

(2022) 09 GAU CK 0009
In the Gauhati High Court
Case No : Writ Petition (Criminal) No. 20 Of 2022

Alia Begum

APPELLANT

Vs

State Of Assam And 4 Ors

RESPONDENT

Date of Decision : 05-09-2022

Acts Referred:

Constitution Of India, 1950 — Article 21, 22, 22(2), 22(5), 226
Prevention Of Illicit Traffic In Narcotic Drugs And Psychotropic Substances Act, 1988 —
Section 3(1), 3(2), 9(b), 9(c)
Indian Penal Code, 1860 — Section 397, 411
Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 21(b), 22(b), 29

Citation : (2022) 09 GAU CK 0009

Hon'ble Judges : R.M. Chhaya, CJ; Soumitra Saikia, J

Bench : Division Bench

Advocate : Y.S. Mannan, N. Dekaraja, D. Mozumder, K.K. Parasar

Final Decision : Allowed

Judgement

R.M. Chhaya, CJ

1. By way of this petition under Article 226 of the Constitution of India, the petitioner has challenged the order of detention dated 18.04.2022 passed by the Commissioner & Secretary to the Govt. of Assam, Home & Political Department, Dispur, Guwahati under Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (hereinafter referred to as 'the Act', for the sake of brevity) and has prayed that the respondent authorities be directed to release the detenu, who happens to be the husband of the petitioner, without any further delay.

2. The following facts emerge from the records:

The present petition is filed for a writ of habeas corpus by the wife of the detenu who has been detained in jail vide order dated 18.04.2022 passed by the Commissioner & Secretary to the Government of Assam, Home & Political Department (Respondent No.2) under Section 3(1) of the Act. The record

indicates that the order of detention of the husband of the petitioner is based on his involvement in three cases which are as under:-

(i) Gorchuk P.S. Case No. 76/2018 under Section 379/411 of the Indian Penal Code read with Section 21(b)/29 of the NDPS Act, 1985.

(ii) Bharalumukh P.S. Case No. 315/2020 under Section 22(b) of the NDPS Act, 1985.

(iii) Panbazar P.S. Case No. 279/2021 under Section 22(b)/29 of the NDPS Act, 1985.

3. It is the case of the detaining authority that the detenu is lodged in Central Jail, Guwahati and it is likely that he may be released very soon and therefore, it was considered essential to detain him under the Act. The order of detention was served upon the detenu on 20.04.2022. The record indicates that the petitioner herein filed a representation on behalf of the detenu i.e. her husband on 7.05.2022 addressed to the Commissioner & Secretary to the Government of Assam, Home & Political Department, Dispur, Guwahati, and a copy thereof was marked to the Advisory Board, PITNDPS Act and the Deputy Secretary (PITNDPS), Ministry of Finance, Department of Revenue, New Delhi. It also appears that prior to filing of the representation dated 07.05.2022 by the petitioner, the detenu had also filed a representation on 02.05.2022 to the Commissioner & Secretary to the Government of Assam, Home & Political Department, Dispur, Guwahati. Both the representations came to be rejected vide order dated 20.06.2022.

4. The petitioner as the wife of the detenu has preferred this petition on various grounds, more particularly, it is contended that the impugned order of detention is based on total non-application of mind on the part of the detaining authority and is violative of Articles 21 and 22 of the Constitution of India. It is also averred in the petition that even though in all the three cases which are referred to in the order of detention dated 18.04.2022 the detenu has been enlarged on bail by the competent Courts including this Court, the same has not been considered and, on the contrary, involvement of the detenu in those three cases is made the very basis of passing the impugned detention order. It is also contended that the representation filed by the petitioner and the detenu have been considered after much delay, which is violative of the Articles 21 and 22 of the Constitution of India. On such grounds, it is submitted by the petitioner that the order of detention deserves to be quashed and set aside.

5. The respondent authorities through the respondent Nos. 1 and 2 have filed an affidavit-in-opposition and have denied the contentions raised by the petitioner in the petition. The respondent authorities have relied upon the order dated 20.06.2022 whereby the representations filed by the detenu and the petitioner came to be rejected. The respondents have also relied upon the parawise comments submitted by the Deputy Commissioner of Police (Crime), Guwahati on the representation filed by the petitioner and the FIR in Azara P.S. Case No.

