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STATE OF U.P.

v.

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JAIRAM ETC.

December 1, 1981

[Y.V. CHANDRACHUD, C.J., D.A. DESAI AND  
AMARENDRA NATH SEN, JJ.]

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*Practice and Procedure—High Court—If could release a detenu on bail on considerations applicable to cases of punitive detention.*

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After hearing the habeas corpus petitions of the respondents, who were detained under the provisions of the Maintenance of Supplies of Essential Commodities Act, 1980 the Division Bench of the High Court released the writ petitions from their list since the Court was to have holidays for over ten days immediately thereafter. Another Division Bench, which took up the petitions for hearing, also adjourned the petitions until the reopening of the Court after holidays.

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In the mean time a single Judge of the High Court, before whom the detenus made an application for bail, allowed their petitions on the ground that the Government had erred in forwarding their representations to the advisory board without considering them for itself.

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On reopening of the Court, a Division Bench heard the habeas corpus petitions. It however, allowed the detenus to be on bail till the judgment was pronounced.

In its petition for grant of special leave to appeal the State challenged the impugned order of the Single Judge releasing the detenus on bail "until the next date of hearing of the habeas corpus petitions".

Allowing the appeal

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HELD : 1: The single Judge erred in releasing the detenus on bail when their writ petitions were listed for hearing before a Division Bench. Neither was there any pressing or particular reason of a unique kind such as grave illness or pressing and personal business justifying the order of release on bail for a short period. The detenus cannot be released on bail as a matter of common practice on considerations generally applicable to cases of punitive detention. [26 F-H]

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In the instant case the single Judge took up on himself the decision on merits.

Although the Courts would be anxious to protect the individual liberty of the citizen on justiciable grounds and within the limits of their jurisdiction, it would be unwise to ignore the object which the orders of detention are intended to serve. The reluctance of Courts to pass orders of bail in detention cases is based on the fact that they are fully conscious of the difficulties—legal and constitutional—and of the other risks involved in making such orders. If an order of bail is made by the Court without a full trial of the issues involved merely on prima facie opinion formed by the High Court, such order would be open to challenge that it is the result of improper exercise of jurisdiction. It is essential to bear in mind the distinction between the existence of jurisdiction and its proper exercise. Improper exercise of jurisdiction in such matters must necessarily be avoided by the courts in dealing with applications of this character. [29 A-F]

*State of Bihar v. Rambalak Singh and others*, [1966] 3 SCR 344 applied.

2. There is no force in the argument of the detenus that by reason of the decision of the Division Bench, allowing the detenus to be on bail till the delivery of the judgment by it in their writ petitions, the special leave petition filed by the State had become infructuous because the primary order of bail was the one passed by the single Judge. The Division Bench has allowed that order to remain in operation only because the counsel for the State was unable to say whether the Advisory Board had recommended the confirmation of detention or not. The Division Bench postponed the delivery of the judgment for that reason and directed that the detenus would be allowed to continue on bail until further orders. [30 A-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 932-933 of 1981.

Appeals by special leave from the judgment and order dated the 23rd October, 1981 of the Allahabad High Court in CM. Ap. No. 5909 (W) of 1981 in CW No. 8918/81.

*R.K. Bhatt* for the Appellant.

*Shaukat Hussain and Shakil Ahmed* for the Respondent.

The Judgment of the Court was delivered by

CHANDRACHUD, C.J. : Heard counsel. Special leave granted.

The respondents, who are detained under the provisions of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 filed Habeas Corpus petitions in the High Court of Allahabad challenging the orders of detention passed against them. Those petitions were almost fully heard by a Division Bench on October 19 and 22, 1981. The learned Judges, however, released the writ petitions from their list since the Court had Diwali

**A** holidays from October 24 until November 2, 1981 and they were not likely to be available, perhaps as a Bench, for concluding the hearing of the writ petitions.

