REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2545 OF 2014
(Arising out of SLP (Criminal) No.4199 of 2013)

The Secretary to Government,
Public (Law and Order-F) and another .....Appellants

Versus

Nabila and another .....Respondents

J U D G M E N T

M.Y. EQBAL, J.

Leave granted.

2. By way of present appeal by special leave, Secretary to the Government of Tamil Nadu, Public (Law and Order-F) Department, Chennai has assailed the Order dated 26.4.2013 passed by the Division Bench of the Madras High Court at Madurai Bench by which order of detention passed by the appellant under Section 3 (1)(a)of the National Security Act 1980 has been quashed.

3. The respondent-writ petitioner, being the wife of the detenu, by way of Habeas Corpus Petition before the High Court, challenged the detention order mainly on the ground that the detenu was detained on the solitary ground case and the sponsoring authority has failed to place any material before the detaining authority to show that either the detenu himself or his relatives have taken any step to file bail application in a solitary ground case. The High Court held that the satisfaction arrived at by the detaining authority that there is real or imminent possibility of the detenu being enlarged on bail is vitiated in law.

4. Assailing the impugned order, Mr. L. Nageshwara Rao, learned senior counsel appearing for the appellants, submitted that the detention of the detenu on the solitary ground case cannot be held to be erroneous and even on solitary ground the detenu can be detained in custody if sufficient materials on record are available to the

satisfaction of the authority concerned. Learned counsel relied upon the decision of this Court in ***Shiv Ratan Makim vs. Union of India,*** (1986) 1 SCC 404, and ***Union of India & Anr. vs. Chhaya Ghosal & Anr.***, (2004) 10 SCC 97.

5. Mr. Rao then submitted that the High Court has not appreciated the law in holding that the subjective satisfaction arrived at by the detaining authority that there is a real or imminent possibility of the detenu being enlarged on bail and if he is released on bail, he would indulge in such activities which would be prejudicial to the security of the State. In this connection, learned senior counsel relied upon Constitution Bench judgment of this Court in the case of ***Haradhan Saha vs. State of West Bengal and others***, (1975) 3 SCC 198, ***Ahmad Nssar vs. State of Tamil Nadu & Ors.***, (1999) 8 SCC 473 and ***Baby Devassy Chully vs. Union of India & Ors.***, (2013) 4 SCC 531.

6. Mr. Rao, learned senior counsel, lastly submitted that by reason of the detention order dated 5.12.2012 the detenu remained in jail till the order passed by the High Court dated 26.4.2013. On the question as to whether the detenu is required to undergo remaining period of detention, learned counsel fairly submitted that the matter is to be sent to the detaining authority to decide the same in accordance with law. In this regard, learned counsel relied upon the decision of this Court in the case of ***Sunil Fulchand Shah vs. Union of India & Ors.,*** (2000) 3 SCC 409 and ***Chanddrakant Baddi vs. ADM & Police Commissioner & Ors.,*** (2008) 17 SCC 290.

7. Mr. S. Gowthaman, learned counsel appearing for respondent no.1, at the very outset submitted that no bail application was filed on the date of passing of detention order although the respondent was confined in jail since 16.9.2012 and hence the detaining authority ought to have been satisfied while passing the order of detention that the

detenu was likely to be released on bail. In this regard, learned counsel relied upon the decision of this Court in ***Pebam Ningol Mikoi Devi vs. State of Manipur and others***, (2010) 9 SCC 618. Learned counsel also relied upon ***T.V. Sravanan alias A.R. Prasana Venkatachaariar Chaturvedi vs. State through Secretary and another***, (2006) 2 SCC 664.

8. On the question of detention on solitary ground, learned counsel submitted that no criminal prosecution against the detenu is pending in any court of law except the instant case where the detenu was detained without any subjective satisfaction. There is no material against the detenu for the purpose of passing order of detention. In this connection, learned counsel relied upon the case of ***Ayub alias Pappukhan Nawabkhan Pathan vs. S.N. Sinha and another***, (1990) 4 SCC 552.

9. Learned counsel, on the question of undergoing remaining period of detention when the period of detention has expired, relied upon ***Fulchand Shah vs. Union of India and Others*** (supra). Mr. Gowthaman lastly contended that very stringent conditions have been imposed while allowing the bail petition, as a result he has not gone to his hometown and is always available in Trichy. In that view of the matter there is no need for the detenu to undergo the remaining period of detention.

