REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO(s). 755 OF 2011

REKHA **Appellant (s)**

VERSUS

STATE OF T.NADU TR.SEC.TO GOVT. & ANR **Respondent(s)**

WITH
CRIMINAL APPEAL NO. 756 of 2011
CRIMINAL APPEAL NO. 757 of 2011
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CRIMINAL APPEAL NO. 764 of 2011

J U D G M E N T

MARKANDEY KATJU, J.

CRIMINAL APPEAL NO. 755 OF 2011

Heard learned counsel for the parties.

This Appeal has come up in a reference made by a two Judge Bench of this Court by order dated 15.03.2011.

The detenu in this Appeal Ramakrishnan (whose wife Rekha has filed this Appeal) has been detained by a detention order dated 08.04.2010 passed under the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Forest Offenders, Goondas, Immoral Traffic

Offenders, Sand Offenders, and Slum Grabbers and Video Pirates Act, 1982, on the allegation that he was selling expired drugs after tampering with the labels and printing fresh labels showing them as non-expired drugs. The habeas corpus petition filed by the wife of the detenu before the Madras High Court challenging the said detention order has been dismissed by the impugned order dated 23.12.2010. Hence, this Appeal.

Several grounds have been raised before us, but, in our opinion, this Appeal is liable to succeed on one ground itself, and hence we are not going into the other grounds.

The detention order reads as under :-

"No. 199/2010 Dated 08.04.2010

DETENTION ORDER

Whereas I, T. Rajendran, IPS., Commissioner of Police, Chennai Police, is satisfied that the person known as Tr. Ramakrishnan, male aged 35, S/O Devaraj, No. 82-B, South Mada Veethi, Villivakkam, Chennai-49 is a Drug Offender as contemplated under Section 2(e) of the Tamil Nadu Act 14 of 1982 and that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, it is necessary to make the following order.

Now therefore in exercise of the powers conferred on me by sub-section (1) of Section 3 of the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, and Slum Grabbers and Video Pirates Act, 1982 (Tamil Nadu Act 14 of 1982) read with orders issued by the Government in G.O. (D) No. 6, Home, Prohibition and Excise (XVI) Department dated 18th January, 2010 under sub-section (2) of Section 3 of the said Act, I hereby direct that the said Drug Offender Tr.

Ramakrishnan, S/o Devaraj, be detained and kept in custody at the Central Prison, Puzhal, Chennai.

Given under my hand and seal of this office the 8th day of April, 2010."

The relevant part of the grounds on which the said detention order has been made is as follows :-

"Thiru. Elango, M. Pharm, male aged 43, S/O Ramasamy is working as a Drug Inspector, Drug Control Department, Perambur Range, Zone-II, D.M.S. Complex, Teynampet, Chennai-18. On 15.03.2010, Thiru. Elango appeared before the Inspector of Police, Crimes P-6 Kodungaiyur Police Station and lodged a complaint against Thiruvalargal, Prabhakar @ Ravi, 2) Venkatesan, 3) Sanjay Kumar, 4) Sekar, 5) Baskar, 6) Pradeep Kumar Chordia and 7) Meenakshi Sundaram.

In his complaint, he has stated that expired drugs collected from the medical shops of Chennai city and Suburban used to be dumped at dump yard of Corporation ground at Ezhil Nagar, Kodungaiyur, Chennai. On 15.3.2010, Thiru, Elango received a secret information that expired drugs dumped at the dump yard at Corporation ground, Ezhil Nagar, Kodungaiyur, Chennai, were taken by Thiru. Prabhakar @ Ravi residing at the first floor of No. A-6/541, 151st Street, Muthamizh Nagar, Kodungaiyur, Chennai and by keeping the same with his associates tampered the same tampering the original labels and printing fresh labels to make it appear as though they are not expired drugs and redistribute the same for sale to the general public."

