

(2015) 10 GAU CK 0020
In the Gauhati High Court
Case No : W.P. (Crl.) No. 7 of 2015

Chandan Kalita

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 01-10-2015

Acts Referred:

Arms Act, 1959 — Section 25(1A), 25(1B), 27
Constitution of India, 1950 — Article 21, 22, 22(4), 22(5), 226
National Security Act, 1980 — Section 10, 11, 12, 13, 3
Penal Code, 1860 (IPC) — Section 120(B), 302, 307, 326, 34

Citation : (2015) 4 GLT 893

Hon'ble Judges : Ujjal Bhuyan, J.

Bench : Single Bench

Advocate : M. Sarania, S.U. Ahmed, S. Tetla and G. Pegu, Advocates, for the Appellant; H. Rahman, Advocate and B.J. Talukdar, G.A., for the Respondent

Judgement

Ujjal Bhuyan, J.—Heard Mr. M. Sarania, learned counsel for the petitioner, Mr. N. Upadhyay, learned Govt. Advocate, Assam, who has produced the record and Mr. DC Bora, learned Central Govt. Counsel. By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of detention order dated 9.02.2015, passed by the Commissioner of Police, Guwahati detaining the petitioner for a period of 3 months in exercise of power conferred under sub-section (3) of section 3 of the National Security Act, 1980 (Act).

2. A perusal of the order dated 09.02.2015 indicates that it was based on the report and prayer of the Deputy Commissioner of Police, Central Police District, Guwahati dated 04.02.2015 alongwith the enclosed dossier, which disclosed that petitioner is presently in judicial custody in Central Jail, Guwahati in connection with Jalukbari PS Case No. 882/2014, under section 120(B) /399 IPC, read with section 25(1A) of the Arms Act. Petitioner was earlier arrested by East Garo Hills Police, Meghalaya for anti-national activities. After he was released by Meghalaya Police, he was arrested in the following cases:-

1. Fatasil Ambari P.S. Case No. 389/2011, under sections 302 /326 /307 /394 IPC, read with section 27 of the Arms Act.
2. Nalbari P.S. Case No. 662/2012, under sections 302 /392 /34 IPC, read with section 25(1B) of the Arms Act,
3. Dispur PS Case No. 1323/2014, under section 365 IPC in addition to Jalukbari PS Case No. 882/2014, under sections 120(B) /399 IPC, read with section 25(1A) of the Arms Act as noticed above. It is stated that petitioner is a trained militant belonging to the outlawed United Liberation Front of Assam capable of handling sophisticated weapons and involved in heinous crimes in the city of Guwahati and other areas. Expressing his satisfaction that detention of the petitioner is necessary since if he is released from custody, there is every possibility of him indulging in activities prejudicial to the maintenance of public order, the detaining authority i.e., Commissioner of Police passed the impugned order as above.
3. The impugned order of detention was accompanied by grounds of detention which were served on the detainee (petitioner) on the same day.
4. Govt. of Assam in the Political (A) Department passed order dated 19.02.2015 approving the detention of the petitioner under section 3(3) of the Act.
5. Petitioner submitted representation dated 02.03.2015 stating various grounds and reasons for revocation of the detention order and for releasing him from detention. The representation was received by the jail authority, Central Jail, Guwahati on the same day and was forwarded to the addressed authorities on that day itself i.e., on 02.03.2015.
6. By order dated 08.04.2015, passed by the Commissioner & Secretary to the Govt. of Assam, Home & Political Department, representation of the petitioner was rejected as it was held that the Government did not find any justifiable ground to revoke the order of detention. It was served on the detainee on 10.04.2015.
7. Thereafter by order dated 14.04.2015, the Govt. confirmed the detention order of the petitioner dated 09.02.2015 for a period of 12 months on receipt of report from the Advisory Board.
8. Aggrieved, present writ petition has been filed seeking the relief as indicated above.
9. A common affidavit has been filed on behalf of respondent Nos. 3 & 4 by Sri Swapnaneel Deka, Deputy Commissioner of Police (Crime), Guwahati. While narrating various criminal activities of the petitioner leading to his arrest in the various police cases as mentioned in the detention order, it is stated that the supporting documents mentioned in paragraph 8 of the affidavit were furnished to the petitioner. It is further stated that the report submitted by the Deputy Commissioner of Police, Central Police District, Guwahati along with the dossier

