

(2005) 04 GAU CK 0018

In the Gauhati High Court

Case No : Writ Petition (Criminal) No. 9 of 2002 (Imphal) and W.P. (Criminal) No. 44 of 2002 (Gau)

Laishram Bihari Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 13-04-2005

Acts Referred:

Constitution of India, 1950 — Article 19(1), 20, 21, 22
National Security Act, 1980 — Section 3(1), 3(5), 8, 8(1)

Citation : (2006) 1 GLT 362

Hon'ble Judges : T. Nanda Kumar Singh, J;R. Gogoi, J;B.P. Katakey, J

Bench : Full Bench

Judgement

Ranjan Gogoi, J.—This case was referred to larger Bench pursuant to the order dated 19.09.2002 passed by a Division Bench of this count on the following question.

Whether the judgment passed by another Division Bench of this Court in Thounaojam Lukhoi Singh Vs. District Magistrate and Others, holding that detenu under the National Security Act has no right to make a representation to the detaining authority, is valid in view of the decision of the Apex Court in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, as well as the decision of Division Bench of this Court passed in W.P. (Criminal) No. 20/2001 decided on 8.5.2002.

2. The question therefore to be decided is- "Whether the detenu under the National Security Act has a right to make representation against the order of detention to the authority making such order, even if the Act provides for making representation to the appropriate government".

3. None appeared on behalf of the contesting parties. May be because of the fact that the detenu in W.P. (Criminal) No. 9/2002 has been released by setting aside the order, of detention vide order dated 19.9.2002. In spite of the absence of the learned Counsel for the parties, we have proceeded to dispose of the case as the

aforementioned question has been referred by the Division Bench.

4. A Division Bench of this Court in Thounaojam Lukhoi Singh Vs. District Magistrate and Others, while dealing with detention under National Security Act, 1980 has held that since Section 8(1) of the said Act has specifically provided for making a representation against the order of detention to the appropriate government, the detenu under the said Act has no right to make a representation to the authority who passed the order for detention and hence the decision of the Constitutional Bench of the Apex Court in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, is not applicable to the detention under the provisions of the National Security Act. The relevant paragraph of the said judgment is quoted below:

20 Last, it is contended by Mr. A. Nilamani that the detaining authority can also revoke the detention order and as such it was incumbent on the part of the detaining authority to inform the catenu that he can also make a representation before the detaining authority. No this connection, he has referred to the decision of the Constitutional Bench of the Supreme Court in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, Relying heavily on the observations of the Supreme Court in paragraphs 6 and 14 of its judgment in which the Apex Court had observed that the authority which made the detention can also revoke it and therefore, the representation against the order of detention can also be made to the detaining authority. This submission, in our opinion misconceived because in the case of Kamalesh kumar (Supra), the Apex Court was considering the validity of the detention order under COFEPOSA Act and NDPS Act and the representation thereof Unlike in COFEPOSA and NDPS Act. in the case of detention under National Security Act, a specific provision has been made in Section 8(1) if the Act that a representation again the order of detention must be made to the appropriate Government. Therefore, the arguments that such representation can also be made to the detaining authority is not well in unded.

5. For the purpose of consideration whether the detenu under the said Act has the right to make representation to the authority who passed the order of detention even though Section 8(1) of the act provides for making representation to the appropriate government only, in view of the fundamental right of the citizen guaranteed under Article 22(5) of the Constitution of India let us now first consider whether the Fundamental right guaranteed to a citizen under Part-in of the Constitution of India more particularly the right to make representation to the detaining authority by a detenu against an order of detention passed under any preventive detention law, is (sic) be read into the provision of any preventive detention law even if such law does not make any provision for making such representation to the detaining authority. Part-III of the Constitution of India enumerates the Fundamental Rights of the citizens which includes the right to protection against arrest and detention in certain cases under Article 22 of the Constitution of India which provides that whenever any person is arrested and detained in custody he has to be informed about the grounds for such arrest and

also shall have the right to consult or to be defended by a legal practitioner of his choice. Every such person arrested and detained in such custody shall have to be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from place of arrest to the court of Magistrate and no such person shall be detained in custody beyond the said period without an order of a Magistrate. Clause 3 of Article 22 provides that the aforesaid conditions shall not be applicable to any person who for the time being is an enemy alien or to any person who is arrested or detained under any law providing for preventive detention.