4/2022 registered u/s 224/353/325/511 IPC. The respondents have also contended that the Union of India has also rejected the representation vide order dated 19. 07.2022. It is further contended by the respondents that as the detenu has been chargesheeted in the cases referred to in the detention order and the cases are pending before the Trial Court, providing of more documents would be within the purview of the Trial Court. The respondents have therefore denied that the petitioner has not been provided the complete dossier, as claimed. According to the respondents, the case record of all the cases indicate that the detenu is running illegal drug trafficking business continuously for last couple of years inspite of his arrest and, that too, after his release from judicial custody. It is also alleged that the detenu has made an attempt to escape from police custody and such a case was registered against the detenu at Azara Police Station. The respondents have contended that the detention order is passed in accordance with law in order to prevent the detenu from engaging in illicit trafficking of Narcotic Drugs and Psychotropic Substances which is likely to be detrimental to the youth of the entire society. It is also contended that the detention order has been issued with a view to prevent the detenu from engaging in illegal and harmful activities of illicit business of Narcotic Drugs and Psychotropic Substances and repeated violation of the provisions of the NDPS Act. On such grounds, the respondents have contended that the petition deserves to be dismissed.

6. We have heard Mr. Y.S. Mannan, learned counsel along with Ms. N. Dekaraja, learned counsel for the petitioner. We have also heard Mr. D. Mozumder, learned Additional Advocate General, Assam as well as Mr. K.K. Parasar, learned Central Government Counsel for the respondents.

7. Learned counsel for the petitioner has taken us through the factual matrix arising in this case and has contended that in all the three cases which are mentioned in the impugned order of detention, the petitioner has been granted bail much earlier. It was contended by Mr. Mannan that even though before passing of the impugned order of detention the detenu has been enlarged on bail, still however, it is mentioned in the detention order that he is lodged in jail and is likely to be released on bail. It is thus contended that the order of detention is a result of total non-application of mind on the part of the detaining authority. It was contended by Mr. Mannan that the detenu had filed a representation on 02.05.2022 whereas the petitioner filed a representation on 07.05.2022 before the detaining authority. However, the representations were considered and rejected by the respondent No.1 on 20.06.2022 and by the Central Government on 19.07.2022, which was served upon the petitioner on 28.07.2022. Thus, it is clear that the representation was considered by the respondent authorities after almost three months. Learned counsel for the petitioner Mr. Mannan has also contended that the relevant documents were not provided to the detenu which has prejudiced the rights of the petitioner and the same is violative of Articles 21 and 22 of the Constitution of India.

8. Mr. Mannan, learned counsel for the petitioner also contended that the detaining authority has committed breach of Section 3(2) of the Act. It was contended that the detaining authority has also committed breach of Section 9(b) and 9(c) of the Act, inasmuch as, no reference has been made by the State Government to the Advisory Board and for eleven weeks no order had been passed. It was also contended that even though a representation was filed before the Advisory Board, the same has not been considered and such action is violative of Articles 21 and 22 of the Constitution of India. On such grounds, Mr. Mannan, learned counsel for the petitioner submitted that the petition be allowed by quashing and setting aside the impugned order of detention and the detenu be released forthwith.

In support of his contentions, learned counsel for the petitioner has placed reliance upon the decisions of the Apex Court in *Rekha -vs- State of Tamil Nadu & Anr.*, reported in (2011) 5 SCC 244; *Ummu Sabeena -vs- State of Kerala & Ors.*, reported in (2011) 10 SCC 781; *Yumman Ongbi Lembi Leima -vs- State of Manipur & Ors.*, reported in (2012) 2 SCC 176; *Cherukuri Mani -vs- Chief Secretary, Government of Andhra Pradesh & Ors.*, reported in (2015) 13 SCC 722 as well as in *Banka Sneha Sheela -vs- The State of Telangana & Ors.*, reported in 2021 SCC Online SC 560. Reliance has also been placed on the judgment dated 24.01.2022 rendered by a Division Bench of this Court in W.P.(C) No. 6206/2021 (*Ali Ahmed Laskar @ Bablu Mulla -vs- The State of Assam & Ors.*) as well as the judgment dated 25.06.2021 passed by a Single Bench of this Court in W.P.(Crl.) No. 14/2020 (*Debarshi Kashyap -Vs- The Union of India & Ors.*) and the judgment dated 11.11.2021 passed by another Single Bench of this Court in W.P. (Crl.) No. 15/2021 (*Miss Rejina Begum -vs- The Union of India & Ors.*).

