

(2002) 06 OHC CK 0031
In the Orissa High Court
Case No : O.J.C. No. 401 of 2002

Animesh Ghosh ' Bapi

APPELLANT

Vs

The State of Orissa and Others

RESPONDENT

Date of Decision : 17-06-2002

Acts Referred:

Constitution of India, 1950 — Article 22(5)
National Security Act, 1980 — Section 3(2), 8

Citation : (2002) 94 CLT 194 : (2002) 2 OLR 192

Hon'ble Judges : M. Papanna, J;A.K. Patnaik, J

Bench : Division Bench

Advocate : B.N. Panda, S.R. Mohapatra, B.R. Mohanty, G.P. Panda, R.K. Mohapatra, N.K. Dash and M. Sahu, for the Appellant; R.N. Acharya, Additional Government Advocate (For O.P. Nos. 1 to 3), M. Agrawal, Senior Standing Counsel (Central) and P.K. Padhi, A.S.C. (Central) (For O.P. No. 4), for the Respondent

Final Decision : Allowed

Judgement

A.K. Patnaik, J.—This is a habeas corpus petition under Article 226 of the Constitution of India challenging the order passed by the District Magistrate, Balasore on the 19th of September, 2001 detaining the petitioner in District Jail, Balasore.

2. The relevant facts for disposal of this writ petition briefly are that on 19.9.2001, the District Magistrate, Balasore after being satisfied that the detention of the petitioner was necessary to prevent him from acting in any manner prejudicial to the maintenance of public order, passed the impugned order of detention under Subsection (2) of Section 3 of the National Security Act, 1980 (for short, "the Act"). Pursuant to the said order of detention, the petitioner was detained in the District Jail, Balasore. Thereafter, by communication dated 23.9.2001, the District Magistrate, Balasore communicated the grounds of detention to the petitioner. In the said grounds of detention it was, inter alia, stated that the petitioner has been indulging in anti-social activities in Balasore

town for over a period of three years from 1999-2001 and this has become a matter of concern in the maintenance of public order within the municipal limits of Balasore town and in particular, in F. M. College area, Sahadevkhunta, Railway Station, Cinemabazar and Nuabazar, etc. It was further stated in the said grounds of detention that the activities of the petitioner had created terror in the hearts of common people of Balasore who out of fear do not dare to report against the said activities to the police. In the said grounds of detention, the various anti-social activities of the petitioner during the years 1999-2000 and 2001 has been detailed. On 26.9.2001, the State Government approved the said order of detention in exercise of its power under Sub-section (4) of Section 3 of the Act. The petitioner then submitted a representation dated 7.10.2001 addressed to the Chairman and Members of the Advisory Board constituted under the Act by the State Government through the District Magistrate, Balasore. The said representation was rejected by the State Government on 27.10.2001 and the said rejection by the State Government was communicated to the petitioner by Memo No. 5621/C dated 29th October, 2001 of the Government of Orissa, Home (Special Section) Department, Bhubaneswar. In the meanwhile, the matter was referred to the Advisory Board constituted under the Act and the Advisory Board gave its opinion that there was sufficient cause for the detention of the petitioner. By order dated 29th of October, 2001, the Government of Orissa, Home (Special Section) Department, confirmed the order of detention u/s 12(1) of the Act and directed that the petitioner shall continue in detention for 12 (twelve) months in the District Jail, Balasore. Aggrieved, the petitioner and for directing the Opposite Parties to release him from custody.

3. Mr. S. R. Mohapatra, learned counsel for the petitioner, submitted that the continued detention of the petitioner is liable to be quashed on the ground of delay on the part of the State Government to consider the representation of the petitioner. He argued that while the representation of the petitioner against the order of detention was received by the State Government on 10.10.2001. It was rejected after eighteen days on 27.10.2001 and no explanation has been furnished by the State Government in its counter-affidavit for this delay of eighteen days in considering the representation of the petitioner. He cited the decision of the Supreme Court in *Rajammal Vs. State of Tamil Nadu and Another*, in which the order of detention under the Tamil Nadu Act 14 of 1982 was quashed on the ground of violation of the fundamental right of the detenu under Article 22(6) of the Constitution of India, as a delay of five days from 9.2.1998 to 14.2.1998 in considering the representation of the detenu had remained unexplained by the authorities.

