

(2022) 02 GAU CK 0030

In the Gauhati High Court

Case No : Writ Petition (Criminal) No. 27 Of 2021

Jiten Das

APPELLANT

Vs

Union Of India And 7 Ors.

RESPONDENT

Date of Decision : 10-02-2022

Acts Referred:

Constitution Of India, 1950 — Article 21, 22(5)
Prevention of Illicit Traffic In Narcotic Drugs And Psychotropic Substance (PITNDPS) Act, 1985 — Section 3(1)
Narcotic Drugs and Psychotropic Substances [NDPS] Act, 1985 — Section 22(b), 37

Citation : (2022) 02 GAU CK 0030

Hon'ble Judges : Arun Dev Choudhury, J

Bench : Single Bench

Advocate : M. K. Das, D. Nath, K. Gogoi

Final Decision : Allowed

Judgement

1. Heard Mr. M. K. Das, the learned counsel for the petitioner. Also heard Mr. D. Nath, the learned Senior Government Advocate, Assam and Mr.

D. Gogoi, the learned C.G.C representing the Union of India.

2. The facts of the case of the petitioner are as under:-

(i) The petitioner is alleged to have been involved in four (4) Nos. of cases, under different provisions of Narcotic Drugs and Psychotropic Substance

Act, 1985 (herein after referred to as the NDPS Act, 1985). The cases are as follows:-

(a) Bharalumukh P.S. Case No. 249/2016 U/S 21(a) of the NDPS Act, 1985.

(b) Basistha P.S. Case No. 1135/2016 U/S 22(a) of the NDPS Act, 1985.

(c) Jalukbari P.S. Case No. 968/2020 U/S 22(a) and 27 of the NDPS Act, 1985 and

(d) Jalukbari P.S. Case No. 601/2021 U/S 22(b) of the NDPS Act, 1985.

(ii) The petitioner was arrested in connection with the Jalukbari P.S. Case No. 601/2021 on 30.05.2021. At that stage, on 09.06.2021, the

Commissioner of Police vide memo No. V/ DCP (Crime)/Ghty/ NDPS (Jiten Das)/2021/144 informed the Secretary to the Government of Assam,

Home and Political Department that the petitioner is a repeated offender under the NDPS Act, 1985. Thereafter the competent authority i.e. the

Secretary to the Government of Assam, Home and Political Department issued the order of detention dated 15.07.2021 under Section 3(1) of the

Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance (PITNDPS) Act, 1985. The same is challenged in the present proceeding.

(iii) The said detention order dated 15.07.2021 was served upon the petitioner on 18.07.2021

(iv) The petitioner had submitted a representation on 05.08.2021 before the Jail authorities addressing the same to the Secretary to the Government of

Assam, Home and Political Department against the order of detention, seeking its revocation and praying for setting aside the same. He also submitted

a similar representation to the Deputy Secretary (PITNDPS), Ministry of Finance, Department of Revenue, New Delhi.

(v) Thereafter, the Secretary to the Government of Assam, Home and Political Department vide Memo No. HMA-19/38/2021-VIG-H&P/ecf-

168494/258 rejected the prayer of the petitioner for revocation of the detention order as prayed by him vide his representation dated 05.08.2021.

(vi) In the given facts, the petitioner has approached this Court for redressal of his grievances challenging the order of detention as well as the order

of rejection of the representation of the petitioner.

3. Submission of the learned counsel for the petitioner

The learned counsel for the petitioner challenges this writ petition on the following grounds:-

(i) There is absolute non application of mind by the detaining authorities while passing the impugned order. The contraband allegedly recovered from

the petitioner are of small quantity in three cases and the quantity of the contraband in the fourth case, though more than small quantity but less than

commercial quantity. The detaining authority also has failed to apply their mind to the fact that at that time, petitioner was under custody and there

was no scope for immediate release of the petitioner on bail as his bail was already rejected by the competent Court. The detaining authority has failed to apply their minds to the provision of Section 37 of the NDPS, Act, 1985.

(ii) There is inordinate and unexplained delay in disposing of the representation of the petitioner. The representation was filed on 05.08.2021 and his representation was rejected vide the impugned rejection order dated 07.10.2021. The unexplained delay in disposal of the representation is having of fatal bearing on the detention. The Central Government has not till disposed of his representation.

(iii) The detaining authority had failed to furnish the relevant documents on the basis of which the order of detention was passed and non furnishing of such documents are fatal to the detention. The detention order reflects that the detention order is based on police report and connected records.