9. Per contra, Mr. D. Mozumder, learned Additional Advocate General, Assam has opposed the petition and has relied upon the affidavit-in-opposition filed by the State. The learned Additional Advocate General, Assam contended that the detenu has been continuously involved in illegal trafficking of narcotic drugs and psychotropic substances and the respondent authority after due application of mind, has passed the order of detention. Mr. Mozumder, learned Additional Advocate General also invited attention of this Court to the order dated 20.06.2022 whereby the representation filed by the petitioner came to be rejected and contended that the detenu is also involved in another offence and is in Central Jail, Guwahati. It shows that the detenu has continued such illegal activities even after being enlarged on bail by the competent Courts including this Court. With regard to the allegation of breach of Section 9(b) and 9(c) of the Act, the learned Additional Advocate General has contended that this aspect has not been averred in the petition and, therefore, the petitioner should not be permitted to raise such a contention for the first time and, that too, orally. Mr. Mozumder contended that there is no breach of Articles 21 and 22 of the Constitution and the detenu being actively and continuously involved in drug trafficking, should not be permitted to go scot free and the very purpose of preventive detention will be marred if a lenient view is taken by the Court. Mr.

Mozumder, learned Additional Advocate General further contended that there is total compliance of Section 9(b) and 9(c) of the Act and has also placed on record the report of the Advisory Board dated 27.06.2022. Relying heavily on the statements made in the affidavit-in-opposition filed by the State, the learned Additionally Advocate General, Assam, contended that in view of the averments made in the affidavit-in-opposition, the petition being meritless, deserves to be dismissed.

10. Upon considering the submissions made by the learned counsels for the parties and on a bare reading of the impugned order dated 18.04.2022, it clearly transpires that the order of detention is based on three cases enumerated hereinabove. Paragraphs-3,4 and 5 of the impugned order are based upon the involvement of the detenu in the criminal cases registered under the provisions of the NDPS Act read with the provisions of the Indian Penal Code. It is also evident from the impugned order that the detaining authority has an apprehension that the detenu who is lodged in Central Jail, Guwahati, is likely to be released very soon. It is also mentioned in the order that such release of the detenu appears to be seriously detrimental to a large number of people mostly young generation of the society. It is further averred that after such release the detenu will resurge in illegal trafficking of drugs and it is specifically averred that once the detenu is released on bail, he will again continue his criminal activities along with his associates in a manner prejudicial to the provisions of the NDPS Act, 1985.

11. It is a matter of record that the order of detention is dated 18.04.2022 whereas it is also an admitted position that in Gorchuk P.S. Case No. 76/2018, the detenu was enlarged on bail by the Sessions Judge, Kamrup (M), Guwahati vide order dated 05.11.2018 i.e., much before passing of the order of detention dated 18.04.2022. Similarly, in the second case i.e. Bharalumukh P.S. Case No. 315/2020 registered against the detenu for offence under Section 22(b) of the NDPS Act, a learned Single Judge of this Court enlarged the detenu on bail vide order dated 27.07.2020 passed in Bail Application No. 1331/2020. Again in the third case, i.e. NDPS Case No. 81/2021 corresponding to Panbazar P.S. Case No. 297/2021, the detenu has been enlarged on bail by the Additional District & Sessions Judge No.5, Kamrup (M), Guwahati vide order dated 04.08.2021. Thus, it is an admitted position that in all the three cases that have been made the basis of the detention order, the detenu was already enlarged on bail.

