
(1996) 07 AHC CK 0057
In the Allahabad High Court
Case No : O.P. Nos. 4662 & 10258 of 1996

Aji Kumari

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 17-07-1996

Acts Referred:

Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 —
Section 10(1), 10(2), 3(1), 9

Citation : (1996) 07 AHC CK 0057

Hon'ble Judges : K.Narayan, J

Final Decision : Disposed Of

Judgement

K.G. Balakrishnan, J.—Petitioners in both the Original Petitions have been detained under the provisions of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (hereinafter it will be referred to as "PITNDPS Act"). In both the cases, the detention orders have been passed under Sections 3 (1) and 10 (1) of the PITNDPS Act. The detention is challenged on the ground that the Advisory Board under the PITNDPS Act has not given opinion regarding the continued detention and, therefore, the petitioners prayed that they are entitled to be released on completion of one year period of detention ordered under Section 3 (1) of the PITNDPS Act.

2. In O.P. No 4642/96, the order of detention under Section 3(1) was passed on 1171995 and it was served on him on 1571995. Subsequently, an order of detention was passed by the Central Government on 11895 and that was served on the detenu on 191995. The order of detention passed under Section 3(1) on 1171995 was referred to the Advisory Board constituted under Article 22 (4) of the Constitution for its opinion and the Board met on 23 895 and gave its opinion to the effect that there was sufficient cause for detention of the detenu under Section 3(1) of the PITNDPS Act. The contention of the petitioner is that the order for continued detention passed under Section 10(1) of the PITNDPS Act was received by the detenu only on 191995 and the petitioner did not get an opportunity to place his case before the Advisory Board and the Advisory Board

had no occasion to give its opinion regarding the sufficient cause for the continued detention in respect of the order passed under Section 10(1) of the PITNDPS Act.

3. In O.P. No. 10258/96, the detention order passed under Section 3(1) of the PITNDPS Act was passed on 11/7/1995 and it was served on him on 12/7/1995. Thereafter, the order of continued detention was passed under Section 10(1) of the PITNDPS Act on 11/8/1995 and it was served on him on 12/9/95. In this case also, the detention order passed under Section 3(1) of the PITNDPS Act was referred to the Advisory Board and the Advisory Board in its meeting held on 23/8/1995 considered the question of the sufficiency of cause for detention of the detenu under Section 3(1) of the Act and gave its opinion. The contention of the petitioner is that as regards the order passed under Section 10(1) of the PITNDPS Act for continued detention, the petitioner did not get an opportunity to place his case before the Advisory Board as the Advisory Board had already given its opinion as early as 23/8/1995. Therefore, the order of continued detention is challenged.

4. We heard Counsel for the petitioners, learned Government Pleader and also the learned Counsel who appeared for the Central Government. First respondent has filed a counteraffidavit. In Paragraph II of the counteraffidavit, it is stated that after the passing of the detention order under Section 3 (1) of the PITNDPS Act the matter was referred to the Central Government under Section 3(2) of the PITNDPS Act by letter dated 12/7/1995. It is alleged that after the passing of continued detention order under Section 10(1) of the PITNDPS Act, the detenu could have filed a representation before the Central Government.

5. In the counteraffidavit filed by the Union of India, it is stated that the State Government issued the detention order on 11th July, 1995 and the declaration under Section 10(1) of the PITNDPS Act was passed on 11th August, 1995. The detenu was also informed that he has a right to represent before the Detaining Authority, Government of Kerala, Central Government and the Advisory Board against the declaration made against him and no representation was filed by the detenu. In O.P. No. 10258/96, the respondents have not chosen to file any counteraffidavit.

6. The main thrust of the arguments of the petitioners Counsel is that there was no opinion by the Advisory Board regarding the sufficiency of cause for the continued detention passed under Section 10(1) of the PITNDPS Act. It is admitted that the Advisory Board met on 23/8/1995 and the order of continued detention passed under Section 10(1) of the PITNDPS Act was served on these petitioners only after the Advisory Board gave its opinion under Section 9(c) of the PITNDPS Act. Petitioners are justified in their contentions. The detenus were not given an opportunity to submit their case before the Advisory Board as the order of continued detention under Section 10(1) of the PITNDPS Act was served on them after the Advisory Board gave its opinion.

7. If a continued detention was ordered under Section 10(1) of the PITNDPS Act by the Central Government, the procedure for reference and the time given to the Advisory Board to give its opinion are different. That is evident from Section 10(2) of the PITNDPS Act. The procedure for giving opinion by the Advisory Board is given in Section 9 of the PITNDPS Act. Section 9(b) says that in the case of the detention order under Section 3(1), the appropriate Government shall within five weeks from the date of detention of person under a detention order make a reference in respect thereof to the Advisory Board of Section 9(c) says that the Advisory Board to which a reference is made under clause (b) shall consider the reference and the materials placed before it and after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government, prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned.

8. Section 10(2) of the PITNDPS Act says that in case there is a continued detention order under Section 10(1) of the PITNDPS Act, the time schedule mentioned in Section 9 shall have certain modifications. From Section 10(2) it is clear that in the case of a continued detention order under Section 10 of the PITNDPS Act, a reference is to be made to the Advisory Board for its opinion within four months and two weeks and the Advisory Board is given time of five months and three weeks to give its opinion regarding the continued detention. It is also important in Section 10(2) of the PITNDPS Act that in the case of continued detention order was passed under Section 10, the opinion of the Advisory Board shall be in respect of the sufficiency of cause for the continued detention order.

9. In these two cases, the order of detention passed under Section 10(1) of the PITNDPS Act were served on the detenus after 2381995 on which date the Advisory Board gave its opinion and the order of confirmation was passed by the State Government on the basis of that opinion. The petitioners did not get an opportunity, to submit their representation before the Advisory Board. It has been held in *Abdula Mamad Mithani v. State of Gujarat*, 1986 Cr. LJ1880, that "since the Advisory Board can go behind the declaration, it stands to reasons to hold that the detenu must have an opportunity to represent against his continued detention by pointing out that the material on the basis whereof the declaration was made was not sufficient for reaching the subjective satisfaction required for making the declaration."

10. While dealing with a similar provision contained in COFEPOSA Act Supreme Court held in *Hawabi Syed Arif Sayed Hanif v. L. Hmingliana*, AIR 1993 SC 810:1993 JIC 265 (SC) that:

"The detenu has got a constitutional right to challenge the order of detention by making a representation against the detention order as envisaged under Article

22 (5). It may be recalled that the detenu against whom the order of detention has been passed and thereafter a declaration under Sec. 9 (1) has been made, has not a statutory right under Section 8(c) of the Act, to be heard in person if he so desires and the Advisory Board had to submit its report only after hearing him. Therefore, it follows that the detenu should be served with the initial order of detention within the specified period and the order of declaration within a reasonable time to that he could make his personal representation to the Advisory Board leaving apart his right of making representation to the Detaining Authority under Article 22(5), challenging the order of detention."

Similar view was taken in *P. Vmalamma v. State*, 1996(1) KLJ 483:

In both the cases, the orders passed under Section 10(1) of the PITNDPS Act were not placed before the Advisory Board for its consideration as to the sufficiency of cause for the continued detention and in the absence of such opinion by the Advisory Board the continued detention order passed by the Central Government has to be set aside. We are told that the petitioners have already undergone the period of mention under Section 3(1) of the PITNDPS Act. As that period of detention is already over, the detenus are ordered to be released forthwith if they are not required in any other case.

Original Petitions are disposed of in the above terms.

Decided accordingly.