6. Clause (4) of Article 22 provides for detention of a person under Preventive Detention Law for a longer period than 3 months, one on the report of the Advisory Board constituted for that purpose authorizing detention for a period longer than 3 months. Clause (5) of Article 22 provides that when a person is detained under any Preventive Detention Law, the authority passing such order of detention has to communicate such person the grounds on which the order has been passed and also to afford him earliest opportunity of making a representation against the order of detention, Clause (5) of Article 22 of the Constitution of India is quoted below:

22.(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

7. The Parliament in the 31st year of Republic of India has enacted the National Security Act, 1980 providing for preventive detention of a person with a view to preventing him from acting in any manner prejudicial to the defence of India or the relations of India with foreign power or the security of India or in case of any Foreigner, to regulated his continued presence in India or with a view to making arrangement for his expulsion from India. The Central Government or the State Government may also detained any person under the provisions of said Act with a view to preventing him from acting in any manner prejudicial to the Security of the State or to the maintenance of public order or to the maintenance of supplies and service essential to the community. The said Act also provides for empowering the District Magistrate or Commissioner of Police by the State Government, to exercises the power of detention and in that case the District Magistrate or the Commissioner of Police shall have to report forthwith the fact of the detention to the State Government together with grounds on which the order has been made and such other particulars having bearing on the matter and unless such order is approved by the State Government, the same shall not remain in force for more than 12 days after making the order. Sub-section (5) of Section 3 requires the State Government to report the fact of retention to the Central Government along with grounds and other particulars having a bearing on the necessity for such order within 7 day from the date of approval by the

State Government.

8. Section 8 of the Act provides for communicating the grounds for such detention to the detenu ordinarily not later than 5 days and in exceptional circumstances not later than 10 days from the date of detention, for which the reasons have to be recorded in writing and also for affording such detenu the earliest opportunity of making a representation against the order of detention to the appropriate government.

9. Section 8(1) of the Act therefore provides for affording opportunity to the detenu to make a representation against the order to the appropriate government. Article 22(5) of the Constitution of India also provides for affording the detenu under any preventive detention law an opportunity to make representation against the order of detention to the authority making such order.

10. Article 21 of the Constitution lays down in general terms that no person should be deprived of his life or personal liberty except according to the procedure established by law. Article 22 states what should be the rights of a person who is deprived of the life or personal liberty by arrest or detention. Clauses (1) and (2) of Article 22 prescribed minimal procedural safeguard in case of arrest and Clause (3) expressly state that they do not apply to any person who is arrested or detained under any law providing for preventive detention or to any person who is an enemy alien. Clauses (4) to (7) of Article 22 deals exclusively with certain procedural safeguard against preventive detention.

11. Article 22(5) confers a constitutional right on the detenu to make representation to the detaining authority, which is evident from the language of Article 22(5) of the Constitution which requires the detaining authority to communicate the grounds of detention to the person under the preventive detention law and to afford him earliest opportunity of making a representation against the order. Since the order of detention is passed by the detaining authority, it is the said authority before whom a representation under Article 22(5) can be filed by the detenu intimating such authority that the grounds on which the detention is based is non-existent etc. and therefore it should be revoked. The Fundamental Right guaranteed under Part-III of the Constitution of India can only be taken away during the proclamation of emergency by the President of India except the Fundamental Rights guaranteed under Articles 20 and 21.

12. A Constitutional Bench of the Apex Court in *Pankaj Kumar Chakrabarty and Others Vs. The State of West Bengal*, while dealing with the provision of Preventive Detention Act, 1950 has held that though Clause (5) of Article 22 does not in positive language provide as to whom the representation is to be made and by whom, when made, it is to be considered, but the expressions "as soon as may be" and "the earliest opportunity" in that case clearly that the grounds are to be served and the opportunity to make a representation are provided for to enable the detenu show that his detention is unwarranted and

since no other authority who should consider such representation is mentioned in the said clause, it can only be the detaining authority to whom it is to be made and which has to be considered by it. It has further been held that though Clause (5) of Article 22 does not in express terms say, so it follows from its provisions that it is the detaining authority which has to give the detenu the earliest opportunity to make a representation and to consider it when so made, whether its order is wrongful or contrary to the law, enabling it to detain him. The relevant portion of paragraph 10 is quoted below:

