

(2005) 11 OHC CK 0008
In the Orissa High Court
Case No : Writ Petition (Cri) No. 238 of 2005

Bijoy Kumar Panda

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 09-11-2005

Acts Referred:

Arms Act, 1959 — Section 27
Constitution of India, 1950 — Article 21, 22(5)
Criminal Procedure Code, 1973 (CrPC) — Section 107, 110
National Security Act, 1980 — Section 10, 11(2), 12(1), 12(2), 3(2)
Penal Code, 1860 (IPC) — Section 147, 148, 149, 294, 307

Citation : (2006) CLT 1 (Suppl CrI) : (2006) CriLJ 1072

Hon'ble Judges : R.N. Biswal, J; L. Mohapatra, J

Bench : Division Bench

Advocate : D. Sarangi, M. Chand and M. Mohapatra, for the Appellant; J.K. Mishra (A.S.C. of India), for the Respondent

Final Decision : Allowed

Judgement

R.N. Biswal, J.—In this writ application, the petitioner who has been detained by the District Magistrate, Kalahandi under Sub-section (2) of Section 3 of the National Security Act (hereinafter referred as the Act) has sought for his release by issue of a writ of habeas corpus.

In the grounds of arrest, the detenu-petitioner is stated to have been involved in four incidents; they being :

1. On 30-8-2003 while Dr. Aswini Kumar Kar, Medical Officer, Kalampur PHC along with his medical team was returning from village Temra under Kalampur Block after performing flood duty, on the way, near village Patrabasha the petitioner along with his associates restrained him, abused him in filthy language, constricted his throat and assaulted and threatened him with dire consequence. Basing upon the report of Dr. Kar, Jaipatna P. S. case No. 65 dated 31-8-2005 was registered for the offence under Sections 341/294/323/506/34,

I.P.C. against the petitioner and others wherein charge sheet was submitted on 4-6-2004.

2. On 28-4-2005 at about 7.40 p.m., while Rudra Prasanna Sahu, B.D.O. Kalampur was taking cold drink with the computer operator of Kalampur Block in a small hotel in front of Junagarh Block Office, the petitioner along with his associates abused him in obscene words, forcibly made him sit in a jeep and took him to the B.J.P. party office of Junagarh and inflicted blows on his face publicly. Basing on the report of the B.D.O., Kalampur, Junagarh P. S. case No. 47 dated 29-4-2005 was registered for the offence under Sections 341/332/294/506/34, I.P.C. against the petitioner and his associates.

3. The-petitioner executed a bond of Rs. 25.000/-, on 24-10-2003 to keep peace in connection with a case u/s 107 of Cr.P.C. of the Court of S.D.M. Dharma-garh.

4. In spite of that he continued his criminal and anti-social activities for which another case u/s 110 of Cr.P.C. was registered against him in the Court of S.D.M., Dharmagarh on 17-5-2005.

2. Learned Counsel appearing for the petitioner submitted that admittedly the petitioner had been lodged in Dharmagarh Sub-Jail, by the time the detention order was passed against him on 22-5-2005 and the D. M. Kalahandi was aware of it. In the grounds of arrest the D. M., Kalahandi has reflected his satisfaction that the detenu was likely to be released on bail, but no reason has been assigned for it. There was also no cogent materials before him to arrive at such satisfaction. So, the detention order should be quashed on this ground. In support of his submission he relied on the decisions; Amritlal and Others Vs. Union Govt. Through Secy. Ministry of Finance and Others, and Premoda Medhi and Another Vs. Gauhati Roller Flour Mills Ltd. and Another, .

3. In the decision Amritlal and Others Vs. Union Govt. Through Secy. Ministry of Finance and Others, it was held that:--

Before passing the detention order the concerned authority must satisfy himself of the likelihood of the petitioner being released on bail and that satisfaction ought to be reached on cogent material.

In the said case cogent material was the likelihood of having a bail application moved in the matter, but not obtaining a bail order. In Sunil Rajgarhia case cited Premoda Medhi and Another Vs. Gauhati Roller Flour Mills Ltd. and Another, a Division Bench of this Court quashed the detention order even though the detaining authority in the grounds of detention recorded his satisfaction that the petitioner was likely to be released on bail shortly, since he had neither given any reason on the basis of which such a satisfaction was arrived at nor there was any material in the grounds of arrest in support of such satisfaction. The material from which the detaining authority arrived at a satisfaction that the detenu was likely to be released on bail shortly, as found from the grounds of his detention, reads as follows --

You were arrested on 26-5-2002 at 6 a.m. and forwarded to the Hon''ble Court of S. D. J. M., Berhampur on the same day on the strength of N. B. Ws vide G. R. Nos. 191 / 2001 /1250/2001/987/2000 corresponding to B.N. pur P. S. case No. 71 dated 1-12-2001 under Sections 147/148/307/149, I.P.C. 27 Arms Act and case No. 238 dated 16-10-2000 u/s 399/402, I.P.C. and M. C. No. 388/94 and now you are in jail custody. You are likely to be released on bail shortly.

