

(1996) 10 GAU CK 0002

In the Gauhati High Court

Case No : Civil Rule (HC) No"s. 41, 42 and 46 of 1996

Banwarilal Sharma and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 15-10-1996

Acts Referred:

Constitution of India, 1950 — Article 22(5), 226
Essential Commodities Act, 1955 — Section 7
Penal Code, 1860 (IPC) — Section 120B, 420
Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980 — Section 10, 3, 8

Citation : (1997) 3 GLR 149

Hon'ble Judges : J.N. Sharma, J;D.N. Chowdhury, J

Bench : Division Bench

Advocate : J.M. Chowdhury, R.K. Jain, P. Pathak, P. Katakty and D. Seal, for the Appellant; P.G. Baruah, R.P. Kakati, S.S. Dey and A.K. Sarma, for the Respondent

Final Decision : Allowed

Judgement

J.N. Sarma, J.—All these three matters are taken up together for hearing. We have heard Sri J.M. Chowdhury, learned Sr. counsel for the Petitioner in all the Civil Rules and Sri P.G. Baruah, learned Advocate General, Assam for the Respondents No. 1 and 2, Sri P.P. Kakaty, learned Central Govt. Standing counsel for the Respondent No. 3 in all the cases. Sri Baruah has also produced the records available with him before us.

2. In Civil Rule (HC) 41/96 the Petitioner is the Saks Manager in the firm under the name and style of M/s Kishore and Co., Adabari. In Civil Rule (HC) 42/96 the Petitioner is the handyman of the oil tanker and in Civil Rule (HC) No. 46/96 the Petitioner is the Pump Operator of the firm M/s Kishore and Company. There was a police case being Jalukburi Police Station case No. 241/96 under Sections) 420/120-B.I.P.C. read with Section 7 of the Essential Commodities Act. The allegation was that one N.N. Buragohain, Inspector of Police (C.I.D.) after receipt of a secret information caught red-handed while the oil tanker bearing Lorry No.

AS-01-5448 was offloading blue dyed SK Oil meant for public distribution system into underground reservoir of M/s. Kishore and Co., Guwahati. It was further alleged that the oil lorry was loaded with 12000 liters of Blue dyed S.K. oil and this was dispatched from Dhaligaon Dispatch Unit of IOC to be delivered at Tap-Off Point of IOC Ltd., at Betkuchi, Guwahati. Instead off-loading the said S.K. oil Betkuchi Tap-Off Point the said S.K. oil was put into underground diesel reservoir of the filling station,

3. 7 persons were named as accused in the case, They are as follows:

- i) Shri Binod Sarawgi, S/o late Harakchand Sarawgi, Proprietor of M/s Harak Chand Sarawgi and Sons (A dealer of petroleum products).
- ii) Sri Sudesh Kumar Jain, Alias Munna, Manager of M/s Kishore and Company, Adabari.
- iii) Sri Anil Shaw, Handyman of oil tanker.
- iv) Sri Bhawarlal Sarma, as described earlier.
- v) Shri Rajesh Dubey, employee of M/s Kishore and Co.
- vi) Shri Lukhan Deo Rai.

Shri Alai Miah, the owner of the Oil tanker and the carrying contractor. Out of these 7 accused persons, the pitiable and mysterious thing is that the authority arrested only the following persons;

- i) Sri Anil Shaw.
- ii) Bhanwarlal Sharma.
- iii) Rajesh Dubey.
- iv) Lakhan Deo Rai.

It is stated that four persons were not arrested, but only three persons were arrested meaning thereby that Lakhan Deo Rai was not arrested. Be that as it may, the authority without making any attempt to arrest the other accused persons who are the Kingpin of the alleged crime proceeded in a queer manner in the matter. The three persons named herein were released on bail by the Sessions Judge Kamrup on 8.8.96, 30.8.96 and 4.9.96. But, while they were in jail, the order of detention was passed u/s 3 of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980. The ground of detention which is common in all the three cases are as follows:

GROUND OF DETENTION

Whereas M/s Kishore and Company, Adabari, Guwahati was caught red-handed while mixing blue dyed S.K. oil from an Oil Tanker No. AS-01-C 5448 and whereas M/s Kishore and Company, Adabari jointly with the owner and other staff of the tank lorry involved themselves in mal-practices by mixing blue dyed

S.K. oil meant for public distribution system with the stock of High Speed Diesel Oil of the underground tank of M/s Kishore and Company, Adabari, with the ulterior motive of making un-due monetary gain and in process seriously affecting the public distribution system and thus have violated the provisions of Clause 5 of the Motor Spirit and High Speed Diesel (Prevention of Mal-practice in Supply and Distribution) Order, 1990.

and on this ground the above mentioned 7 persons were ordered to be detained by order dated 31.7.96. but only the three Petitioners were detained, nothing" was done with others, Thereafter the Petitioners filed representations on 14.8.96 Annexure-V in all the Civil Rules, But from the record it is seen that the representation of Bhanuwarlal Sharma is dated 14.8.96, others are dated 16.8.96 and the representations, it appears were not placed before the Advisory Board as required u/s 10 of the Act of 1980. Be that as it may, the Advisory Board confirmed the detention. Hence, these writ petitions.

4. The Advisory Board found that there are sufficient grounds for detention of these persons and therefore the State Govt. confirmed the detention. It further appears that the representations which were submitted on 14.8.96 were not disposed of expeditiously. Though the stipulated time is prescribed it to be disposed of at the earliest in consonance with the mandate of Article 22(5) of the Constitution.

5. Sri Choudhury, learned Counsel for the Petitioners submits that the detention order should fall through on the other ground that the detaining authority did not apply its mind at the time of passing the order of detention. He also submits that the liberty of a person cannot be taken away or curtailed in a mechanical manner as sought to be done by the authority. The ground of detention has already been quoted and it is argued that itself will show that the involvement of these persons in the alleged crime is not mentioned in the ground. The order dated 31.7.96 which is available in record shows that the authority was aware that these three persons have been arrested as reflected in the order itself. The order was approved by the State Govt. The curious thing is that out of 7 persons three were arrested but even if other four were absconding (presumed by the authority as revealed from record) no further step was taken under the law, though law provides how to deal with such absconders. The record does not reveal anything and the learned Advocate General also failed to point out/clarify on this point. It has been held by the Supreme Court that the obligation of the Government under Article 22(5) is to consider the representation as soon as it is received by it, because it affects the liberty of a citizen, though it may not be possible to lay down any hard and fast rule as to measure of time taken by the appropriate authority for such consideration. This is a constitutional safeguard against improper or unjustified power of detention. Any delay on the part of the Government to consider the representation must be accounted for, and the court will in a petition for habeas corpus release the detenu if there was no explanation for the delay or the explanation was unsatisfactory. This right to consider the

representation at the earliest being a constitutional right any inaction or delaying procedure adopted will contravene the constitutional mandate. Nodoubt the delay will depend upon the circumstances of each case. Further, the question of delay is to be pleaded in the petition, otherwise the court will not enter into any investigation on this point. The High Court under Article 226 does not sit in appeal from the order of preventive detention. But the court is only to see whether the formality as enjoined by Article 22(5) had been complied with by the detaining authority, and if so done, the court cannot question the sufficiency of the grounds of detention for the subjective satisfaction of the authority. However it is the duty of the court to see that a law depriving the person of the liberty available even to a j;person charged with crime is strictly complied with. All the three petitions were filed on 27.8.96 before the court and in para 5 and 15 it has been stated as follows:

That the Petitioner begs to state that after receipt of the said grounds of arrest the Petitioner preferred a representation before the Respondent No. 1 for revocation of said order of detention with a copy to the Respondent No. 3. In the said representation the Petitioner has categorically stated that he has been highly prejudiced in making the said representation since the copy of the order of detention has not been served upon him. The grounds accompanying with the letter dated 5.8.96 are vague, devoid of material facts and, therefore, the Petitioner has been deprived of making representation to the Government rather, it shows that the said order of detention was passed not in bona fide exercise of power. It has been further contended in the said representation that the detaining authority has failed to disclose the compelling reason for passing the detention order against the Petitioner who is already in custody in connection with another criminal case and, therefore, appears that the detaining authority has failed to apply its mind that the Petitioner may be detained with a view to prevent him from acting in manner prejudicial to the Maintenance of Supplies of Commodities essential to the community.