10. We have heard the learned counsel appearing for the parties and perused the orders passed by the Detaining Authority and the High Court.

11. The Habeas Corpus Writ Petition under Article 226 of the Constitution of India was filed by the respondent No.1, the wife of the detenu. The order of detention was primarily based on the information received by the Sub-Inspector of Police Q. Branch, CID, Trichy, who went to TVS toll gate,

Trichy along with his force and detenu was arrested and confessional statement was recorded which lead to seizure of incriminating articles containing official secrets relating to Indian Defence Forces and other articles. The Inspector of Police 'Q' Branch CID, Karur received those incriminating and other articles along with the special report and registered a case in Crime No.1 of 2012 under Sections 3,4, and 9 of Official Secrets Act, 1923 read with Section 120(B) IPC. Later on the detenu was produced before the Court of Judicial Magistrate No.2, Trichy and was remanded to judicial custody and his remand was periodically extended. The Detaining Authority being satisfied with the material placed by the Sponsoring Authority that the activities of the detenu are prejudicial to the security of the State, passed the order of detention on 5.12.2012.

12. As noticed above, the order of detention in the Habeas Corpus Petition was challenged before the High Court mainly on the ground that the detenu is involved in a solitary case

and has not filed any application for bail. But the order of detention was passed without recording any subjective satisfaction as to the real imminent possibility of the detenu being enlarged on bail as would indulge in such activities which have prejudicial to the security of the State. The High court while allowing the habeas corpus petition and quashing the order of detention observed as under:-

> "A perusal of paragraph No.11 of the grounds of detention would disclose that the detenu is in remand in connection with the solitary grounds case and admittedly he has not filed any bail application. The sponsoring authority has failed to place any material before the detaining authority to show that either the detenu himself or his relatives are taking steps to file application for bail in the solitary ground case and in the absence of such vital and cogent materials, the subjective satisfaction arrived at by the detaining authority that there is a real or imminent possibility of the detenu being enlarged on bail and if he is released on bail, he would indulge in such activities which would be prejudicial to the security of the state, is vitiated and therefore on this sole ground the impugned order of detention is liable to be quashed."

13. Indisputably, the object of law of preventive detention is not punitive, but only preventive. In case of preventive detention no offence is to be proved nor is any charge formulated. The justification of such detention is suspicion and reasonability and there is no criminal conviction which can only be warranted by legal evidence. However, the detaining authority must keep in mind while passing the order of detention the civil and constitutional right granted to every citizen by Article 21 of the Constitution of India inasmuch as no person shall be deprived of life and liberty except in accordance with the procedure established by law. The laws of Preventive Detention are to be strictly construed and the procedure provided must be meticulously complied with.

14. In the instant case, as noticed above, the High Court quashed the order of detention mainly on the ground that the detenu was in remand in connection with the solitary

ground case when there was no material before the detaining authority to show that either the detenu himself or his relatives are taking steps to file application for bail in the solitary ground case. In our opinion, the view taken by the High Court while passing the impugned order cannot be sustained in law. This point was considered by this Court in the case of ***Union of India & Anr. vs. Chhaya Ghosal & Anr.***, (2004) 10 SCC 97, and observed:-

> "23. So far as the finding of the High Court that there was only one incident is really a conclusion based on erroneous premises. It is not the number of acts which determine the question as to whether detention is warranted. It is the impact of the act, the factual position as highlighted goes to show that the financial consequences were enormous and ran into crores of rupees, as alleged by the detaining authority. The High Court seems to have been swayed away that there was only one incident and none after release on bail. The approach was not certainly correct and the judgment on that score also is vulnerable. At the cost of repetition it may be said that it is not the number of acts which is material, it is the impact and effect of the act which is determinative. The High Court's conclusions in this regard are therefore not sustainable."

