

(2013) 09 GAU CK 0056

In the Gauhati High Court

Case No : Writ Petition (Criminal) No. 16 (K) of 2013

Jutika Chakraborty

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 03-09-2013

Acts Referred:

Citation : (2013) 5 GLT 785

Hon'ble Judges : N. Chaudhury, J

Bench : Single Bench

Advocate : A. Zho and Mr. Moa Jamir, for the Appellant; K. Wotsa, GA, for the Respondent

Final Decision : Allowed

Judgement

N. Chaudhury, J.—Heard Mr. A. Zho, learned counsel for the petitioner and Mr. K. Wotsa, learned Government Advocate. By this application under Article 226 of the Constitution of India, the petitioner has challenged the detention of her husband Santosh Chakraborty ordered on 25.6.2013 by the District Magistrate, Dimapur which was approved by the appropriate Government on 5.7.2013.

2. On 18.6.2013, the petitioner's husband was arrested in connection with Dimapur East PS Case No. 130/13 u/s 384 IPC read with Section 25(1-A) of the Arms Act alleging that on being tipped off, the security personnel recovered a pistol and incriminating documents from him and on investigation it was found that he had been involved in extorting money from businessmen on behalf outlawed organization. Subsequently, on 21.6.2013 a proposal was made to the District Magistrate by the Superintendent of Police Dimapur for detaining the petitioner's husband under National Security Act. Accordingly, on 25.6.2013 an order was passed by the District Magistrate applying sub section (3) of Section 3 of the National Security Act 1980. In the proposal letter dated 21.6.2013 sent by the Supdt. of Police Dimapur, it was opined as follows:

Accordingly, a joint interrogation was conducted in the present of all investigation

agencies on 20.6.13. During the interrogation it was ascertained that accused is not a member of any underground group but he does the work of the FGN since last two years by collecting of illegal tax from shops and vehicle and the said pistol and tax collection receipt coupon was given to him by one Atovi Sumi of FGN.

3. The detainee was informed of his right of making representation to the detaining authority, Central Government and the State Government through the concerned Jail authority. It was also mentioned that he had the right to claim personal hearing before advisory board constituted by the appropriate Government under the National Security Act, 1980 (hereinafter referred to as "the Act"). The appropriate Government approved the detention on 5.7.2013 for 12 months w.e.f. 25.6.2013. The petitioner appears to have made a representation to the Government on 9.7.2013 and the same was rejected on 17.7.2013.

4. Mr. A. Zho, learned counsel for the petitioner submits as follows:-

(i) The communication to the detainee in regard to ground of detention does not contain necessary information to the effect that the detainee was entitled to be represented by next friend and as such the right conferred on the detainee under Article 22(5) of the Constitution of India has been violated. There was no meaningful compliance of the provisions of the Act as well as the Constitution inasmuch as because of the failure on the part of detaining authority to make the detainee aware about his right of being represented the detainee has been prejudiced. The learned counsel has placed reliance on a Division Bench judgment of this Court in the case of Nameirakpam Inaotomba Singh Vs. Union of India (UOI) and Others, In paragraph 14 of the said judgment the Division Bench of this Court has held that informing the detainee about his right of being represented by next friend is a necessary exercise and failure to do so vitiates the fundamental right of the detainee conferred under Article 22(5) of the Constitution of India.

(ii) The subjective satisfaction of the detaining authority that there is likelihood of the detainee being released on bail in connection with the police case is also based on no material and the opinion does not contain necessary ingredients to arrive at such subjective opinion. True, opinion of the detaining authority is a subjective one but such opinion should be based on some material. Relying on the Division Bench judgment of this Court in the case of Moirangthem Ibomcha Singh Vs. State of Manipur and Others, the learned counsel would argue that details of the case where bail was granted under similar circumstances have to be disclosed by detaining authority to show that subjective opinion was arrived at basing on some materials. Here in his case, the order of detention and proposal made by Police does not disclose such material and as such Mr. Zho submits that the order of detention as well as consequent approval thereof is vitiated.

(iii) That the order of approval passed on 5.7.2013 being prior to submission of

report by the Advisory Board, the said order dated 5.7.2013 is contrary to the provision of Section 12 of the Act and as such the detention is illegal. Even if the order dated 5.7.2013 is construed to be one u/s 3(4) of the Act, then also the same could not have been passed for more than 3 months before obtaining opinion of the Advisory Board inasmuch as Section 14A of the Act has been infringed thereby.

5. Per contra, Mr. K. Wotsa, learned Government Advocate denies that there is any violation of the provisions of the Act and or that of Article 22(5) of the Constitution of India. Relying on an affidavit submitted on behalf of the respondents No. 1, 2 and 3, the learned Government Advocate claims that all opportunities available under the Act have been provided to the detainee. It is noticeable that the affidavit of the respondents does not make any mention as to whether the case of the petitioner was referred to Advisory Board u/s 10 of the National Security Act, 1980. However, by producing record today, Mr. K. Wotsa has drawn my attention to a report dated 31.7.2013 whereby advisory board constituted by Government of Nagaland being the appropriate Government opined that there was ground for detention of the petitioner. It also appears that on 12.7.2013 i.e., 5 days before the representation of the petitioner was rejected by the State Government parawise comments were sent to the Central Government as is required u/s 3(5) of the Act. According to Mr. Wotsa all the formalities prescribed under the Act have been scrupulously followed and there is no scope for interference by this Court by way of judicial review.

6. After hearing the learned counsel for the parties and on perusal of the records produced by Mr. K. Wotsa, it appears that the authorities acted in a routine manner in informing the ground of detention of the detainee. After having come to a finding on the basis of the material that the petitioner was not involved in any outlawed organization in any manner, the trial of the petitioner under the India Penal Code for alleged extortion of money would have been sufficient. Materials warranting application of Section 3 of the National Security Act are not discernible on records. At least materials did not make out nexus of the detention order with the purported opinion that there is threat on the security of the State and or defence of India and or apprehension in regard to maintenance of public order. All or any of these ingredients of Section 3 had to be based on at least some materials on record for curtailing the right to liberty of a citizen. Coming to the fact of this case, the detaining authority failed to inform the detainee that he has a right of being represented by next friend before the Advisory Board, a requirement held by the Division Bench of this Court to be necessary for meaningful compliance or the provisions of the Act. The order dated 5.7.2013 passed by the appropriate Government approving detention of the petitioner for a period of 12 months having been passed prior to opinion of the Advisory Board, the same is unauthorized being violative of Section 14A of the Act which has empowered the appropriate Government to pass detention order for a period not exceeding 3 months unless the Advisory Board recommends. Moreover, even if order dated 5.7.2013 is construed to be a one u/s 12 of the Act, the same having

been passed before obtaining the opinion of the Advisory Board, the confirmation order is also unauthorized. Thus on totality of circumstances, I have no other alternative but to allow this application setting aside the detention order.

7. The detention order dated 25.6.2013 and all further consequential orders passed on it are hereby set aside. The detainee shall be released forthwith unless required under any other case. The petition is allowed. However, no order as to cost.