However, only the seizure list and copy of the F.I.R. in connection with the four cases been served upon the petitioner. Police report contains dossier, and other materials like seizure list, FSL report etc. As the ground of detentions are based on the police report, in absence of furnishing the said police report is fatal to the order of detention.

(iv) The petitioner's right under Article 22(5) of the Constitution of India has been violated and also the petitioner's right under Article 21 of

the Constitution of India. In support of the aforesaid contention, the learned counsel for the petitioner relies on the following judgment i.e. (1) 1998 1

GLT 259, (2) 1999 1 GLT 370, (3) 2021 4 GLT 584, (4) 2021 4 GLT 574 and (5) 1986 4 SCC 416.

4. The State of Assam has filed an affidavit-in-opposition inter alia contending the following:-

(i) The Detention Order was issued after examining the Police reports, FSL reports, FIR, seizure list etc., against the petitioner in order to prevent him being engaged in prejudicial activities involving illicit trafficking of narcotics drugs and psychotropic substances.

(ii) Explaining the delay disposal of the representation, it is the stand of the respondent that representation of the petitioner dated 05.08.2021, forwarded by the Superintendent, Central Jail Guwahati vide letter dated 05.08.2021 had been received in the office of the Commissioner & Secretary, Home & Political Department on 07.08.2021. According to the said affidavit, the

Commissioner of Police was requested to submit the parawise comments on the same. It is also stated in the said affidavit that DCP (Crime) Guwahati vide order dated 01.10.2021 submitted that required parawise comments and after receipt of the parawise comments on 01.10.2021, the impugned order of rejection was passed on 11.10.2021. Therefore, according to the State, there was no delay in disposal of the representation.

(iii) The rejection order is also in inconformity with the PITNDPS Advisory Board reports dated 20.08.2021 which opined that there are sufficient grounds for detention of the detainee. The authority also took a stand that proper application of minds was there while passing the impugned order of detention.

(iv) Due process of law followed in issuing the detention order.

Therefore no violation of any constitutional right of the petitioner.

5. Submissions of the learned Senior Government Advocate, Assam:

(i) There are two kinds of documents in passing a detention order i.e. the relied on documents and the referred documents. The relied on documents are required to be served to the detainee not the referred documents. The relied documents have been served upon the petitioner and non submission of referred documents cannot be a ground for interfering with a detention order. The dossiers, statement of witnesses are referred documents and therefore non submission of same is not fatal to the detention of the petitioner.

(ii) Though there is no pleading in the affidavit, the learned Senior Government Advocate, Assam tries to submit that there was delay at the office of the DCP (Crime) and not on the part of the Commissioner & Secretary, Home and Political Department and he also submits that between 01.10.2021, on which date the parawise comments was received and on 11.10.2021, on which date the order of rejection was passed, there were holidays and Saturdays and Sundays. Therefore, Mr. D. Nath, the learned Senior Government Advocate, Assam submits that there was no delay on the part of the State. The period of time spent getting the parawise comments cannot be said to be a delay on the part of the respondent authorities to invalidate the order of detention.

(iii) In this regard, he relies on the judgment of Honâ??ble Apex Court passed in Kantilal Hirji Shah â??Vs- State of Tamil Nadu & Ors reported in

2000 7 SC 606. Accordingly he submits that seeking the parawise comments from that authority cannot be treated as an unexplained delay.

(iv) He also submits that Court should not interfere with the subjective satisfaction of the detaining authority as there is no procedural lapse on their part.

(v) The learned Senior Government Advocate, Assam submits that in view of the aforesaid, it cannot be said that there is any violation of the right of

the petitioner under Article 22(5) of the Constitution of India or his right under Article 21 of the Constitution of India.

6. By now, the law is well settled that generally procedural requirement are the only safeguard available to the detainee since the Court is not expected

to go behind the subjective satisfaction of detaining authority until and unless, the same is a result of non application of mind or detention order is

issued on the basis of irrelevant material and facts. It is also well settled that since the power of preventive detention is an extra ordinary power, the

same need be exercised strictly in accordance with the provision of the Constitution and the law in this regard.

7. It is a settled proposition of law that the right of life and personal liberty is placed on a much higher pedestral and whenever there is any deprivation

of such rights, the authority who deprives such rights of a citizen must thoroughly justify the Court that it has acted in accordance with law. The

Constitutional court of India have always regarded personal liberty as the most precious possession of mankind. The burden of showing that the

detention is in accordance with the procedure established by law is always on the detaining authority inasmuch as Article 21 of the Constitution of

India mandates for the same.

