HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

DIVISION BENCH

JUSTICE SHEEL NAGU
&
JUSTICE ANAND PATHAK

WRIT PETITION NO.4499/2021

Kalla alias Surendra Jat
Versus
State of Madhya Pradesh and others

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Shri S.K. Shrivastava, learned counsel for the petitioner.
Shri D.D. Bansal, learned Government Advocate for the respondents/State.

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Whether approved for reporting : Yes

Law laid down:

1. **P**reventive detention is devised to afford protection to society. An act, affecting public order may have ramifications over law and order and security of the State at the same time.
2. **L**iberty of an individual is to be reconciled with collective interest of the community so that Public Order, Social Peace and overall Development of the Area may not be sacrificed at the altar of Lawlessness, Misgovernance and Private Retribution.
3. **C**rime 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 National Security Act. Theory explained.
4. **O**ffence under Section 353 of IPC is not against public servant only but is a challenge to the Public Order and Administration of Justice at the instance of offender because public servant is

duty bound to serve public and maintain Public Order. If his position is compromised, then public order is immediately and automatically compromised.

5. **Ashok Kumar Vs. Delhi Administration and others, (1982) 2 SCC 403, Commissioner of Police and Ors. Vs. C. Anita, (2004) 7 SCC 467, Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and others, (1987) 2 SCC 684 and Debu Mahto Vs. State of West Bengal, AIR 1974 SC 816** are followed.

6. Relevant paras are 13, 17, 19 to 22 and 25.

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O R D E R
{Passed on 9th day of April, 2021}

Per Justice Anand Pathak, J.:

1. Present petition is under Article 226 of Constitution of India in the nature of certiorari taking exception to the order dated 08-02-2021 passed by the District Magistrate, Guna (Annexure P/1) whereby provision of Section 3(3) of the National Security Act, 1980 (hereinafter referred to as 'the Act') has been invoked and petitioner has been directed to be detained for 3 months at Central Jail, Gwalior. Petitioner is absconding and therefore, petition is at pre execution stage.

2. Precisely stated facts of the case are that petitioner is resident of District Guna and is living within the territorial jurisdiction of this Court. It appears from the pleadings that for last almost 20 years petitioner faced different criminal cases/charge-sheeted for alleged commission of different offences, particulars of which are placed with the petition and on the basis of those

cases as well as apprehension of the authorities that petitioner may commit breach of public order, proceedings were initiated under the Act against the petitioner which culminated into passing of impugned order dated 08-02-2021 by the District Magistrate, District Guna.

3. From the pleadings, it appears that on 19-01-2021, Station House Officer, Police Station Kotwali District Guna (respondent No.4 herein) recommended to Superintendent of Police, Guna (respondent No.3) to invoke the provisions of Section 3(3) of the Act since the petitioner is having criminal history of around 20 cases and is a threat to Public Order. On such recommendation, respondent No.3 initiated the proceedings against the petitioner under the provisions of the Act and list of 20 cases was catalogued along with recommendation about his conduct to breach public order and referred to the District Magistrate, Guna on 19-01-2021 itself. District Magistrate, Guna (respondent No.2 herein) after considering the fact situation, recommendations and thereafter the statement of prosecution witness (Station House Officer of Police Station Kotwali, Guna) passed the impugned order of detention in exercise of power under Section 3(3) of the Act. Being crestfallen by the said order of detention, petitioner has preferred this petition.

4. It is the submission of learned counsel for the petitioner that

order of detention is being passed on the basis of old and stale cases in which petitioner has already been acquitted way back (except one or two cases) and these stale cases are not at all sufficient to invoke the provisions of the Act. He referred different orders passed in this regard by the trial Courts in which after full fledged trials, he has been acquitted, albeit in some cases on the basis of settlement and in some cases on the basis of witnesses being turned hostile. Even in some cases, after investigation, police did not find the case for prosecution and therefore, closure reports were filed in those cases. Therefore, sheet anchor of the arguments of the petitioner is that detention order is based upon old and stale cases. He relied upon the judgments of this Court in the case of **Rinku alias Kuldeep Shukla Vs. State of M.P. and others, 2015(2) JLJ 140**, **Rajendra Kumar Jain Vs. State of M.P. 2015 (I) MPWN 37 (DB)**, **Shanker Mihani Vs. State of M.P. and others, ILR [2008] M.P. 797**, **Dhanwan s/o Balchandra Pardi Vs. State of M.P. and others, 2014(3) MPLJ 256**, **Bhaiya alias Bhaiyalal alias Arvind Vs. State of M.P. [2013 (1) MPLJ (Cri) 547]** to support his submission.