In para 4 of the grounds of detention, it is stated :-

> **"4. I am aware that Thiru. Ramakrishnan, is in remand in P.6, Kodungaiyur Police Station Crime No. 132/2010 and he has not moved any bail application so far. The sponsoring authority has stated that the relatives of Thiru. Ramakrishnan are taking action to take him on bail in the above case by filing bail applications before the Higher courts since in similar cases bails were granted by the Courts after a lapse of time. Hence, there is real possibility of his coming out on bail in the above case by filing a bail application before the higher courts. If he comes out on bail he will indulge in further activities, which will be prejudicial to the maintenance of public health and order. Further the recourse to normal criminal law would not have the desired effect of effectively preventing him from indulging in such activities, which are prejudicial to the maintenance of public health and order. On the materials placed before me, I am fully satisfied that the said Thiru. Ramakrishnan is also a Drug Offender and that there is a compelling necessity to detain him in order to prevent him from indulging in such further activities in future which are prejudicial to the maintenance of public order under the provisions of Tamil Nadu Act 14 of 1982."**

A perusal of the above statement in para 4 of the grounds of detention shows that no details have been given about the alleged similar cases in which bail was allegedly granted by the concerned court. Neither the date of the alleged bail orders has been mentioned therein, nor the bail application number, nor whether the bail orders were passed in respect of the co-accused on the same case, nor whether

the bail orders were passed in respect of other co-accused in cases on the same footing as the case of the accused. All that has been stated in the grounds of detention is that "in similar cases bails were granted by the courts". In our opinion, in the absence of details this statement is mere *ipse dixit*, and cannot be relied upon.

In our opinion, this itself is sufficient to vitiate the detention order.

It has been held in T.V. Sravanan alias S.A.R. Prasana Venkatachaariar Chaturvedi Vs. State through Secretary and Anr., (2006) 2 SCC 664; A. Shanthi (Smt.) Vs. Govt. of T.N. and Ors., (2006) 9 SCC 711; Rajesh Gulati Vs. Govt. of NCT of Delhi and Anr. (2002) 7 SCC 129, etc. that if no bail application was pending and the detenue was already, in fact, in jail in a criminal case, the detention order under the preventive detention law is illegal. These decisions appear to have followed the Constitution Bench decision in Haradhan Saha Vs. State of West Bengal, (1975) 3 SCC 198, wherein it has been observed (vide para 34):

> **"Where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or public order."**

On the other hand, Mr. Altaf Ahmed, learned

senior counsel appearing for the State of Tamil Nadu, has relied on the judgments of this Court in A. Geetha Vs. State of T.N. And Anr. (2006) 7 SCC 603; and Ibrahim Nazeer Vs. State of T.N. and Anr., (2006) 6 SCC 64, wherein it has been held that even if no bail application of the petitioner is pending but if in similar cases bail has been granted, then this is a good ground for the subjective satisfaction of the detaining authority to pass the detention order.

In our opinion, if details are given by the respondent authority about the alleged bail orders in similar cases mentioning the date of the orders, the bail application number, whether the bail order was passed in respect of co-accused in the same case, and whether the case of the co-accused was on the same footing as the case of the petitioner, then, of course, it could be argued that there is likelihood of the accused being released on bail, because it is the normal practice of most courts that if a co-accused has been granted bail and his case is on the same footing as that of the petitioner, then the petitioner is ordinarily granted bail. However, the respondent authority should have given details about the alleged bail order in similar cases, which has not been done in the present case. A mere *ipse dixit* statement in the grounds

of detention cannot sustain the detention order and has to

be ignored.

In our opinion, the detention order in question only contains *ipse dixit* regarding the alleged imminent possibility of the accused coming out on bail and there was no reliable material to this effect. Hence, the detention order in question cannot be sustained.

Moreover, even if a bail application of the petitioner relating to the same case was pending in a criminal case the detention order can still be challenged on various grounds e.g. that the act in question related to law and order and not public order, that there was no relevant material on which the detention order was passed, that there was *mala fides*, that the order was not passed by a competent authority, that the condition precedent for exercise of the power did not exist, that the subjective satisfaction was irrational, that there was non-application of mind, that the grounds are vague, indefinite, irrelevant, extraneous, non-existent or stale, that there was delay in passing the detention order or delay in executing it or delay in deciding the representation of the detenu, that the order was not approved by the government, that there was failure to refer the case to the Advisory Board or that the reference was belated, etc.