That the Petitioner begs to state that the representation submitted by him has never been forwarded by the State Government to the Central Government expeditiously and as such the impugned detention is illegal and unconstitutional....

In the affidavit-in-opposition these two paragraphs have been controverted in para 5 and 11 as follows:

That as regards to the statements made in Paragraph 5 of the writ petition, it is stated, although the date of representation was typed to be 14.8.96, the same was in fact signed by the detenu on 16.8.96 and his signature was attested by the Assistant Jailor on 16.8.96. Thereafter, the Superintendent of District Jail, Guwahati forwarded the said representation to the Commissioner and Secretary, to the Govt. of Assam, Food and Civil Supplies Department at Dispur vide memo No. 1987 dated 22.8.96. Immediately after receipt of the said representation the Commissioner and Secretary to the Govt. of Assam, Food and Civil Supplies

Deptt was pleased to ask for parawise comments regarding the content of the representation submitted by the detenu from the District Magistrate, Kamrup. Ultimately on perusal of the record the Commissioner and Secy. to the Govt of Assam, Food and Civil Supplies Deptt. was placed to pass an order vide his No. FSA 151/96/95 dated 11.9.96 rejecting the said representation.

That the statements made in paragraphs-14 and 15 of the writ petition are hereby denied. It is stated that the detention order was passed on the basis of materials available on record and on the basis of adequate satisfaction arrived at by the authorities warranting preventive detention of the detenu. These are specific and very much relevant and based on material particulars on the basis of which the detention order was passed. Further, as stated above, the detention order has already been confirmed by the State Govt. within time and the representation submitted by the detenu was also duly considered and disposed of without an delay whatsoever by the State Govt.

It is slated in para 5 of the affidavit-in-opposition that representation was disposed of 21.8.96 and it is verified from record. From the record it is seen that the representation of Bhunuwarlal Sharma (C.R. 41/96) was rejected as found from the record on 21.8.96, but the representation of other two along with the second representation of (sic) were rejected on 11.9.96. Even from jail these representations were forwarded on 22.8.96. The State Govt. forwarded the representation to the Central Govt. on 3.9.96. Thereafter it was rejected on 11.9.96 by the following order:

ORDER

Read the representation dated 16.8.96 submitted by Shri Rajesh Dubey S/o Shri Batcha Dubey, an employee of M/s Kishore and Company, Adabari, Guwahati against the order of detention under Section-8 of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980.

Also read the relevant records.

ORDER

After examining the relevant records and the points raised in the representation, the Government regret their inability to the request of the detenu for revocation of the detention order passed by the District Magistrate, Kamrup under No. KSL. 504/96/35, dtd. 5/8/96.

His case of detention has already been confirmed by the State Government vide order No. FSA. 151/96/92 dtd. 11/9/96 as per report and opinion dtd. 23/8/97 of the Advisory Board.

sd/

Commissioner and Secretary to the Govt. of Assam, Food and Civil Supplies Department.

The order is same in all three. Curiously enough even in case of Bhawarlal Sharma, the authority did not apply its mind that it was rejected earlier on 21.8.96, so mechanical is the approach of the authority. The authority roughly took 25 days to dispose of the representation. In a case before the Supreme Court (Gasi Khan v. State of Rajasthan 1990 SC 136 delay of 27 days in disposal of the representation was held to be fatal. The same law has been laid down in Mahesh Kumar v. Union of India 1990 SC 1455 . Be that as it may, further submits that at the relevant time the Petitioners were behind the bar and the authority at the time of passing the detention order must apply their mind to that aspect that is they are released, they will act to further prejudice to maintenance of Supplies of Essential Commodities. He further submits that if the authority was not aware of the fact of custody/detention of the Petitioners, the detention order is void. An order of detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu was already in detention (ii) there was compelling reason justifying such detention despite the fact that the detenu was already in detention. The expression compelling reasons in the context of making an order for detention of a person already in custody implies that there must be cogent materials before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in near future and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities (See Dharmendra Suganchand Chelawat and another Vs. Union of India and others, Further the detaining authority though can take into account the possibility of bail in the criminal case, it has to be satisfied having regard to his past activities or by reason of the credible information or cogent reasons, that if he is enlarged on bail he would do prejudicial activities. Making a bald statement in the ground or order of detention that he would repeat his activities after coming out of jail is not sufficient without credible information material or cogent reason apparent on the record to warrant such an inference. It must be warranted from record, that it is not a solitary instance, but he is indulging in such activities. Detention order cannot be made to supplant the criminal prosecution (See Anand Prakash Vs. The State of Uttar Pradesh and others,

