MANU/SC/0226/1990

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IN THE SUPREME COURT OF INDIA

Criminal Appeal Nos. 11 and 12 of 1990

Decided On: 09.02.1990

Appellants: **Dharmendra Suganchand Chelawat and Ors.**
Vs.
Respondent: **Union of India (UOI) and Ors.**

Hon'ble Judges/Coram:
B.C. Ray, Kuldip Singh and S.C. Agrawal, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: M.K. Ramamurthi and S.K. Agarwal, Advs

For Respondents/Defendant: Soli J. Sorabjee, Attorney General , P. Parmeswaran, B. Parthasarthi, N.N. Johari and Uma Nath Singh, Advs.

Case Note:
Detention - Preventive detention--Offences under NDPS Act--Person already under judicial custody--Grounds of detention must show (i) that the detaining authority is aware that the detenu is already under judicial custody, and (ii) that it was satisfied, on the basis of antecedent activities of the detenu, that it is necessary to detain him to prevent him from engaging in prejudicial activities if released from custody.

Facts: The Appellants were already in Judicial custody for offences punishable under the NDPS Act, when orders for their preventive detention were passed. Their writ petitions challenging the detention orders were dismissed by the Delhi High Court, against which these appeals were filed.

Held: Detention--Offences under NDPS Act--Person already in Judicial custody--Grounds of detention must show that the detaining authority was aware that the detenu is already under custody and that on account of the antecedent activities of the detenu it was satisfied that it is necessary to detain him to prevent him from engaging in prejudicial activities.

2. Detention--Offences under NDPS Act--Person already in Judicial custody with no prospect of release from such custody in the near future--Detention order not sustainable.

ORDER

S.C. Agrawal, J.

1. These appeals, by special leave, arise out of the judgment of the High Court of Delhi whereby the writ petitions filed under Article 226 of the Constitution to challenge the legality of the orders dated October 11, 1988 passed under Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances

Act, 1988 (hereinafter referred to as 'the Act') for the detention of the appellants have been dismissed. This Court by the order dated January 11, 1990 allowed the appeals and after setting aside the orders of detention dated October 11, 1988 directed that the appellants be set at liberty forthwith and that reasoned judgment would follow. We are hereby indicating our reasons for the order passed on January 11, 1990.

2. Dharmendra Suganchand Chelawat (the Appellant in Criminal Appeal No. 11/90) hereinafter referred to as 'Dharmendra' is the son of Suganchand Kanhaiyyalal Chelawat (the Appellant in Criminal Appeal No. 12 of 1990) hereinafter referred to as 'Suganchand'. In the grounds of detention furnished to the appellants it is stated that on September 21, 1988 the officers of the Directorate of Revenue Intelligence, Bombay Zonal Unit, searched the godown of Siddharth Trotters Pvt. Ltd., Kothari Mansion, at 357, S.V.P. Road, Bombay and five card board cartons containing in all 2,51,000 mandrax tablets weighing 125.5 Kgs. and valued at Rs. 7,53,000 were seized from there. During the follow-up investigation the officers of the Central Excise & Customs searched the premises of Suganchand at Indore (M.P.) which resulted in the recovery of 51 Kgs. of mandrax tablets from a Maruti Van parked in the house compound on September 22/23, 1988 which was seized. In addition to 20. 500 Kgs. of mandrax tablets, 148.300 Kgs. of methaqualone powder and 97.700 Kgs. of white powder was recovered from the residence itself. Suganchand in his statement which was recorded on September 23, 1988 stated that he had manufactured mandrax tablets at his factory at Indore and that he was assisted by his son, Dharmendra. Suganchand was arrested on September 23, 1988 and produced before the Additional Chief Judicial Magistrate, Indore on September 24, 1988 who remanded him to the police custody till September 30, 1988. On September 30, 1988 Suganchand was remanded to judicial custody till October 13, 1988. A bail application was submitted by Suganchand in the Sessions Court on September 28, 1988 and the same was rejected by the Sessions Court on October 1, 1988.

3. Dharmendra was arrested on October 4, 1988 and he was remanded to the police custody upto October 5, 1988. On October 5, 1988 he was remanded to judicial custody till October 13, 1988. During 15 the course of arguments Shri Harjinder Singh, the learned Counsel for the appellants, stated that a bail application was submitted on behalf of Dharmendra and the same was rejected on October 5, 1988.