In our opinion, Article 22(3)(b) of the

Constitution of India which permits preventive detention is only an exception to Article 21 of the Constitution. An exception is an exception, and cannot ordinarily nullify the full force of the main rule, which is the right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting the civil liberties of the people, and not to put them in jail for a long period without recourse to a lawyer and without a trial. As observed in R Vs. Secy. Of State for the Home Dept., Ex Parte Stafford, (1998) 1 WLR 503 (CA) :-

> **"The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law."**

Article 22, hence, cannot be read in isolation but must be read as an exception to Article 21. An exception can apply only in rare and exceptional cases, and it cannot override the main rule.

Article 21 is the most important of the fundamental rights guaranteed by the Constitution of India. Liberty of a citizen is a most important right won by our forefathers after long, historical, arduous struggles. Our Founding Fathers realised its value because they had seen

during the freedom struggle civil liberties of our countrymen being trampled upon by foreigners, and that is why they were determined that the right to individual

liberty would be placed on the highest pedestal along with the right to life as the basic right of the people of India.

Right to liberty guaranteed by Article 21 implies that before a person is imprisoned a trial must ordinarily be held giving him full opportunity of hearing, and that too through a lawyer, because a layman would not be able to properly defend himself except through a lawyer.

The importance of a lawyer to enable a person to properly defend himself has been elaborately explained by this Court in A.S. Mohd. Rafi Vs. State of Tamilnadu, AIR 2011 SC 308, and in Md. Sukur Ali Vs. State of Assam, JT 2011 (2) SC 527. As observed by Mr Justice Sutherland of the U.S. Supreme Court in Powell Vs. Alabama, 287 U.S. 45 (1932) "Even the intelligent and educated layman has small and sometimes no skill in the science of law", and hence, without a lawyer he may be convicted though he is innocent.

Article 22(1) of the Constitution makes it a fundamental right of a person detained to consult and be defended by a lawyer of his choice. But Article 22(3) specifically excludes the applicability of clause (1) of

Article 22 to cases of preventive detention. Therefore, we must confine the power of preventive detention to very narrow limits, otherwise the great right to liberty won by

our Founding Fathers, who were also freedom fighters, after long, arduous, historical struggles, will become nugatory.

In State of of Maharashtra & Ors. Vs. Bhaurao Punjabrao Gawande, (2008) 3 SCC 613 (para 23) this Court observed :

> **"...Personal liberty is a precious right. So did the Founding Fathers believe because, while their first object was to give unto the people a Constitution whereby a government was established, their second object, equally important, was to protect the people against the government. That is why, while conferring extensive powers on the government like the power to declare an emergency, the power to suspend the enforcement of fundamental rights or the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against executive and legislative despotism those human rights which they regarded as fundamental. The imperative necessity to protect these rights is a lesson taught by all history and all human experience. Our Constitution makers had lived through bitter years and seen an alien Government trample upon human rights which the country had fought hard to preserve. They believed like Jefferson that "an elective despotism was not the Government we fought for". And, therefore, while arming the Government with large powers to prevent anarchy from within and conquest from without, they took care to ensure that those powers were not abused to mutilate the liberties of the people. (vide A.K. Roy Vs. Union of India (1982) 1 SCC 271, and Attorney General for India Vs. Amratlal Prajivandas, (1994) 5 SCC 54." [emphasis supplied]**

In the Constitution Bench decision of this Court in M. Nagaraj & Ors. Vs. Union of India & Ors. (2006) 8 SCC 212, (para 20) this Court observed :

"It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race."

In the 9 Judge Constitution Bench decision of this Court in I.R. Coelho (dead) By LRs. Vs. State of T.N., (2007) 2 SCC 1 (vide paragraphs 109 and 49), this Court observed :

"It is necessary to always bear in mind that fundamental rights have been considered to be the heart and soul of the Constitution.....Fundamental rights occupy a unique place in the lives of civilized societies and have been described in judgments as "transcendental", "inalienable", and primordial".