8. The law of preventive detention has empowered the administrative authorities a kind of discretionary power to order preventive detention and there

is very little scope for judicial review. As the preventive detention affects the most precious right of human being i.e. the right of life and liberty,

therefore, the court must jealously safeguard the rights and must see whether such discretionary power has used within the parameters prescribed by

law.

9. Now let this Court consider the facts of the present case vis-À-vis the argument advanced by the learned counsel for the parties.

10. Regarding the ground of non furnishing of documents on the basis of which the detention order has been passed, it is apparent from the detention

order that on 15.07.2021, the detaining authority has relied on the police report and connected records. In the communication dated 15.07.2021 by

which the petitioner was informed regarding the ground of detention reflects that the petitioner was supplied with the police report, FIR and the

Seizure list of all the four cases wherein the petitioner has been arrested.

11. The record and police report reveals that the Police Commissioner proposed the detention of the petitioner on the basis of his alleged criminal

antecedents and apprehension that if released on bail, the petitioner will continue to indulge in his criminal activities under the NDPS Act. The police

report refers to the seizure list, the background and antecedents of the petitioners and the FSLs report. The said police report also refers the history

sheet of the accused Jiten Das including photographs, newspaper cutting, details of case registered against Jiten Das and the ground for proposed

detention. The ground of detention at paragraph 5 certain findings adverse to the petitioner are made. But on what basis the detaining authority

reached such satisfaction is not discernible either from the detention order or from the ground of detention. Such satisfaction can be based on the

dossier of the petitioners and some other materials. But those are not part of either Police Report or ground of detention. Thus though those materials

are relied on to come to the said conclusion but not saved upon the detainee. In that view of the matter, this Court is of the view that, there is total non

application of mind in the issuing the detention order.

12. On perusal of the impugned order dated 15.07.2021, it is seen that though the said order is based on a police report and connected records but

what are these connected record are not discernible.

13. Thereafter, the petitioner vide his letter dated 28.11.2021 addressed to the Superintendent of Central Jail, Guwahati requested for a copy of the

ground of detention issued against the petitioner. Subsequent to this the ground of detention was served upon the petitioner. Such plea has not been

specifically denied by the State respondents but it is stated that subsequent to a direction issued to the Commissioner of Police on 15.07.2021, copy of

the police report and ground of detentions were furnished to the petitioner. Along with ground of detention, the copies of only the FIRs and seizure list

were annexed. The relied on document like FSLs report and dossier of the petitioner were not served upon the petitioner. While perusing the records

in connection with detention of the petitioner, the second copy of the detention order which was to be acknowledged by the detenue with his signature

as proof of service is found not available on record. Only a xerox copy is available.

14. This Court is of the considered opinion that the procedural requirement of furnishing all the documents is not followed in the present case inasmuch

as though no mention of dossier is made, but the police report reflects that the police report was based on material/document collected about the

petitioner, different events relating to the petitioner and subject relating to activity of the petitioner inasmuch as dossier is a collection of materials

about a particular person, event or subject. Therefore, non furnishing of such material/document/dossier makes the detention order unsustainable in

law.

15. The Honâ??ble Division Bench of this Court in the case of Silvester Nurzery â??Vs- State of Assam and Ors reported in 1998 (1) GLT 259

wherein it was held that the detenue was entitled to receipt copy of the documents examined by the polie while preparing the report and failure to

supply the relevant document relied upon and also referred in order of detention is fatal. In the case in hand, even if we go by the submission of Mr.

D. Nath that only relied on documents need to be furnished, the petitioner was not even served with relied on document as stated hereinabove. Thus

there were procedural lapse on the part of the State respondent in not furnishing of documents.

16. So far relating to the ground of delay in disposal of the representation admittedly, there were 85 days delay in disposing the same. The

representation was filed on 05.08.2021 and the same was disposed of on 11.10.2021.

17. By way of filing affidavit, the State respondents has tried to explain the delay on the ground that after receipt of the representation on 07.08.2021,

the Commissioner of Police was requested to submit parawise comment on the same and such parawise comment was submitted on 01.10.2021 and

the impugned detention order was passed on 11.10.2021. In this regard Mr. Nath heavily relied on the judgment of Honâ??ble Apex Court in the

case of Kantilal Hirji Shah â??Vs- State of Tamil Nadu & Ors reported in 2000 7

SC 606 to contend that delay in submitting the parawise comment cannot be treated as delay on the part of detaining authority. In the aforesaid case, the fact was that on receipt of the representation, a comment was sought from the sponsoring authority by an officer who had not passed the order of detention (emphasis given by the Court).