4. In the case at. hand the relevant paragraph of the grounds of detention containing the satisfaction of the District Magistrate, Kalahandi that the petitioner was likely to be released on bail shortly reads as follows :

Though you are at present in jail custody in sub-jail Dharamgarh subsequent to your arrest on 17-5-2005 in Junagarh P. S. case number 47 of 29-4-2005,. you are trying frantically to be released on bail. Your lust bail application has already been rejected by the Hon''ble S.D.J.M., Dharmagarh. Your subsequent bail application has also been rejected by the Hon''ble Asst. Sessions Judge, Dharmagarh on 20-5-2005. Now it is learnt from reliable sources that you are trying to get bail from the higher Court. There is likelihood of you being released on bail and I am convinced that if you are released on bail, you will indulge in criminal and anti-social activities prejudicial to public order.

5. After his bail petition was rejected by the S.D.J.M. Dharmagarh, the detenu filed an application for bail before the Asst. Sessions Judge, Dharmagarh which was also rejected on 20-5-2005. The detaining authority from reliable sources came to know that the detenu was trying to get bail order from higher forum and that there was likelihood of his being released on bail. Jaipatria P. S. case No. 65 of 2003 was registered for the offences under Sections 341/294/323/506/34, 1.P.C. of which all except the offence u/s 506 are bailable in nature. The allegation against the detenu in Junagarh P. S. case No. 47 of 2005 was for the offence under Sections 341/332/294/506/365/34, I.P.C. of which the offence under Sections 506/365 are only non-bailable, but both the offences are triable by Magistrate. The S. D. J. M. and Asst. Sessions Judge had already rejected the bail petitions of the petitioner by the time the detention order was passed against him. So, there was cogent material in the grounds of arrest for the detaining authority to be satisfied that there was likelihood of release of the detenu on bail. As such the decisions cited (supra) would not be applicable to the case at hand.

6. Learned Counsel for the petitioner, next submitted that occurrence in the first case was alleged to have taken place on 30-8-2003 wherein charge sheet was submitted for the offence u/s 294 read with Section 34 of I.P.C. only. For the selfsame occurrence a proceeding u/s 107 of Cr.P.C. was also initiated. Thereafter there was no allegation whatsoever against the detenu till 28-4-2005 when he was alleged to have committed offence under Sections 341/332/294/506/34. I.P.C. A proceeding u/s 110 of Cr.P.C. was also initiated against him for the self same allegation. So, the detaining authority ought not have passed the detention order on 22-5-2005 basing on the stale materials. Opposite parties did not

specifically refute that the 107 Cr.P.C. proceeding did not relate to the occurrence dated 30-8-2003 and the 110 Cr.P.C. proceeding to the occurrence dated 28-4-2005. The detaining authority has also not mentioned the case number either of the 107 Cr.P.C. or the 110 Cr.P.C. proceeding in the grounds of arrest. So, it is held that there are only two cases against the detenu. In one case the occurrence was alleged to have taken place on 30-8-2003 and in the other case on 28-4-2005. As found from the grounds of arrest the detenu had been languishing in jail since 17-5-2005 as such there was no scope for him to carry out illegal activities from that date. Of course it can be said that there was scope for the detenu to indulge himself in illegal activities from 28-4-2005 to 17-5-2005 when he was arrested. But he was not involved in such activities. S. P., Kalahandi in his report stated that the detenu absconded from 28-4-2005 till he was arrested on 17-5-2005. So, the delay between the alleged illegal act dated 28-4-2005 and the detention order dated 22-5-2005 is explained. Moreover, the gap between the date of last criminal act and the date of arrest of the detenu being only 18 days the last incident cannot be said to be a stale one.

7. Learned Counsel for the petitioner, next submitted that as per the allegation, the petitioner assaulted the B.D.O. in one occasion and doctor Kar in the second occasion. Even if the allegations are held to be true, since the acts were directed against the individuals only, the same would not affect public order. So the order of detention should be quashed. In support of his submission he relied on the decisions in Arun Ghosh Vs. State of West Bengal, and Santosh Singh Saluja alias Kuku v. State of Orissa through Secretary Home Department (1990) 3 OCR 157.

Sub-section (2) of Section 3 of the Act reads as follows :

The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to community it is necessary so to do, make an order directing that such person be detained.