6. In the case in hand in the order of detention dt. 31.7.96 except mentioning that these three persons have been arrested, nothing is mentioned with regard to ground of detention quoted in the earlier part of judgment. Record made available do not show any material to enable the authority to draw an inference with regard to this. Bails as pointed out above were granted subsequent to the order and of detention. There is not even a whisper that they would be related (sic) on bail and on being released they would continue with their prejudicial activity. It is thus a case of total non application of mind,

7. This point came up for consideration before the Supreme Court in the

following cases:

(i) *Anant Sakharam Raut Vs. State of Maharashtra and Another*, wherein Supreme Court pointed out that if detention is based on certain incident and criminal cases pending, in respect of these incidents and the detenu is an undertrial prisoner, if the detaining authority is not made aware of the fact that the detenu had moved applications for bail and that he was enlarged on bail, detention order is silent about these facts, that will amount to total absence of application of mind on the part of the authority and the detention order is void on this ground alone.

(ii) *Rameshwar Shaw Vs. District Magistrate, Burdwan and Another*, This was a decision of the constitutional bench wherein the Supreme Court has pointed out *inter alia* as follows:

It is obvious that before an authority can legitimately come to the conclusion that the detention of the person is necessary to prevent him from acting in a prejudicial manner, the authority has to be satisfied that if the person is not detained, he would act in a prejudicial manner and that inevitably postulates freedom of action to the said person at the relevant time. If a person is already in jail custody, how can it factually be postulated that if he is not detained, he would act in a prejudicial manner? At the point of time when an order of detention is going to be served on a person, it must be patent that the said person would act prejudicially if he is not detained and that is a consideration which would be absent when the authority is dealing with a person already in detention.

Sri Chowdhury also relies on the following decisions of the Apex Court, (i) 1993) 3 SCC 194 (*Jundandbhai Shaikh v. District Magistrate, Ahmedabad and Ors.*) where in paragraphs 14 and 25 the Supreme Court pointed out as follows:

(This is case on the point of representation).

From the above, it will be seen that the right to make representation against the order of detention is not only a constitutional right but a statutory right as well. Since the Constitution as also the Act specifically provide that the detenu shall be given the earliest opportunity of making a representation against the order of detention, it is implicit that there is a corresponding duty on the authorities to whom the representation is made to dispose of the representation at the earliest or else the constitutional and the statutory obligation to provide the earliest opportunity of making representation would lose both its purpose and meaning.

Black marketing is a social evil. Persons found guilty of economic offences have to be dealt with a firm hand, but when it comes to fundamental rights under the Constitution, this Court irrespective of enormity and gravity of allegations made against the detenu, has to intervene as was indicated in *Mahesh Kumar Chauhan* case and in the earlier decision in *Prabhu Dayal Deorah v. Dist. Magistrate*, in which it was observed that the gravity of the evil to the community resulting

from anti social activities cannot furnish Sufficient reason for invading the personal liberty of a citizen, except in accordance with the procedure established by law particularly as normal penal laws would still be available for being invoked rather than keeping a person in detention without trial.