and supporting documents are the records for perusal and consideration by the detaining authority i.e., Commissioner of Police, Guwahati who was satisfied with the report dated 04.02.2015 and thereafter passed the detention order dated 09.02.2015, which was served on the petitioner on the same day. It is also stated that petitioner is a charge sheeted accused in two cases where trial is going on. Petitioner has cultivated acquaintance with veteran criminals inside the jail and his release from custody would be highly prejudicial to maintenance of public order as there is every possibility of him indulging in criminal activities on his release.

10. Identical affidavit has been filed by respondent No. 2 through the Joint Secretary.

11. Central Govt. through the Under Secretary, Ministry of Home Affairs has also filed an affidavit stating that report from the Govt. of Assam under section 3(5) of the Act was received on 10.03.2015. The Joint Secretary (Security) perused the report and felt that there is no reason to interfere with the detention order.

12. Mr. Sarania, learned counsel for the petitioner has raised various grounds in support of his contention that impugned detention order is illegal and untenable. He has made submissions on merit as well as on procedure. According to the learned counsel for the petitioner, from a perusal of the grounds of detention annexed to the detention order, it is clear that there was no subjective satisfaction of the detaining authority to the materials which were before him to arrive at the conclusion that preventive detention of the petitioner was necessary. Preventive detention has been ordered merely on apprehension and suspicion that in the event of petitioner being enlarged on bail, he would resort to unlawful activities again. Learned counsel for the petitioner has also sought to draw a distinction between apprehended danger to law and order and maintenance of public order, the latter being a higher form of breach of law and order. Mere apprehension of breach in law and order would not be sufficient to justify preventive detention. He further submits that it is the satisfaction of the detaining authority, which is relevant in the matter of preventive detention. The detaining authority has not come forward to depose before this Court justifying the preventive detention of the petitioner. Affidavit has been filed by the Deputy Commissioner of Police, who had only given the proposal for preventive detention of the petitioner, which was accepted by the detaining authority. This he contends to be a fundamental flaw affecting the impugned decision.

13. Coming to the procedural aspect, learned counsel for the petitioner submits that from a perusal of the impugned order, it is evident that there is no mention about application of the substantive provision of sub-section (2) of section 3 of the Act which would enable the detaining authority to exercise the power of detention under sub-section (3). This again is a fundamental flaw striking at the root of the detention order of the petitioner. He further submits that copy of the report of the Deputy Commissioner of Police dated 04.02.2015 which is the foundation of the detention was not communicated to the petitioner which has

adversely affected his right to file effective representation against his detention. In any case, the representation submitted by the petitioner was not attended to by the competent authority with utmost expedition as is required in a case of preventive detention and there is unreasonable delay in the disposal of the representation which has vitiated the preventive detention of the petitioner. He also submits that copy of the report of the Advisory Board was also not furnished to the petitioner. Consequently, petitioner is not aware as to how his case was considered by the Advisory Board. In support of his submissions, Mr. Sarania, learned counsel for the petitioner has placed reliance on a number of decisions of the Apex Court as well as of this Court.

14. While Mr. Bora, learned Central Govt. Counsel submits that in a case of this nature, the role of the Central Govt. is minimal, Mr. Upadhyay, learned Govt. Advocate submits that petitioner is a hardened criminal and is involved in series of criminal activities starting from anti-national activities to petty crimes. His free movement at large would be a threat to the society and, therefore, the authority has rightly invoked provisions of section 3(3) of the Act and has kept him confined under preventive detention. He submits that all the procedural formalities have been fulfilled while passing the order of preventive detention. Detaining authority had arrived at his subjective satisfaction about the need to detain the petitioner under the Act and no case for interference is made out, he submits. He has produced the record for perusal of the Court.

15. Submissions made by learned counsel for the parties have received the due consideration of the Court. Also perused the record produced.

16. Though learned counsel for the petitioner has advanced arguments both on substantive grounds as well as on procedural aspect, Court is of the view that procedural aspect may be taken up first for adjudication.

