
(2001) 11 OHC CK 0003
In the Orissa High Court
Case No : O.J.C. No. 6219 of 2001

Chittu ' Sayed Iftekar Alli

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 06-11-2001

Acts Referred:

Constitution of India, 1950 — Article 20(5), 21, 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 161

Citation : (2002) 93 CLT 39

Hon'ble Judges : P.C. Naik, J;C.R. Pal, J

Bench : Division Bench

Advocate : R.N. Mohanty, R.C. Ojha, A.K. Jena and M.K. Panda, for the Appellant; R.N. Acharya, Additional Government Advocate and Anil Deo, A.S.C. (Central), for the Respondent

Final Decision : Allowed

Judgement

P.C. Naik. J.

1. On 14.12.2001, Shri Basanta Charan Swain, District Magistrate, Kendrapara, on being satisfied that with a view to preventing Chittu alias Sayed Iftekar Alli (the petitioner herein) from acting in a manner prejudicial to the maintenance of public order it was necessary to detain him, directed that said Chittu alia Sayed Iftekar Alli to be detained in the Circle Jail, Choudwar until further orders. The order of detention was approved by the State Government on 20.12.2000 and the matter being referred to the Advisory Board, it opined that there was sufficient cause for the detention of Chittu alias Sayed Iftekar Alli (hereinafter referred to as" the detenu"). On a consideration of the material on record, the order of confirmation was passed by the State government on 2.2.2001. Much later on 7.5.2001, the petitioner submitted representations which were duly considered and rejected by the State Government on .17.5.2001 and by the Central Government on 24.5.2001. Accordingly, the petitioner has preferred this writ application challenging the order of detention, the approval and the

confirmation and his continued detention at Choudwar Jail.

2. Though the order of detention is assailed on more than one ground including the ground of delay in passing the order of detention, non-recording of satisfaction of the detaining authority that the petitioner if released on bail was likely to act in a manner prejudicial to the maintenance of public order, and non-supply of relevant material documents which prejudiced the detenu (the petitioner) as he was prevented from making an effective representation to the State Government and the Central Government which was violative of his right under Article 20(5) of the Constitution of India. However, for the reasons to follow, it will not be necessary to refer to the said contentions as the petition can be disposed of on the grounds of non-filing of affidavit of the detaining authority who had passed the order, and its failure to explain the delay of about five months in passing the order of detention.

3. In paragraph 6 of the writ application, it is alleged that the District Magistrate without any inquiry and without any basis blindly passed the order of detention. For better appreciation, said paragraph is quoted hereunder :

"6. That the petitioner being politically oppose to B.J.P., and the influence of local B.J.R, M.L.A. and party functionary the Superintendent of Police of Kendrapara prepared a false and motivated report which was submitted to District Magistrate and the District . Magistrate without any enquiry, without basis of proper materials on record blindly passed the order of detention verbatives reproducing report of Superintendent of Police in the grounds of the order of the detention under Annexure-2, Bare reading of Annexure-2 it goes to show the order of the detention passed on the basis of dosier supplied by the Superintendent of Police. The aforesaid actions of the District Magistrate, Kendrapara in amounting the non-application of mind and is a clear case of colourable exercise of power."

4. Thus, in substance, the allegation is that the order was passed mechanically in bad faith, without application of mind on "the basis of false and motivated report submitted by the Superintendent of Police. So, considering the fact that the challenge was to the satisfaction arrived at by the detaining authority with reference to the petitioner's detention, it was expected of the detaining authority of the petitioner to file an affidavit. However, that was not done. Instead, an affidavit of the present incumbent in the office of the Collector-Cum-District Magistrate, Kendrapara, Shri Krushna Chandra Mohanty, has been filed. Not only that, the affidavit has been filed as if the said Krushna Chandra Mohanty had passed the order of detention. This is clear from paragraph 7 of the counter which reads thus :

"7. That this deponent after being subjectively satisfied with the allegations against the petitioner which were produced by S.P. Kendrapara along with Case records and after applying his judicial conscience passed detention order under N.S.Act which was inoperative on the evidences & circumstances laid before this deponent. That the petitioner in all the incidences created situation disturbing

public order in the locality & as such this deponent had no other choice than to pass order for detention under N.S.Act. That to save repetition, the petitioner prays this Hon"ble Court's indulgence to refer to Annex-2 of the writ application to justify the above said statement."