4. In reply to the aforesaid submission of Mr, Mohapatra, Mr. R. N. Acharya, Additional Government Advocate, submitted that the representation dated 7.10.2001 of the petitioner against the order of detention was addressed to the Chairman and Members of the Advisory Board constituted under the Act and for this reason, the Collector sent the representation to the Advisory Board and only after consideration of the representation of the petitioner by the Advisory Board

that the representation was sent to the State Government on 22.10.2001 for consideration and the State Government rejected the representation on 27.10.2001. Mr. Acharya argued that in view of the said explanation furnished by the State Government for the delay in disposal of the representation of the petitioner, the detention of the petitioner ought not to be quashed by this Court.

5. Article 22(5) of the Constitution of India provides that when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, "as soon as may be", communicate to such person the grounds on which the order has been made and shall afford him "the earliest opportunity" of making a representation against the order. The words "as soon as may be" and the words "the earliest opportunity" in Article 22(5) cast an obligation on the Government to consider the representation of the detenu against the order of detention without any delay. In *Rajammal v. State of Tamil Nadu and Anr.* (supra) cited by Mr. Mohapatra, the Supreme Court after considering the law laid down on the point by its earlier decisions, held :

"8. It is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay. Though no period is prescribed by Article 22 of the Constitution for the decision to be taken on the representation, the words "as soon as may be" in Clause (5) of Article 22 convey the message that the representation should be considered and disposed of at the earliest. But that does not mean that the authority is pre-empted from explaining any delay which would have occasioned in the disposal of the representation. The Court can certainly consider whether the delay was occasioned due to permissible reasons or unavoidable causes..."

6. As per the aforesaid decision of the Supreme Court, the Court can consider whether the delay in disposal of representation against the order of detention was occasioned by permissible reasons or unavoidable causes. The reasons for the delay of eighteen days in disposing of the representation dated 7.10.2001 of the petitioner in the order of detention are available in the counter-affidavit filed on behalf of Opposite Party No. 1 and in the records produced before the Court. In the counter-affidavit filed on behalf of Opposite Party No. 1, it has been stated :

".....The original representation of the petitioner dated 7.10.01 addressed to the Chairman and Members of N. S. A. Board received in Home (SS) Department on 9.10.01 was forwarded to Secretary, N. S. A. Board on the same day along with the parawise comments of the Opp. Party No. 2. The representation was considered by the N. S. A. Board in their sitting dated 10.10.01. The State Government also rejected the same representation on 27.10.01 and communicated to the detenu and the Opp. Party No. 2 on 29.10.01....."

7. Thus, in the counter-affidavit filed on behalf of Opposite Party No. 1, it is stated that the representation of the petitioner dated 7.10.01 addressed to the

Chairman and Members of the Advisory Board it was first considered by the Advisory Board on 10.10.01 and, thereafter, considered and rejected by the State Government on 27.10.01. It further appears from the records that on 9.10.01, the Joint Secretary to Government, Home Department gave a note that since the representation was addressed to the Advisory Board, it will be probably preferable to wait till the opinion of the Advisory Board is received after which the Government orders may be taken and, thereafter, the report of the Advisory Board was received on 22.10.01 and the representation of the petitioner was rejected by the State Government on 27.10.01. The question to be decided, therefore, is whether the aforesaid reasons given for the delay in considering the representation dated 7.10.01 of the petitioner against the order of detention from 7.10.01 to 27.10.01 were permissible reasons or unavoidable causes.