10. It is true that Clause (5) does not in positive language provide as to whom the representative is to be made and by whom when made, it is to be considered. But the expressions "as soon as may be" and "the earliest opportunity" in that case clearly that the grounds are to be served and the opportunity to make a representation are provided for to enable the detenu to show that his detention is unwarranted and since no other authority who should consider such representation is mentioned it can only be the detaining authority to whom it is to be made which has to be considered by it. Though Clause (5) does not in express terms say so it follows from its provisions that it is the detaining authority which has to give to the detenu the earliest opportunity to make a representation and to consider it when so made whether its order is wrongful or contrary to the law enabling it to detain him. The illustrations given in *Sk. Abdul Karim and Others Vs. State of West Bengal*, show that Clause (5) Article 22 not only contains the obligation of the appropriate Government to furnish the grounds and to give the earliest opportunity to make a representation but also by necessary implication the obligation to consider that representation. Such an obligation is evidently provided for to give an opportunity to the detenu to show and a corresponding opportunity to the appropriate Government to consider any objections against the order which is, through error or otherwise, wrongly arrested and detained. If it was intended that such a representation need not be considered by the Government where an Advisory Board is constituted and that representation in such cases is to be considered by the Board and not by the appropriate Government, Clause (5) would not have directed the detaining authority to afford the earliest opportunity to the detenu....

13. The Apex Court in the *The State of Bombay Vs. Atma Ram Sridhar Vaidya*, has held that the provision contained in Article 22(5) has the same force and sanctity as any other provision relating to Fundamental Rights. It has further been held that Article 22(5) has two parts, first part gives a right to the detained person to be furnished with the grounds on which the order has been made and that has to be done "as soon as may be". The second right gave to such person is of being afforded "the earliest opportunity of making a representation against the order". The second right as it is a right of objection, has to depend on the first on the service of the grounds on which the conclusion i.e. satisfaction of the detaining authority about the necessity of making the order is based. If the grounds supplied are not sufficient to enable the detenu to make a representation, the detenu can rely on his second right and if he likes ask for

particulars which will enable him to make the representation. On an infringement of either of these two rights, the obtained person has a right to approach the court and complained that there has been an infringement of his Fundamental right and even if the infringement of the second part of the right under Article 22(5) is established he is bound to be released by the Court.

14. The Apex Court in *Vimalchand Jawantraj Jain Vs. Shri Pradhan and Others*, has held that the power to preventively detain a person cannot be exercised except in accordance with the constitutional safeguards provided in Clauses (4) and (5) of Article 22 and if any order of detention is made in violation of such constitutional safeguards, it would be liable to be struck down is invalid. It has further been held that it is immaterial whether this constitutional safeguards are incorporated in the law authorizing preventive detention, because even if they are not, they would be deemed to be the part of the law as a super imposition of the Constitution which is the supreme law of the land and they must be obeyed in pain by invalidation of the order of detention. It has further been held that the requirement of Clause (5) of Article 22 is that the authority making the order of detention must afford the detenu the earliest opportunity of making a representation against the order of detention and the said requirement would be illusory unless there is a corresponding application on the detaining authority to consider the representation of the detenu as early as possible. The constitutional imperative enacted in Clause (5) of Article 22 requiring the earliest opportunity to be afforded to the detenu to make a representation carries with it by necessary implication a constitutional application on the detaining authority to consider the representation as early as possible before making an order confirming the detention. The detaining authority must consider the representation of the detenu and come to its own conclusion whether it is necessary to detain him. The Apex Court has further held that two distinct safeguards have been provided to a detenu under the Constitution-one is that his case must be referred to Advisory Board for its opinion, if it is sought to detain him for a longer period than 3 months and the other is the should be afforded the earliest opportunity of making a representation against the order of detention and as such representation should be considered by the detaining authority as early as possible. Paragraph 3 and 4 of the said decision is quoted below:

3. The Petitioner on these facts contended that the order confirming the detention of the Petitioner was passed by the 1st Respondent without considering the representation of the Petitioner and the detention of the Petitioner was, therefore, unlawful as being in contravention of Article 22(5) of the Constitution. This contention has in our opinion great force and it must result in invalidation of the detention of the Petitioner. It is now settled law that the power to preventively detain a person cannot be exercised except in accordance with the constitutional safeguards provided in Clauses (4) and (5) of Article 22 and any order of detention is made in violation of such safeguards it would be liable to be struck down as invalid. It is immaterial whether these constitutional safeguards are incorporated the law authorizing preventive detention, because even if they

are not, they would be deemed to be part of the law as a super imposition of the Constitution which is the supreme law of the land and they must be obeyed on pain of invalidation of the order of detention. The 1st Respondent was, therefore, bound to observe the constitutional safeguards provided inter alia in Clauses (4) and (5) of Article 22 in detaining the Petitioner. We are concerned in this case only with a complaint of violation of the provisions of Clause (5) of Article 22 and that clause reads as follows:

