

(2004) 12 GAU CK 0062
In the Gauhati High Court

Amit Agarwal

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 03-12-2004

Acts Referred:

Constitution of India, 1950 — Article 22
Criminal Procedure Code, 1973 (CrPC) — Section 10
Essential Commodities Act, 1955 — Section 7
Penal Code, 1860 (IPC) — Section 120B, 379, 411, 468, 471
Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980 — Section 3

Citation : (2007) 1 GLR 313 : (2005) 1 GLT 527

Hon'ble Judges : Amitava Roy, J;A.H. Saikia, J

Bench : Division Bench

Final Decision : Allowed

Judgement

A.H. Saikia, J.—Heard Mr. A.K. Bhattacharjee, learned senior counsel assisted by K.L. Agarwal, Mr. R.J. Baruah, Mr. A.K. Choudhury, learned Counsel appearing for the petitioner. Also heard Mr. K.N. Choudhury, learned Addl. Advocate General, Assam assisted by Mr. B.J. Talukdar, learned Counsel on behalf of the State respondents and Mr. H. Rahman, learned senior CGSC representing the Union of India.

2. In this habeas corpus petition, the detenu-petitioner has challenged the detention order dated 26.8.2004 passed by the District Magistrate in-charge, Golaghat, respondent No. 6 (hereinafter called as the respondent No. 6) detaining him u/s 3(1) of the Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (for short, "the Act") in connection with Dergaon PS Case No. 175/03 under Sections 120(B)/379/411/468/471/472 IPC read with Section 7(1)(c) of E.C. Act and read with Section 23/24 of Petroleum Act, 1984 as reflected in the impugned detention order itself.

3. The factual matrix of the case in short is that the detenu-petitioner was arrested on 17.8.2004 in connection with Dergaon PS Case No. 175/03 when he

appeared before the Officer-in-Charge at Kamargaon Police Station on the said date in terms of the conditions contained in order dated 3.8.2004 passed by this court in Bail Application No. 1367/ 04 by which the detenu was granted anticipatory bail in connection with Kamargaon P.S. Case No. 32/04 registered u/s 120(B)/379/472 IPC read with Section 7(1)(c) of the B.C. Act, 1993 read with Section 23/24 of the Petroleum Act, 1984. While he was in jail custody at Golaghat, the Respondent No. 6, issued the impugned order of detention dated 26.8.04 under the relevant provisions of the Act as referred above and the same was served upon him in the afternoon of 27.8.2004 while he was lodged in the District Jail at Golaghat. Alongwith the said detention order, the authority also served the grounds of detention upon the detenu and such detention order was also approved by the Government vide communication dated 2.9.2004.

4. Feeling aggrieved by such detention order, the petitioner-detenu submitted a representation on 5.9.2004 in four copies addressed to - (i) the Secretary to the Ministry of Home Affairs, Govt. of India, Sanshad Marg, New Delhi-110001, (ii) the Secretary to the Govt. of India, Ministry of Consumer Affairs, Foods & Public Distribution, Department of Food and Public Distribution, Krishi Bhawan, New Delhi, (iii) the Chief Secretary, Govt. of Assam, Dispur, Guwahati-6 and (iv) the Secretary to the Govt. of Assam, Food and Civil Supplies Department, Dispur. In the said representation praying for revocation of the order of detention dated 26.8.2004, the petitioner made a request for allowing him to be represented by lawyer or a friend of his choice before the Advisory Board, if his case was referred to the Advisory Board, The same has been reflected in paragraph 26 of the representation which reads as under:

That the detenu states that if the detenu's case is referred to the Advisory Board, the Detenu may be allowed to be represented before the Advisory Board by a lawyer or a friend of his choice.

5. On 7.9.2004, the representation of the petitioner dated 5.9.2002 was forwarded to the Advisory Board by the Commissioner and Secretary to the Govt. of Assam, Food and Civil Supplies Department for taking necessary action. On the other hand, on 10.9.2004, Government through its Commissioner and Secretary, Food and Civil Supplies Department informed the District Magistrate, Golaghat that on careful consideration of the representation submitted by the detenu on 5.9.2004 praying for revocation of the order of detention order dated 26.8.2004 as well as for allowing him to be represented before the Advisory Board by a lawyer or a friend of his choice, could not be acceded to since there did not appear any valid and sufficient grounds.

