

(2009) 09 OHC CK 0054

In the Orissa High Court

Case No : Writ Petition (Criminal) No. 252 of 2009

Jitu ' Sourav Sana

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 05-09-2009

Acts Referred:

Constitution of India, 1950 — Article 22, 22(5)

National Security Act, 1980 — Section 10, 13, 3(2), 3(4), 3(5)

Citation : (2009) CLT 1409 (Suppl CrI)

Hon'ble Judges : L. Mohapatra, J;B.N. Mahapatra, J

Bench : Division Bench

Advocate : H.M. Dhal, for the Appellant; Bikram Senapati, A.G.A. for O.Ps. 1 and 2 and J.K. Mishra, Asst. Solicitor General for O.P. No. 3, for the Respondent

Final Decision : Allowed

Judgement

B.N. Mahapatra, J.—This writ petition has been filed challenging correctness of the order dated 9.2.2009 under Annexure-1 passed by the District Magistrate, Sambalpur, (opposite party No. 2) in exercise of power conferred on him u/s 3(2) of the National Security Act, 1980 (for short, "the Act") directing detention of the Petitioner (hereinafter referred to as the "detenu") on the ground that the said order is illegal and contrary to law and therefore it is liable to be quashed.

2. The facts giving rise to the present petition are that opposite party No. 2 passed the aforesaid order of detention dated 09.02.2009 in exercise of power conferred on him u/s 3(2) of the Act. The said order of detention was served on the detenu on the very day it was passed while he was in the judicial custody in connection with some criminal cases. Thereafter, the detenu was served with the grounds of detention dated 10.2.2009 under Annexure-2 narrating inter alia the grounds of detention. In the grounds of detention, the detenu is shown to have been involved in as many as eight criminal cases. The State Government vide its order dated 19.2.2009 (Annexure-3) has approved the order of detention in exercise of the powers conferred on it u/s 3(4) of the Act. On receipt of the

grounds of detention, the detenu sent his representations dated 25.2.2009 (Annexure-4, 8 & 9) through the Jail authority to the Advisory Board, the State Government as well as the Central Government. The Advisory Board to which the case of the detenu had been referred to u/s 10 of the Act was of the opinion that there were sufficient grounds for detention of the detenu. On the basis of such opinion of the Advisory Board, the State Government has confirmed the order of detention of the detenu and in exercise of its powers u/s 13 of the Act directed detention of the Petitioner for a period of twelve months vide order dated 2.4.2009 under Annexure-5. The said order dated 2.4.2009 (Annexure-5) was served upon the detenu on 3.4.2009. Hence the present petition.

3. Mr. Dhal, learned Counsel appearing for the detenu-Petitioner vehemently argued that there has been undue and unexplained delay on the part of the State Government in dealing with the representation of the detenu, which renders the order of detention invalid. Before making representations to the State Government, Central Government and Advisory Board, the detenu had sought for certain relevant documents from the detaining authority. But the District Magistrate did not supply those documents to the detenu and non-supply of those documents amounts to clear violation of the Article 22 of the Constitution. Even if all the allegations made against the detenu are taken to be true, the same do not come within the meaning of "public order". There was no necessity to take recourse to the provisions of the National Security Act, since law of the land is sufficient to take care of various offences alleged to have been committed by the detenu in the order of detention. It is further argued that the State Government has confirmed the order of detention without application of mind. The detaining authority has not recorded any reason about his satisfaction that there was likelihood of the detenu being released on bail and, in absence of such reason, the subjective satisfaction being vitiated, the order of detention is bad.

The SDPO, who has filed the counter affidavit on behalf of the opposite parties, does not have any-connection with detention and therefore it deserves no consideration by this Court. Such affidavit should have been filed by the detaining authority himself. The grounds of detention are all creations by the Police with a view to rope the detenu in as many as cases and to build a platform for the order of detention without recording any statement of witness or material particulars. The facts surrounding the grounds of detention show that the detenu has been granted bail in almost all the cases except in one case and there is apprehension of his release on bail in the other case. The apprehension of the District Magistrate that in the event the detenu is released on bail he may continue his lawless activities affecting the public peace and tranquility is purely speculative and without any basis and cogent material and the same is based on surmises and conjectures. Hence, the order of detention is liable to be quashed.

