IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE

HON'BLE SHRI JUSTICE SUSHRUT ARVIND DHARMADHIKARI

&

HON'BLE SHRI JUSTICE GAJENDRA SINGH

WRIT PETITION No. 26575 of 2023

BETWEEN:-

MOHAMMAD HUZEFA PATHAN S/O MOHAMMAD IBRAHIM PATHAN, AGED ABOUT 37 YEARS, OCCUPATION: BUSINESS R/O 62 ANJUMAN NAGAR KHARGONE (MADHYA PRADESH)

.....PETITIONER

(BY SHRI ABHINAV DHANODKAR, ADVOCATE)

AND

1. **THE STATE OF MADHYA PRADESH PRINCIPAL SECRETARY DEPARTMENT OF HOME VALLABH BHAWAN BHOPAL (M.P.) (MADHYA PRADESH)**
2. **DISTRICT MAGISTRATE KHARGONE (MADHYA PRADESH)**
3. **SUPERINTENDENT OF POLICE KHARGONE (MADHYA PRADESH)**
4. **POLICE STATION KHARGONE THROUGH STATION INCHARGE KHARGONE (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI BHUWAN GAUTAM, GOVERNMENT ADVOCATE)

Reserved on : 29th April, 2024

Pronounced on : 03rd June, 2024

This petition having been heard and reserved for order coming on for pronouncement this day, ***Justice Sushrut Arvind Dharmadhikari*** *pronounced the following:*

O R D E R

Heard finally, with the consent of the parties.

The present petition under Article 226 of the Constitution of India is filed by the brother of the detenu assailing the order dated 14.09.2023 passed by the respondent No.2 – District Magistrate, Khargone, whereby the brother of the petitioner (detenu) has been kept under detention by invoking the provisions of National Security Act, 1980 (hereinafter referred to as 'the NSA'). The petitioner has also challenged the orders dated 30.11.2023, 04.12.2023 & 07.03.2024.

02. Briefly stated facts of the case are that the brother of the petitioner namely Adeeb S/o Mohammad Pathan was detained in Crime No.0002/NSA/2023 under Section 3(2) of the NSA for a period of three months from the date of detention and was sent to the Central Jail, Ujjain. The action of the respondents is contrary to the mandate of NSA and it violates Articles 14 & 21 of the Constitution of India. The right to life with dignity of the detenu has been infringed by issuance of mechanical orders of detention. The impugned orders have been passed without application of mind without recording any subjective satisfaction, therefore, the orders falls within the purview of illegal detention. Even the respondents have denied the basic rights depriving of the opportunity of hearing amounting to violation of principle of natural justice. The petitioner is the resident of District – Khargone and is living within the territorial jurisdiction of this Court.

03. It appears from the pleadings that since 2012, detenu is facing different cases / charge-sheeted alleging commission of different offences, particular of which are placed with writ petition and on the basis of those cases as well as apprehension of the authorities that detenu may commit breach of public order, proceedings were initiated under the Act against the detenu which culminated into passing of impugned order dated 14.09.2023 by the District Magistrate, District – Khargone.

04. From the pleadings, it appears that the Superintendent of Police, Khargone has recommended the District Magistrate, Khargone to initiate action under Section 3(2) of the NSA against the detenu since he is continuous which are threat to public peace and law & order. The District Magistrate after considering the fact situation, recommendation as well as the statement of prosecution witnesses passed the impugned order of detention in exercise of power under Section 3(2) of the NSA. Being aggrieved by the said order of detention, petitioner has preferred this petition.

05. Learned counsel appearing for the petitioner contended that the order of detention has been passed on the basis of false complaints and allegations. He further submits that Article 21 of the Constitution of India provides for right to life and personal liberty and the same is infringed in view of the impugned order of detention.

06. In support of his contention regarding the order of detention, he relied upon the full Bench judgment passed by this Court in the case of ***Kamal Khare v/s The State of Madhya Pradesh*** *reported in* ***2021 (2) MPLJ 554***.

07. *Per contra*, learned Government Advocate for the respondents / State vehemently opposed the prayer by referring to the documents and argument in place that the detenu is a history sheeter indulged in various crimes including heinous crimes. The detenu is a person of criminal proclivity as despite being charge-sheeted for offences under various sections of IPC, there is no change in his behaviour. The detenu is in the habit of destroying the public property, threatening for public at large with deadly weapons, attempt to murder which clearly reveals that the detenu became a threat to the public order because of his audacity and desperate criminal disposition. Therefore, the impugned orders do not deserve any interference.