15. In **Shiv Ratan Makim's** case (supra), the same question arose where on the basis of information received the customs officer intercepted one auto-rickshaw and on search two foreign mark gold in the shape of round tablets were recovered from the possession of the husband of respondent no.1. He was immediately arrested and was detained by the order passed by the government under Section 3 of the COFEPOSA Act. The said order was assailed on the ground that the detention order was passed on the solitary incident which cannot be sustained in law. This Court, while rejecting the said view, held:-

> "3. Though several grounds were taken in the writ petition only three were seriously pressed by the learned counsel appearing on behalf of the petitioner. The first ground was that the order of detention was based on the solitary incident in which two pieces of foreign marked gold were recovered from the pocket of the trousers of the petitioner on November 20, 1984 and apart from this incident there were no other incidents showing that he was habitually smuggling gold. The second ground was that considerable time had elapsed between the date when he was found to be carrying two pieces of foreign marked gold and the date of the order of detention and this long

lapse of time showed that the order of detention was vitiated by mala fides. And the last ground was that the order of detention was made with a view to circumventing or bypassing the criminal prosecution instituted against the petitioner and the detaining authority had not applied its mind to the vital aspect that the power of detention cannot be used to subvert, supplant or substitute the punitive law. We do not think any of these three grounds can be sustained.

4. So far the first ground is concerned, it is obvious that having regard to the nature of the activity of smuggling, an inference could legitimately be drawn even from a single incident of smuggling that the petitioner was indulging in smuggling of gold. Moreover, the written statement given by the petitioner clearly indicated that the petitioner was engaged in the business of purchase and sale of foreign marked gold and that this incident in which he was caught was not a solitary incident. The facts stated by the petitioner in his written statement could legitimately give rise to the inference that the petitioner was a member of a smuggling syndicate and merely because only one incident of smuggling by the petitioner came to light, it did not mean that this was the first and only occasion on which the petitioner tried to smuggle gold. There can be no doubt that having regard to the nature of the activity and the circumstances in which the petitioner was caught smuggling gold and the facts set out by him in his written statement, the second respondent was justified in reaching the satisfaction that the petitioner was engaged smuggling gold and that with a view to preventing him from smuggling gold, it was necessary to detain him.

16. Mr. Gowthaman, learned counsel appearing for the respondent vehemently argued that on the date of passing the detention order no bail was sought for by the detenu hence the detaining authority while passing the impugned order must be satisfied that the detenu was likely to be released on bail. Learned counsel submitted that there is no material or evidence in this regard. In our view, the detention order cannot be set aside merely on this ground. The Constitution Bench of this Court in ***Haradhan Saha vs. State of West Bengal & Others***, (1975) 3 SCC 198, while considering the constitutional validity of maintenance of Internal Security Act 1971, as being ultra vires and violates Article 19 and 21 of the Constitution of India, observed:-

> "32. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be, made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to

an order of preventive detention. An order of preventive detention is also not a bar to prosecution.

33. Article 14 is inapplicable because preventive detention and prosecution are not synonymous. The purposes are different. The authorities are different. The nature of proceedings is different. In a prosecution an accused is sought to be punished for a past act. In preventive detention, the past act is merely the material for inference about the future course of probable conduct on the part of the detenu.

34. The recent decisions of this Court on this subject are many. The decisions in *Borjahan Gorey* v. *State of W.B.*, *Ashim Kumar Ray* v. *State of W.B.*; *Abdul Aziz* v. *District Magistrate, Burdwan* and *Debu Mahato* v. *State of W.B.* correctly lay down the principles to be followed as to whether a detention order is valid or not. The decision in *Biram Chand* v. *State of U.P.,* (1974) 4 SCC 573, which is a Division Bench decision of two learned Judges is contrary to the other Bench decisions consisting in each case of three learned Judges. The principles which can be broadly stated are these. First, merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Act. Second, the fact that the Police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the Code of Criminal Procedure and even lodges a first information report may be no bar against the District Magistrate issuing an order under the preventive detention. Third, 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 the public order. Fourth, the

> mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the order. Fifth, the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances."