(ii Dharmendra Suganchand Chelawat and another Vs. Union of India and others, wherein the Supreme Court in paragraphs 18 and 19 has pointed out as follows:

In N. Meera Rani Vs. Government of Tamil Nadu and Another, (supra) the legal position has been summed up as under (para 22):

We may summarise and reiterate the settled principle. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case, preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order etc. ordinarily it is not needed when the detenu is already in custody; the detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order albeit, even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities the detention order can be validly made even in anticipation to operate on his release. This appears to be the correct legal position." In this case this Court has, pointed out that there was no indication in the detention order read with its annexure that the detaining authority considered it likely that the detenu could be released on bail and that the contents of the order showed the satisfaction of the detaining authority that there was ample material to prove the detenu's complicity in the Bank dacoity including sharing of the booty in spite of absence of his name, in the FIR as one of the dacoits. The court held that the order for determination was invalid since it was, made when the detenu was already in jail custody for the offence of bank dacoity with no prospect of his release.

The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detention authority was aware of the fact that the detenu is already in detention; (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention, The expression "compelling reasons in the context of making an order for detention of a person already in custody" implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future and (b) taking into account the nature of antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.:

8. Sri P.G. Baruah, learned Advocate General, Assam, relies on the following decision: Smt. Panna Waringe Vs. A.S. Samra and others, where in paragraph 7 it is pointed out as follows:

There is no force even in the third contention of the learned Counsel. The detaining authority in its affidavit before the High court stated that he had gone through all the documents placed before him and after full application of mind, he culled out the grounds of detention. There is material on the record to support the contention of the learned Counsel and as such we see no reason to reject the statement of the detaining authority made on oath before the High Court. Even otherwise the High Court examined the original records and satisfied itself that there was proper application of mind in issuing the detention order,

That case does not help the Respondents inasmuch as in that the Supreme Court found two things-(i) that in the detaining order there was a statement that all the documents were placed before him and after full application of mind, he culled out the grounds of detention, (ii) The High court itself was satisfied on examining the original records that (here was proper application of mind in issuing detention order. So, this case does not help the Respondents. Sri Baruah with all his fairness submits that except the two things (order of detention and affidavit) there are no other materials to show that the authority before passing the detention order was aware of the fact that the Petitioners were behind the bar and their continuous detention is necessary to prevent the mischief, He submits that the detention order was served in jail. So, the authority knew about it.

(ii) That in the affidavit, it has been stated that the authorities were satisfied. That statement of the affidavit is based on record. The record does not show the materials or reasons for satisfaction. The next case relied on by Sri Baruah is Birendra Kumar Rai alias Virendra Kumar Rai Vs. Union of India (UOI) and Others, This case need not at all be considered inasmuch as Mr. Choudhury never questioned the power of the authority to arrive at subjective satisfaction. But the vital aspect of the matter as pointed out above was not at all considered by the authority before passing the order of detention. Accordingly, we come to the following conclusions:

i) That the orders of detention are vitiated because of non application of mind and the authority passed the detention orders mechanically discharged the Petitioner from the Criminal Case lodged against him, it cannot be said that the impugned order is incompetent, nor can it be inferred that it was without a basis or malafide" Mohd. Salim Khan Vs. Shri C.C. Bose and Another, See also Sahib Singh Dugal Vs. Union of India (UOI), and Mohd. Subrati alias Mohd. Karim Vs. State of West Bengal, But that does not mean that the authority can make an order of detention despite the prosecution of the same person on the self same facts. From the facts situations it thus appears that the order of detention was made with a view to bypass the Criminal Prosecution by abuse of the power of preventive detention. Preventive detention, after all is a serious inroad to the

individual liberty, which is recognised as the most prized possession of an individual. Deprivation of personal liberty of an individual is a matter of grave consequence. The power of detention without trial is drastic in nature and such power is conferred with a view to protect the interests of the community. Those who are charged with the responsibility of upholding the public interest are required to act conscientiously and sensibly and exercise its discretion on fulfillment of the conditions precedents justifying such exercise of powers. If such authority acts with indiscretion and misuse the powers acting arbitrarily, unreasonably or capriciously, the faith and confidence on the authority is eroded.

For the reasons and for all the reason's given by my learned brother Hon''ble Justice Mr. J.N. Sarma with which I entirely agree, I too would allow the petitions

Writ Petitions are allowed.