4. Per contra, learned Counsel appearing on behalf of the State vehemently contended that there was no delay on the part of the State Government in dealing with the representation of the detenu-Petitioner. The representation of

the detenu dated 25.2.2009 was inadvertently sent to the Advisory Board and the State Government received the same on 25.5.2009. After receipt of the representation on 25.5.2009, the State Government forwarded the same to the Central Government on 28.5.2009. The State Government rejected the representation of the detenu by its order dated 30.5.2009 which was communicated to the detenu on 1.6.2009. The order of detention dated 9.2.2009 does not suffer from any illegality as it has been passed after proper application of mind. The detenu is involved in many cases, which involve violation of public order. On 02.04.2009, the detaining authority recorded the grounds of his satisfaction that there was likelihood of the detenu being released on bail. There is nothing wrong in filing the affidavit by a Police officer in the rank of SDPO on behalf of the detaining authority. Neither the detenu nor any of his representatives has sought for any document as alleged by him. It was further contended that after coming out of the jail there is every possibility that the detenu may indulge himself in criminal and antisocial activities and disturb the public order. The order of detention has been passed after careful consideration of all the materials including the opinion of the Advisory Board. The activities of the detenu using the firearm in public place on broad day light created lawlessness and disturbed the public order and normal law of the land. On 15.4.2000 during celebration of "Sital Sashi" festival, the most important festival of western Orissa, the detenu along with his associates formed an unlawful assembly being armed with deadly weapons and resorted to create lawlessness in the procession affecting the religious sentiment of thousand of devotees in the crowd. There are other several incidents where the detenu endangered the public order. Therefore, the writ petition is liable to be dismissed.

5. Mr. J.K. Mishra, learned Asst. Solicitor General of India, submitted that the Central Government received the report of the State Government dated 05.03.2009. The Deputy Secretary (Legal) in the Ministry of Home Affairs completed examination of the report on 06.03.2009 and found the detention order justified. There is no provision under the Act prescribing confirmation of the detention order by the Central Government. The State Government is informed of the decision of the Central Government on the report received u/s 3(5) of the Act only when the detention order is revoked or modified by the Central Government. The representation of the detenu dated 25.02.2009 stated to have been forwarded to the Central Government through jail authorities has not been received in the concerned Section of the Ministry of Home Affairs.

6. On the rival contentions of the parties, though several questions fall for consideration by this Court, it will be appropriate to deal first with the objection of the detenu-Petitioner that there was delay and laches on the part of the State in dealing with his representation, which is violative of the mandate enshrined in Article 22 of the Constitution.

7. To deal with the question of delay and laches on the part of the Opp. Party State Government in dealing with the representation of the detenu-Petitioner, the

following dates need to be noted:

SI. No. Date. Action taken 1. 25.2.2009 The Petitioner submitted representation to State Government, Central Government and Advisory Board. 2. 30.5.2009 The State Government rejected the representation of the Petitioner. 3. 8.6.2009 The Central Government rejected the representation of the Petitioner. 4. 13.6.2009 The Central Government communicated about rejection of the representation of the Petitioner on 8.6.2009

Thus, the State Government took 94 days in disposing of the representation of the Petitioner. In order to explain the delay the State Government in Paragraph-14 of its counter affidavit has stated that the representation of the Petitioner dated 25.2.2009 was wrongly sent to the Advisory Board on 4.3.2009. However, the State Government received the representation on 25.5.2009, which was rejected on 30.5.2009. Nothing has been disclosed in the counter affidavit about the date on which the representation of the Petitioner dated 25.2.2009 stated to have been wrongly sent to the Advisory Board was received by the Advisory Board and thereafter how the same could reach the State Government. It is not known whether the Advisory Board sent the said representation back to the District Magistrate ? If so, when the same was received by the District Magistrate and when the District Magistrate sent the representation to the State Government along with his views ? If the Advisory Board sent the representation of the Petitioner dated 25.2.2009 directly to the State Government, then on which date it was sent to the State Government. Nothing is stated in "" the-counter affidavit of State the Government as to why the copy of the representation addressed to the State Government was not sent by the District Magistrate promptly as required by law. In absence of all these information/particulars, it is difficult to say that the delay and laches on the part of the State Government in dealing with the representation of the Petitioner was for valid reasons. There is no satisfactory explanation for the delay. Further, even though the periods from 25.5.2009 to 30.5.2009 was declared as the working days, the day to day events dealing with the representation have not been explained in the counter. All these cast doubts Upon sincerity of the State Government in dealing with the representation of the Petitioner. Tire O.P-State miserably failed to explain the inordinate delay of 94 days in disposing of the representation of the detenu. Therefore, this Court is of the opinion that the so-called explanation cannot be accepted at all.

8. Law is well settled that the representation of the detenu under the Act must be attended to promptly, as the same infringes the fundamental rights of the detenu guaranteed under Article 22 of the Constitution. At this stage, it is necessary to refer to some of the decisions of the apex Court and this Court.

In Aslam Ahmed Zahire Ahmed Shaik Vs. Union of India and Others, , the jail Superintendent to whom the representation was handed over by the detenu for onward transmission, was kept it unattended and pending with him for 7 days. The Jail Superintendent gave no explanation as to why the representation was

retained though opportunity was afforded to him.