6. The detenu also appeared before the Advisory Board on 7.10.2004 but he was not given any assistance of his friend as requested when he was heard by the Board in its sitting on that date.

7. Although several grounds have been addressed challenging the impugned detention order, Mr. Bhattacharjee, learned senior counsel has vehemently and

emphatically stressed on two points, i.e., firstly under the Act the District Magistrate in-charge is not an authorised and competent authority to issue a detention order and secondly assistance of a friend as requested by the detenu in his representation dated 5.9.2000 has been denied contrary to the established principles of law.

8. Arguing on his first point, it is contended by the senior counsel that only the District Magistrate has been empowered to issue a detention order under the Act and if any officer other than the District Magistrate has to act under the Act, he must be specifically empowered either by the Central Govt. or by the State Govt. as the case may be. To bolster his submission, Mr. Bhattacharjee has taken us through the provisions of Section 3, particularly its Sub-sections (1) and (2) and also relied on a decision of the Apex Court reported in AIR 1965 SC 1619 *Ajaib Singh v. Gurbachan Singh and Ors.*

9. So far as the second point is concerned, Mr. Bhattacharyee has contended that the refusal of the request of the detenu for assistance of a friend by the Government vide communication dated 10.9.2004 is illegal, arbitrary and without sanction of law inasmuch as the Commissioner and Secretary to the Government has no power to reject the representation submitted by the detenu asking for allowing him to be represented by a friend before the Advisory Board which is the only appropriate authority to consider such request. The said authority, instead of expressing their inability to accede the request of the detenu made in the above made representation, ought to have referred the matter to the Advisory Board. On the other hand, it is submitted that on 7.10.2004 when the detenu appeared before the Advisory Board, such request of the petitioner was also not considered at all. A bunch of judicial decision has been placed before us in support of this contention.

10. To decide the case in hand on the precise points raised before us, it would be apt and necessary to look into the relevant provisions of Section 3 particularly its Sub-sections (1) and (2) of the Act. which read as under:

3. Power to make orders detaining certain persons. - (1) The Central Government or a State Government or any officer of the Central Government not below the rank of a Joint Secretary to that Government specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government specially empowered for the purpose of this section by that Government, may, if satisfied, with respect to any person that with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community it is necessary so to do, make an order directing that such person be detained.

(2) Any of the following officers, namely, -

(a) District Magistrate ;

(b) Commissioners of Police, wherever they have been appointed, may also, if satisfied as provided in Sub-section (1), exercise the powers conferred by the said sub-section.

From a bare perusal of the above provisions of law, it is abundantly clear that the State Govt. or any other Officer of State Govt. not below the rank of a Secretary to the Govt. of Assam who must be specially empowered for such purpose by the State Govt., may only make an order of detention of a person, if such authority is satisfied that such person is acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community. Even Section 3(2) distinctly names two officers, i.e., (a) District Magistrate and (b) Commissioner of Police who by virtue of their appointment to those posts, may exercise such power conferred u/s 3(1) of the Act.

11. Dealing with a case of similar nature pertaining to power of Addl. District Magistrate to exercise all powers of the District Magistrate in passing the detention order under the provisions of Section 3(2) of Defence of India Act vis-a-vis Section 10(1) and (2) of the Code of Criminal Procedure, 1898, the Apex Court in Ajaib Singh's case (supra) arrived at a conclusion that though Section 10(2) of the Code (Old Code) vested all powers of District Magistrate upon the Addl. District Magistrate and even on a temporary vacancy of District Magistrate post, he could exercise such power under the Code, but in any case he could not be said to be the District Magistrate in law in passing the detention order. In paragraph 11 of the said judgment the Apex Court held as follows:

