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In the Gauhati High Court

Haobijam Kenjit Singh alias Kenedy — APPELLANT

Vs

State of Manipur and Others — RESPONDENT

Date of Decision : 08-12-2006

Acts Referred:

Constitution of India, 1950 — Article 22, 226
General Clauses Act, 1897 — Section 21
National Security Act, 1980 — Section 14, 3
Penal Code, 1860 (IPC) — Section 34, 384, 400

Citation : (2007) CriLJ 689 : (2006) GLT 577 Supp

Hon'ble Judges : U.B. Saha, J;I.A. Ansari, J

Bench : Division Bench

Judgement

I.A. Ansari, J.—On being arrested, on 8-7-2006, in connection with Imphal Police Station FIR No. 102(7)2006, under Sections 400/384/34 of the Indian Penal Code read with Section 17/20 of the Unlawful Activities (Prevention) Act, 2004, while the petitioner was still in custody, an order was passed, on 14-7-2006, by the District Magistrate, Imphal East, Manipur, under Sub-section (3) of Section 3 of the National Security Act, 1980 (hereinafter referred to as "the NS Act"). Based on this order, dated 14-7-2006, the petitioner was placed under preventive detention and the validity of this order, which stands impugned, in this application, made under Article 226 of the Constitution of India, by the petitioner.

2. We have heard Mr. S. Jhaljit, learned Counsel for the petitioner, and Mr. N. Ibotombi, learned Central Government Counsel, appearing on behalf of the Union of India. We have also heard Mr. Th. Ghohal, learned Government Advocate, Manipur, for the State-respondents.

3. Though the detenu, in the present writ petition, challenges his detention under the Act on a number of grounds, we confine our discussion to the two important questions, which the petitioner has raised for determination by this Court, for, we are of the view that the decision, in any of the two questions, would warrant

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petitioner''s release from preventive detention.

4. Having heard the learned Counsel for the parties and on perusal of the materials on record, what attracts out eyes, most prominently, is the omission, on the part of the Central Government, to act in accordance with the requirements of the provisions of Section 14 of the Act. In order to make clear as to what we are driving at, we may point out that Sub-section (5) of Section 3 of the Act states that when any order is made or approved by the State Government, the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order.

5. Close on the heels of what Sub-section (5) of Section 3 of the Act states, Sub-section (1) of Section 14 reads as follows:

14. Revocation of detention order - (1) Without prejudice to the provisions of Section 21 of the General Clauses Act, 1897 (10 of 1897), a detention order may, at any time, be revoked or modified,-

(a) notwithstanding that the order has been made by an officer mentioned in Sub-section (3) of Section 3 by the State Government to which that officer is subordinate or by the Central Government;

(b) notwithstanding that the order has been made by a State Government or by the Central Government.

6. A combined reading of Sub-section (5) of Section 3 and Sub-section (1) of Section 14 makes it clear that the Central Government has the power to modify or revoke an order of preventive detention, passed under Sub-section (3) of Section 3 by the State Government or even by the Central Government.

7. A Full Bench of this Court in the case of Hitendra Nath Goswami v. State of Assam and Ors. 1984 Cri LJ 1558, while considering, in the context of the provisions of Sub-section (5) of Section 3 of the Act, the object and scope of the discretionary power of the Central Government under Sub-section (1) of Section 14, held that the discretionary power of the Central Government under Sub-section (1) of Section 14 is coupled with the duty to consider the report received from the State Government and that such consideration shall be with reasonable expedition even if no representation is made by the detenu to the Central Government. To put it differently, when Sub-section (1) of Section 14 vests in the Central Government the discretion either to modify or revoke the preventive detention order made under Sub-section (3) of Section 3, the Central Government owes a duty, in law, to at least, consider the report made over to it by the State Government, in terms of the provisions of Sub-section (5) of Section 3, in order to determine for itself if the order of detention needs to be modified or revoked. Such a consideration by the Central Government is mandatory irrespective of the fact as to whether the detenu has or has not made

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any representation to the Central Government seeking modification or revocation of the detention order. Omission to discharge this duty, intentionally or inadvertently, would deny to the detenu a right, which the law has vested in him. A preventive detention puts in peril the liberty of an individual and except the procedural safeguards, which the relevant enactment of preventive detention may contain in terms of the constitutional guarantees given by provisions of Article 22, a detenu has really no other remedy. Hence, when a duty is cast upon an authority, not discharging of the duty may, in itself, make the detention of such a person illegal and not sustainable in law.