5. Thus, the resultant position, as noticed above, is that though the order of detention was passed by Shri Basant Charan Swain as the District Magistrate, Kendrapara, the affidavit in reply to the writ application has been filed by Shri Krushna Chandra Mohanty, the present incumbent in the said office who has not passed the order of detention in question. The question, therefore, is whether the affidavit of Shri Krushna Chandra Mohanty can be taken into consideration in reply to the challenge raised by the petitioner in paragraph 6 of the writ application which has earlier been quoted. The answer, for reasons to follow, has necessarily to be in the negative. Shri Krushna Chandra Mohanty may be the Collector-Cum-District Magistrate, Kendrapara but was not the detaining authority so far as the petitioner was concerned. When a challenge is made for want of subjective satisfaction of the detaining authority in passing the order of detention and it is alleged that the order has been passed mechanically and without application of mind, it becomes incumbent upon the detaining authority of that particular detenu, to file a counter affidavit in reply to the averments made in a writ application. In the case at hand, as observed above, Shri Krushna Chandra Mohanty may be the holder of the office of the District Magistrate, Kendrapara, but he was not the detaining authority of the petitioner.

6. At the stage, a reference may be made to the decision of the Supreme Court in *Biru Mahato Vs. District Magistrate Dhanbad*, That was a case in which an affidavit had been filed by the District Magistrate, Dhanbad as if he was the detaining authority. The question arose as to whether it could be taken into consideration in reply to the averments made in that petition. The Apex Court in paragraph 11 of its judgment observed thus :

"... Mr. U.P. Singh, learned counsel for the detenu urged that this Court should not take into consideration the affidavit filed by Dr. J.S. Brara on behalf of the respondent, Dr. J.S Brara describing himself as District Magistrate Dhanbad has made the affidavit as if he was the detaining authority..."

After considering the contentions, it was held :

"..... In para 1 he has described himself as District Magistrate being the detaining authority of the petitioner which statement is not borne out by the record. He may be the holder of office of the District Magistrate. But, when the subjective satisfaction of holder of office is put in issue, the mere occupant of office cannot arrogate to substitute his subjective satisfaction. He may speak from the record but that is not the case here. Therefore, the affidavit of Mr.Brara has to be ignored and one must reach the conclusion that the averments made by the detenu have remained uncontroverted.

12. For these reasons we have quashed and set aside the order of detention."

similar is the fact situation in the case at hand.

7. It is no doubt true that in Shaik Hanif and Others Vs. State of W.B., the Apex Court has held that the failure to file a counter affidavit of the District Magistrate who had passed the order of detention was an impropriety though in most of the cases, it may not be of much consequence, especially when there is no allegation of mala fide against the detaining authority. Accordingly, in the facts and circumstances of that case, it was held that absence of affidavit of the District Magistrate did not vitiate the detention order. The fact of non-filing of an affidavit of the District Magistrate who had passed the order of detention was considered by a Constitutional Bench of the Apex Court in State of Punjab and Others Vs. Jagdev Singh Talwandi, wherein after referring to the case of Shaik Hanif (supra), the Court in paragraph 27 of its judgment, held thus :-

"27. In this case too, there are no allegations of mala fides against the District Magistrate and so his failure to file a counter affidavit will not vitiate the order of detention. We cannot, however, leave this subject without emphasizing once again the importance of the detaining authority filing his own affidavit in cases of the present nature. There are degrees of impropriety and the line which divides grave impropriety from illegality is too thin to draw and even more so to judge. Conceivably, there can be cases in which such impropriety arising out of the failure of the detaining authority in filing his own affidavit may vitiate the order of detention."