When any person is detained in pursuance of an order made under any law providing detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

This Court explained the true meaning and import of this clause in *Khudiram Das Vs. The State of West Bengal and Others*,

The constitutional imperative enacted in this article are two fold: (1) the detaining authority must, as soon as may be, that is, as soon as practicable after the detention, communicate to the detenu the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detenu the earliest opportunity of making a representation against the order of detention. These are the barest minimum safeguards which must be observed before an executive authority can be permitted to preventively detain a person and thereby drown his right of personal liberty in the name of public good and social security.

It will, therefore, be seen that one of the basic requirements of Clause (5) of Article 22 is that the authority making the order of detention must afford the detenu the earliest opportunity of making a representation against the order of detention. Now this requirement would become illusory unless there is a corresponding obligation on the detaining authority to consider the representation of the detenu as early as possible. It could never have been the intention of the constitution makers that the detenu should be given the earliest opportunity of making a representation against the order of detention but the detaining authority should be free not to consider the representation before confirming the order of detention. That would render the safeguard enacted by the constitution makers meaning less and futile. There can, therefore, be no doubt that the constitutional imperative enacted in Clause (5) of Article 22 requiring the earliest opportunity to be afforded to the detenu to make a representation carries with it by necessary implication a constitutional obligation on the detaining authority to consider the representation as early as possible before making an order confirming the detention. The detaining authority must consider the representation of the detenu and come to its own conclusion whether it is necessary to detain him. If the detaining authority takes the view on considering the representation of the detenu, that it is not necessary to detain him, it would be wholly unnecessary for it to place the case of the detenu before

the Advisory Board. The requirement of obtaining opinion of the Advisory Board is an additional safeguard over and above the safeguard afforded to the detenu of making a representation against the order of detention. The opinion of the Advisory Board even if given after consideration of the representation by the detaining authority (sic.) this Court pointed out in *Khairul Haque v. The State of West Bengal*, W.P. No. 246 of 1969, D/- 10.9.1969* (*Reported in (1969) 2 SCWR 529)

It is implicit in the language of Article 22 that the appropriate Government, while discharging its duty to consider the representation, cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. There was, therefore, no reason for the Government to wait for considering the Petitioner's representation until it had received the report of the Advisory Board. As laid down in *Sk. Abdul Karim and Others Vs. State of West Bengal*, the obligation of the appropriate Government under Article 22(5) is to consider the representation made by the detenu as expeditiously as possible. The consideration by the Government of such representation has to be as aforesaid, independent of any opinion which may be expressed by the Advisory Board.

The fact that Article 22(5) enjoins upon the detaining authority to afford to the detenu the earliest opportunity to make a representation must implicitly mean that such representation, must, when made, be considered and disposed of as expeditiously as possible, otherwise it is obvious that the obligation to furnish the earliest opportunity to make a representation loses both its purpose and meaning.

5. There are thus two distinct safeguards provided to a detenu; one is that his case must be referred to an Advisory Board for its opinion if it is sought to detain him for a longer period than three months and the other is he should be afforded the earliest opportunity of making a representation against the order of detention and such representation should be considered by the detaining authority as early as possible before any order is made confirming the detention. Neither safeguard is dependent on the other and both have to be observed by the detaining authority. It is no answer for the detaining authority to say that representation of the detenu was sent by it to the Advisory Board and the Advisory Board has considered the representation and then made a report expressing itself in favor of detention. Even if the Advisory Board has made a report stating that in its opinion there is sufficient cause for the detention, the State Government is not bound by such opinion and it may still on considering the representation of the detenu or otherwise, decline to confirm the order of detention and release the detenu. The detaining authority is, therefore, bound to consider the representation of the detenu on its own and keeping in view all the facts and circumstances relating to the case, come to its own decision whether to confirm the order of detention or to release the detenu.