17. Clause - 4 to Clause - 7 of Article 22 of the Constitution of India deals with preventive detention of a person. A combined reading of the aforesaid provisions would show that no law providing for preventive detention shall authorize detention of a person for a period longer than 3(three) months unless the Advisory Board reports before expiry of 3(three) months that there exists sufficient cause for such detention. A person taken in preventive detention is required to be communicated at the earliest the grounds on which the preventive detention order was made and to afford the detainee the earliest opportunity of making representation against such order.

18. Parliament has enacted the National Security Act, 1980, vesting power on the Central Government as well as on the State Government to take into custody certain persons on preventive detention. In a given case, under sub-section (1) of section 3 of the Act, the Central Government or the State Government has to be satisfied that preventive detention is necessary to prevent that person from acting in any manner prejudicial to the defence of India, relations of India with foreign powers or under sub-section (2) of section 3, the security of India or

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 etc.,. Under sub-section (3) of section 3 , if the State Government is satisfied that it is necessary so to do, it may be by order in writing, authorize the District Magistrate or Commissioner of Police to exercise powers conferred by sub-section (2). As per the proviso to sub-section (3), the period specified in an order of detention should not, in the first instance, exceed 3(three) months, but the State Government may extend such period from time to time not exceeding 3(three) months at a time, if it is satisfied that such extension is required. Section 8 provides that grounds of detention have to be disclosed to the person affected by the detention order within 5(five) days of detention and in exceptional circumstances, within 10(ten) days for which reasons have to be recorded in writing. Section 9 provides for constitution of Advisory Board to examine validity of such detention and to report to the appropriate Government. Under section 10 , where a detention order has been made under the National Security Act, 1980, the appropriate Government shall, within 3(three) weeks from the date of detention, place the case of the detainee before the Advisory Board. The procedure to be followed by the Advisory Board is laid down under section 11 . Advisory Board is required to submit its report to the appropriate Government, within 7(seven) weeks from the date of detention of the person concerned. Under section 12 , where the Advisory Board has opined that detention is justified the appropriate Government may confirm the detention order, which shall be for a maximum of 12(twelve) months as per section 13 .

19. Thus, as per the scheme of the National Security Act, 1980, read with Article 22(4) to (7) of the Constitution, an initial order for preventive detention can be for a maximum period of 3(three) months. The grounds of detention are to be disclosed to the detainee ordinarily within 5(five) days and in exceptional circumstances for reasons to be recorded in writing, within 10(ten) days, affording the detainee the earliest opportunity of making representation against his detention. Within 3(three) weeks from the date of detention, case has to be placed before the Advisory Board. Advisory Board has to submit its opinion to the appropriate Government within 7(seven) weeks from the date of detention.

20. As is well known nature of preventive detention is qualitatively different from detention under the normal criminal laws. The Apex Court has pointed out in the case of *Union of India (UOI) Vs. Yumnam Anand M. @ Bocha @ Kora @ Suraj and Another*, that in a case of preventive detention, no offence is proved, nor any charge is formulated. The justification for such detention is suspicion or reasonability. There is no criminal conviction which can only be warranted by legal evidence. Power of preventive detention is exercised to prevent apprehended objectionable activities. But since such a detention would be an invasion of the personal liberty of a person, laws of preventive detention are required to be strictly construed and a meticulous compliance to the procedural safeguards, howsoever technical, is mandatory.

21. Having noticed the above, a perusal of the impugned detention order dated 09.02.2015 would go to show that though power has been exercised under section 3(3) of the Act in ordering preventive detention of the petitioner, there is no mention about the provision to which the objectionable activities of the petitioner can be attributed. Though it is mentioned that petitioner may indulge in activities prejudicial to the maintenance of public order, Court is of the view that keeping in mind that it is a case of preventive detention and the necessity to strictly follow the procedural requirements, it was incumbent on the part of the detaining authority to have expressed his satisfaction in terms of sub-section (2) of section 3 of the Act. A conjoint reading of subsections (2) and (3) of section 3 of the Act would show that presence of any of the conditions mentioned in sub-section (2) is a sine quanon for exercise of power under sub-section (3). The general principles that there is presumption as to the validity of an executive order and that an executive order which is otherwise valid would not be rendered invalid because of non-mentioning of particular section or provision would not be applicable in a case of preventive detention where burden is on the detaining authority to justify such preventive detention.