4. On October 11, 1988 orders were passed by Shri K.L. Verma, Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, under Section 3(1) of the Act for the detention of the appellants. In the order of detention the detaining authority has stated that he was satisfied from the record of the case with respect to the appellants that with a view to preventing them from engaging in the transportation and abetting in the export inter-state of Psychotropic Substances it is necessary to make the order directing that the appellants be detained and kept in custody. The said order of detention was served on appellants on October 13, 1988 while they were in custody. The appellants were also served with the grounds of detention dated October 11, 1988 as well as the documents on which reliance was placed by the detaining authority.

5. Writ Petitions under Article 226 of the Constitution of India were filed by Kumari Archana Chelawat, the daughter of Suganchand and sister of Dharmendra, wherein the legality of the detention of the appellants was challenged before the Delhi High Court. The said writ petitions have been dismissed by the High Court by order dated September 7, 1989. Thereafter the appellants moved this Court for special leave to appeal against the judgment of the Delhi High Court and special leave to appeal was

granted on January 11, 1990. Hence these appeals.

6. Shri Harjinder Singh, the learned Counsel for the appellants has urged that since the appellants were in custody on October 11, 1988, the date of passing of the impugned order of detention, there was no apprehension that the appellants would be engaging in any prejudicial activity and the order for detention of the appellants under Section 3(1) of the Act could not be validly passed. In support of the aforesaid submission Shri Harjinder Singh has placed reliance on the decision of this Court in Ramesh Yadav v. District Magistrate, Etah and Ors. MANU/SC/0098/1985 : 1986 CriLJ 312 ; Suraj Pal Sahu v. State of Maharashtra and Ors., MANU/SC/0223/1986 : 1986 CriLJ 2047 and N. Meera Rani v. Government of Tamil Nadu and Anr. MANU/SC/0381/1989 : [1989] 3 SCR 901 .

7. The learned Attorney General, oh the other hand, has supported the decision of the High Court and has submitted that in the facts and the circumstances of the present cases the orders for detention of the appellants were validly passed on October 11, 1988. The submission of Â£ the learned Attorney General is that the appellants had been remanded to judicial custody upto October 13, 1988 only and the detaining authority could have apprehended that the said remand may not be extended beyond October 13, 1988 and the appellants may be released from custody on October 13, 1988 and thereafter they would be free to engage in prejudicial activities.

In view of the aforesaid submissions the question which needs consideration is whether in the facts and the circumstances of the present cases, the detaining authority was justified, in law, in passing the orders for the detention of the appellants under Section 3(1) of the Act on October 11, 1988 when the appellants were in custody. The question as to whether and in what circumstances an order for preventive detention may be passed against a person who is already in custody has come up for consideration before this Court. In Rameshwar Shaw v. District Magistrate, Burdwan and Anr., MANU/SC/0041/1963 : 1964 CriLJ 257 decided by the Constitution Bench, it has been laid down that the question as to whether an order for detention can be passed against a person who is in detention or in jail will always have to be determined in the circumstances of each case and it has been observed:

> As an abstract proposition of law, there may not be any doubt that Section 3(1)(a) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail; but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail. Take for instance, a case where a person has been sentenced to rigorous imprisonment for ten years. It cannot be seriously suggested that soon after the sentence of imprisonment is pronounced on the person, the detaining authority can make an order directing the detention of the said person after he is released from jail at the end of the period of the sentence imposed on him. In dealing with this question, again the considerations of proximity of time will not be irrelevant. On the other hand, if a person who is under-going imprisonment, for a very short period, say for a month or two or so, and it is known that he would soon be released from jail, it may be possible for the authority to consider the antecedent history of the said person and decide whether the detention of the said person would be necessary after he is released from jail, and if the authority is bona fide satisfied that such detention is necessary, he can make

a valid order of detention a few days before the person is likely to be released.

8. In Masood Alam Etc. v. Union of India and Ors. MANU/SC/0278/1973 : 1973 CriLJ 627 it has been held that merely because the person concerned has been served with the order of detention while in custody when it is expected that he would soon be released that service cannot invalidate the order of detention. This Court has observed as under:

> The real hurdle in making an order of detention against a person already in custody is based on the view that it is futile to keep a person in dual custody under two different orders but this objective cannot hold good if the earlier custody is without doubt likely to cease very soon and the detention order is made merely with the object of rendering it operative when the previous custody is about to cease.

