
(2004) 10 OHC CK 0006

In the Orissa High Court

Case No : Writ Petition (Criminal) No. 220 of 2003

Babu alias Gobardhan Rath

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 12-10-2004

Acts Referred:

National Security Act, 1980 — Section 3(2)

Penal Code, 1860 (IPC) — Section 232, 294, 327, 364, 392

Citation : (2004) CLT 1233 (Suppl CrI) : (2004) 29 OCR 686 : (2004) 2 OLR 560

Hon'ble Judges : Sujit Barman Roy, C.J; L. Mohapatra, J

Bench : Division Bench

Advocate : S.K. Mishra, for the Appellant; Government. Advocate, for the Respondent

Final Decision : Allowed

Judgement

L. Mohapatra, J.—The Petitioner in this writ application challenges the legality of the order dated 10.11.2003 passed by the District Magistrate and Collector, Angul in Annexure-1 directing the detention of the Petitioner in custody in exercise of power under Sub-section (2) of Section 3 of the National Security Act, 1980.

2. The case of the Petitioner is that he was taken to custody in connection with Talcher P.S. Case No. 163 of 2003 corresponding to G.R. Case No. 711 of 2003 pending in the Court of the learned S.D.J.M., Talcher registered for commission of offences u/s 392, 398, 364, 327 and 506 of the Penal Code as well as Talcher P.S. Case No. 164 of 2003 corresponding to G.R. Case No. 712 of 2003 registered for commission of offences under Sections 294, 232, 506 of the Penal Code. While in custody, the Petitioner was served with the order in Annexure-1 directing his detention under the National Security Act, 1980 until further orders. In the grounds of the detention involvement of the Petitioner in 9 (nine) cases had been mentioned and out of the nine cases except Talcher P.S. Case No. 163 of 2003, Talcher P.S. Case No. 164 of 2003 and NTPC P.S. Case No. 395 of 2003,

all other cases were registered between 1998 and 2001. The further case of the Petitioner is that the impugned order was passed on the basis that the Petitioner is likely to be released on bail, but on the very same day i.e. 10.11.2003 the prayer for bail was rejected in G.R. Case No. 711 of 2003 by the learned Magistrate. Apart from the above, at the time of hearing the learned Counsel for the Petitioner also submitted that the Petitioner had made a representation against the detention order to the Advisory Board and it was the duty of the State Government to forward the said representation to the Central Government for consideration. The same having not been done, the order in Annexure-1 is unsustainable.

3. A counter affidavit has been filed by the opposite party No. 2 stating that the Petitioner was involved in nine cases within a period of four years i.e. between 1998 and 2002 and in some of the cases the Petitioner was involved for commission of serious offences. On the basis of the above report, the District Magistrate and Collector, Angul was satisfied that the detention of the Petitioner under the National Security Act has become necessary in order to maintain public order and, therefore, there is nothing illegal in the impugned order. The Union of India, opposite party No. 3 has also filed a counter affidavit supporting the stand taken by the State Government and the specific stand taken in the said affidavit is that the Petitioner had not submitted any representation to the Central Government for consideration.

4. At the time of hearing apart from other grounds, the main ground taken by the learned Counsel for the Petitioner is that the Petitioner had made a representation to the Advisory Board against the order of detention. It was the duty of the State Government to send the representation to the Central Government for consideration. The State Government having failed to send the said representation to the Central Government for consideration, the impugned order is unsustainable. In this connection, the learned Counsel for the Petitioner relied upon a decision of the Apex Court in the case of Smt. Gracy Vs. State of Kerala and another, . The Apex Court in the aforesaid decision referring to Article 22(5) of the Constitution of India held as follows:

It is undisputed that if there be only one representation by the detenu addressed to the detaining authority, the obligation arises under Article 22(5) of its consideration by the detaining authority independent of the opinion of the Advisory Board in addition to its consideration by the Advisory Board while giving its opinion. In other words, one representation of the detenu addressed only to the Central Government and not also to the Advisory Board does not dispense with the requirements of its consideration also by the Advisory Board. The question, therefore, is : Whether one of the requirement of consideration by Government is dispensed with when the detenu's representation instead of being addressed to the Government or also to the Central Government is addressed only to the Advisory Board and submitted to the Advisory Board instead of the Government ? On principle, we find it difficult to uphold the learned Solicitor

General's contention, which would reduce the duty of the detaining authority from one of substance to mere form. The nature of duty imposed on the detaining authority under Article 22(5) in the context of the extraordinary power of preventive detention is sufficient to indicate that strict compliance is necessary to justify interference with personal liberty. It is more so since the liberty involved is of a person in detention and not of a free agent. Article 22(5) casts an important duty on the detaining authority to communicate the grounds of detention to the detenu at the earliest to afford him the earliest opportunity of making a representation against the detention order which implied the duty to consider and decide the representation when made, as soon as possible. Article 22(5) speaks of the detenu's representation against the order, and imposes the obligation on the detaining authority. Thus, any representation of the detenu against the order of his detention has to be considered and decided by the detaining authority, the requirement of its separate consideration by the Advisory Board being an additional requirement implied by reading together Cls. (4) and (5) of Article 22, even though express mention in Article 22 (5) is only of the detaining authority. Moreover, the order of detention is by the detaining authority and so also the order of its revocation if the representation is accepted, the Advisory Board's role being merely advisory in nature without the power to make any order itself. It is not as if there are two separate and distinct provisions for representation to two different authority viz, the detaining authority and the Advisory Board, both having independent power to act on its own.

It being settled that the aforesaid dual obligation of consideration of the detenu's representation by the Advisory Board and independently by the detaining authority flows from Article 22 (5) when only one representation is made addressed to the detaining authority, 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 pendency of the reference before it. It is difficult to spell out such an inference from the contents of Article 22 (5) in support of the contention of the learned Solicitor General. The content of Art, 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 safeguard provided to the detenu in case of preventive detention.

5. The Government of India in its counter affidavit has clearly admitted that it had not received any representation on behalf of the detenu and there is no averment in the counter affidavit filed by the opposite Party No. 1 or 2 setting that the representation of the Petitioner was sent to the Central Government for consideration. The learned Counsel for the State also could not cite any decision

of the Apex Court taking a contrary view. In view of the above, relying on the decision of the Apex Court referred to above, we hold that the State Government having failed to forward the representation of the Petitioner to the Central Government for consideration, the order in Annexure-1 is unsustainable.

6. Accordingly, we allow the writ application, quash the order dated 10.11.2003 passed by the District Magistrate and Collector, Angul in Annexure-1 and direct that the Petitioner be released forthwith, if his detention in custody is not required in connection with any other case.

Sujit Barman Roy, C.J.

7. I agree.