

(1998) 06 GAU CK 0047
In the Gauhati High Court
Case No : Civil Rule (HC) No. 36 of 1998

Hemanta Nath

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 01-06-1998

Acts Referred:

Arms Act, 1959 — Section 25(1)
Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3
Constitution of India, 1950 — Article 22(5), 226
National Security Act, 1980 — Section 14, 3(2), 8
Penal Code, 1860 (IPC) — Section 120(A), 121, 122, 302, 394
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 3, 4
Unlawful Activities (Prevention) Act, 1967 — Section 13

Citation : (1998) 2 GLT 344

Hon'ble Judges : V.D. Gyani, Acting C.J.; N.S. Singh, J

Bench : Division Bench

Advocate : B.K. Mahajan and R.K. Pradhan, for the Appellant; A.C. Bora, Addl. A.G., C. Hazarika and R. Hussain, Addl. C.G.S.C., for the Respondent

Final Decision : Allowed

Judgement

V.D. Gyani, Actg. C.J.

1. By this petition under Article 226 of the Constitution the Petitioner seeks to challenge the detention order dated 12.9.97 passed by District Magistrate, Bongaigaon in exercise of powers u/s 3(2) of the National Security act, 1980, hereinafter referred to as "the Act" filed as Annexure-A to the petition.

The impugned order of detention based on grounds as contained in Annexure-B, they are reproduced hereunder:

1. Sri. Binod Bihari Nath @ Ananda Jogi @ Partha Pratim Nath is an active member of banned "United Liberation Front of Asom" (ULFA) since 1989.

2. The person has the following associates:

- a) Sanjip Singh @ Mech S/O Surendra Mohan Singha, T.R. Phukan Road, Bongaigaon town, P.S. and Dist. Bongaigaon.
- b) Pradeep Chakraborty @ Chiko @ Samiran Baruah, S/O Nityananda Chakraborty of Barpeta, Gossaipara, Bongaigaon town, P.S. and Dist. Bongaigaon.
- c) Parashmoni Roy @ Dilip Das @ Janmoni Roy S/O Nirmal Ch. Das of village Chakihali, P.S. Manikpur, Dist. Bongaigaon (Chief Secretary/Parichalak Birjhora Anchalik, ULFA).
- d) Jamuna Sastri @ Bipin Sastri @ Bikash Patowary @ Abhoy Singha, S/O Late Chintaharan Sastri of Borobazar, Bongaigaon town, P.S. and Dist. Bongaigaon (Finance Secretary/Parichalak Birjhora Anchalik ULFA).
- e) Binoy Kr. Das @ Prabhakar Mili Rudra Baruah @ Bimal Das, S/O Rajani Kt. Das of Patiladha, Jakuapara, P.S. Manikpur, Dist. Bongaigaon (Ex. Finance Secy. Bongaigaon dist. ULFA).
- f) Utshav Das @ Ashim Singha, S/O Ratneswar Das of Jhaubari, P.S. Manikpur, Dist. Bongaigaon (Ex-Commander Bngg. Dist. ULFA).
- g) Bijoy Boro, President, ULFA, West Bongaigaon, ULFA)
- h) Indrajit Rava, Organising Secy. Western Range.

3. The persons has joined ULFA in the year 1989 at the instance of Sri. Biswajit Singha, hardcore ULFA activist of Bongaigaon. ULFA organisation has been declared unlawful association by Govt. of India vide notification No. SO. 915(E) dated 27.11.90 under the provision of Unlawful Activities (Prevention) Act, 1967.

4. The person has framed an unit of ULFA at Abhayapuri in September, 1989 along with his associates and took over charge of Parichalak.

5. The person underwent political training in November, 1989 at different places like Kaljirapara under Patacharkuchi P.S. under Barpeta district. Asanta Bagh Phukan imparted the political training on the aim, objective, ideology etc. of ULFA. The person also took arms training at Goalpara in July, 1991.

6. The person was appointed by Bijoy Boro as Organising Secretary of undivided Goalpara dist. in 1991. Thereafter the person was appointed as organisation secretary of Bongaigaon dist. During his organising secretariship he formed a good No. of ULFA sub unit in Bongaigaon dist. such as Patiladaha, Dewangaon, Bashbari etc.

These are all prejudicial activities of the person.

7. The person was also associated in the incident of killing of Dhurbajyoti Adhikary, a Congress (I) worker of Abhayapuri town on 6.11.91 the day when the Hon''ble Chief Minister, Assam Hiteswar Saikia visited Abhayapur. This refer A. Puri P.S. Case No. 240/91 u/s 394/302 IPC R/W Section 3/4 TADA (P) Act.

8. In July, 1992 the person attended the General Council meeting of ULFA held in Bangladesh which was attended by Arabinda Rajkhowa, Chairman of ULFA, Pradeep Gogoi, Vice-Chairman, ULFA, Anup Chetia, Secretary, ULFA and Paresh Barua C-in-C, ULFA among others. After his return from the meeting he was arrested by Police on 31.7.92 but subsequently released on bail. After getting release on bail the person has again gone underground and continued his prejudicial activities.

9. In March, 1996 the person took over charge of publicity Secy. of Birjhora Anchalik Parishad under West Zone. As Publicity Secretary, the person published a souvenir "SMARANIKA" on 27th July, 1996 in connection with their Swahid Divas. The souvenir contains the life histories of some ULFA members and their prejudicial activities were also incorporated therein.

