

(2015) 03 GAU CK 0028
In the Gauhati High Court
Case No : W.P (Cri.) No. 1 (K) of 2015

Jemima Rengma

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 11-03-2015

Acts Referred:

Arms Act, 1959 — Section 25 (1A), 7
Constitution of India, 1950 — Article 22(5)
National Security Act, 1980 — Section 3, 3(2), 8
Penal Code, 1860 (IPC) — Section 120(B), 302

Citation : (2015) CriLJ 2302 : (2015) 3 Crimes 439

Hon'ble Judges : Lanusungkum Jamir, J

Bench : Single Bench

Advocate : A. Zho, Inaholi Kinny, Rosemary, Moa Jamir and Esther, for the Appellant; K. Wotsa, Govt. Adv., Advocates for the Respondent

Final Decision : Allowed

Judgement

Lanusungkum Jamir, J.—Heard Mr. A. Zho, learned counsel for the petitioner as well as Mr. K. Wotsa, learned Addl. Senior Government Advocate for the State respondents. None appears for the Union of India. The petitioner before this Court is the wife of the detenu who was detained under the National Security Act, 1980 by the order dated 22-7-2014 issued by the District Magistrate, Dimapur, Nagaland.

2. The detenu was arrested on 2-7-2014 by Dimapur police in connection with Diphupar PS Case No. 01/14 u/s. 302/120(B), IPC read with section 25 (1A), Arms Act and was also later shown to have been arrested in connection with Dimapur PS Case No. 03/14 u/s. 25 (IB), Arms Act read with section 7/NSR.

3. After arrest, and while the detenu was lodged in the Central jail Dimapur, the detaining authority i.e. the District Magistrate, Dimapur, Nagaland passed an order dated 22-7-2014 detaining the detenu under section 3(2) of the National Security Act, 1980 in exercise of powers conferred by sub-section (3) of section 3

of the said act. The grounds of detention along with its schedule were also furnished to the detenu. Thereafter, the District Magistrate/detaining authority by letter dated 22-7-2014 had written to the Principal Secretary, Home Department Nagaland Kohima for approval of the detention order passed. The Chief Secretary to the Government of Nagaland passed the approval order dated 28-7-2014. The detenu had also made a representation under sub-section (1) of section 8 of the National Security Act, 1980. Thereafter, confirmation order dated 9-10-2014 was passed by the Chief Secretary to the Government of Nagaland. Being aggrieved, the present petition.

4. Mr. A. Zho, learned counsel for the petitioner submits that no affidavit has been filed by the detaining authority explaining her subjective satisfaction before this Court. He submits that the Chief Secretary has only filed an affidavit trying to show subjective satisfaction of the detaining authority which is not permissible in law. Further, he also submits that the affidavit has been filed by Shri C.J. Ponraj on 3-3-2015 whereas he had already retired on 28-2-2015 and therefore, the said affidavit cannot be accepted by this Court. It is further submitted that the order of approval dated 28-7-2014 was passed when one Smti Banuo Z. Jamir while she was the Chief Secretary and the confirmation order dated 9-10-2014 was passed by one Shri Toshi Aier who was the then Chief Secretary to the Government of Nagaland. Therefore, the present affidavit filed by the said C.J. Ponraj would in no way explain the subjective satisfaction of the detaining authority nor the satisfaction of approving or confirming authority inasmuch as he was at no point of time connected with the said case.

Secondly, learned counsel for the petitioner submits that the detenu was never informed about his right to be represented by his next friend which has also become a requirement of law. He submits that the ground of detention as annexed to the writ petition would also clearly show that the said requirement was missing.

Thirdly, the learned counsel for the petitioner submits that no materials were placed before the detaining authority while the detention order was passed and the same was passed only on the basis of police records. Therefore, the detaining authority could not have come to a subjective satisfaction based only on such records.

5. Mr. K. Wotsa, learned Government Advocate submits that insofar as filing of the affidavit by the Chief Secretary on 3-3-2015 is concerned, the same was an error on the part of the counsel inasmuch as the said affidavit was already sworn as early as 28-2-2015 and thereafter, since there was intervening holidays he could not file immediately and the same was only filed on 3-3-2015 after furnishing a copy to the petitioner on 2-3-2015. He also submits that though the Chief Secretary who had sworn the affidavit may not have been holding the office when the approval order and the confirmation order was passed, the records were before him and it was on such basis that the said affidavit was sworn. As regard to filing of affidavit by the detaining authority is concerned, he submits

that the detaining authority has already been transferred out and therefore, was not in a position to file counter affidavit showing subjective satisfaction. The learned Government Advocate also submits that there is no provision under the National Security Act that the detenu should be informed of having assistance of his next friend and that informing the detenu that he has right to make representation is sufficient and therefore, the ground taken by the learned counsel for the petitioner has no substance.

The detenu had submitted his representation and personal hearing was also given to him by the Advisory Board and therefore there has been no violation of any provisions of the act. He further submits that the detenu has been arrested in connection with a very heinous crime involving inter-state relation and therefore, the detaining authority after considering all materials on record passed the detention order after coming to a subjective satisfaction. In that view of the matter, the learned Government Advocate submits that there is no merit in the writ petition and the same should be dismissed.