In our opinion, Article 22(3)(b) cannot be read in isolation, but must be read along with Articles 19 and 21, vide Constitution Bench decision of this Court in A.K. Roy Vs. Union of India (1982) 1 SCC 271 (para 70).

It is all very well to say that preventive detention is preventive not punitive. The truth of the matter, though, is :11:

that in substance a detention order of one year (or any other period) is a punishment of one year's imprisonment. What difference is it to the detenu whether his imprisonment is called preventive or punitive?

Mr. Altaf Ahmed, learned senior counsel for the

respondents, submitted that there are very serious allegations against the detenu of selling expired drugs after removing the original labels and printing fresh labels to make them appear as though they are not expired drugs.

In this connection, criminal cases are already going on against the detenu under various provisions of the Indian Penal Code as well as under the Drugs and Cosmetics Act, 1940 and if he is found guilty, he will be convicted and given appropriate sentence. In our opinion, the ordinary law of the land was sufficient to deal with this situation, and hence, recourse to the preventive detention law was illegal.

Mr. Altaf Ahmed, learned senior counsel, further submitted that the impugned detention order was passed on 08.04.2010, and the bail application of the detenu was also dismissed on the same date. Hence, he submitted that it cannot be said that no bail application was pending when the detention order in question was passed.

In this connection, it may be noted that there is nothing on the record to indicate whether the detaining authority was aware of the fact that the bail application of the accused was pending on the date when the detention order was passed on 08.04.2010. On the other hand, in para 4 of

the grounds of detention it is mentioned that "Thiru. Ramakrishnan is in remand in crime No. 132/2010 and he has not moved any bail application so far". Thus, the detaining authority was not even aware whether a bail application of the accused was pending when he passed the detention order, rather the detaining authority passed the detention order under the impression that no bail application of the accused was pending but in similar cases bail had been granted by the courts. We have already stated above that no details of the alleged similar cases has been given. Hence, the detention order in question cannot be sustained.

It was held in Union of India Vs. Paul Manickam and another, (2003) 8 SCC 342, that if the detaining authority is aware of the fact that the detenu is in custody and the detaining authority is reasonably satisfied with cogent material that there is likelihood of his release and in view of his antecedent activities he must be detained to prevent him from indulging in such prejudicial activities, the detention order can validly be made.

In our opinion, there is a real possibility of release of a person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be

illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed.

Mr. Altaf Ahmed, learned senior counsel, further submitted that we are taking an over technical view of the matter, and we should not interfere with the preventive detention orders passed in cases where serious crimes have been committed. We do not agree.

Prevention detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution

of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous, historic struggles. It follows, therefore, that if the ordinary law of the land (Indian Penal Code and other penal statutes) can deal with a situation, recourse to a preventive

detention law will be illegal

Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is : Was the ordinary law of the land sufficient to deal with the situation ? If the answer is in the affirmative, the detention order will be illegal. In the present case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Indian Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation. Hence, in our opinion, for this reason also the detention order in question was illegal.

In this connection, it may be noted that it is true that the decision of the 2 Judge Bench of this Court in Biram Chand Vs. State of Uttar Pradesh & Anr, (1974) 4 SCC 573, was overruled by the Constitution Bench decision in Haradhan Saha's case (supra) (vide para 34). However, we should

carefully analyse these decisions to correctly understand the legal position.

In Biram Chand's case (supra) this Court held that the authorities cannot take recourse to criminal proceedings as well as pass a preventive detention order on the same facts (vide para 15 of the said decision). It is this view which was reversed by the Constitution Bench decision in Haradhan Saha's case (supra).

This does not mean that the Constitution Bench laid down that in all cases the authorities can take recourse to both criminal proceedings as well as a preventive detention order even though in the view of the Court the former is sufficient to deal with the situation.

This point which we are emphasizing is of extreme importance, but seems to have been overlooked in the decisions of this Court.

No doubt it has been held in the Constitution Bench decision in Haradhan Saha's case (supra) that even if a person is liable to be tried in a criminal court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in

Articles 21 and 22 of the Constitution (which we have already explained). Articles 22(3)(b) is only an exception to Article 21 and it is not itself a fundamental right. It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him opportunity of placing his defence through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a

criminal offence, but the ordinary criminal law (Indian Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.