5. It is further submitted that respondent No.3 did not supply the correct information regarding cases registered against the petitioner to respondent No.2 -District Magistrate, Guna and therefore, non placement of material before the authority,

vitiates the proceedings. He relied upon **(1989) 2 SCC 370 {Dharamdas Shamlal Agarwal Vs. Police Commissioner and another}** and **2000 (4) MPHT 482 (DB) { Smt. Geeta Sahu Vs. District Magistrate, Shahdol and others}**.

6. Learned counsel for the petitioner also raised the ground that earlier externment proceedings under M.P. Rajya Suraksha Adhiniyam, 1990 were inflicted twice over the petitioner in 2018 and thereafter in 2019 but both were set aside at appellate stage and both the externment proceedings contained the grounds of criminal background just like in the present case but both proceedings resulted into quashment. Therefore, no ground existed for the authorities to initiate proceeding under stringent provisions of the Act. He raised the point regarding personal liberty of the petitioner and submits that it cannot be compromised on the basis of such flimsy pretext.

7. It is the submission of learned counsel for the petitioner that petition at pre execution stage is maintainable in view of the judgment rendered by the Apex Court in the case of **Additional Secretary to the Government of India and others vs. Smt. Alka Subhash Gadia and another, 1992 Supp. (1) SCC 496**.

No other ground was raised by the petitioner for consideration.

8. *Per contra*, learned counsel for the respondents/State matched the vehemence while referring documents and arguments in

place that petitioner not only has long chequered history of 20 cases spread over twenty long years, out of which most of the cases carried allegations of grievous offences and he was prosecuted for the offences ranging from Section 302, 307 to 353 and 147/149 of IPC as well as to Section 25/27 of Arms Act and Section 3(1)(r)(s), 3(2)(va) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Section 14 of M.P. Rajya Suraksha Adhiniyam etc. Not only this, on 19-01-2021 vide Rojnamcha entry No.33 at Police Station Kotwali, Guna an intimation was received that petitioner along with others was trying to grab Government land as well as land of other private parties and extending threats to the parties. This complaint precipitated the further proceedings. Statement of SHO of Police Station Kotwali, Guna; Shri Umesh Mishra reveals that petitioner became a threat to the public order because of his audacity and desperate criminal disposition.

9. It is further submitted that on 08-02-2021 impugned order has been passed and on same day, respondents affixed the order over the residence of petitioner. On 12-02-2021 case was forwarded to the State Government for confirmation. On 15-02-2021 State Government confirmed the detention order and on same day i.e. 15-05-2021 matter was forwarded to Government of India (Central Government). Therefore, provisions of Section 3 of the Act are being complied with utmost promptitude.

Therefore, impugned order does not deserve any interference.

10. Learned counsel for the respondents/State in support of his submission referred Division Bench judgment of Delhi High Court in the case of **Khurvesh alias Pappu alias Pahalwan Vs. State and another, ILR (2010) (II) Delhi 550** as well as in the case of **Narendra Kumar Vs. Union of India (UOI), 2002 STPL 12860 Delhi**, Division Bench of Allahabad High Court in the case of **Noor Mohammad Vs. State of U.P. and another, 1982 STPL 4030 Allahabad** and Division Bench of Rajasthan High Court in the matter of **Subhan Mohammad Vs. State of Rajasthan and another, 1988 STPL 5970 Rajasthan**. He prayed for dismissal of writ petition.

11. Heard learned counsel for the parties and perused the record.

12. Instant case is in respect of National Security Act and its different fallouts and factual contours attract reconciliation between “Public Order” and “Personal Liberty”.

