
(2005) 01 GAU CK 0050
In the Gauhati High Court

Hatneilam Dounge

APPELLANT

Vs

Union of India and Ors.

RESPONDENT

Date of Decision : 14-01-2005

Acts Referred:

Citation : (2005) 01 GAU CK 0050

Hon'ble Judges : M.B.K.Singh, J and T.Nanda Kumar Singh, J

Bench : Division Bench

Advocate : K.Kumar, S.T.Kom, Jalal Uddin, Advocates appearing for Parties

Judgement

M.B.K. Singh, J.—In this writ petition, the petitioner is challenging the order of detention of her husband, Lamkholun Dounge @ Sarat, hereinafter referred to as the detainee, passed by the District Magistrate, Senapati on 24.7.2004 directing the detention of the said detainee under the National Security Act, 1980 (for short, ?the NSA?) and subsequent approval and confirmation of the said order by the State Government (Annexures A/1 and A/3).

2. There is no dispute in respect of the following facts : On 01.7.2004 at about 6 p.m., the detainee was arrested by the personnel of 3rd IRB near Sapermeina Bazar and handed over to the Officer in Charge, Senapati P.S.. The FIR case No.19(7)2004 u/ss 400/120B IPC was registered against him and he was remanded to police custody till 12.7.2004. On the same day, he was remanded to judicial custody. While he was in the judicial custody, the said detention order dated 24.7.2004 was passed. The grounds of detention dated 26.7.2004 (Annexure A/2) was also served on him. The state government vide order No.17(1)/743/2004H, dated 23.8.2004 issued by the Special Secretary (Home), Govt. of Manipur, confirmed the said detention order.

3. As per allegations of the respondents 2 and 3 made in their respective affidavits in opposition, the detainee is a hardcore member of KNF and he has been involved in various heinous crimes prejudicial to the security of the State and maintenance of public order. Further, according to the respondents No.2 and 3,

apart from the said FIR case No.19(7) 2004, Sapermeina P.S., the detainee was involved in many other FIR cases but after his release on bail, he repeated his antisocial activities and the detention order under NSA,1980 was made in order to prevent him from doing in future any prejudicial activities to the security of the State and also to the maintenance of public order.

4. We have heard Mr.S.T.Kom, learned counsel appearing on behalf of the petitioner and also Mr.Jallaluddin, learned Addl.Govt.Advocate appearing on behalf of the respondent Nos.2 and 3 as well as Mr.K.Kumar, learned Addl.CGSC appearing on behalf of the respondent No.1.

5. The order of detention is challenged on the ground that the detaining authority never informed the detainee about his right to make a representation to the detaining authority i.e. the District Magistrate, Senapati as well as to the Central Government and as such, his right under article 22 (5) of the Constitution of India has been violated. There is no any dispute that the detainee was informed about his right to make representation to the appropriate government but he was never informed about his right to make a representation against the order of detention to the detaining authority as well as to the Central Government. The relevant information is at para.8 of the grounds of detention at AnnexureA/2. The said paragraph is as follows:

?8. You are hereby informed that you have a right to make a representation to the appropriate Government against the order of detention passed against you and that you shall be afforded the earliest opportunity to such a representation if you wish to do so. The representation is to be made through the superintendent of the Manipur Central Jail, Sajiwa and should be submitted within 3 weeks from the date of this order. The representation if any shall be placed before the Advisory Board within 3 week's time from the date of detention along with such other documents/papers connected with your detention as the Government is bound under the law to produce before the Board for its consideration.?

6. According to the learned counsel of the petitioner, as a result of the failure on the part of the concerned authority to inform the detainee about his right to make a representation to the detaining authority as well as to the central government, there has been denial of opportunity to make representation to the detaining authority as well as to the central government and as such, the continued detention is vitiated.