(11) The next question is whether an Additional District Magistrate can be said to be of the same rank as the District Magistrate. We are clearly of the opinion that an Additional District Magistrate is below the rank of a District Magistrate and cannot be said to be the same rank as the District Magistrate. We may in this connection refer to Section 10(2) of the Code which show's that an Additional District Magistrate need not necessarily be conferred with all the powers of the District Magistrate under the Code or any other law for the time being in force. He can be an Additional District Magistrate though he may be exercising only some of the powers of the District Magistrate. Clearly, therefore, an Additional District Magistrate must be an officer below the rank of the District Magistrate. Further Sub-section (3) of Section 10 bear this out. That sub-section says that for certain purpose, the Additional District Magistrate shall be deemed to be subordinate to the District Magistrate. Therefore, even if the Additional District Magistrate is invested with all the powers of a District Magistrate under the Code or under any other law for the time being in force he is still below the District Magistrate for certain purposes mentioned in Section 10(3) of the Code. Besides there is only one District Magistrate in a district and all other Magistrates whether they be Magistrates first class or even Additional District Magistrates must obviously be below him in rank. As Section 3(2)(15) of the Act provides that the power of detention cannot be exercised by any officer below the rank of the District Magistrate, such power cannot be exercised by an Additional District

Magistrate who is in our opinion an officer below the rank of a District Magistrate....

12. In the instant case, from a close perusal of the affidavit filed by the respondent No. 6, the District Magistrate, in-charge, Golaghat, it is explicit that he was the Addl. Deputy Commissioner, Golaghat and holding the charge of District Magistrate and nowhere it was stated that he was specifically empowered to exercise the power of District Magistrate as envisaged under the Act as noticed hereinabove. Relevant paragraphs of the affidavit-in-opposition may be read as follows:

(1) That, I am the Additional Deputy Commissioner, Golaghat and was in-charge of the District Magistrate, Golaghat District and the District Magistrate in-charge, Golaghat has been impleaded as the respondent No. 6 in the aforesaid W.P.(Crl.) No. 48/04. I have gone through the writ petition and I have understood the contents made therein. Being fully acquainted with the facts and circumstances of the case, I am competent to swear this affidavit.

17. That, with regard to the statements made in the paragraph 16 of the petition, this deponent begs to state that Section 3(2) of the Act, 1980 empowers the District Magistrate to pass the order of detention as provided u/s 3(1) of the Act. It is stated that the deponent being the District Magistrate in-charge has been vested with all the powers of the District Magistrate and as such, the deponent was empowered and competent, to pass the order of detention. Therefore, the order of detention is not illegal, without jurisdiction and non est.

13. On pointed queries from this court, Mr. K.N. Choudhury, learned Addl. Advocate General, Assam has with all his fairness stated that there is no such record in hand to show empowering the said Addl. Deputy Commissioner to exercise the power of District Magistrate as required u/s 3 of the Act.

14. In view of the facts, and circumstances of the case as indicated above and also having regard to the ratio laid down in Ajaib Singh's case (supra) and also taking the averments made in the affidavit-in-opposition filed by the respondent No. 6 into account, we have no hesitation to hold that the District Magistrate in-charge, who was the Addl. Deputy Commissioner, Golaghat, is devoid of any authority or empowerment to exercise the power of District Magistrate as underlined u/s 3 of the Act and as such the detention order passed by him is not tenable under the law and liable to be quashed.

15. We have also carefully examined the records so produced before us on behalf of the State-respondents. It appears that the Advisory Board sat on 17.10.2004 submitted its report on the same date observing that there was sufficient cause for detention of the detenu/petitioner but the said report did not disclose anything as regards allowing the detenu any assistance of a friend as requested in the representation.

16. Coming to the question of assistance of a friend as sought by the detenu, many a times the Apex Court as well as this court, through various decisions have required the constitutional authorities concerned to afford the detenu the assistance of a friend, if such request has been made by him, denial of which would result in violation of constitutional dictum.

17. In a latest case of P. Murugesan Vs. State and Another, the Apex Court referring to the cases of (i) A.K. Roy and Others Vs. Union of India (UOI) and Others, being the basic judicial pronouncement on the question of "assistance of a friend" ; (ii) Abdul Zabbar Vs. State of Rajasthan and Others, and (iii) Anil Vats Vs. Union of India and others, in paragraph 9 held as, follows:

9. ...We have no doubt that by the refusal of request made by the detenu to have the assistance of the friend who was present at the same place. Article 22(5) of the Constitution is violated and the detention is consequently vitiated....

18. Consequently and in view of what has been discussed and observed we are of the considered opinion that on both the points as noted above, this writ petition succeeds. The impugned detention order appears to be bad in law and cannot be sustained and accordingly the same stands quashed and set aside.

19. The petition is allowed and we direct the concerned authorities to release the detenu forthwith unless required in any other case.