**B** Another Division Bench took up the Writ Petitions for hearing on October 23 but they adjourned the petitions until the reopening of the Court on November 3. Soon after the Division Bench rose, counsel for the respondents approached a learned Single Judge after Court hours and applied for bail. It appears that the Deputy Government Advocate was available. He was sent for and after hearing both the sides, the learned Judge granted bail to the respondents on the ground that the State Government had erred in forwarding the respondents' representations to the Advisory Board without considering them for itself.

**C** The writ petitions were taken up for hearing by another Division Bench on November 3, 1981. They concluded the hearing on that date, reserved their judgment and allowed the respondents to continue on bail till November 10 which was fixed for judgment. The judgment is not yet delivered. The learned Judges directed: "It may however be inquired as to how file was sent before the learned single Judge for bail when there was no case fixed before him."

**D** These Special Leave Petitions are directed against the order passed by the learned Single Judge on October 23, 1981, releasing the respondents on bail "until the next date of hearing of the Habeas Corpus petitions."

**E** We are unable to appreciate how the learned Single Judge could release the respondents on bail when, in the first instance, the writ petitions filed by them were listed for hearing before a Division Bench. Secondly, and that involves a question of principle, we are unable to see for what special reason the learned Judge thought it necessary to release the respondents on bail. The order passed by the learned Judge does not show that there was any pressing or particular reason of a unique kind for which it was imperative to enlarge the respondents on bail. If persons held in detention are released on bail in the manner done by the learned Judge, the very object and purpose of detention will be totally frustrated. Grave illness or pressing and personal business may justify an order of release in detention cases for a short period suited to the exigencies of the particular occasion. But a detenu cannot be released on bail as a matter of common practice, on considerations generally appli-

cable to cases of punitive detention. The learned Single Judge virtually took upon himself the decision of the writ petitions of merits. He found, evidently on an on-the-spot argument, that the State Government had erred in not considering the representations of the respondents before forwarding them to the Advisory Board and released the respondents on bail as their further continuance in detention was "prima facie" vitiated.

In passing the order of bail, the learned Judge has sought the support of a decision of a Constitution Bench of this Court in *State of Bihar v. Rambalak Singh and Others*.<sup>(1)</sup> In that case, the State of Bihar appealed to this Court against an order of interim bail passed by the Patna High Court in a Habeas Corpus petition which was filed by the respondent to challenge an order of detention issued under Rule 30 of the Defence of India Rules, 1962. It was held by this Court that though the High Court has jurisdiction to grant bail in Habeas Corpus petitions filed against orders of detention passed under rule 30, the exercise of the said jurisdiction is inevitably circumscribed by the considerations which are special to such proceedings and which have relevance to the object which it intended to be served by orders of detention passed under the said Rule. If on proof of certain conditions or grounds it is open to the High Court to set aside the order of detention made under Rule 30 and direct the release of the detenu, then it cannot be held that in a proper case the High Court has no jurisdiction to make an interim order giving the detenu the relief which the High Court would be entitled to give him at the end of the proceedings. The Court, however, hastened to emphasize :

"...though we have no hesitation in affirming the jurisdiction of the High Court in granting interim relief by way of bail to a detenu who has been detained under Rule 30 of the Rules there are certain inexorable considerations which are relevant to proceedings of this character and which inevitably circumscribe the exercise of the jurisdiction of the High Court to pass interim orders granting bail to the detenu. There is no doubt that the facts on which the subjective satisfaction of the detaining authority is based, are not justiciable, and so, it is not open to the High Court to enquire whether the impugned order of detention is justified on facts or not. The jurisdiction of the High Court to grant relief to

(1) [1966] 3 S.C.R. 344.