12. At this juncture, it would be appropriate to refer to the order dated 20.06.2022 passed by the Commissioner & Secretary to the Govt. of Assam, Home & Political Department wherein a reference is made to the communication dated 07.05.2022 addressed by the Superintendent, Central Jail, Guwahati to the detaining authority in relation to the representation dated 02.05.2022 filed by the detenu and the representation dated 07.05.2022 filed by the petitioner informing the detaining authority that the detenu is in jail in connection with Gorchuk P.S. Case No. 02/2022. It is a matter of record that when bail was

granted to the detenu by the competent Court, the State was being represented by the Public Prosecutor and therefore, on the date on which the detention order was passed i.e. 18.04.2022, the detaining authority had constructive knowledge of the fact that in all the three cases which have been made the basis of the detention order, the detenu is already enlarged on bail and, therefore, the very mention in Para-9 that he is in jail in connection with those three cases exhibits total non-application of mind on the part of the detaining authority which renders the impugned detention order vulnerable and likely to be struck down. As the impugned detention order is passed much after the detenu was enlarged on bail in all the three cases, the same lacks application of mind. On all the grounds mentioned hereinabove, the impugned order of detention dated 18.04.2022 smacks of total non-application of mind and the same is violative of Articles 21 and 22 of the Constitution of India.

13. Secondly, it is also noticed that the detenu filed a representation on 2.05.2022 and the petitioner filed a representation on 07.05.2022, copies of which were sent to the concerned authorities including the Advisory Board. Whereas the same were considered and rejected vide order dated 20.06.2022 passed by the Commissioner & Secretary to the Govt. of Assam, Home & Political Department, the Central Government rejected the representation so filed on 19.07.2022 i.e. almost about 75 days. Thus, the detaining authority as well as the Central Government authority has considered the representations filed by the detenu as well as the petitioner as next friend of the detenu in a delayed manner which has prejudiced the fundamental right of the detenu and has thus violated Articles 21 and 22 of the Constitution of India.

14. The Hon'ble Apex Court in the case of Ummu Sabeena (supra), has observed as under:

"6. Now the question is whether the aforesaid manner of consideration and rejection of representation by the Central Government is in accord with the principles laid down by this Court on this aspect in several cases? It is clear in this case that the Central Government took about more than two months i.e. whole of April and May and ultimately rejected the representations only on 6-6-2011 whereas representations were made on 30-3-2011.

7. Reference in this connection may be made to the Constitution Bench decision of this Court in the case of K.M. Abdulla Kunhi v. Union of India². The unanimous Constitution Bench, speaking through K. Jagannatha Shetty, J. after noting the Constitutional provisions under sub-clauses (4) and (5) of Article 22, was pleased to hold that neither under the Constitution nor under the relevant statutory provisions, has any time limit been fixed for consideration of representation made by a detenu. The time-limit, according to the Constitution Bench, has been deliberately kept elastic. But the Constitution Bench laid emphasis on the expression "as soon as may be" in sub-clause (5) of Article 22 and held that the said expression sufficiently makes clear the concern of the Framers of the Constitution that the representation should be very expeditiously

considered and disposed of with a sense of urgency and without any avoidable delay.

8. Considering the aforesaid provision, the Constitution Bench held that:

(K.M. Abdulla case², SCC p.484, para 12)

"12.there should not be any supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal".

In support of the said conclusion, the learned Judges of the Constitution Bench relied on various other judgments mentioned in Para 12 at p. 484 of the Report.

9. In a subsequent judgment in *Rajammal v. State of T.N.*³, a three-Judge Bench of this Court, relying on the ratio of the Constitution Bench decision in *Abdulla Kunhi*², reiterated the same principles. From para 9 at p. 421 of the Report, it would appear that in the case of *Rajammal*³, the Minister concerned, while on tour, received the file after 9-2-1998 and then passed the order on 14-2-1998. No explanation was offered for this delay of about five days. This Court held that such delay has vitiated further detention of the detenu (see para 11 at p.422).

10. In another subsequent judgment of this Court in *Kundanbhai Dulabhai Shaikh Vs. District Magistrate, Ahmedabad*⁴, this Court while reiterating the aforesaid principles, found that representation was received by the Central Government on 21-9-1995 and then comments were called for from the State Government and the same were received by the Central Government on 18-10-1995 and the representation was rejected on 19-10-1995. This Court held in para 22 of the judgment at p. 204 that the internal movement of the file thus took four days and this Court found that this inaction in taking up the representation for six days is unexplained and the mere ground was that there were forty or fifty representations pending for disposal is not a valid justification. This Court found that such delay voids the continued detention of the detenus and the detention order was quashed."