13. First and foremost point is in respect of maintainability of writ petition because in the instant case petitioner is absconding and is not being detained yet. This aspect has been dealt with in detail by the Hon'ble Apex Court in the case of **Smt. Alka Subhash Gadia and another (supra)** wherein the Court has specifically held that a writ petition is maintainable even at pre execution stage and later on this principle has been reiterated by the Hon'ble Apex Court in the case of **Deepak Bajaj Vs.**

State of Maharashtra and another, (2008) 16 SCC 14. Although some discretion is being given by the Apex Court while entertaining writ petition but this Court intends to proceed on deciding the matter on merits and found the petition as maintainable at pre execution stage.

14. The Apex Court in the case of **Smt. Alka Subhash Gadia and another (supra)** and **Deepak Bajaj (supra)** have 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 Vs. Rambalak Singh Balak, AIR 1967 SC 1441** as well as **Khudiram Das Vs. State of West Bengal, (1975) 2 SCC 81.** Observation of Apex Court in the case of **Khudiram Das** 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 sub-section (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-judicial power."

Therefore, the scope of interference in such matter is narrow and limited.

15. 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 vs. Delhi Administration and others, (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 over-awed witnesses or against him no one is

prepared to depose.

16. 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."

17. 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 and Ors. Vs. C. Anita, (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]."

18. 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}**.

19. 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.

20. 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 petitioner reflects such attitude.

21. 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 petitioner has chequered history of all types of crime, therefore, whole proceeding against the petitioner deserves to be seen from that vantage point also.

22. 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 Vs. Ishtiaq Hasan Khan and others, (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."*

23. This observation is being reiterated by the Apex Court in the case of **Ramgovind Upadhyay Vs. Sudarshan Singh, (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.

24. If the above referred legal principles/guidance are tested on the anvil of present set of facts then it appears that petitioner appears to be a habitual offender and his criminal disposition spans around two decades. It is not the case, where he faced allegations of minor offences but he faced trial for offences like Section 302 and 307 as well as 353 of IPC along with other offences as referred above.

25. In one of the cases under Section 353 of IPC he was convicted and fined. It is to be reiterated that offence under Section 353 of IPC is not against public servant only but is a challenge to the Public Order and Administration of Justice at the instance of offender because public servant is duty bound to serve public and maintain Public Order. If his position to serve public is compromised by Desperado like petitioner, then public order is immediately and automatically compromised. Therefore, offences under Section 353 of IPC against the petitioner cannot be taken lightly; specifically when in one of the cases, petitioner

was convicted and in other case he was given benefit of doubt because of some contradictions in Court statement of victim. In some of the cases of different nature, compromise reached between the parties and therefore, cases concluded in acquittal.

26. 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 petitioner because of his misdeeds, misdemeanors and criminal bend of mind. Therefore, different nature of cases registered and tried against the petitioner even through resulted into acquittal cannot be taken lightly. Hon'ble Supreme Court in the case of **Debu Mahto Vs. State of West Bengal, 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."

27. Even otherwise the impugned order and record indicate that immediately before initiation of proceedings a complaint was received by the Police Station about his offending action whereby he tried to grab Government land as well as private land. Therefore, his criminal record of past 20 years apparently made him more audacious than remorseful.

28. SHO, Police Station Guna also made statement as prosecution witness and police report indicates that petitioner is a habitual offender and he is in habit of forcible encroachment of lands of private owners also and they are afraid to come forward to ventilate their grievances and all these attributes, render the petitioner 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.

29. Pertinently the petitioner has not raised the ground of procedural lapse or violation of due process prescribed u/S 3 of NSA and thus we refrain from considering such ground.

30. Petitioner is still absconding and has not submitted to the course

of justice yet. This fact further takes out the sheen of arguments on behalf of petitioner.

31. Conclusively, petition preferred by the petitioner fails and order of detention dated 08-02-2021 passed by District Magistrate, Guna is hereby affirmed. Respondents are at liberty to proceed against the petitioner as per law.

32. Petition sans merits and is hereby dismissed. No order as to costs.

33. Copy of this order be sent to District Magistrate, Guna for information and compliance.

(Sheel Nagu)
Judge
09/04/2021

(Anand Pathak)
Judge
09/04/2021

Anil*