8. Even in the case of Lalbhai Talsibhai Patel Vs. Additional Special Land Acquisition Officer, the Division Bench of this Court, relying on Hitendra Nath Goswami (supra), has held that it is the duty of the Central Government to consider, in terms of the provisions of Sub-section (1) of Section 14, the report submitted to it by the State Government under Sub-section (3) of Section 3. In the case at hand, paragraph 4 of the affidavit filed by the respondent No. 3, reads as follows:

In regard to consideration of report of the detenu of the petition it is submitted that a report as envisaged u/s 3(5) of the National Security Act, 1980 about the detention of the petitioner was made by the Government of Manipur to the Central Government in the Ministry of Home Affairs vide their letter No. 17(1)/1031/2006 H, dated 25-7-2006. The said report was received by the Central Government in the concerned Desk in the Ministry of Home Affairs on (sic) and the report received from the State Government was processed on 28-8-2006 and it was immediately submitted to DS (Security)(who has been delegated powers by the Union Home Minister to take note of such cases). DS (Security) completed the examination of the report in the Ministry of Home Affairs on 31-8-2006.

9. The averments made in paragraph 4 clearly indicate that the report, which was sent to the Central Government by the State Government in accordance with the requirements of Sub-section (5) of Section 3, was received by the Central Government and the fact that such a detention order had been received was noted by the DS (Security). There is no assertion, in the averments made in their affidavit by the Union of India, that any authorized person ever considered, in terms of the requirements of Sub-section (1) of Section 14, the said report of the State Government for the purpose of determining if the petitioner''s detention needs to be modified or revoked. Far from this, there is no indication at all that any one even thought it fit to consider the said report in terms of requirement of Sub-section (1) of Section 14. The present case, therefore, suffers from non-exercise of discretionary power, which stands vested in the Central Government by Sub-section (1) of Section 14, to revoke or modify a detenu''s order for preventive detention.

10. In the case of Gopal Boro alias Gwojen Boro v. Union of India and Ors. reported in 2005 (3) GLT 33 a Division Bench of this Court interfered and set

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aside the order of detention for the reason that the Central Government had not taken any step in accordance with the requirements of Sub-section (1) of Section 14. We see no reason to take a view different from what has been taken in Gopal Boro (supra).

11. Though the absolute non-compliance of the provisions of Sub-section (1) of Section 14, is in itself sufficient to interfere with the impugned order of detention, there is yet another important aspect of the present case, which has a crucial bearing on the outcome of this writ petition. The impugned order of detention states, inter alia, "And whereas. I am satisfied from the Police report that Shri Haobijam Kenjit Singh alias Kenedy (27) years, s/o. H. Shyam Singh of Kakwa Ningomthongjao Sairom, Leirak, PS. Singjamei, Dist. Imphal East, Manipur, is ''likely to be released on bail in the near futurel''".

(Emphasis is added)

12. From what has been noted above by the detaining authority, it is abundantly clear that according to the detaining authority, he was satisfied from the police report that the detenu was ''likely to be released on bail in the gear future''. According to Mr. Ghbhal, learned State Government counsel, a copy of this police report was furnished to the detenu and the same has been enlisted at Clause (ix) of Para 7 of the grounds of detention furnished to the detenu. We have meticulously examined the copy of the police report, in question. We have also minutely scanned the entire materials based whereon the impugned order of detention has been made. What we, however, notice is that there was no material whatsoever before the detaining authority, at the time when it passed the detention order, indicating that the detenu was, contrary to what the detaining authority has observed in the detention order, ''likely to be released on bail in.the pear future''. It is nobody''s case that when a person is in custody in connection with a criminal offence or for the purpose of his prosecution for commission of an offence, an order, under preventive detention laws, cannot be passed. While a criminal proceeding aims at punishing a person for an offence committed by him, a preventive detention is an act done as an anticipatory measure. There is no parallel between the two. Pendency of a criminal proceeding is, therefore, no bar to the passing of an order of preventive detention nor does an order of preventive detention create a bar to a criminal prosecution. See Alijan Mian Vs. District Magistrate, Dhanbad and Others, .