08. In support of his contention, learned Government Advocate for the respondents / State referred Division Bench judgment of Delhi High Court in the case of ***Khurvesh alias Pappu alias Pahalwan v/s State & Another*** *reported in* ***ILR (2010) (II) Delhi 550*** as well as in the case of ***Narendra Kumar v/s Union of India (UOI)*** *reported in* ***2002 STPL 12860 Delhi***, Division Bench of Allahabad High Court in the case of ***Noor Mohammad v/s State of U.P. & Another*** *reported in* ***1982 STPL 4030 Allahabad*** and Division Bench of Rajasthan High Court in the matter of ***Subhan Mohammad v/s State of Rajasthan & Another*** *reported in* ***1988 STPL 5970 Rajasthan***. He prayed for dismissal of writ petition.

09. Heard learned counsel for the parties.

10. Instant case is in respect of National Security Act and its different fallout and factual contours attract reconciliation between "Public Order" and "Personal Liberty".

11. The Apex Court in the case of ***Deepak Bajaj v/s State of Maharashtra & Another*** *reported in* ***(2008) 16 SCC 14*** has cautioned the High Courts regarding scope of jurisdiction and scope of High Court to grant relief in such matters. According to Apex Court; scope is very narrow and limited and subjective satisfaction of the detaining authority cannot be looked by the High Court as appellate authority. In the said case, the Apex Court reiterated the observation made by the Apex Court in the case of ***State of Bihar v/s Rambalak Singh Balak*** *reported in* ***AIR 1967 SC 1441*** as well as ***Khudiram Das v/s State of West Bengal*** *reported in* ***(1975) 2 SCC 81***.

12. Observation of Apex Court in the case of *Khudiram Das (supra)* is reproduced as under:

> *"The power of detention is clearly a preventive measure. It does not partake in any manner of the nature of punishment. It is taken by way of precaution to prevent mischief to the community. Since every preventive measure is based on the*

principle that a person should be prevented from doing something which, if left free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof.... This being the nature of the proceeding, it is impossible to conceive how it can possibly be regarded as capable of objective assessment. The matters which have to be considered by the detaining authority are whether the person concerned, having regard to his past conduct judged in the light of the surrounding circumstances and other relevant material, would be, likely to act in a prejudicial manner as contemplated in any of sub-clauses (i), (ii) and (iii) of clause (1) of subsection (1) of section 3, and if so, whether it is necessary to detain him with a view to preventing him from so acting. These are not matters susceptible of objective determination and they could not be intended to be judged by objective standards. They are essentially matters which have to be administratively determined for the purpose of taking administrative action. Their determination is, therefore, deliberately and advisedly left by the legislature to the subjective satisfaction of the detaining authority which by reason of its special position, experience and expertise would, be best fitted to decide them. It must in the circumstances be held that the subjective satisfaction of the detaining authority as regards these matters constitutes the foundation for the exercise of the power of detention and Court cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction of the detaining authority is based. The Court cannot, on a review of the grounds, substitute its own opinion for that of the authority, for what is made condition precedent to the exercise of the power of detention is not an objective determination of the necessity of detention for a specified purpose but the subjective opinion of the detaining authority, and if a subjective opinion is formed by the detaining authority as regards the necessity of detention for a specified purpose, the condition of exercise of the power of detention would be fulfilled. This would clearly show that the power of detention is not a quasi- udicial power." Therefore, the scope of interference in such matter is narrow and limited."

13. So far as question regarding breach of public order or threat to public peace is concerned, this aspect also is very subjective and differs from case to case. In ***Ashok Kumar v/s Delhi Administration & Others*** *reported in* ***(1982) 2 SCC 403***, the Apex Court held that preventive

detention is devised to afford protection to society. It was observed that preventive measures, even if they involve some restraint and hardship upon some individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State. The Executive is empowered to take recourse to its power of its preventive detention in those cases where the Court is genuinely satisfied that no prosecution could possibly succeed against the detenu because he is a dangerous person who has overawed witnesses or against him no one is prepared to depose.