6. I have considered the submissions forwarded by the learned counsel appearing for the parties.

7. As regard to the affidavit filed by the Chief Secretary on 3-3-2015, this Court is satisfied with the explanation given by the Government Advocate and therefore does not want to linger on this issue any further. However, what has been seen in the present case is that no affidavit has been filed by the detaining authority showing subjective satisfaction. The Chief Secretary may have filed an affidavit trying to explain subjective satisfaction of the detaining authority however, this Court is not impressed inasmuch as the subjective satisfaction of the detaining authority i.e. District Magistrate, Dimapur has to be explained only by the detaining authority and cannot be explained by any other person including the Chief Secretary who has filed the affidavit explaining such subjective satisfaction of the detaining authority.

8. The Supreme Court in the case of Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others, AIR 1986 SC 687 : (1986) CriLJ 786 : (1985) 1 SCALE 813 : (1985) SCC 144 Supp : (1985) 3 SCR 697 has held as under:--

"8.The Detaining Authority has not filed any affidavit. The affidavit is filed by the successor in office. Ordinarily the affidavit-in-opposite must come from the Detaining Authority, more so in a case where mala fide is alleged and subjective satisfaction challenged as in the instant case. There is not even a whisper as to why the Detaining Authority who passed the impugned order, annexure-A could not file an affidavit. Assuming he was transferred, yet he was very much available for filing an affidavit. The affidavit filed by the District Magistrate, Sri Ashish Kumar Bhutani, cannot say anything about the subjective satisfaction arrived at by the then District Magistrate, Nalbari Sri B. Bhattacharjee who passed the impugned order on 5-4-97. Now let us examine

the affidavit as sworn and filed by Sri Ashish Kumar Bhutani. The verification appended to read as follows:--

"That the statements made in this affidavit and in paragraphs 1, 2, 8, 10, 16, 17, 18 and 19 are true to my knowledge while those made in paragraphs 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15 and 20 are true to my information derived from the records which I believe to be true and the rest are my humble submissions before this Hon"ble Court."

The deponent Ashish Kumar in the affidavit in paragraph 8 states:

"The District Magistrate duly applied his mind to the facts of the case and was satisfied to pass the detention order on the basis of the grounds. The deponent denies that the order of detention is fraud on power and have been made for ulterior purpose."

How can he say about the subjective satisfaction of someone else? There is glaring discrepancy. The impugned order of detention speaks of the activities that are prejudicial to the maintenance of public order whereas the ground of detention referred to security of State and maintenance of public order. But the order does not reflect to Security of State, but it could only be explained by the authority who passed the detention order. It is significant to note that the Successor in office is a step ahead. What the District Magistrate who passed the Detention Order does not even claim, is claimed by the successor in office as quoted above speaks about the satisfaction of the Detaining Authority, the impugned order as quoted above merely states "whereas it has been made to appear to me". There is not remotest suggestion that the then District Magistrate was satisfied about the necessity of passing the detention order. The order does not anywhere say the detaining authority was satisfied on the basis of materials placed before him that a detention order should be passed. It was a compulsive necessity. This cannot be allowed to be substituted by proxy. The subjective satisfaction of B. Bhattacharjee cannot be approved by the affidavit of Ashish Kumar, moreso in face of the discrepant nature of the impugned order which has been passed on mere appearance and not satisfaction....."

9. Further, the Division Bench of this Court in the case of Ananta Gogoi Vs. Union of India (UOI) and Others, (2009) 4 GLR 11 : (2009) 4 GLT 216 has also held as under:

"18. Firstly if we take the issue of filing the affidavit on behalf of the detaining authority by the officer Sri Kumud Chandra Kalita, Additional Deputy Commissioner, Kamrup Metropolitan District, Guwahati, we have no hesitation to say that this officer is not competent to put on record the subjective satisfaction of the detaining authority himself. How can the officer, assuming that he was duly authorized, say about the subjective satisfaction of someone who personally issued the impugned detention order....."

10. In the present case in hand, leaving aside the question of authorizing an

officer to file affidavit on behalf of the detaining authority, there is no affidavit at all either by the detaining authority or on her behalf showing subjective satisfaction of the detaining authority. In the absence of such affidavit showing subjective satisfaction, this Court is of the considered opinion that the same is fatal for the respondents.