13. When a person is in custody in connection with an offence, what factors must be considered or taken into account for the purpose of sustaining an order of detention, has been considered at length and dealt with in the case of Kamarunnissa and Others Vs. Union of India and another, In Kamarunnissa (supra), having considered a number of authorities, the Apex Court, at paragraph 13, observed thus : "13. From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable

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material placed before him (a) that there is a real possibility of his being released on bail, and (b)that on being so released he would in all probability indulge in prejudicial activity, and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail granted notwithstanding such opposition, to question it before a higher Court. What this Court stated in the case of Ramesh Yadav Vs. District Magistrate, Etah and Others, was that ordinarily a detention order should not be passed merely to pre-empt or circumvent enlargement on bail in cases which are essentially criminal in nature and can be dealt with under the ordinary law. It seems to us well settled that even in a case where a person is in custody, if the facts and circumstances of the case so demand, resort can be had to the law of preventive detention. This seems to be quite clear from the case law discussed above and there is no need to refer to the High Court decisions to which our attention was drawn since they do not hold otherwise. We, therefore, find it difficult to accept the contention of the counsel for the petitioners that there was no valid and compelling reason for passing the impugned orders of detention because the detenus were in custody."

14. From what have been observed and laid down in Kamarunnissa and Others Vs. Union of India and another, it becomes transparent that there is no legal impediment in making a detention order against a person, who may be in custody in connection with the commission of an offence. In order to, however, sustain an order of detention made against a person, who already in custody, the order of detention must reflect that the authority passing the order is aware of the fact that the detenu is actually in custody. This apart, the detaining authority can make an order of preventive detention if he has reason to believe, on the basis of the materials placed before him, (a) that there is real possibility of the detenu being released on bail, (b) that the detenu, on being so released, in all probability, indulge in prejudicial activities, and (c) that it is essential to detain him in order to prevent him from doing so. If an order of detention is passed against a person, who is already in custody and if such an order does not indicate that the detaining authority had based its satisfaction that the detenu is ''likely to be released on bail in the near future'' on materials placed before it, a mere recitation in the order of detention, such as the present one, that the detenu is ''likely to be released on bail in the near future'' would not make the order sustainable in law.

15. It is also, at this stage, pertinent to point out that passing of an order of detention against a person, who is not in custody, and a person, who is in custody, does not stand on the same footing. In what circumstances, an order of preventive detention can be passed against a person, who is already in custody, has been the subject of many authoritative pronouncements, the foremost amongst these being the Constitution Bench decision in Rameshwar Shaw Vs. District Magistrate, Burdwan and Another,

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16. At a later stage, in Dharmendra Suganchand Chelawat and another Vs. Union of India and others, , a three-Judge Bench of the Supreme Court, taking into account the earlier decision of the Apex Court including the Constitution Bench decision in Jagdish Singh and Another Vs. State of H.P. and Others,

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 detaining authority was aware of the fact that the detenu is already in detention; and (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 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.

17. From the observations made in Dharmendra Suganchand Chelawat (supra), it is clear that when a person is in custody and yet an order of detention is made against him, the detaining authority must be inferred to have arrived at its satisfaction of the necessity of passing of the order of detention on the basis of the materials available before it reflecting that the person, sought to be detained, is likely to be released on bail. Merely on the ground that the person concerned will, if released on bail, indulge in prejudicial activities cannot permit making of a detention order unless compelling reasons are reflected from the materials furnished by the detaining authority, to show that the detaining authority had reasons to feel satisfied that the detenu, though in custody, is likely to be released from the custody in the near future. In the absence of any material available in this regard, an order of detention cannot be sustained.

18. Bearing in mind the above aspects of the law, when we revert to the facts of the present case, we notice, as already indicated hereinabove, that the detaining authority has, while making the order of detention, observed that the detenu was ''likely to be released on bail in the near future''. For the conclusion, which the detaining authority has so reached, or for the inference, which the detaining authority has so drawn, there ought to have been cogent materials available on record indicating that the detaining authority was justified in arriving at its satisfaction that there was likelihood of the petitioner being released from custody on bail in the near future. There is, however, not even an iota of materials placed before'' this Court to show that there was some material, howsoever inadequate, to justifiably infer that the petitioner, in the present case, was ''likely to be released on bail in the near future''. In the absence of any material, whatsoever, as is the case at hand, showing that the detaining authority had reasons to conclude that there was likelihood of the petitioner''s

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being released on bail in the near future, the detaining authority had really no power under the law to pass the order of detention.