8. Though the word " mala fide" may not have been specifically used in paragraph 6 of the writ application, but the import of the averment in substance is that the order is question has not been passed in good faith and is motivated or has been passed with an oblique intention. When it is said that the action is mala fide, it simply means that it is done in bad faith or with oblique motive. In State of Bihar and Another Vs. P.P. Sharma, IAS and Another, it has been observed that "mala fides" means," want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose". At the cost of repetition, we may observe that in the case at hand, it is averred that on the basis of a false and motivated report at the instance of the local M.L.A of B.J.P., the District Magistrate passed the order of detention blindly without any basis and without application of his mind in colourable exercise of power. In view of this, we are of the opinion that it was incumbent upon the person who had passed the detention order, i.e. Shri Basanta Charan Swain, to have filed an affidavit in reply to the averments made by the petitioner. The affidavit of Shri Krushna Chandra Mohanty, who had in fact not passed the order of detention but has described himself in the affidavit as the detaining authority, cannot be accepted. Reference may also be made to the contention raised and observations made by the Apex Court in paragraph 25 of its judgment in Jagdev Singh's Case (supra) which reads thus :-

"25. Shri Hardev Singh serious fault with the fact that in answer to the writ petition filed by the respondent in the High Court, the counter-affidavit was

sworn by Shri K.C.Mahajan, Deputy Secretary in the Home Department of the Government of Punjab, and not by the District Magistrate, Ludhiana, who had passed the order of detention. We are not prepared to dismiss this submission as of no relevance or importance. In matters of a routine nature, if indeed there are any matters of a routine nature in the field of detention, a counter - affidavit may be sworn by a person who derives his knowledge from the record of the case. However, in sensitive matters of the present nature, the detaining authority ought to file his own affidavit in answer to the writ petition and place the relevant facts before the Court which the Court is legitimately entitled to know."

9. From a joint reading of the observations made in paragraphs 25 and 27, it follows that though by itself, non-filing of a counter affidavit by the District Magistrate, who had passed the order, may not vitiate the order, nonetheless it is important for the authority passing the order of detention to file its affidavit and the effect of the non-filing of the affidavit vis-a-vis the detention order will depend on the facts and circumstances of each case.

10. In the case at hand, no effort has been made to explain the reason as to why the affidavit of Shri Basanta Charan Swain could not be filed. In case, he had left the service or had superannuated and was, therefore, not available or any other such reason for not filing his affidavit was advanced, then the Court could have been called upon to consider the effect of non-filing of his affidavit in the facts and circumstances of the case. As observed above, the affidavit filed by the present incumbent is as if he was the detaining authority. The affidavit on behalf of the State has been filed by Shri Siba Prasad Mishra, Joint Secretary to Government, Home Department and he has stated therein that " he is well acquainted with the facts of the case and is filing the counter affidavit on being duly authorized by the opposite party No. 1". He has further stated that after being satisfied that with a view to prevent Chittu from acting in any manner prejudicial to the maintenance of public order it was necessary to detain him, the District Magistrate, Kendrapara, passed the order of detention.

11. The order is also assailed, inter alia, on the ground that there was delay in passing the order of detention and in as much as the last incident involving the petitioner as mentioned in the grounds of detention is alleged to have taken place on 9.7.2000 whereas the order of detention was passed on 14.12.2000; that the order was passed while the petitioner was in custody and without recording the satisfaction that the detenu (petitioner) was likely to be released on bail and if so released, he would indulge in activities which are prejudicial to the maintenance of public order; that relevant documents like statement of witnesses recorded u/s 161 Cr.P.C. copy of post mortem report and seizure list in different cases were not supplied for which he could not submit an effective representation; and that the order was confirmed by the State Government mechanically without application of mind and without going through the report of the advisory Board. ,

12. In support of his contention that the order of detention is liable to be

quashed as there was undue delay in passing the order of detention vis-a-vis the grounds on which it was passed, reliance was placed on two judgments of the Apex Court in Jagan Nath Biswas Vs. The State of West Bengal, (by a Bench of two Hon''ble judges), wherein there was a delay of six months between the date of last occurrence and the date of passing the detention order, and in Sk. Serajul Vs. State of West Bengal, (by a Bench of four Hon''ble Judges), wherein there was a delay of seven months between the date of last occurrence and the date of passing the detention order. In both these cases, the order of detention was quashed holding that unexplained delay will be fatal to the subjective satisfaction. In Sk.Serajul's case (Supra), the Court observed thus : -