18. In the case of Kantilal Hirji Sah (supra) the fact was that the comments were called on by sub ordinate officer from another authority. In the case

in hand, the order of detention was passed by the Secretary to the Government of Assam, Department of Home. The record reveals that the

representation was received on 07.08.2021 and thereafter, on 06.09.2021, a report was called from the Commissioner of Police, Guwahati. The said

report was submitted on 01.10.2021. Thereafter, the rejection order was passed on 11.10.2021. The said report was not sought by any sub ordinate

authority rather from the office of the Secretary, Government of Assam, Department of Home who passed the detention order. At the same time, it

took 30 days at the office of the Secretary to obtain a parawise comment. The explanation given by Mr. Nath regarding holiday between 01.10.2021

& 11.10.2021 is also not accepted by the Court for the reason that the authority was well aware of such holidays and they were also well aware that

they are dealing with a right of a citizen guaranteed under Article 21 of the Constitution of India and they are presumed to be aware of the mandate of

the provision of Article 22(5) of the Constitution of India. Therefore, the contention of Mr. Nath regarding explanation of delay is not tenable in law

and this court accordingly holds that there are delay in disposal of the representation and the petitioner's right under Article 22 (5) is thereby

violated.

19. In the case in hand, at the time of passing the detention order on 15.07.2021, the petitioner was already under custody in connection with Jalukbari

PS Case No.601/2021 under Section 22 (b) of the NDPS Act, 1985. In fact on 17.07.2021, the prayer of bail of the petitioner was rejected by the

learned Sessions Court (Kamrup). The detention order nowhere record and reflect any satisfaction as regards implication of Rigors of Section 37 of

the NDPS Act or regarding the likelihood of the detenue being released on bail. In the case of Binod Singh Vs- District Magistrate, Dhanbad Bihar

and others reported in (1986) 4 SCC 416 it was held that while issuing the order

of detention, the detaining authority must record satisfaction as regards the likelihood of the detainee being released on bail. It has been held that mere fact that a bail application submitted by the detainee was pending consideration before the Court, by itself would not be a ground to pass an order of detention.

20. Subsequent to decision of Binod Singh (supra), the Honâ??ble Apex Court in Amrit Lal and Ors â??Vs- Union of India reported in 2001 Vol. 1.

SCC. 341 held that there must be cogent materials before the officer passing the detention order that the detainee is likely to be released on bail. It

was further held that the interference must be drawn from the materials on record and must not be the *ipse dixit* of the officer passing the order of

detention. In view of the aforesaid pronouncements as well as the given facts of the case, this Court unhesitatingly holds that there was total non

application of mind in dealing with the representation of the petitioner resulting in the impugned detention order bad in law.

21. Mr. Nath heavily relied upon the judgment of the Honâ??ble Apex Court in Union of India â??Vs- Dimple Happy Dhakad reported in (2019) 20

SCC 609 to project that non furnishing of documents is not fatal and also to project that likelihood of release on bail may not be a consideration.

According to him non recording of reason that the detainee is likely to be released on bail cannot be a ground for interfering with the detention order.

The case of Dimple Happy Dhakad (supra) was based on a different set of facts, and same cannot be applied to the facts of the present case. The

paragraph 46 of the said judgment clarifies such position. The paragraph 46 read as follows:-

â??The Court must be conscious that the satisfaction of the detaining authority is â??subjectiveâ? in nature and the court cannot substitute

its opinion for the subjective satisfaction of the detaining authority and interfere with the order of detention. It does not mean that the

subjective satisfaction of the detaining authority is immune from judicial review ability. By various decisions, the Supreme Court has carved

out areas within which the validity of subjective satisfaction can be tested. In the present case, huge volume of gold had been smuggled into

the country unabatedly for the last three years and about 3396 kg of the gold has been brought into India during the period from July 2018

to March 2019 camouflaging it with brass metal scrap. The detaining authority recorded finding that this has serious impact on the economy of the nation. The detaining authority also satisfied that the detenus have propensity to indulge in the same act of smuggling and passed the order of preventive detention, which is a preventive measure. Based on the documents and the materials placed before the detaining authority and considering the individual role of the detenus, the detaining authority satisfied itself as to the detenusâ?? continued propensity and their inclination to indulge in acts of smuggling in a planned manner to the detriment of the economic security of the country that there is a need to prevent the detenus from smuggling goods. The High Court erred in interfering with the satisfaction of the detaining authority and the impugned judgment cannot be sustained and is liable to be set aside.â??

22. For the aforesaid reasons and decision, this writ petition is allowed.

23. The detention order dated 15.07.2021 is set aside and quashed.

24. The detenue be released forthwith, if his custodial detention is not required in connection with other pending proceeding. The records be returned.