19. That there must be likelihood of the person, in detention, being released on bail in order to enable an authority to pass an order of detention has also been emphasized in Surya Prakash Sharma Vs. State of U.P. and Others, and Amritlal and Others Vs. Union Govt. Through Secy. Ministry of Finance and Others,

20. In Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others, , the Apex Court has made it clear that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not, ordinarily, be exercised. The Supreme Court has also held, in Binod Singh (supra), that there must be cogent materials before the officer passing the detention order to show that the detenu is likely to be released on bail. The inference must be drawn from the available materials on record and must not be ipse dixit of the officer passing the order of detention. In the matter of preventive detention, the test is not one of the prejudice, but one of the strict compliance with the provisions of the Act and when there is a failure to comply with these requirements, further order of detention becomes unsustainable. See Mrs. Tsering Dolkar Vs. Administrator, Union Territory of Delhi and Others,

21. Reminds us the Supreme Court, in the following words, in Rajesh Gulati Vs. Govt. of N.C.T. of Delhi and Another, , of the necessity to ensure compliance by the detaining authorities of both the subjective as well as procedural safeguards provided to a detenu (Para 11):

We are of the view that the High Court erred in accepting the respondents'' submissions and rejecting the appellant''s writ application. This Court has repeatedly held that the law permitting preventive detention must be meticulously followed both substantively and procedurally by the detaining authority. Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, ; Vijay Narain Singh Vs. State of Bihar and Others, ; Hem Lall Bhandari Vs. State of Sikkim and Others, and Ayya alias Ayub Vs. State of U.P. and Another,

22. Preventive detention is an anticipatory measure. The law of preventive detention is not punitive in object; but only preventive. It is resorted to when the executive is convinced, on the materials available or placed before it, that such detention is necessary in order to prevent the person, sought, to be detained, from acting in a manner prejudicial to certain objects, which are specified by the law. Explaining the constitutional philosophy behind the preventive detention law, observed the Supreme Court, in Union of India (UOI) Vs. Paul Manickam and Another, thus, "The constitutional philosophy of personal liberty is an idealistic view, the curtailments of liberty for reasons ''of States'' security, public order, disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions. In Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, , this judicial commitment was highlighted in the following words Para 2003 Cri LJ 9:

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The Court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of the social cost involved in the release of a possible renegade.

xxxx xxxx xxxx xxxx xxxx xxxx In Hem Lall Bhandari Vs. State of Sikkim and Others, it was observed (para 12):

It is not permissible in matters relating to the personal liberty and freedom of a citizen to take either a liberal or a generous view of the lapses on the part of the officers....

23. In the present case, if we may reiterate, there were no materials available to the detaining authority or considered by the detaining authority for coming to the conclusion, which it did, that the detenu is ''likely to be released on bail in the near future''. The satisfaction reached by an authority that a person is likely to be released on bail may be regarded as his subjective satisfaction, yet the fact remains that in order to reach such a subjective satisfaction, the authority concerned must consider the materials placed before it objectively. In the case at hand, there was no room for reaching subjective satisfaction that the detenu was ''likely to be released on bail in the near future'' inasmuch as there was no material placed before the detaining authority to enable it to objectively consider the same and arrive at the conclusion, which it has reached, namely, that the detenu is ''likely to be released on bail in the near future''. If there were any material, which had impelled the detaining authority to form the opinion that the detenu was ''likely to be released on bail in the near future'', such material ought to have been furnished to the detenu and also to this Court. Neither any such material was furnished to the petitioner nor has any such material been made available to this Court. There can, therefore, be no escape from the conclusion there was no material available to corroborate or support the detaining authority''s conclusion that the detenu was ''likely to be released on bail in the near future''. Situated thus, we are constrained to take the view that there was no material before the detaining authority to come to the conclusion, which it had reached, namely, that the detenu is ''likely to be released on bail in the near future''. In the absence of any material pointing that the detenu was ''likely to be released on bail in the near future'', no order of preventive detention could have been made against the petitioner.

24. What crystallizes from the above discussion is that the impugned order of detention suffers from incurable legal infirmities, for, such infirmities infringe the petitioner''s fundamental rights guaranteed by the Constitution.

25. Because of what have been discussed and pointed out above, we set aside the impugned order of detention, dated 14-7-2006, and direct that the petitioner be set at liberty forthwith unless he is required to be detained in connection with any other case.

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