"... It is the obligation of the State or the detaining authority in making its return to the rule in such a case to place all the relevant facts before the Court and if there (sic) making the order of detention or in arresting the detenu which is prima facie unreasonable, the State must give reasons explaining the delay. Here there is no explanation for the delay which has occurred at both stages and in the absence of such ex-planation, we are not at all satisfied that the District Magistrate, Burdwan applied his mind and arrived at a real and genuine subjective satisfaction that it was necessary to detain the petitioner with a view to preventing him from acting in a prejudicial manner. The condition precedent for the making of the order of detention was, therefore, not satisfied, and consequently, the order of detention must be quashed and set aside."

13. The question of delay in passing the order of detention also came up for consideration before the Apex Court in Malwa Shaw Vs. The State of West Bengal, (by a Bench of three Hon''ble judges). In the said case, the contention was advanced that the date when the order of detention was made was so far removed from the dates of the alleged incidents that no reasonable person on the basis of the alleged incidents which took place about five months before, could possibly arrive at the satisfaction leading to the making of the order of detention. It was further contended that, the satisfaction of the District Magistrate, which was the foundation of the making of the order of detention was, therefore, no satisfaction at all and the order of detention based on it was invalid. Repelling the contention, the Apex Court observed thus:

"..... This contention is without force and cannot be accepted. The District Magistrate has filed an affidavit in reply to the petition stating that he was satisfied on the basis of the incidents referred to in the grounds of detention that the petitioner was acting in a manner prejudicial to the maintenance of supplies and services essential to the community and he had, therefore, passed the impugned order detaining the petitioner. Of course this statement made on oath by the District Magistrate merely affirms the recital made in the order of detention and like the recital, it can be shown to be incorrect. But when the District Magistrate has made a statement on oath, the burden would be heavy on the petitioner to show that what is stated by the District Magistrate is not correct. The petitioner would have to establish from the material on record that

the District Magistrate could not possibly have arrived at the satisfaction which he claims to have done and that his satisfaction is colourable....."

This view has been reiterated in Smt. K. Aruna Kumari Vs. Government of Andhra Pradesh and Others, and Yogendra Murari Vs. State of U.P. and Others, Thus, the position of law that emerges is that unless it is satisfactorily explained, the delay in passing the order of detention will vitiate the order.

14. Reverting to the case at hand, as has been observed above, the affidavit has been filed by the District Magistrate who had not passed the order of detention. In reply to the averments in paragraph 9 of the writ application that there was a delay of more than five months in passing the order of detention and that the delay in passing the order of detention having not been explained, the order was liable to be set aside, it is merely stated in paragraph 10 of the counter that "there is definitely no delay in passing such order". Thus, instead of explaining the delay, the District Magistrate has denied that there was any delay in passing the order of detention. The record, however, does not indicate this, for the last incident taken into consideration, took place on 9.7.2000 whereas the order of detention was passed on 14.12.2001. From what has been stated above, the following position emerges :-

(i) Though it has been alleged that the order of detention was passed on false and motivated report, by the District Magistrate with non-application of mind and in colourable exercise of power, affidavit of the said officer who had passed the order of detention has not been filed.

(ii) Though the officer, who has filed the affidavit, had not passed the order of detention, nonetheless he has stated in paragraph 7 of his affidavit that he after being subjectively satisfied with the allegations made against the petitioner and after applying his judicial cons cience passed the detention order.

(iii) The long delay of five months between the date of the last incident and the date of the order of detention, has not been explained.

15. Thus, having considered the matter from all aspects and in the light of the decisions of the Apex Court, referred to above, it has to be held that the impugned order of detention cannot be sustained and the same is accordingly quashed. It, therefore, follows that the continued detention of the petitioner is not justified.

16. In the result, the writ application is allowed. The petitioner-Chittu alias Sayed Iftekar Alli be released from custody forthwith if his detention is not required in connection with any other case.

C.R. Pal, J.

17. I agree Writ application allowed.