9. In Dulal Roy v. District Magistrate, Burdwan MANU/SC/0112/1975 : 1975 CriLJ 1322 it was held that if a person was serving a long time of imprisonment or was in jail custody as an undertrial and there was no immediate or early prospect of his being released on bail or otherwise, the authority would not legitimately be satisfied on the basis of his past history or antecedents that he was likely to indulge in similar prejudicial activities after his release in the distant or indefinite future.

10. In Vijay Kumar v. State of Jammu & Kashmir and Ors. MANU/SC/0127/1982 : [1982] 3 SCR 522 this Court has observed:

> Preventive detention is resorted to, to thwart future action. If the detenu is already in jail charged with a serious offence, he is thereby prevented from acting in a manner prejudicial to the security of the State. May be, in a given case there yet may be need to order preventive detention of a person already in jail. But in such a situation the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order need to be made.

11. In Alijan Mian v. District Magistrate, Dhanbad and Ors. MANU/SC/0082/1983 : 1983 CriLJ 1649 in the grounds of detention it was stated that the subject is in jail and is likely to be released on bail and that if he was allowed to remain at large, he will indulge in activities prejudicial to the maintenance of public order. After considering the said statement in the grounds of detention this Court has observed:

> The position would have been entirely different if the petitioners were in jail and had to remain in jail for a pretty long time. In such a situation there could be no apprehension of breach of 'public order' from the petitioners. But the detaining authority was satisfied that if the petitioners were enlarged on bail, of which there was every likelihood, it was necessary to prevent them from acting in a manner prejudicial to public order.

12. In Ramesh Yadav v. District Magistrate, Etah and Ors., (supra) in the grounds of detention it was mentioned that the detenu had filed an application for bail and there was positive apprehension that after having bail he would come out of jail and would indulge in activity prejudicial to the maintenance of the public order. This Court has observed:

> On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail he would again carry on his criminal activities in the area. 11 the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under-trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed. We are inclined to agree with counsel for the petitioner that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles indicated by this Court in a series of cases relating to the preventive detention.

13. In Suraj Pal dahu v. State of Maharashtra and Ors. (supra) after considering the earlier decisions this Court has observed:

> If there was an imminent possibility of the man being set at liberty and his detention coming to an end, then it appears, as a principle, if his detention is otherwise necessary and justified then there is nothing to prevent the appropriate authorities from being satisfied about the necessity of passing an appropriate order detaining the person concerned.

1 4 . In Binod Singh v. District Magistrate, Dhanbad, Bihar and Ors., MANU/SC/0164/1986 : 1986 CriLJ 1959 it has been laid down:

> If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In the instant case when the actual order of detention was served upon the detenu, the detenu was in Jail. There is no indication that this factor or the question that the said detenu might be released or that there was such a possibility of his release, was taken into consideration by the detaining authority properly and seriously before the service of the order. A bald statement is merely an ipse dixit of the officer. If there were cogent materials for thinking that the detenu might be released then these should have been made apparent.

15. In Smt. Shashi Aggarwal v. State of V.P. and Ors., MANU/SC/0457/1988 : 1988 CriLJ 839 this Court while referring to the decision in Ramesh Yadav v. District Magistrate, Etah (Supra) has observed:

> What was stressed in the above case is that an apprehension of the detaining authority that the accused if enlarged on bail would again carry on his criminal activities is by itself not sufficient to detain a person under the National Security Act.

16. This Court has further observed:

> Every citizen in this country has the right to have recourse to law. He has the right to move the Court for bail when he is arrested under the ordinary law of the land. If the State thinks that he does not deserve bail the State could oppose the grant of bail. He cannot, however, be interdicted from moving the court for bail by clamping an order of detention. The possibility of the court granting bail may not be sufficient. Nor a bald statement that the person would repeat his criminal activities would be enough. There must also be

credible information or cogent reasons apparent on the record that the detenu, if enlarged on bail, would act prejudicially to the interest of public order.

17. In Vijay Kumar v. Union of India, MANU/SC/0568/1988: 1988 CriLJ 951 , it has been held that two facts must appear from the grounds of detention, namely:

(i) awareness of the detaining authority of the fact that the detenu is already in detention, and

(ii) there must be compelling reasons justifying such detention, despite the fact that the detenu is already under detention.

