the request of the detenu for the onward transmission of the representation to the Central Government has deprived the detenu of his valuable right to have his detention revoked by that Government."

(emphasis supplied)".

In the said case, unexplained delay of seven days in forwarding of the representation had been found fatal.

19. From the above decisions, it is settled that under Article 22(5), the detenu has two rights; (i) to be informed, as soon as may be, of the grounds on which his detention is based; and (ii) to be afforded the earliest opportunity of making representation against his detention.

Having considered the mandate of Article 22(5) readwith Section 10 of the National Security Act, we find in the facts of the instant case that the deadline for placing all papers, i.e. the ground of detention, the representation and the report of the detaining authority before the Advisory Board had not been adhered to by the State Government. The non-compliance of the mandatory provision of Section 10 of the NSA renders the detention orders illegal.

20. It is evident that the detaining authority could not explain the delay in forwarding the representations of the petitioners/detenues before the State Government. The explanation of the State Government that report was submitted by the Advisory Board within the prescribed period of seven weeks from the date of detention of the petitioners and thus, Section 11(1) of the Act has been complied with, cannot be treated sufficient explanation to the delay in placing representations before the Advisory

Board, after expiry of the period stipulated in Section 10. The maximum period prescribed under Section 11(1) to submit the report by the Advisory Board to the appropriate Government cannot be taken to condone the delay on the part of the State Government, in placing the matter before the Board which in turn had occurred on account of the delay caused at the ends of the District Magistrate, Mau/the detaining authority. The deadline for the action of every authority at every stage of the decision making process has been fixed under the Act in order to meet the constitutional obligation under Article 22(5) of the concerned authority/Government.

21. The stringent provisions of the National Security Act resulting in curtailment of personal liberty of a person guaranteed under Article 21 of the Constitution of India have to be strictly complied with. The deadlines have to be strictly obeyed. The delay caused on account of any indifference, slackness or callous attitude of the authority/Government at any stage of the decision making process, if remained unexplained, cannot be condoned. The representation of the detenues in any case, has to be considered at the earliest, as soon as may be, without any delay. In case, the deadline prescribed under the Act at any stage of the decision making process has not been met, it is for the authority concerned to explain the delay, which in turn resulted in delay in disposing of the representation. The delay, however, short it may be requires explanation of the authority concerned. Mere explanation of the State Government, as in this case, that final decision was taken within the time prescribed under the Act is not a justifiable explanation when the liberty of a person guaranteed under Article 22 of the Constitution is involved. The outer limit of seven weeks from the date of detention to submit its report prescribed under Section 11(1) of the Act is for the Advisory Board. But the State Government is mandated under Section 10 of the Act to submit the detention order alongwith the report of the Officer concerned and the representation of the affected person within three weeks from the date of detention. The delay

caused in placing the matter before the Advisory Board cannot be condoned for the reason that the Advisory Board had submitted its report within the prescribed period of seven days.

The contention of the respondent no. 2/State Government cannot be accepted as an explanation of the delay caused on the part of the District Magistrate, Mau/respondent no. 3, when no explanation is found in his affidavit.

22. For the aforesaid, on the first ground of challenge itself, the detention orders dated 3.9.2020 are found illegal. However, we would also like to add that while analyzing the second ground of challenge, within the scope of judicial review, considering the orders passed by the detaining authority i.e. the District Magistrate, Mau, we find that the subjective satisfaction recorded by the District Magistrate to arrive at the conclusion of detaining the petitioners is not based on any relevant material which would form an objective criteria to reach at the decision.

23. As per the settled law, though the detaining authority is not obliged to record his subjective satisfaction in the detention order but it cannot record its subjective satisfaction on the irrelevant grounds. The application of mind in a mechanical manner cannot be permitted to be termed as a subjective satisfaction of the detaining authority. It is the duty of the sponsoring authority to collect all the relevant material and place it before the detaining authority upon which the detaining authority has to apply its independent mind to arrive at its subjective satisfaction on the material before it. Sufficiency or insufficiency of the material before the detaining authority cannot be examined by the Court in exercise of the power of judicial review. However, relevancy or irrelevancy of the material before the detaining authority can be seen so as to ascertain as to whether the subjective satisfaction has been recorded on relevant grounds or irrelevant material formed the basis of such a decision.