22. There is also merit in the submission of Mr. Sarania, learned counsel for the petitioner that non-furnishing of the report of the Deputy Commissioner of Police dated 04.02.2015 has caused prejudice to the petitioner. From the common affidavit filed on behalf of respondent Nos. 3 & 4, it is evident that copy of the said report was not furnished to the petitioner.

23. There is one more aspect. Both in the detention order as well as in the grounds of detention furnished to the petitioner, it is stated that those were served on the petitioner with all the annexures. What were the annexures furnished to the petitioner have not been mentioned either in the detention order or in the grounds of detention. Considering that it is a case of preventive detention, it was necessary that while serving copies of the detention order along with the grounds of detention on the petitioner, the detaining authority should have submitted a list of supporting documents furnished to the detainee.

24. Non-mentioning of the substantive provision i.e., section 3(2) of the Act in the detention order, non-furnishing of the report dated 04.02.2015 to the petitioner and non-mentioning of the list of documents relied upon and served on the petitioner in the detention order only goes to show non-application of mind of the detaining authority to the preventive detention of the petitioner. It reflects a mechanical approach which cannot be accepted when a detention affects the fundamental right of a citizen under Article 21 of the Constitution of India.

25. As already noticed above, petitioner submitted his representation on 02.03.2015, which was forwarded to the addressed authorities by the jail authority on the same day. A perusal of the note sheet and the documents contained in the file produced by the learned Govt. Advocate would go to show that information about the representation was received by the Political Department only on 09.03.2015. It was put up before the competent authority

on 12.03.2015. It was processed at the level of Commissioner and Secretary on 19.03.2015. Thereafter it was placed before the Addl. Chief Secretary on 26.03.2015. It had the approval of the Hon''ble Chief Minister on 27.03.2015. Thereafter, the file was again put up on 31.03.2015 for preparation of draft order. Finally, the rejection order was issued on 08.04.2015 and served on the petitioner on 10.04.2015.

26. From the scheme of the Act, it is seen that at every stage of the detention process, the authority is required to act with utmost expedition. The extent of urgency can be gauged from the legal requirement of disclosing to the detenu the grounds of detention within 5 days of detention. Only in exceptional circumstances those can be disclosed within 10 days that too for reasons to be recorded in writing. This is so to enable the detenu to make a representation at the earliest opportunity. The natural corollary would be that such representation is required to be attended to with utmost expedition. Failure to do so would be a breach of the detenu's fundamental right under Article 21 . Preventive detention is not permissible beyond 3 months, unless approved by the Advisory Board; that also for a total period of 12 months. The right to make a representation against an order of preventive detention is a constitutionally recognized right of the detenu under Article 22(5) of the Constitution. Therefore, it becomes absolutely necessary that the representation of the detenu is considered expeditiously at every stage keeping in mind the constitutional provision and the mandate of the Act. A perusal of the file does not disclose that the authorities while dealing with the representation of the petitioner were alive to such legal and constitutional requirement. There is no explanation as to why initially there was a delay in processing the file from 12.03.2015 to 19.03.2015. At every stage thereafter there appears to be some delay in considering the representation. Ultimately though the representation was rejected on 31.03.2015, the rejection order was issued more than 7 days thereafter on 08.04.2015. In the facts and circumstances of the case, Court is of the view that there were unexplained delays in considering the representation of the petitioner which has vitiated the decision making process.

27. As already noticed above, in a case of preventive detention, a meticulous compliance to the procedural requirements is mandatory and non-compliance thereof would render such detention to be untenable in law.

28. In view of the findings arrived at for the above reasons, Court is of the view that it may not be necessary to examine the other grounds urged by learned counsel for the petitioner.

29. Accordingly, impugned order dated 09.02.2015 is set aside and quashed. Petitioner shall be released forthwith, if not detained in any other case. Record produced by Mr. Upadhyay, learned Govt. Advocate is returned back.