Hence, the observation in para 34 in Haradhan Saha's case (supra) cannot be regarded as an unqualified statement that in every case where a person is liable to be tried, or is actually being tried, for a crime in a criminal court a detention order can also be passed under a preventive detention law.

It must be remembered that in cases of preventive detention no offence is proved and the justification of such detention is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as a

'jurisdiction of suspicion', (Vide State of Maharashtra Vs. Bhaurao Punjabrao Gawande, (supra) - para 63). The detaining authority passes the order of detention on subjective satisfaction. Since clause (3) of Article 22 specifically excludes the applicability of clauses (1) and (2), the detenu is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest.

To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly

construed and meticulous compliance with the procedural safeguards, however, technical, is, in our opinion, mandatory and vital.

It has been held that the history of liberty is the history of procedural safeguards. (See : Kamleshkumar Ishwardas Patel Vs. Union of India and others (1995) 4 SCC 51, vide para 49). These procedural safeguards are required to be zealously watched and enforced by the court and their rigour cannot be allowed to be diluted on the basis of the nature of the alleged activities of the detenu.

As observed in Rattan Singh Vs. State of Punjab, (1981) 4 SCC 1981 :-

> **"May be that the detenu is a smuggler whose tribe (and how their numbers increase!) deserves no sympathy since its activities have paralysed the Indian economy. But the laws of preventive detention afford only a modicum of safeguards to persons detained under them, and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenus."**

As observed in Abdul Latif Abdul Wahab Sheikh Vs. B.K. Jha and another (1987) 2 SCC 22, vide para 5, :

> **"...The procedural requirements are the only safeguards available to a detenu since the court**

is not expected to go behind the subjective satisfaction of the detaining authority. The procedural requirements are, therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard....”

As observed by Mr. Justice Douglas of the United States Supreme Court in Joint Anti-Fascist Refugee Committee Vs. McGrath, 341 US 123 at 179, *“It is procedure that spells much of the difference between rule of law and rule of whim or caprice. Steadfast adherence to strict procedural safeguards are the main assurances that there will be equal justice under law.”*

Procedural rights are not based on sentimental concerns for the detenu. The procedural safeguards are not

devised to coddle criminals or provide technical loopholes through which dangerous persons escape the consequences of their acts. They are basically society's assurances that the authorities will behave properly within rules distilled from long centuries of concrete experiences.

Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords

with the procedure established by law. The stringency and concern of judicial vigilance that is needed was aptly described in the following words in Thomas Pacham Dale's case, (1881) 6 QBD 376, :

> **"Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue."**

For the reasons given above, this Appeal is allowed, the impugned order is set aside and the impugned detention order is quashed. However, we make it clear that this will not affect the criminal cases pending against the alleged accused.

We further direct that the concerned detenu in this Appeal shall be released forthwith if not required in any other case.

CRIMINAL APPEAL NO. 756 of 2011; CRIMINAL APPEAL NO. 757 of 2011; CRIMINAL APPEAL NO. 759 of 2011; CRIMINAL APPEAL NO. 760 of 2011; CRIMINAL APPEAL NO. 762 of 2011; CRIMINAL APPEAL NO. 763 of 2011; CRIMINAL APPEAL NO. 764 of 2011

The Order passed in CRIMINAL APPEAL NO. 755 OF 2011 will also govern these Appeals.

Accordingly, for the reasons given in the Order

passed in CRIMINAL APPEAL NO. 755 OF 2011, these Appeals are allowed, the impugned common order is set aside and the impugned detention orders are quashed. However, we make it clear that this will not affect the criminal cases pending against the alleged accused persons.

We further direct that the concerned detenus in these Appeals shall be released forthwith if not required in any other case.

.....J.
(MARKANDEY KATJU)

.....J.
(SURINDER SINGH NIJJAR)

NEW DELHI; **.....J.**
APRIL 05, 2011 **(GYAN SUDHA MISRA)**