24. It is also settled that the Court in exercise of judicial review can

only examine the correctness of the decision making process and not the decision itself. Judicial review, it may be noted, is not an appeal from a decision but review of the manner in which the decision was made. The purpose of review is to ensure that the individual receives a fair treatment.

25. The question as to whether and in what circumstance an order of preventive detention can be passed against a person who is already in custody had been considered for the first time by the Constitution bench in **Rameshwar Shaw vs. District Magistrate, Burdwan & another**¹⁰.

Considering the said decision in **Dharmendra Suganchand Chelawat and another vs. Union of India and others**¹¹, it was observed as under:-

“19. 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 implies 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.”

26. In **Surya Prakash Sharma**³ decided on 9th August, 1994, the Apex Court having considered the above principles had observed in the facts of that case that the grounds of detention therein indicated the detaining authority's awareness of the fact that the detenu was in judicial custody at the time of making the order of detention. However, the

10 1964 (4) SCR 921

11 AIR 1990 SC 1196

3 1994 Supp (3) SCC 195

detaining authority had not brought on record any cogent material nor furnished any cogent ground in support of the averment that if the detenue therein was released on bail, he might again indulge in serious offences causing threat to public order. The satisfaction of the detaining authority that the detenu might indulge in serious offences causing threat to public order, was not found proper and justifiable.

27. In a recent decision in **Pebam Ningol Mikoi Devi**⁴, it was observed by the Apex Court that the individual liberty is a cherished right, one of the most valuable fundamental rights guaranteed by the Constitution to the citizens of this country. The observations in paragraphs '3' and '4' of the said decision are relevant to noted hereunder:-

“3. Individual liberty is a cherished right, one of the most valuable fundamental rights guaranteed by the Constitution to the citizens of this Country. On "liberty", William Shakespeare, the great play writer, has observed that "a man is master of his liberty". Benjamin Franklin goes even further and says that "any society that would give up a little liberty to gain a little security will deserve neither and lose both". The importance of protecting liberty and freedom is explained by the famous lawyer Clarence Darrow as "you can protect your liberties in this world only by protecting the other man's freedom; you can be free only if I am free." In India, the utmost importance is given to life and personal liberty of an individual, since we believe personal liberty is the paramount essential to human dignity and human happiness.

4. The Constitution of India protects the liberty of an individual. Article 21 provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. In matters of preventive detention such as this, as there is deprivation of liberty without trial, and subsequent safeguards are provided in Article 22 of the Constitution. They are, when any person is detained pursuant to an order made under any law providing for preventive detention, the authority making the order is required to communicate the grounds on the basis of which, the order has been made and give him an opportunity to make a representation against the order as soon as possible. It thus, cannot be

4 (2010) 9 SCC 618

doubted that the Constitutional framework envisages protection of liberty as essential, and makes the circumstances under which it can be deprived.”

On the scope of judicial scrutiny to the decision of preventive detention under the National Security Act, it was observed that there must be a reasonable basis for the detention order, and there must be material to support the same. The Court is entitled to scrutinize the material relied upon by the authority in coming to its conclusion, and accordingly determine, if there was an objective basis for the subjective satisfaction. The subjective satisfaction as observed therein must be two folds:-

(i) The detaining authority must be satisfied that the person to be detained is likely to act in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of the public order.

(ii) The authority must be further satisfied that it is necessary to detain the said person in order to prevent from so acting, i.e. from repealing his action.