11. With regard to the issue raised by the learned counsel for the petitioner that the detenu has not been informed of his right to take assistance of his next friend, the Division Bench of this Court in the case of Nameirakpam Inaotomba Singh Vs. Union of India (UOI) and Others, (2007) 4 GLT 200 has held as under:

"14. The argument advanced by the parties has been duly considered. From the arguments of the learned counsel as well as from the law reports stated above and records available before the Court, this Court is of the opinion that the right to be heard by the Board is not an empty formality. But, to safeguard the right to life and liberty of a citizen and it is the duty of a detaining authority to inform regarding his all rights which includes rights to make representation to the said Board. Unless a detenu is informed that he is entitled to be represented before the advisory board with the assistance of a friend how he will ask for the same to appropriate authority, i.e. the State Government, Central Government and the advisory board. In the instant case, though it is mentioned in para 8 of the ground of detention that advisory board may call him for such information as it may deem necessary for him and if he desires to be heard in person, an arrangement may be made to produce him before the advisory board for the purpose. The said ground in para 8 does not indicate that the detenu has the right to take assistance of his friend before the advisory board to be represented himself before the advisory board with representation and/or the detenu as a right to make a representation before the advisory board. Non mentioning of such requirement as stated above may not vitiate the order of detention, but the valuable right of the detenu to make an effective representation to the State Government, Central Government and to the advisory board is curtailed, which is a right protected under Art. 22(5) of the Constitution of India and Section 8 of the Act. As the words, "and shall afford in Art. 22(5) have a positive content in the matter of personal liberty, the needs for observance of procedural safeguard, particularly in cases of deprivation of life and liberty is of prime importance to the body politic" as the Apex Court said and it is the duty of the detaining authority to inform or apprise the detenu regarding his right under Art. 22(5) of the Constitution read with Section 8 of the Act including to make representation against the order of detention before the appropriate authority as well as to the advisory board. Mere right to be heard mentioned in the grounds of detention will be a mere formality unless it is mentioned that a detenu has a right to make representation to the appropriate Govt. including the advisory board with the assistance of his next friend and/or by way of filing representation. For fairness it is the duty of the detaining authority to inform the detenu regarding his aforesaid right and entitlement in his grounds of detention.

If we read conjointly paragraph 9 of *Anil Vats Vs. Union of India and others*, AIR 1991 SC 979 : (1991) CriLJ 605 : (1990) 4 JT 691 : (1991) 2 SCC 661 Supp and para 18 of the case of *Wasi Uddin Ahmed (supra)*, it can be easily presumed that a detenu has the right to be heard by the advisory board either by filing representation in person with the assistance of his next friend and in the instant case though in the ground No. 8 of the detention it is mentioned that he has the right of being heard by the board but the same is not enough as the word "right to be heard" does not exclude the right of the detenu to file a representation before the board and while the Apex Court decided that the detenu is entitled to get the assistance of his next friend before the board. The detenu has to be informed by detaining authority that he has right to make a representation as right to be heard include right to representation and hearing in person and also he is entitled to get assistance of his friend before the board at the time when the detenu is to be heard, which is not mentioned in the order and for such non mentioning of the right of the detenu, this Court is of the considered opinion that the procedural safeguards, as envisaged under Art. 22(5) was not satisfied in this case and as a result, the continued detention of the detenu would be rendered illegal. And in the preventive detention, the right to representation and consideration thereof by the appropriate authority at earliest time and entitlement of next friend of the detenu for representing him before the Board as a procedural safeguard and any infraction of law relating to such procedural safeguard vitiates the order of detention and the subsequent action would render the order of detention illegal."

12. Therefore, the ground taken by the learned Government Advocate that there is no provision in the Act that the detenu should be informed of his right of having assistance of his next friend is also rejected.

13. Coming to the last ground taken by the learned counsel for the petitioner that no materials were placed before the detaining authority before coming to subjective satisfaction to detain the detenu, this Court has considered the materials on record and has seen that the detaining authority has come to the conclusion that the subject are presently in judicial custody but there is likelihood of they being release on bail and in the event of his release he is likely to indulge in similar prejudicial activities unless an effective alternative measure is called for.

14. The learned counsel for the petitioner has categorically stated before this Court that no bail application has been filed by the detenu or his representative in connection with the aforesaid case and therefore, there was no material before the detaining authority to come to such conclusion. This Court is in agreement with the learned counsel for the petitioner inasmuch as even today the learned Government Advocate has failed to produce any bail application or any materials before this Court nor has it been supplied to the detenu or the counsel for the petitioner. This issue has already been settled by the Division Bench of this Court in the case of *Haobijam Kenjit Singh alias Kenedy Vs. State of Manipur and Others*, (2007) CriLJ 689 : (2006) GLT 577 Supp wherein at paragraph 23 it has

been held as under:

"In the present case, if we may reiterate, there was 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 in 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 available before the detaining authority to come to the conclusion, which it has 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."

15. This being the admitted position and the law having been already settled insofar as the subjective satisfaction of the detaining authority is concerned, informing the detenu with regard to his right of taking assistance of his next friend and non-filing of affidavit by the detaining authority, this Court has no option but to interfere with the detention order of the detenu. Accordingly, the impugned detention order dated 22-7-2014 passed by the District Magistrate, Dimapur Nagaland is set aside and quashed along with all other consequential orders.

16. The detenu namely, Shri Tennyson Jishing alias Asong Rengma alias Tinison Tinsheng alias Tenyengseng alias Tenny shall be forthwith released from custody unless he is wanted for some other case.

17. Writ petition is allowed. No cost.