15. In the case on hand, the detenu filed his representation on 02.05.2022. The petitioner also filed a representation on 07.05.2022. However, the representations were considered by the respondent No.1 on 20.06.2022 and by the Central Government on 19.07.2022. There is nothing on record to show that the Advisory Board has considered such representations which were forwarded to it. Hence, the ratio laid down by the Apex Court in *Ummu Sabeena* (supra) shall squarely apply to the present case.

16. The Hon'ble apex Court in the case of *Yumman Ongbi Lembi Leima* (supra), has observed as under:

"23. Having carefully considered the submissions made on behalf of the respective parties, we are inclined to hold that the (sic exercise of) extraordinary

powers of detaining an individual in contravention of the provisions of Article 22(2) of the Constitution was not warranted in the instant case, where the grounds of detention do not disclose any material which was before the detaining authority, other than the fact that there was every likelihood of Yumman Somendro being released on bail in connection with the cases in respect of which he had been arrested, to support the order of detention.

24. Article 21 of the Constitution enjoins that:

“21. Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except, according to procedure established by law.”

In the instant case, although the power is vested with the authorities concerned, unless the same are invoked and implemented in a justifiable manner, such action of the detaining authority cannot be sustained, inasmuch as, such a detention order is an exception to the provisions of Articles 21 and 22(2) of the Constitution.

25. When the courts thought it fit to release the appellant's husband on bail in connection with the cases in respect of which he had been arrested, the mere apprehension that he was likely to be released on bail as a ground of his detention, is not justified.”

17. In the case on hand also while passing the order of detention what was considered by the detaining authority as the basis of the order was the three pending cases wherein the detenu has already been enlarged on bail, a fact which was totally ignored. Hence, the judgment of the Apex Court in Yumman Ongbi Lembi Leima (supra) will squarely apply to the present case. As the representation made to the Advisory Board has remained undecided and the same is not brought on record by the respondents, the ratio laid down in the case of Cherukuri Mani (supra) would also apply to the present case. Even considering the ratio laid down by the Apex Court in the case of Banka Sneha Sheela (supra) and by a Division Bench of this Court in Ali Ahmed Laskar @ Bablu Mulla (supra) as well as by the Single Benches of this Court in Debarshi Kashyap (supra) and in Miss Rejina Begum (supra), the order impugned is violative of Articles 21 and 22 of the Constitution of India.

18. It is also evident from the affidavit-in-opposition that the detaining authority has clearly stated that as the detenu has been chargesheeted, all papers could not be provided to him. The fact, however, remains that the detention order is based on the very three cases where the detenu has been chargesheeted and non-supply of the relevant materials would be violative of Articles 21 and 22 of the Constitution of India and on that ground also the impugned order of detention stands vitiated.

19. Though Mr. D. Mozumder, learned Additional Advocate General has raised a technical objection and has submitted that the allegation of breach of Section 3(2), 9(b) and 9(c) has no factual foundation, the fact remains that compliance

of these provisions is sine qua non. It is also a matter of record that though representation was made to the Advisory Board, there is nothing on record to show that the same has been considered. The same would also be violative of Articles 21 and 22(5) of the Constitution of India. Even if it is presumed that there is compliance of Section 9(b) and 9(c) of the Act, the same would not render the order impugned legal and proper in view of what has been stated hereinabove.

20. Resultantly, the writ petition deserves to be allowed. The impugned order of detention dated 18.04.2022 is hereby quashed and set aside. The detenu is hereby ordered to be released forthwith from detention, if not required in any other case.

21. It is made clear that any observation made in this order is limited to the validity of the impugned order of detention dated 18.04.2022 passed under Section 3(1) of the Prevention of Illicit Traffic in narcotic Drugs and Psychotropic Substances Act, 1988 and the same shall not have any application on any pending criminal case against the detenu.

22. The petition is allowed. There shall, however, be no order as to costs.