17. The submission of Mr. Gowthaman that in absence of any satisfaction having been recorded by the authority while passing the impugned order of detention that detenu was likely to be released on bail cannot be accepted. The detaining authority has arrived at the conclusion that there is a real and imminent possibility of the detenu being enlarged on bail cannot be said to be erroneous. This point was considered by this Court in the case of ***Ahamed Nassar vs. State of Tamil Nadu***, (1999) 8 SCC 473, held as under:-

> "46. So before the detaining authority, there existed not only the order dated 12-4-1999 rejecting his bail application but the contents of the bail application dated 1-4-1999. The averments made therein are relevant material on which subjective satisfaction could legitimately be drawn either way. Thus in spite of rejection of the bail application by a court, it is open to the detaining authority to come to his own satisfaction based on the contents of the bail application keeping in mind the circumstances that

there is likelihood of the detenu being released on bail. Merely because no bail application was then pending is no premise to hold that there was no likelihood of his being released on bail. The words "likely to be released" connote chances of being bailed out, in case there be pending bail application or in case if it is moved in future is decided. The word "likely" shows it can be either way. So without taking any such risk if on the facts and circumstances of each case, the type of crime to be dealt with under the criminal law, including contents of the bail application, each separately or all this compositely, all would constitute to be relevant material for arriving at any conclusion. As the contents of bail application would vary from one case to the other, coupled with the different set of circumstances in each case, it may be legitimately possible in a given case for a detaining authority to draw an inference that there is likelihood of the detenu released on bail. The detention order records:

"The Administrator of the National Capital Territory of Delhi is aware that you are in judicial custody and had not moved any bail application in the court(s) after 9-6-1992 but nothing prevents you from moving bail applications and possibility of your release on bail cannot be ruled out in the near future. Keeping in view your modus operandi to smuggle gold into India and frequent visits to India, the Administrator of the National Capital Territory of Delhi is satisfied that unless prevented you will continue to engage yourself in prejudicial activities once you are released."

18. Having regard to the law discussed hereinabove, the impugned order passed by the High Court quashing the order of detention on solitary ground case is erroneous in law.

19. Admittedly, the detenu was confined in jail since 16.9.2012. The detention order was passed on 5.12.2012, after about three months from the date of arrest, and the said order of detention was finally quashed by the High Court by passing the impugned order on 26.4.2013. The question, therefore, that needs to be considered is as to whether if the impugned order passed by the High Court is quashed, can the detenu be then asked to undergo the remaining period of detention. In this regard Mr. Rao relied upon the Constitution Bench judgment of this Court in ***Sunil Fulchand Shah vs. Union of India and Others***, (2000) 3 SCC 409, and fairly submitted that it is for the detaining authority to consider the matter afresh. Relevant paragraphs from the judgment in Fulchand Shah's case are worth to be quoted hereinbelow:-

> "32. The quashing of an order of detention by the High Court brings to an end such an order and if an appeal is allowed against the order of the High Court, the question whether or not the detenu should be made to surrender to undergo the remaining period of detention, would depend upon a variety of factors

and in particular on the question of lapse of time between the date of detention, the order of the High Court, and the order of this Court, setting aside the order of the High Court. A detenu need not be sent back to undergo the remaining period of detention, after a long lapse of time, when even the maximum prescribed period intended in the order of detention has expired, unless there *still* exists a proximate temporal nexus between the period of detention prescribed when the detenu was required to be detained and the date when the detenu is required to be detained pursuant to the appellate order and the State is able to satisfy the court about the desirability of "further" or "continued" detention. Where, however, a long time has *not* lapsed or the period of detention initially fixed in the order of detention has also not expired, the detenu may be sent back to undergo the balance period of detention. It is open to the appellate court, considering the facts and circumstances of each case, to decide whether the period during which the detenu was free on the basis of an erroneous order should be excluded while computing the total period of detention as indicated in the order of detention, though normally the period during which the detenu was free on the basis of such an erroneous order may not be given as a "set-off" against the total . period of detention. The actual period of incarceration cannot, however, be permitted to exceed the maximum period of detention, as fixed in the order, as per the prescription of the statute.

33. The summary of my conclusions by way of answer to the questions posed in the earlier portion of this order are:

1. Personal liberty is one of the most cherished freedoms, perhaps more important than the other freedoms guaranteed under the Constitution. It was for this reason that the Founding Fathers enacted the safeguards in Article 22 in the Constitution so as to limit the power of the State to detain a person without trial, which may otherwise pass the test of Article 21, by

humanising the harsh authority over individual liberty. In a democracy governed by the rule of law, the drastic power to detain a person without trial for security of the State and/or maintenance of public order, must be strictly construed. However, where individual liberty comes into conflict with an interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the nation.

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5. That parole does not interrupt the period of detention and, thus, that period needs to be counted towards the total period of detention unless the terms for grant of parole, rules or instructions, prescribe otherwise.