14. The Court also made a distinction between the concepts of "Public Order" and "Law and Order" in the following words: -

> *"13. The true distinction between the areas of 'public order' and 'law and order' lies not in the nature or quality of the Act, but in the degree and extent of its reach upon society. The distinction between the two concepts of 'law and order' and 'public order' is a fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order, while in another it might affect public order. The act by itself therefore is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order. That test is clearly fulfilled in the facts and circumstances of the present case."*

15. The Supreme Court in the context of preventive detention also highlighted the distinction between "Public Order", "Security of State" and "Law and Order" in the case of ***Commissioner of Police & Others v/s C. Anita*** *reported in* ***(2004) 7 SCC 467*** in following words:-

> *"The crucial issue is whether the activities of the detenu were prejudicial to public order. While the expression 'law and order' is wider in scope inasmuch as contravention of law always affects order. 'Public order' has a narrower ambit, and public order could be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the*

country as a whole or even a specified locality. The distinction between the areas of 'law and order' and 'public order' is one of the degree and extent of the reach, of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it could raise problem of law and order only. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps to distinguish it as an act affecting public order' from that concerning 'law and order'. The question to ask is: "Does it lead to disturbance of the current life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed"? This question has to be faced in every case on its facts.

8. "Public order" is what the French call 'ordre publique' and is something more than ordinary maintenance of law and order. The test to be adopted in determining whether an act affects law and order or public order, is: Does it lead to disturbance of the current life of the community so as to amount to disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? (See Kanu Biswas v. State of West Bengal(1972) 3 SCC 831).

9. "Public order" is synonymous with public safety and tranquility: "it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State". Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum, which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. (See Dr. Ram Manohar Lohia (Dr.) v. State of Bihar (1966) 1 SCR 709; 1966 Crl.LJ 608).

10. 'Public Order', 'law and order' and the 'security of the State' fictionally draw three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the State. Every infraction of law must necessarily affect order, but an act

> *affecting law and order may not necessarily also affect the public order. Likewise, an act may affect public order, but not necessarily the security of the State. The true test is not the kind, but the potentiality of the act in question. One act may affect only individuals while the other, though of a similar kind, may have such an impact that it would disturb the even tempo of the life of the community. This does not mean that there can be no overlapping, in the sense that an act cannot fall under two concepts at the same time. An act, for instance, affecting public order may have an impact that it would affect both public order and the security of the State. [See Kishori Mohan Bera v. The State of West Bengal(1972) 3 SCC 845: AIR1972SC1749; Pushkar Mukherjee v. State of West Bengal(1969) 1 SCC 10; Arun Ghosh v. State of West Bengal(1970) 1 SCC 98; Nagendra Nath Mondal v. State of West Bengal(1972) 1 SCC 498].”*

16. An act, affecting public order, may have ramifications over law and order and security of the State at the same time *[See: Kishori Mohan Bahra Vs. State of West Bengal, (1972) 3 SCC 845, Pushkar Mukherji Vs. State of West Bengal, (1969) 1 SCC 10, Arun Ghosh Vs. State of West Bengal, (1970) 1 SCC 98, Nagendra Nath Mondal Vs. State of West Bengal, (1972) 1 SCC 498]*.

17. Some Crimes give Psychic Gains whereas some Crimes give Monetary Gains. If Cultural Norms affect the law, the law likewise affects cultural norms. Therefore, expressive function of punishment or deterrent of punishment is the law's capacity to send a message of condemnation about a particular criminal act. When a criminal mind while committing crime or expresses his intention to commit crime, sends a message to the world about the value of victim then conversely punishment or preventive measure (like the present one) sends a reciprocal message to the accused in a kind of dialogue with the crime. Therefore, in the considered opinion of this Court, expressive function of punishment or preventive measure like detention under NSA are both retributive and utilitarian. Retributive punishment/preventive measures give even if not proportional to the physical/psychic harm done to a victim even then it gives a chance to the

perpetrator to purge his misdeeds and act as deterrent to other probable perpetrators. Similarly utilitarian function of punishment/preventive measure has the power to change social norms and behaviour via the messages it expresses and may help in reduction of crime.

18. In India where we witness high rate of crime against victims especially against weaker sections and females originates from the confidence of perpetrators that they would go unpunished because of lacuna in Investigation, Prosecution and Adjudication and therefore, this tendency prompts them to commit more severe offences and create an atmosphere of fear and terror. Conduct of detenu reflects such attitude.