8. Under Article 22(5) of the Constitution, the authority making the order of detention is to communicate to the person detained the grounds on which the order has been made and is to afford him the earliest opportunity to make a representation against the order. Though Article 22(5) of the Constitution does not mention the authority to whom the detenu can make a representation against the order of detention, Section 8 of the Act provides that the authority making the order of detention shall afford the person detained the earliest opportunity of making a representation against the order "to the appropriate Government". Section 2(a) of the Act defines "appropriate Government" to mean, as respects a detention order made by the State Government or by an Officer subordinate to the State Government. Hence, in respect of an order of detention passed by the District Magistrate, as in this case, who is subordinate to the State Government, the appropriate Government is the State Government. u/s 8 of the Act, therefore, the petitioner had the right to make a representation against the impugned order of detention to the State Government and it was the duty of the State Government to consider the said representation as expeditiously as possible without waiting for the report of Advisory Board even though the representation was addressed to the Chairman and Members of the Advisory Board.

9. In Smt. Gracy Vs. State of Kerala and another, the Supreme Court held that consideration of the representation of the detenu against the order of detention has to be uninfluenced by the view of the Advisory Board and that the detenu's right to make a representation to be considered by the Government under Article 22(5) is independent of the consideration of the detenu's case and his representation by the Advisory Board. The Supreme Court further held that consideration of the detenu's representation by the Advisory Board and independently by the detaining authority flows from Article 22(5) of the Constitution and there is no reason to hold that the detaining authority is relieved of his obligation merely because the representation is addressed to the Advisory Board instead of the detaining authority and submitted to the Advisory Board during the pendency of the reference before it. In particular, the Supreme Court held :

"6. It is thus clear that the obligation of the Government to consider the representation is different and in addition to the obligation of the Board to consider it at the time of hearing the reference before giving its opinion to the Government. Consideration of the representation by the Government has to be uninfluenced by the view of the Advisory Board. In short, the detenu's right to have the representation considered by the Government under Article 22(5) is independent of the consideration of the detenu's case and his representation by the Advisory Board.

9. The contents of Article 22(5) as well as the nature of duty imposed thereby on the detaining authority support the view that so long as there is a representation made by the detenu against the order of detention, the aforesaid dual obligation under Article 22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the Advisory Board or to both. The mode of address is only a matter of form which cannot whittle down the requirement of the constitutional mandate in Article 22(5) enacted as one of the safeguards provided to the detenu in case of preventive detention."

10. Thus, the fact that the representation dated 7.10.01 of the petitioner in this case was addressed to the Chairman and Members of the Advisory Board cannot be a ground for the State Government to wait for the opinion of the Advisory Board and consider the representation only after receipt of the opinion of the Advisory Board. This is because the detenu's right to have the representation considered by the Government under Article 22(5) of the Constitution read with Section 8 of the Act is independent of consideration of the detenu's case and his representation by the Advisory Board and the Government is under an obligation under Article 22(5) of the Constitution read with Section 8 of the Act to consider the representation of the petitioner as soon as may be and at the earliest opportunity against the order of detention and pass orders thereon. It further appears in this case that while the opinion of the Advisory Board was received on 22.10.01, the representation of the petitioner was considered by the Government and rejected five days thereafter on 27.10.01. This delay of five days after the opinion of the Advisory Board was received has also not been explained with any good reason by the State Government. This is, thus, a case where there is no permissible reason or unavoidable cause explaining the delay on the part of the State Government to consider and dispose of the representation of the petitioner against the order of detention.

11. In view of our aforesaid conclusion, it is not necessary for us to examine the other grounds taken by the petitioner in this writ petition. The writ petition is, accordingly, allowed and the continued detention of the petitioner Animesh Ghosh alias Bapi is quashed and the Opp. Parties are directed to release the petitioner Animesh Ghosh alias Bapi forthwith unless he is wanted in connection with some other case.

Considering the peculiar facts and circumstances, the parties shall bear their own costs.

M. Papanna, J.

I agree.