18. Shetty, J., in his concurring judgment, has posed the question: what should be the compelling reason justifying the preventive detention, if the person is already in jail and where should one find it? The learned judge has rejected the contention that it can be found from material other than the grounds of detention and the connected facts therein and has held that apart from the grounds of detention and the connected facts therein, there cannot be any other material which can enter into the satisfaction of the detaining authority. The learned judge has also observed that if the activities of the detenu are not isolated or casual and are continuous or part of the transaction or racket, then, there may be need to put the person under preventive detention, notwithstanding the fact that he is under custody in connection with a case. The learned judge has quoted the following observations from the judgment of this Court in Suraj Pal Sahu v. State of Maharashtra, (Supra):

But where the offences in respect of which the detenu is accused are so interlinked and continuous in character and are of such nature that these affect continuous maintenance of essential supplies and thereby jeopardize the security of the State, then subject to other conditions being fulfilled, a man being in detention would not detract from the order being passed for preventive detention.

19. In N. Meera Rani v. Government of Tamil Nadu and Anr., (Supra) the legal position has been summed up as under:

We may summarise and reiterate the settled principle. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case; preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order etc. ordinarily it is not needed when the detenu is already in custody; the detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order; but, even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities the detention order can be validly made even in anticipation to operate on his release. This appears to us, to be the correct legal position.

20. In this case this Court has pointed out that there was no indication in the detention order read with its annexure that the detaining authority considered it likely that the detenu could be released on bail and that the contents of the order showed

the satisfaction of the detaining authority that there was ample material to prove the detenu's complicity in the Bank dacoity including sharing of the booty in spite of absence of his name in the FIR as one of the dacoits. The Court held that the order for detention was invalid since it was made when the detenu was already in jail custody for the offence of bank dacoity with no prospect of his release.

21. 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.

22. If the present cases are examined in the light of the aforesaid principles, it can be said that the first condition is satisfied in as much as the grounds of detention show that the detaining authority was aware of the fact that the appellants were in custody on the date of passing of the order of detention. Can it be said that there was a compelling reason for passing the order for the detention of the appellants, although they were in custody? The learned Attorney General wants the said question to be answered in the affirmative. He has invited our attention to the grounds of detention and has submitted that the appellants were found engaging in the transportation and abetting in the export inter-state of Psychotropic Substances and in the event of their release from custody, the appellants would continue to engage in those activities. The learned Attorney General has also pointed out that the appellants had been remanded to judicial custody upto October 13, 1988 only and their further remand could be refused by the Magistrate and the appellants could be released from custody on October 13, 1988. The submission of the learned Attorney General is that, keeping in view the activities of the appellants and the likelihood of their being released from custody on their remand being not extended by the Magistrate on October 13, 1988, the detaining authority, on October 11, 1988, when it passed the order of detention, was satisfied that the detention of the appellants was necessary even though they were in custody at that time.

23. We have given our careful consideration to the aforesaid submission of the learned Attorney General. We are, however, unable to agree with the same. In the grounds of detention the detaining authority has only mentioned the fact that the appellants has been remanded to judicial custody till October 13, 1988. The grounds of detention do not show that the detaining authority apprehended that the further remand would not be granted by the Magistrate on October 13, 1988, and the appellants would be released from custody on October 13, 1988. Nor is there any material in the grounds of detention which may lend support to such an apprehension. On the other hand we find that the bail applications moved by the appellants had been rejected by the Sessions Judge a few days prior to the passing of the order of detention on October 11, 1988. The grounds of detention disclose that the appellants were engaged in activities which are offences punishable with imprisonment under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985. It cannot, therefore, be said that there was a reasonable

prospect of the appellants not being further remanded to custody on October 13, 1988 and their being released from custody at the time when the order for preventive detention of that appellant was passed on October 11, 1988. In the circumstances, we are of the view that the order for detention of the appellants cannot be sustained and must be set aside and the appellants should be released forthwith. These are the reasons on the basis of which we passed the order for the release of the appellants on January 11, 1990. It is, however, clarified that in case the appellants are released from custody in the aforesaid criminal proceedings, the question of their preventive detention under the Act on the above material may be reconsidered by the appropriate authority in accordance with law and this decision shall not be construed as an impediment for that purpose.