The apex Court held that the supine indifference, slackness and callous attitude on the part of the Jail Superintendent who had unreasonably delayed in transmitting the representation as an intermediary, had ultimately caused undue delay in disposal of the detenu's representation by the Government which received the representation 11 days after it was handed over to the Jail Superintendent by the detenu. This avoidable and unexplained delay has resulted in rendering the continued detention of the detenu illegal and constitutionally impermissible.

In *Smt. Khatoon Begum Ors. Vs. Union of India (UOI) and Others*, , it is held that a person preventively detained under the provisions of the National Security Act is entitled to be released if there is delay in the consideration of the representation made by him to the detaining authority. It cannot be urged in respect of detention under the Security Act that a certain amount of delay was inevitable having due regard to the procedure prescribed by the Act and, therefore, delay in consideration of the representation should not be allowed to prejudice the detention.

Article 22(5) enjoins a duty on the authority making the order of detention to afford the detenu "the earliest opportunity of making a representation against the order". The right and obligation to make and to consider the representation at the earliest opportunity is a constitutional imperative, which cannot be curtailed or abridged. If the Parliament or the State legislature making the law providing for preventive detention cleaves a circumlocutory procedure for considering the representation or if the inter departmental consultative procedures are such that delay becomes inevitable, the law and the procedures will contravene the constitutional mandate. It is essential that any law providing for preventive detention and any authority obliged to make orders for preventive detention should adopt procedures calculated towards expeditious consideration of representations made by detenus.

In, *Shri. Saleh Mohammed Vs. Union of India (UOI) and Others*, , it is held as follows -

Times out of number, this Court has emphasized that where the liberty of an individual is curtailed under a law of preventive detention, the representation, if any made by him must be attended to, dealt with and considered with watchful care and reasonable promptitude lest the safeguards provided in Article 22(5) of the Constitution and the statute concerned should be stultified and rendered meaningless. Here in the instant case we find that the functionaries of the State in attending to the representation of the detenu have been guilty of gross negligence and chill indifference. For more than three weeks, the representation of the detenu remained lying unattended in the office of the Superintendent of Jail, or the Inspector-General of Prisons. This inordinate, unreasonable and unwarranted delay of about 22 days amounted to a violation of Article 22(5),

which guarantees to the detenu a right to have his representation considered with reasonable expedition. It was on this short ground that we had, as per our order dated August 20, 1980, allowed this writ petition, quashed the order of Saleh Mohammed's detention and directed his release forthwith.

In *Noor Salman Makani Vs. Union of India and others*, , while examining the similar issue the Hon'ble Supreme Court observed that day to day delay in disposal of representation is required to be explained by the Authority to whom the representation is made. While dealing with the issue the holidays have been excluded, but inordinate delay in consideration and disposal of the representation may be fatal.

This Court in *Bijaya Parida Vs. State of Orissa and Others*, , for 15 days" delay in the matter of disposal in detenu's representation, quashed the order of detention. Again in the case of *Ananta Parida Vs. State of Orissa and Others*, , for the same delay of 15 days in disposing of the detenu's representation, this Court also quashed the order of detention. Similarly, in the case of *Sankar Gouda v. Union of India and Ors.* 2007 (Supp. 1) OLR 92, this Court quashed the order of detention for delay of thirty-five days on the part State Government in disposing of the representation of the detenu.

This Court in *Shanina Begum v. State of Orissa and Ors.* 2000 (2) Crimes 424, held that laches on the part of the State Government in forwarding the representation to the Central Government for a period of eighteen days vitiated the detention order. In the present case, the representation dated 25.2.2009 was forwarded to the Central Government only on 28.5.2009 and there is no cogent explanation for such inordinate delay.

9. If the case of the Petitioner is examined in the light of the above legal propositions, we have no hesitation to hold that there was inordinate, unreasonable and unwarranted delay on the part of the State Government in dealing with the representation of the detenu, which has infringed the fundamental rights of the detenu guaranteed under Article 22 of the Constitution.

10. Before we part with the case, we express our displeasure for the casual manner in which the administrative functionaries have acted to deal with the matter. The Hon'ble Supreme Court and this Court in innumerable cases have highlighted the constitutional mandate to deal with the representation of a detenu with utmost urgency. But in the present case, the contrary is the fact-situation. Such instance sends out a wrong message about the intention of the administrative authorities concerned.

11. Since there was delay and laches on the part of the State Government in disposing of the representation of the Petitioner dated 25.2.2009, the order of detention is liable to be set aside and, therefore, there is no need to adjudicate the other issues involved in the present case, which will amount to mere academic exercise.

12. In view of the above, we allow the writ petition, set aside the impugned order of detention dated 09.02.2009 passed by the District Magistrate, Sambalpur under Annexure-1 and direct that the detenu be set at liberty forthwith, if his detention is no longer required in connection with any other case.

L. Mohapatra, J.

13. I agree.