(Emphasis supplied by us)

In the case at hand, relevant portion of the detention order reads as follows :--

WHEREAS I am satisfied that with a view to prevent Sri By ay a Kumar Panda, aged about 46 years s/o late Someswar Panda of village Karmel Dangriguda, P. S. Jaipatna, Dist. Kalahandi from acting in any manner prejudicial to the maintenance of public order.

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AND WHEREAS Sri Bijaya Kumar Panda is likely to be released on bail and I am fully convinced that if he is released on bail, he will indulge in criminal and anti-

social activities prejudicial to public order."

THEREFORE, in exercise of powers conferred by Sub-section (2) of Section 3 of the National Security Act, 1980 I hereby direct that the said Sri Bijaya Kumar Panda, aged about 46 years s/o, late Someswar Panda of village Karmel Dangriguda, P. S. Jaipatna, Dist. Kalahandi be detained in the sub-jail, Dharmagarh until further orders.

The petitioner in the present case has been detained with a view to preventing him from acting in any manner prejudicial to the maintenance of public order.

8. In the case of Arun Ghosh Vs. State of West Bengal, the apex Court held that individual act can be a ground for detention only if it leads to disturbance of the current of life of the community so as to amount to disturbance of public order and not if it affects merely an individual leaving the tranquility of the society undisturbed.

In the case of Santosh Singh Saluja cited 1990 (3) OCR 157 (supra) this Court held :

The various allegations go to indicate that the petitioner had been acting highhandedly with the D.F.O. and some staff of the forest department. He had also assaulted them on different occasions, making a grievance that his timber case was not being disposed of. Resulting (Assaulting) the D.F.O. on two occasions and threatening the forest staff and the assault on the third occasion, in our opinion, could not be said to have disturbed the even tempo of life or public tranquility or the peace of the community. The petitioner's acts were reprehensible and outrageous but the acts would be disturbance of law and order, or breaches of law, infraction of law, not peace of the community or public tranquility. We are, therefore, of the view that the detention of the petitioner under the National Security Act was not justified.

9. As per these two decisions, if the acts of a person disturb public order and riot merely law and order then only he can be detained under the Act. Whether an act merely affects law and order or public order depends on the effect of such act on the life of the community.

10. Now, it is to be seen, whether in the present case the alleged acts of the petitioner affect public order or merely law and order. In his report to the District Magistrate, Kalahandi (Opposite Party No. 2) the Superintendent of Police stated that the petitioner assaulted the B.D.O. and the doctor to extract work. Admittedly the petitioner was the sitting Sarpanch by the time the alleged incidents took place. As a representative of the people it was his duty to see that the public functionaries discharge their duty properly. Of course it does not mean that he would assault the Govt. officials to extract work. But even if he did so it cannot be said that it would affect the peace of the community or public order. At another stage it has been alleged by the S.P. that the detenu assaulted the B.D.O. to extort money but no case has been registered on the allegation of

extortion. It has also been alleged that the petitioner use to extort money from local contractors but because of fear for him they do not venture to lodge report. There is no specific instance about such allegation. Right to life and liberty of a citizen as enshrined under Article 21 of the Constitution should be jealously guarded by the State. The same should not be put to peril on vague allegations. If the specific allegations made against the petitioner are believed to be true the same may be said to have potentiality to disturb law and order but not public order. Because the effect of these acts is confined to two individuals only as distinguished from a wide spectrum of the public.

11. Learned Counsel for the petitioner, next submitted that there was inordinate delay on the part of the Government in disposing the representation of the detenu. So the order of detention passed by the District Magistrate should be quashed on that ground also. In support of his submission he relied on the decisions Rama Dhondu Borade Vs. V.K. Saraf, Commissioner of Police and Others, and Jayanarayan Sukul Vs. State of West Bengal, .

12. Article 22(5) of the Constitution of India reads as follows :

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 grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

In corollary to it Section 8(1) has been incorporated in the Act, which reads as follows :--

8. Grounds of order of detention to be disclosed to persons affected by the order--(1) "When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than ten days from the date of detention, communicate to him the ground on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government.

The above two provisions stipulate that the grounds of arrest should be communicated to the detenu in an early date, which imposes an obligation on the part of the appropriate authority to dispose of the representation without delay.

13. In the present case, the detention order was passed on 22-5-2005. As per the writ petition on 31st May, 2005 the detenu made representation to the State (Opp. Party No. 1) for his release which was rejected on 1-7-2005. In the counter-affidavit it is stated by the opposite party-State that the representation of the detenu was received in the Home Department on 23-6-2005. The District Magistrate, Kalahandi was requested on 25-6-2005 to furnish his comment on it.