10. The person was arrested on 10.1.97 with one 32 revolver with 9 rounds of ammunition. One ashica camera loaded with film, some incriminating documents related to ULFA and cash of Rs. 2638.50. Two cases vide Bijni P.S. Case No. 3/97 u/s 25(1-5) Arms Act and 10/97 u/s 120(A)/121/122 IPC R/W Section 13 UA(P) Act were registered against him and investigated into. The loaded film was developed and seen that the person was with some other ULFA activists. The person was seen with dressed generally used by Indian Army. This clearly indicative that the person along with other ULFA activists have been fighting for the cause of ULFA viz. liberation of Assam from Indian Union through arms struggle.

2. Going through the same, it becomes abundantly clear that the detenu, Sri. Binod Bihari Nath @ Ananda Jogi @ Partha Pratim Nath is actively involved with the unlawful activities of waging a war against the Union of India, the organisation ULFA is a banned organisation, he has been taken active part and his activities are against the security of State. Apart from this, he has been involved in two criminal cases registered u/s 25(1-5) of the Arms Act, 120(A)/121/122 IPC read with Section 13 of the Unlawful Activities (Prevention) Act, u/s 394/302 IPC read with Section 3/4 TADA (P) Act. Going through these grounds of detention, we do not have a slightest hesitation in holding that these grounds are relevant and germane to, having a nexus with the object sought to be achieved by passing the impugned order of detention, they are proximate in time as well.

3. The detenu has challenged his detention on several grounds including non-compliance of the inbuilt procedural safeguards not apprising him of his right to make a representation before the Central Government, non application of mind and non-furnishing of basic facts and materials constituting the grounds of detention. The Respondents in their affidavit have denied the allegations made by the detenu.

4. We first deal with the detenu's objection as regards non apprising him of his right to make a representation before the Central Government which is evident

from both Annexures-A and B. There is no reference to the Detenu's right of making representation. The detaining authority along with his affidavit-in-opposition filed on 22.5.98 has also filed the detention order. Annexure-A and annexed hereto also a letter addressed to the Detenu. At the end of the aforesaid letter, it is stated that "you may submit representation if so felt, against the order of detention through the Superintendent of Jail in which you are detained to the State Government." Learned Counsel appearing for the detenu placed before us a copy of the grounds of detention which does not contain any such reference. This letter, Annexure-A has attached to the affidavit-in-opposition as filed and sworn by the Detaining Authority on 22.5.98. There is an endorsement by the detenu as a token of having received the same on 16.9.97 i.e. 4 days after passing of the detention order. It is quite in time so far as Section 8 is concerned, but the fact remains that the grounds of detention as supplied to the detenu does not contain any such statements of facts apprising the detenu of his right to make a representation. May be it has been subsequently corrected, but despite this correction made by the Respondents, the detenu has not been apprised about his right to make the representation to the Central Government. Undoubtedly, it cannot be disputed that the Central Government has the power to revoke any order of detention passed or confirmed by the State Government u/s 14 of the Act and this power is quite independent of the power of the State Government to confirm or revoke the order of detention passed by District Magistrate. It does not depend on the report of the Advisory Board which may be eventually submitted. The Supreme Court in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, has observed as follows:

Having regard to the provisions of Article 22(5) of the Constitution and the provisions of the COFEPOSA Act and the PIT NDPS Act the question posed is thus answered:

Where the detention order has been made u/s 3 of the COFEPOSA Act and the PIT NDPS Act by an officer specially empowered for that purpose either by the Central Government or the State Government the person detained has a right to make a representation to the said officer and the said officer is obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on the person detained to make a representation against the order of detention. This right of the detenu is in addition to his right to make the representation to the State Government where the detention order has been made by an officer specially authorised by a State Government and to the Central Government where the detention order has been made by an officer specially empowered by the Central Government, and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation.

5. It is an admitted position that the detenu has not been apprised of his right to make a representation to the Central Government so much so as per detention order and grounds of detention as supplied to the detenu. There is no mention of his right to make a representation even to the State Government, although subsequently, just within four days of passing the detention order, he was informed through a letter that he could make such representation to the State Government. But there again there is no information so far as the Central Government is concerned. This denial of opportunity to make a representation to the Central Government vitiates the continued detention of the detenu.

6. Dealing with Clause (5) of Article 22 of the Constitution where from the right to make a representation flows, the Supreme Court, in *Kamlesh Kumar* (supra) interpreting this Article has held-

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 order for detention and thereby given relief to the person detained. The right to make a representation carried 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.

7. In *Nutan J. Patel v. S.P. Prasad* (1994) 2 SCC 315, the Supreme Court had occasion to consider such a contention. A Division Bench of the Andhra Pradesh High Court dismissed a writ petition on the ground that the detenu had known that he had a right to make representation but he did not exercise that right and, therefore, the order of detention was not vitiated on the ground of non-intimation of the right to make representation to the specified officer. Of course it was a case under COFEPOSA Act, but the Supreme Court relying on the *Kamlesh Kumar* (supra) allowed the appeal and quashed the detention, even though the period of detention had already undergone by the detenu and the question had become one of academic interest. The Supreme Court refused to accede to the contention.

8. In view of the foregoing discussion, this petition, even on this short ground alone, without advertng to other grounds as taken by the Petitioner deserves to be allowed, it is accordingly allowed. The impugned order of detention is quashed. He be set at liberty forthwith, unless otherwise wanted in connection with any other case or cases.

We make no order as to costs.