19. Crime and Disorder are strongly interrelated, therefore, Broken Windows Theory, a Criminological Theory although moves in respect of Police and law enforcement but has material bearing in the realm of prosecution, adjudication and specially for preventive measures like NSA also. According to this theory, targeting minor disorder is expected to reduce occurrence of more serious crime. Idea behind is can be summarized in an expression that if a window in a building is broken and left unrepaired, all of the windows will soon be broken. On this analogy also, if preventive measure is taken by the police against a miscreant like in the present case then it is for the purpose of sending a message to the person concerned as well as other probable perpetrators. Since, in the present case the detenu has chequered history of all types of crime, therefore, whole proceeding against the detenu deserves to be seen from that vantage point also.

20. While dealing with liberty of an individual *vis-a-vis* collective interest of the community, observation of Apex Court in the case of ***Shahzad Hasan Khan v/s Ishtiaq Hasan Khan & Others*** *reported* ***(1987) 2 SCC 684*** is worth consideration when Apex Court observed as under:-

"Liberty is to be secured through process of law, which is

> *administered keeping in mind the interest of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution.*
>
> *Learned Judge was unduly influenced by the concept of liberty, disregarding the facts of the case."*

21. This observation is being reiterated by the Apex Court in the case of ***Ramgovind Upadhyay v/s Sudarshan Singh*** *reported in* ***(2002) 3 SCC 598***. Although above referred observation and reiteration were in respect of bail but certainly sends a message for reconciliation between "Personal Liberty" *vis-a-vis* "Public Peace" and "Public Order". Said reconciliation is need of the hour otherwise Public Order, Social Peace and Development of the area would be sacrificed at the altar of Lawlessness, Misgovernance and Private Retribution.

22. If the above referred legal principles / guidance are tested on the anvil of present set of facts, then it appears that the detenue appears to be a habitual offender against whom around 16 cases have been registered. It is not the case, where he faced allegations of minor offences but he faced trial for offences like Section 13 of the Gambling Act and under the provisions of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act and under various provisions of IPC.

23. Long trail of criminal cases of different nature certainly suggest that they cannot be motivated at the instance of police authorities or at the instance of some vested interest. These are the instances/discredit points which are being acquired by the detenu because of his misdeeds, misdemeanors and criminal bent of mind. Therefore, different nature of cases registered and tried against the detenu even through resulted into acquittal cannot be taken lightly. Hon'ble Supreme Court in the case of ***Debu Mahto v/s State of West Bengal*** *reported in* ***AIR 1974 SC 816*** has held as under:-

> *"...The order of detention is essentially a precautionary measure and it is based on a reasonable prognosis of the future behaviour of a person based on his past conduct judged in the light of the surrounding circumstances. Such past conduct may consist of one single act or of a series of acts. But whatever it be, it must be of such a nature that an inference can reasonably be drawn from it that the person concerned would be likely to repeat such acts so as to warrant his detention. It may be easier to draw such an inference where there is a series of acts evincing a course of conduct but even if there is a single act, such an inference may justifiably be drawn in a given case."*

24. SHO, Police Station - Khargone, also made statement as prosecution witness and police report indicates that detenu is a habitual offender and he is in habit of giving threats to the locals and they are afraid to come forward to ventilate their grievances and all these attributes, render the detenu a threat to public peace and order and appears to be against the interest of society/community at large. Therefore, subjective satisfaction of detaining authorities in the present set of facts cannot be interfered. All material / documents were placed before the detaining authority and concerned authority applied its mind accordingly. Therefore, judgments relied upon by the counsel for the petitioner are not applicable in the present facts and circumstances of the case.

25. Pertinently the petitioner has not raised the ground of procedural lapse or violation of due process prescribed under Section 3 of NSA, except the ground that before passing each extension order, approval from the Advisory Board was not taken.

26. No procedural lapse or violation has been seen in the detention order, as the same has been passed in accordance with the provisions of NSA. Nowhere in the provision of NSA, it is mandatory to take prior approval from the Advisory Board before each extension order regarding detention period is made, rest of the procedure has been followed in later and spirit. Conclusively, petition preferred by the petitioner fails and order

of detention dated 14.09.2023 passed by District Magistrate, Khargone and orders dated 30.11.2023, 04.12.2023 and 07.03.2024 are hereby affirmed. Respondents are at liberty to proceed against the detenu as per law.

27. The present Writ Petition sans merit and is hereby dismissed. No order as to costs.

Copy of this order be sent to District Magistrate, Khargone for information.

(S. A. DHARMADHIKARI)
J U D G E

(GAJENDRA SINGH)
J U D G E

Ravi