The previous decisions of the Apex Court in **Fazal Ghosi vs. State of U.P.**¹² and **Shafiq Ahmed vs. District Magistrate, Meerut**¹³ have been considered therein in the following manner:-

“22. Some of the decisions of this Court may be of relevance in determining in what manner such subjective satisfaction of the Authority must be arrived at, in particular on Section 3(2) of the National Security Act. In Fazal Ghosi v. State of Uttar Pradesh, (1987) 3 SCC 502, this Court observed that:

"3..... The District Magistrate, it is true, has stated that the detention of the detenus was effected because he was satisfied that it was necessary to prevent them from acting prejudicially to the maintenance of the public order, but there is no reference to any material in support of that satisfaction. We are aware that the satisfaction of the District Magistrate is subjective in nature, but even subjective satisfaction must be based upon some pertinent material. We are concerned here not with the sufficiency of that material but with the existence of any relevant material at all."

(emphasis supplied)

12 (1987) 3 SCC 502

13 (1989) 4 SCC 556

23. In Shafiq Ahmed v. District Magistrate, Meerut (1989) 4 SCC 556, this Court opined :-

"5.....Preventive detention is a serious inroad into the freedom of individuals. Reasons, purposes and the manner of such detention must, therefore, be subject to closest scrutiny and examination by the courts." (emphasis supplied)

This Court further added:

"5.....there must be conduct relevant to the formation of the satisfaction having reasonable nexus with the action of the petitioner which are prejudicial to the maintenance of the public order. Existence of materials relevant to the formation of the satisfaction and having rational nexus to the formation of the satisfaction that because of certain conduct "it is necessary" to make an order "detaining" such person, are subject to judicial review." (emphasis supplied)

Further the observations of the Apex Court in **State of Punjab vs. Sukhpal Singh**¹⁴ has also been noted in paragraphs '24' quoted as under:-

"24. In State of Punjab v. Sukhpal Singh, (1990) 1 SCC 35, this Court held:

"9.the grounds supplied operate as an objective test for determining the question whether a nexus reasonably exists between grounds of detention and the detention order or whether some infirmities had crept in."

(emphasis supplied)

28. It is, thus, settled that the subjective satisfaction of the detaining authority has to be based on objective material and any non-existent or misconceived or irrelevant consideration, if forms basis of detention order, the order of detention would be invalid. The inclusion of an irrelevant or non-existent ground among other relevant ground is an infringement of the first right of the detainee guaranteed under the Constitution, to be informed of the grounds on which his detention is based. If the actual allegations are vague and irrelevant, detention would be rendered invalid.

29. In **Ramesh Yadav vs. District Magistrate, Etah**¹⁵, it was observed by the Apex Court that though there is no bar in passing a detention order against a person in custody, however, such an order should not be passed merely to pre-empt or circumvent enlargement on bail in

¹⁴ (1990) 1 SCC 35

¹⁵ AIR 1986 SC 315

cases which are essentially criminal in nature. There must be “compelling reason” justifying such detention to record satisfaction by the detaining authority that taking into account the nature of the antecedent activities of the detainee, 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.

30. In the light of the above legal position, we have perused the grounds of detention and the material relied on by the detaining authority while passing the order of detention. The material which formed basis of passing the detention orders dated 3.9.2020 by the District Magistrate, Mau, i.e. for recording his satisfaction is the report of the Incharge Inspector, Police Station Dakshin Tola, Mau. In the said report, the Incharge Inspector had narrated the incident which occurred on 16.12.2019 from the first information report lodged against 85 named persons including the petitioners herein. The said report in each case is dated 27/28.8.2020 and verbatim the same. While narrating the incident occurred on 16.12.2019, the report of L.I.U. has also been noted to submit that the public order and peace in District Mau had been completely disturbed on account of the said incident. Thereafter, a Beat information dated 27/28.8.2020 in each case had been noted to state that it was reported that the detainees who were lodged in jail had been telling their friends and relatives, who went to meet them in jail that after release from jail, they would repeat the same crime again and the incident this time would be bigger than the last one. It was reported that the veracity of the beat information was verified by the Senior Inspector and it was found correct. A report in this regard had also been noted in the General Diary. This statement of the said report is verbatim the same in the report of each of the petitioners herein.