Parawise comment on the representation having been prepared was forwarded by the District Magistrate to the opposite party-State on 26-6-2005. In turn copy of representation along with the parawise comment thereon was forwarded by the opposite party-State to the Advisory Board on 29-6-2005. The State Government considered the representation and rejected it on 1-7-2005. The fact of rejection of the representation was communicated to the detenu on 2-7-2005. The Advisory Board after hearing the detenu and the detaining authority and on perusing the materials placed before it, opined that there was sufficient cause for detention of the detenu under the Act. After receipt of the said report of the State Government confirmed the order of detention vide order-dated 15-7-2005. As such, according to the opposite party-State, there was no delay in disposing of the representation of the detenu. It is found from Annexure-4, the representation of the detenu that the Asst. Jailor of Dharmagarh sub-jail received it on 31-5-2005 which according to the counter-affidavit of opposite party-State was received in the Home department on 23-6-2005. This delay of about one month has not been explained. Learned Addl. Standing Counsel for the State submitted that as soon as the State Government, in Home department received the representation it sprang into action and disposed of the same expeditiously. The delay in sending the representation to the Home Department was made at the level of Asst. Jailor of Sub-jail, Dharmagarh. So the opposite party-State cannot be held responsible for such delay. Since the Asst. Jailor was in office under the opposite-party-State, the latter would be responsible for the delay caused by the former.

14. In the decision *Rama Dhoridu Borade* 1989 Cri LJ 2119 cited (supra) the Apex Court held :--

The detenu has an independent constitutional right to make his representation under Article 22(5) of the Constitution. Correspondingly, there is a constitutional mandate commanding the concerned authority to whom the detenu forwards his representation questioning the correctness of the detention order clamped upon him and requesting for his release to consider the said representation within the reasonable dispatch and to dispose the same as expeditiously as possible. This constitutional requirement must be satisfied with respect but if this constitutional imperative is observed in breach, it would amount to negation of the constitutional obligation rendering the continued detention constitutionally impermissible and illegal, since such a breach would defeat the very concept of liberty the highly cherished right which is enshrined in Article 21 of the Constitution.

15. In the said case the gap between receipt and disposal of the representation was 28 days. As the delay of 20 days was not properly explained the detention order was set aside.

In the decision *Jayanarayan Sukul Vs. State of West Bengal*, , the Apex Court also held that there should not be any delay on the part of the appropriate

authority to dispose of the representation of the detenu. In the case at hand, since the delay of about one month in disposing the representation of detenu petitioner has not been explained the impugned order deserves to be quashed.

16. There is yet another ground for which it also deserves to be quashed. The order dated 15-7-2005, wherein the opposite party-State confirmed the order of detention, reads as follows :--

Whereas Sri Bijaya Kumar Panda son of late Sameswar Panda of village Karmal Dangriguda, P. S. Jaipatna, District-Kalahandi has been detained under Sub-section (2) of Section 3 of the National Security Act, 1980 (65 of 1980) from 23-5-2005 in pursuance of the order dated 22-5-2005 of the District Magistrate, Kalahandi.

Whereas the Advisory Board to whom his case was referred u/s 10 of the said Act is of the opinion that there is sufficient cause for his detention. Now, therefore in exercise of the powers conferred by Section 12(2) of the said Act the Government of Orissa do hereby confirm the said detention order and direct that the said Sri Bijaya Kumar Panda shall continue in detention for 12 (twelve) months in the Sub-Jail, Dharmagarh until further orders.

17. It appears from this order that since the Advisory Board was of the view that there was sufficient cause for detention of the detenu, the opposite party-State confirmed the order of detention passed by the District Magistrate, Kalahandi. As per Sub-section (2) of Section 11 of the Act the Board is to decide as to whether or not there is sufficient cause for detention of the person concerned. Section 12(1) of the Act reads as follows :--

12. Action upon the report of the Advisory Board.-- (1) In any case where the Advisory Board has reported that there is, in its opinion, sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.

18. As per this provision, if the Advisory Board reports that there is sufficient cause for detention of a person, the appropriate Government may confirm or revoke the detention order. It is to consider whether there are sufficient grounds for detention of the detenu independently, uninfluenced by the opinion of the Advisory Board. In the case at hand, as found from the order of confirmation dated 15-7-2005, since the Advisory Board opined that there was sufficient cause for detention of the detenu (petitioner) the State Govt. (opposite party No. 1) confirmed the order of such detention which is not in consonance with the provision quoted above.

19. In the result, the writ petition is allowed and the order of detention dated 22-5-2005 passed by the District Magistrate Kalahandi along with the confirming order dated 15-7-2005 of the State Government is hereby quashed and the petitioner (detenu) be released forthwith if his detention is not required in

connection with any other case.

L. Mohapatra, J.

20. I agree.