7. In this connection, the learned Addl.Govt.Advoate submits that there is no any legal obligation on the part of the detaining authority to inform the detainee about making representation to it and to the Central government and prays our attention to the decision of the Hon'ble Supreme Court made in Amin Mohammad Qureshi v. Commissioner of Police, Greater Bombay, AIR 1994 SC 1333 wherein it was held :

? The only other ground urged is that the detaining authority has not specifically mentioned in the grounds that the detenu had also a right to make a

representation to it also besides making such representations to the Central Government and the State Government and therefore the earliest reasonable opportunity of making a representation as provided under Art.22(5) of the Constitution has been denied. This submission is made relying on some of the observations made by this Court in *Amir Shad Khan v. L.Umingghana* (1991) 4 SCC 39 : (1991 AIR SCW 2214). That was a case which arose under COFEPOSA Act where there is no specific provision regarding the approval of the detention order by the State Government within 12 days. This aspect we have dealt with elaborately in our judgment in *Writ Petition(Crl.) No. 364/93 etc. Veeramani v. State of Tamil Nadu* decided on 4.2.94 wherein we held that unlike the provisions of COFEPOSA Act, there is a provision in the National Security Act to the effect that the detention order will cease to remain in force for more than 12 days if in the meantime it is not approved by the State Government and therefore, the authorities to whom the representation could be made would be the Central Government and the State Government, as the case may be, and not the detaining authority. Therefore, the detaining authority is not under an obligation to tell the detenu that he can make a representation to it also. Thus we see no merits in this Special Leave Petition. It is accordingly dismissed.?

8. The learned Addl., Govt. Advocate, however, has not placed any authority in support of his submission about not having any legal obligation on the part of the detaining authority to inform the detenu in connection with making of representation to the central government.

9. On the other hand, learned counsel of the petitioner submits that following decision of the Constitution Bench of the Hon"ble Supreme Court in *Kamleshkumar Ishwarlaldas Patel v. Union of India and ors.* (1995) 4 SCC 51, it is well settled that it is obligatory on the part of the detaining authority to inform the detenu about his right of making representation both to the detaining authority itself as well as to the central government.

10. Dealing with the provisions of article 22 (5) of the Constitution of India, Hon"ble Supreme Court , after referring to its earlier decision such as *State of Bombay v. Atma Ram Shridhar Vaidya*, AIR 1951 SC 157; *Abdul Karim v. State of West Bengal*, AIR 1969 SC 1028; *Pankaj Kumar Chakraborty v. State of West Bengal*, (1969) 3 SCC 400; *Jayanarayan Sukul v. State of West Bengal*, (1970) 1 SCC 219 and *Amir Shad Khan v. L.Hmingliana*, (1991) 4 SCC 39, held at para.14 as follows :

?14. Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not?only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the said order for detention and thereby give relief to the person detained. The right to make a representation carries within it a

corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation.?

11. Following the above settled position, the Hon"ble Supreme Court in *State of Maharashtra & Ors. v. Santosh Shankar Acharya*, AIR 2000 SC 2504, while dealing with the detention order under the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drugs Offenders and Dangerous Persons Act, 1981, (for short, ?the Maharashtra Act?) held as :

?The only logical and harmonious construction of the provisions of the Act would be that in a case where an order of detention is issued by an officer under S.3(2) notwithstanding the fact that he is required to forthwith report the factum of detention together with the grounds and materials to the State Government and notwithstanding the fact that the Act itself specifically provides for making a representation to the State Government under S.8(1), the said detaining authority continues to be the detaining authority until the order of detention issued by him is approved by the State Government within a period of 12 days from the date of issuance of detention order. Consequently, until the said detention order is approved by the State Government the detaining authority can entertain a representation from a detenu and in exercise of his power under the provisions of S.21 of Bombay General Clauses Act could amend, vary or rescind the order, as is provided under S.14 of the Maharashtra Act. Such a construction of powers would give a full play to the provisions of Sec. 8(1) as well as S.14 and also S.3 of the Maharashtra Act. This being the position, noncommunication of the fact to the detenu that he could make a representation to the detaining authority so long as the order of detention has not been approved by the State government in case where an order of detention is issued by an officer other than the State Government under Sec.3(2) of the Maharashtra Act would constitute an infraction of a valuable right of the detenu under Art.22(5) of the Constitution.?.