6. The quashing of an order of detention by the High Court brings to an end such an order and if an appeal is allowed against the order of the High Court, the question whether or not the detenu should be made to surrender to undergo the remaining period of detention, would depend upon a variety of factors and in particular on the question of lapse of time between the date of detention, the order of the High Court, and the order of this Court, setting aside the order of the High Court.

A detenu need not be sent back to undergo the remaining period of detention, after a long lapse of time, when even the maximum prescribed period intended in the order of detention has expired, unless there *still* exists a proximate temporal nexus between the period of detention indicated in the order by which the detenu was required to be detained and the date when the detenu is required to be detained pursuant to the appellate order and the State is able to satisfy the court about the desirability of "further" or "continued" detention.

7. That where, however, a long time has *not* lapsed or the period of detention initially fixed in

> the order of detention has not expired, the detenu may be sent back to undergo the balance period of detention. It is open to the appellate court, considering the facts and circumstances of each case, to decide whether the period during which the detenu was free on the basis of an erroneous order should be excluded while computing the total period of detention as indicated in the order of detention though normally the period during which the detenu was free on the basis of such an erroneous order may not be given as a "set-off" against the total period of detention. The actual period of incarceration cannot, however, be permitted to exceed the maximum period of detention, as fixed in the order, as per the prescription of the statute."

20. Fulchand Shah's case was also considered in the case of ***Chandrakant Baddi vs. Additional District Magistrate & Police Commissioner and Others***, (2008) 17 SCC 290, paragraph nos.5 & 6 of which are reproduced hereunder:-

> "5. This judgment (in *Sunil Fulchand Shah* v. *Union of India*) was followed in *Alagar case*, (2006) 7 SCC 540, and in para 9 it was observed that: (SCC p. 542)
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> > "*9*. The residual question is whether it would be appropriate to direct the respondent to surrender for serving remaining period of detention in view of passage of time. As was noticed in *Sunil Fulchand Shah* v. *Union of India*, (2000) 3 SCC 409, and *State of T.N.* v. *Kethiyan Perumal*, (2004) 8 SCC 780, it is for the appropriate State to consider whether the impact of the acts, which led to the order of detention still survives and whether it would be

> desirable to send back the detenu for serving remainder period of detention. Necessary order in this regard shall be passed within two months by the appellant State. Passage of time in all cases cannot be a ground not to send the detenu to serve remainder of the period of detention. It all depends on the facts of the act and the continuance or otherwise of the effect of the objectionable acts. The State shall consider whether there still exists a proximate temporal nexus between the period of detention indicated in the order by which the detenu was required to be detained and the date when the detenu is required to be detained pursuant to the present order."
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> .6. A reading of the above quoted paragraphs would reveal that when an order of a court quashing the detention is set aside, the remittance of the detenu to jail to serve out the balance period of detention does not automatically follow and it is open to the detaining authority to go into the various factors delineated in the judgments aforequoted so as to find out as to whether it would be appropriate to send the detenu back to serve out the balance period of detention. In this view of the matter, we are of the opinion that the detaining authority must be permitted to re-examine the matter and to take a decision thereon within a period of 3 months from the date of the supply of the copy of this order. We further direct that during this period the interim order in favour of the appellant given by us on 30-4-2007 will continue to operate."

21. As noticed above, the detenu was taken into custody in September, 2012, and the order of detention was passed in December, 2012. The said order of detention was finally quashed by the High Court in terms of Order dated

26.4.2013. Apparently, therefore, a long time has lapsed inasmuch as the period of detention fixed in the order of detention has already expired in April, 2014. Even if the impugned order passed by the High Court is set aside, the detenu cannot and shall not be taken into custody for serving the remaining period of detention unless there still exist materials to the satisfaction of the detaining authority for putting him under detention. In other words, initial detention order having been expired long back, it is for the detaining authority to take a decision in accordance with law.

22. In the facts and circumstances of the case and after giving out anxious consideration in the matter, we are of the considered opinion that the impugned order passed by the High Court cannot be sustained. Therefore, this appeal is allowed and the impugned order passed by the High Court,

quashing the order of detention, is hereby set aside with the direction and observations made hereinabove.

.....J.
(M.Y. Eqbal)

.....J.
(Shiva Kirti Singh)

New Delhi
December 09, 2014