15. In *Amir Shad Khan and another Vs. L. Hmingliana and others*, the Apex Court

has held as under:

...This clause casts a dual obligation on the detaining Authority, namely (i) to communicate to the detenu the grounds on which the detention order has been made; and (ii) to afford to the detenu the earliest opportunity of making a representation against the detention order. Consequently the failure to communicate the grounds promptly or to afford the detenu an opportunity of making a representation against the order would clearly violate the constitutional guarantee afforded to the detenu by Clause (5) of Article 22 of the Constitution. It is by virtue of this right conferred to the detenu that the Detaining Authority considers it a duty to inform the Appellant-detenu of his right to make a representation to the State Government, the Central Government and the Advisory Board. The right to make a representation against the detention order thus flows from the constitutional guarantee enshrined in Article 22(5) which casts an obligation on the authority to ensure that the detenu is afforded an earliest opportunity to exercise that right, if he so desires. The necessity of casting a dual obligation on the authority making the detention order is obviously to acquaint the detenu of what had weighed with the Detaining Authority for exercising the extraordinary powers of detention without trial conferred by Section 3(1) of the Act and to give the detenu an opportunity to point out any error in the exercise of that power so that the said authority gets an opportunity to undo the harm done by it, if at all, by correcting the error at the earliest point of time. Once it is realized that Article 22(5) confers a right of representation the next question is to whom must the representation be made. The grounds of detention clearly inform the detenu that he can make a representation to the State Government the Central Government as well as the Advisory Board. There can be no doubt that the representation must be made to the authority which has the power to rescind or revoke the decision, if need be....

16. A Constitutional Bench of the Hon'ble Supreme Court in Kamalesh Kumar Iswardas Patel (supra) while dealing with the preventive detention law vis-a-vis the constitutional safeguards guaranteed in Clauses (4) and (5) of Article 22 has held that the rights guaranteed to a detenu under the preventive detention law to make a representation against the order of detention is not only available to make representation 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, who is competent to give immediate relief by revoking the said order of detention as well as to any other authority which is competent under the law to revoke the order of detention and thereby give relief to the person detained. The relevant portion of the said decision is quoted below:

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 give relief to the person detained. The right to make a representation carries 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 representation.

17. The Constitution has recognized the personal liberty as Fundamental Rights. It has granted some of them under Article 19(1) but to be restrained on them by Clauses (2) to (6). It has put checks on the State's legislative power by Article 21 and 22. It has by providing for preventive detention recognized that individual liberty may be subordinated to the larger social interest. Article 20 to 22 secures all persons, citizens or non-citizens, certain constitutional guarantees in regard to punishment and prevention of crime. The power to preventively detain a person cannot be exercised except in accordance with constitutional safeguards provided in Clauses (4) and (5) of Article 22 and if any order of detention is made in violation of the safeguards it would be struck down as invalid. The right to make representation is a right which flows from constitutional right to be afforded i.e. reasonable opportunity to make representation. Article 22(5) therefore cast an obligation on the part of the detaining authority to comply with the provisions contained therein i.e. to furnish the detenu the grounds of detention and affording such person the earliest opportunity of making a representation against the order of detention. Such right of representation is a fundamental right of the detenu granted by the Constitution and hence cannot be taken away by any legislation except in case of proclamation of emergency under the Constitution of India. The provisions contained Article 22(4) and (5) of the Constitution being related to the Fundamental right to a detenu, under the Preventive Detention Law and the State's power to enact the law relating to preventive detention having flown from Article 22(4) of the Constitution, the right of making representation to the detaining authority under Article 22(5) shall still be available to a detenu even if there is no provision made in the preventive detention law for making any such representation to the detaining authority against the order of detention.

18. It is, therefore, evident that the rights guaranteed to a detenu under Article 22(5) of the Constitution being the Fundamental Right available to such detenu, such right has to be read into any law dealing with preventive detention even if no such right has been conferred by any such law relating to preventive detention. In other words, even if the provisions of National Security Act do not confer any right on the detenu to make a representation to the detaining authority and has given a right to make representation, u/s 8(1), to the appropriate government, the constitutional right of the detenu guaranteed under Article 22(5) of the constitution cannot be taken away as it is the Fundamental Right conferred on such detenu by the Constitution to make representation to the detaining authority.

19. In view of the above we are constrained to hold that the decision of the Division Bench of this Court in Thounaojam Lukhoi Singh Vs. District Magistrate and Others, is not a good law as the same is contrary to the constitutional requirement under Article 22(5) of the Constitution and also law laid down by the Apex Court.

20. The reference is accordingly answered.