31. In one of the Habeas Corpus Writ Petition No. 40 of 2021 (Shaharyar vs. Union of India and 3 others), specific ground has been taken to assail the contents of the Beat information. It has been

categorically stated in paragraph '31' of the said writ petition that the averments in the Beat information were totally false and baseless, inasmuch as, during COVID times, no visitors were allowed in the District Jail, Mau. No person in jail was permitted to meet his friends and relatives. It is categorically stated therein that it can be verified that the petitioner therein did not meet any outsider in jail nor any friend and relative of him had visited the jail either on the date mentioned in the beat information or any other date during the COVID period.

32. In reply to this specific averment of the petitioner in the said petition, affidavit of the Deputy Jailer, District Jail, Mau dated 2.2.2021 has been filed.

The reply to paragraph '31' of the writ petition is as under:-

“31. That it is important to mention that in paragraph 12 of the detention order dated 8.10.2020 it is mentioned that the petitioner had stated to his friends and relatives that after the release from jail, he would repeat the alleged crime again, when they have visited District Jail Mau on 2.10.2020. In this regard it is submitted that it is totally false and baseless as firstly during Covid period no visitors were allowed to visit the District Jail Mau to meet with any person in jail nor the friend and relatives of the petitioner had visited to District Jail either on 2.10.2020 or any other date during the Covid period.”

A vague assertion has, thus, been made by the deponent of the said affidavit that the facility of telephonic conversation had been provided to the petitioner and his friends and relatives could talk through telephone. However, there is no denial to the fact that the petitioner therein did not meet any of his friends or relatives or talk to them during COVID period.

33. All the petitioners herein were lodged in the District Jail, Mau, so the above facts highlighted in one of the petitions would be relevant for all the detenues. It can be safely inferred that all of the petitioners were not allowed to meet their relatives and friends in Jail due to COVID and the vague assertion of the Deputy Jailer of providing telephone facilities

to the prisoners is irrelevant.

34. From the statement of the Deputy Jailer, Mau in the affidavit filed in Habeas Corpus Writ Petition No. 40 of 2021, at least, it is evident that the incorporation of one of the grounds in the reports of the Incharge Inspector, Police Station Dakshin Tola, Mau based on the Beat information was not on the correct facts. It is evident that the said ground had been added on incorrect facts in the reports so as to influence the detaining authority to record his satisfaction to the effect that the likelihood of the detenues in indulging in prejudicial activities after their release from jail was imminent.

35. We may further note that the above facts make it evident that the detaining authority had proceeded to record his satisfaction without verification of the statement made in the reports of the Incharge Inspector, Police Station Dakshin Tola, District Mau.

It is, thus, clear that the satisfaction recorded by the detaining authority was not based on the objective criteria by application of its independent mind. The incorporation of non-existent and misconceived ground in the material placed before the detaining authority to influence its decision to pass the order of detention, would make the detention order invalid. The flaw in the decision making process in recording satisfaction by the detaining authority without verification of the information supplied to it makes the whole process illegal.

36. Thus, on both the above counts, the detention orders dated 3.9.2020 of the District Magistrate, Mau in respect of all other petitioners herein as also the detention order dated 8.10.2020 to detain the petitioner namely Shaharyar in one of the connected writ petition, passed under Section 3(2) of the National Security Act, 1980 are liable to be quashed.

All the writ petitions are **allowed**.

However, as the detention orders have outlived their life for the fact that the writ petitions could be heard only after the expiry of the

maximum period of twelve months as prescribed in Section 13 of the National Security Act, 1980, no other direction has to be issued.

However, it is clarified that the petitioners could not be kept under detention pursuant to the detention orders passed under Section 3(2) of the National Security Act, 1980 by the District Magistrate, Mau.

[Sadhna Rani (Thakur),J.] (Sunita Agarwal,J.)

Order Date :- 26.11.2021
Brijesh