12. Section 3 of the said Maharashtra Act relates to passing of detention order and also for furnishing report to the State Government regarding the fact. Section 8 of the said Act provides that the detenu must be communicated the grounds on which the order of detention has been made as soon as may, but not later than 5 days from the date of detention. Section 3 of the NSA,1980 provides for passing detention order and section 8 of the NSA provides for communication of the grounds of detention ordinarily not later than 5 days from the date of detention and in exceptional circumstances and for reasons to be recorded in writing , not later than 10 days from the date of detention. Under section 14(1) of the Maharashtra Act, without prejudice to the provisions of Section 21 of the Bombay General Clauses Act, 1904, the detention order may, at any time, be revoked or modified by the State Government, notwithstanding that the order has been made by the officers mentioned in subsection (2) of Section 3. Further, under

section 21 of Bombay General Clauses Act, where, by any Bombay Act, the Maharastra Act, the power to issue notifications, orders , rules or byelaws is conferred, then, that power, includes the power exercisable in the like manner and subject to like sanction and conditions, if any, to add to, amounts to vary or rescind any notifications, orders, rules or byelaws so issued. Similarly, as per section 14(1) of the NSA, without prejudice to the provisions of section 21 of the General Clauses Act, 1897, the detention order may, at any time, be revoked or modified (a) notwithstanding that the order has been made by an officer mentioned in subsection (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 the State Government or by the Central Government. Section 21 of the General Clauses Act, 1897 is to the same effect as that of section 21 of the Bombay General Clauses Act. We find substantial similarity in the provisions of the said Maharastra Act and National Security Act. We do not find any reasonable ground as to why the principles of law laid down by the Supreme Court in Santosh Shankar Acharya (supra), following the decision of the Constitution Bench of the Hon"ble Supreme Court (Kamleshkumar Ishwarlaldas Patel), should not be made applicable to the detention under National Security Act. We are of the opinion that under the provisions of NSA also, as long as the detention order is not approved by the State Government, the District Magistrate, who is to pass the order of detention under subsection (3) of section 3 of the Act, still retains the power to revoke the detention order and as such, when the grounds of detention were served to the detainee on 26.7.2004, the detainee should have been informed that he had a right to make representation not only to the State Government but also to the detaining authority and Central Government. In the light of the said decision of the Constitution Bench of the Hon"ble Supreme Court in Kamleshkumar Ishwarlaldas Patel (Supra), omission to give the required information amounts to denial of constitutional right of the detainee.

13. The above said view was taken by another division bench of this Court vide order passed in WP(Cril) No.20 of 2001 of Gauhati High Court, Imphal Bench, on 8.5.2002. In this connection, we are also referred to the decision of this Court in Hemanta Nath v. State of Assam and ors., 1998(2) GLT 344, Hokuto Sema v. Union of India and ors. 1997 (2) GLT 518, and Thanglenmang. Hangsing v. D.M. Senapati district and ors, 2004(1) GLT 646, etc. This Bench also has taken the same view in WP(Cril.) No.7 of 2004 decided on 20.12.2004.

14. In the result, having regards to the well settled principles of law on the matter, we are of the opinion that the omission on the part of the detaining authority to inform the detainee about his right to make representation before the said authority and the central government vitiates the continued detention of the detainee. For the reasons given above, this writ petition is allowed and the impugned detention order dated 24.7.2004 is hereby quashed. The detainee, namely, Lamkholun DOUNGEL @ Sarat be set at his liberty forthwith unless otherwise wanted in connection with any other case or cases.