**A** the detenu in such proceedings is very narrow and very limited. That being so, if the High Court takes the view that *prima facie*, the allegations made in the writ petition disclose a serious defect in the order of detention which would justify the release of the detenu, the wiser and the more sensible and reasonable course to adopt would

**B** invariably be to expedite the hearing of the writ petition and deal with the merits without any delay. Take the case where *mala fides* are alleged in respect of an order of detention. It is difficult, if not impossible, for the

**C** Court to come to any conclusion, even *prima facie* about the *mala fides* alleged, unless a return is filed by the State. Just as it is not unlikely that the High Courts may come across cases where orders of detention are passed *mala fides*, it is also not unlikely that allegations of *mala fides* are made light heartedly or without justification; and so, judicial approach necessarily postulates that no conclusion can be reached, even *prima facie*, as to *mala fides*

**D** unless the State is given a chance to file its return and state its case in respect of the said allegations; and this emphasises the fact that even in regard to a challenge to the validity of an order of detention on the ground that it is passed *mala fides* it would not be safe, sound or reasonable to make an interim order on the *prima facie* provisional

**E** conclusion that there may be some substance in the allegations of *mala fides*. What is true about *mala fides* is equally true about other infirmities on which an order of detention may be challenged by the detenu. That is why the limitation on the jurisdiction of the Court to grant relief to the detenus who have been detained under R. 30 of the Rules, inevitably introduce a corresponding limitation on the power of the Court to grant interim bail.”

The Court, speaking through Gajendragadkar, C.J. added :

**G** “It is no doubt true that a detenu is detained without a trial; and so, the courts would inevitably be anxious to protect the individual liberty of the citizen on grounds which are justiciable and within the limits of their jurisdiction. But in upholding the claim for individual liberty

**H** within the limits permitted by law, it would be unwise to ignore the object which the orders of detention are intended

to serve. An unwise decision granting bail to a party may lead to consequences which are prejudicial to the interests of the community at large; and that is a factor which must be duly weighed by the High Court before it decides to grant bail to a detenu in such proceedings. We are free to confess that we have not come across cases where bail has been granted in *habeas corpus* proceedings directed against orders of detention under R. 30 of the Rules, and we apprehend that the reluctance of the courts to pass orders of bail in such proceedings is obviously based on the fact that they are fully conscious of the difficulties—legal and constitutional, and of the other risks involved in making such orders. Attempts are always made by the courts to deal with such applications expeditiously; and in actual practice, it would be very difficult to come across a case where without a full enquiry and trial of the ground on which the order of detention is challenged by the detenu, it would be reasonably possible or permissible to the Court to grant bail on *prima facie* conclusion reached by it at an earlier stage of the proceedings.

If an order of bail is made by that Court without a full trial of the issues involved merely on *prima facie* opinion formed by the High Court, the said order would be open to the challenge that it is the result of improper exercise of jurisdiction. It is essential to bear in mind the distinction between the existence of jurisdiction and its proper exercise. Improper exercise of jurisdiction in such matters must necessarily be avoided by the courts in dealing with applications of this character.”

The learned Single Judge, with respect, has failed to appreciate the weight of these observations while passing the order of interim bail. A Division Bench had heard the petitions for two days but did not think it fit or proper to grant interim relief to the detenues. Another Division Bench was going to rehear the petitions after ten days. It is not proper that, in between, the learned Single Judge should have taken upon himself the task of examining the merits of the matter in order to find whether there was a *prima facie* case for releasing the detenues on bail.

Shri Shaukat Husain, who appears on behalf of the respondents, has drawn our attention to an order passed by the Division

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**A** Bench itself on November 10, 1981 by which it has permitted the respondents to continue on bail until the delivery of the judgment by it in the writ petitions. Learned counsel says that the special leave petitions filed by the State of Uttar Pradesh against the order passed by the learned Single Judge have become infructuous by reason of the order passed by the Division Bench. We are unable to accept this submission because the primary order of bail under which the respondents are at large is the one passed by the learned Single Judge. The Division Bench has allowed that order to remain in operation, only for the reason that counsel for the State was unable to say whether the Advisory Board had recommended the confirmation of detention or not. The Division Bench postponed the delivery of the judgment for that reason and directed that the respondents, who are already on bail, will be allowed to continue on bail until further orders.

**D** For reasons aforesaid, we set aside the order of bail and direct that the respondents shall be taken in custody forthwith.

We hope that the Division Bench which has already heard arguments in the Writ Petitions, will be able to deliver its judgment expeditiously, if it has not already done so.

The appeals will stand disposed of in terms of this judgment.

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P.B.R.

*Appeal allowed.*