
(1999) 12 OHC CK 0016

In the Orissa High Court

Case No : Original Jurisdiction Case No. 6691 of 1999

Md. Abdul Zahur

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 02-12-1999

Acts Referred:

Constitution of India, 1950 — Article 22(5)

National Security Act, 1980 — Section 14(1), 3(2), 3(5)

Citation : (2000) 89 CLT 255 : (2000) 18 OCR 169 : (2000) 1 OLR 21

Hon'ble Judges : P.C. Naik, J;B.P. Das, J

Bench : Division Bench

Advocate : R.N. Mohanty and M.K. Panda, for the Appellant; N. Prusty, Government Advocate and D.C. Mohanty, Senior Standing Counsel, Central Govt., for the Respondent

Final Decision : Allowed

Judgement

B.P. Das, J.—This is an application for habeas corpus filed under Article 226 of the Constitution of India (in short "the Constitution") by the petitioner-Md. Abdul Zahur, a cousin of Safo alias Sd. Imran Alli (hereinafter called "the detenu"), who is detained u/s 3(2) of the National Security Act, 1980 (in short "the Act") challenging the order of detention dated 30.12.1998 passed by the District Magistrate, Kendrapara, vide Annexure-1, as also the order of approval passed by the State Government vide Annexure-4.

2. The grounds on which the order of detention has been directed, as stated in the grounds of detention (Annexure-2), are that the detenu was creating havoc in Kendrapara thereby disturbing public order and in spite of being arrested and forwarded to custody on a number of times earlier, his anti-social activities continued to be unabated; that after release on bail he continued to commit further offences more vigorously and was terrorising and intimidating the witnesses and informants of the cases instituted against him in order to scuttle the criminal justice system; and that immediately prior to the impugned order of

detention on 11.9.1998, while he was under police custody at Dillarpur temporary out-post, on being informed about his arrest in connection with Kendrapara P.S. Case Nos. 477/98 and 479/98, all on a sudden he brought out a revolver concealed in his waist and aimed at S.I. R.N. Padhi and Inspector S.K. Chand and threatened to kill them and escaped from their lawful custody. It is further indicated therein that there are also several other cases pending against the detenu. In order to prevent him from acting in any manner prejudicial to the maintenance of public order, the detention was felt necessary and as it was felt by the detaining authority that in case the detenu was released on bail he would continue his criminal and anti-social activities, the impugned order of detention vide Annexure-1 has been passed in the larger interest to prevent the anti-social activities of the detenu which are prejudicial to the maintenance of public order and tranquillity.

3. Several grounds have been urged in support of the application by Shri R. N. Mohanty, learned counsel for the petitioner. Firstly, it is submitted that in the grounds of detention although the detaining authority was aware of the fact that the detenu was already in jail custody and as there was no material to show that the detenu was likely to be released on bail, the detention order was passed without application of mind. Secondly, it is urged that although on 23.1.1999 representations were sent to the State Govt. and the Central Govt. from the jail custody through the District Magistrate, such representations have not yet been disposed of by the Central Govt. and the State Govt.. This fact is highlighted by the petitioner in para 13 of the writ petition. It is worthwhile to mention here that in the instant case in spite of repeated direction and time granted to file counter affidavit, O.P. Nos. 2, 3 and 4, i.e., the District Magistrate, Kendrapara, Superintendent, Circle Jail, Choudwar, and the Union of India, respectively, did not file any counter affidavit and accordingly the matter was heard and is being disposed of on the basis of the materials on record.

4. Coming to the argument of Shri Mohanty that while passing the order of detention the detaining authority had not applied his mind as there was no materials to show that the detenu was likely to be released on bail, and in such event he was likely to indulge in such prejudicial activities affecting public order. In this regard learned counsel for the petitioner has referred to a decision of this Court in N. Ganesh Reddy alias Nilapu Ganesh Reddy Vs. State of Orissa and Another, . While rendering the aforesaid decision, Hon"ble D.P. Mohapatra, ACJ, (as his Lordship then was) relied upon a judgment of the apex Court in N. Meera Rani Vs. Government of Tamil Nadu and Another, wherein it was observed as follows :

"We may summarise and reiterate the settled principle. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case; preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order etc. ordinarily it is

not needed when the detenu is already in custody; the detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order; but, even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made even in anticipation to operate on his release. This appears to us to be the correct legal position."

Learned counsel for the State submits that the records produced by the State would clearly indicate that there is application of mind and the authority, while passing the impugned order of detention, has applied his mind to the fact of detention and was satisfied that in the event of release the detenu would indulge in prejudicial activities affecting public order. Hence, the argument of the counsel for the petitioner absolutely does not hold good. In this respect, it may be stated that the authority while passing an order of detention in a case where the detenu is already in custody should take the following facts into consideration.

- (i) The detaining authority must show his awareness to the fact of subsisting custody of the detenu; and
- (ii) While making the order, the detaining authority is to be reasonably satisfied on cogent materials that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities.

We have gone through the records of the District Magistrate and found that the detenu in spite of being arrested and forwarded to custody on a number of times earlier, his anti-social activities continued to be unabated and each time the detenu was released on bail, he was indulged in committing further offences and creating havoc in the area affecting public order. The order of detention has clearly indicated that the detaining authority was conscious of the fact that the detenu was in jail custody. There is no dispute in the contention of the counsel for the petitioner that the detaining authority must show his awareness to the fact of subsisting custody of the detenu and if the detaining authority is reasonably satisfied of cogent material that there is likelihood of his release, the detaining authority can pass an order of detention. But, in the aforesaid materials are absent, then the order of detention is vitiated. The decision must depend on the facts and circumstances of a particular case. After perusing the records we are satisfied that the detaining authority was aware of the fact that the detenu was in custody and considering his past conduct, he was also satisfied that there was possibility of his release on bail and in that event he would in all probability indulge in prejudicial activities affecting public order. Several other instances have been highlighted in which, according to the detaining authority, the detenu after being released on bail has committed several anti-social activities which have impact on public order. Hence, the contention of the learned counsel for the petitioner that the detaining authority has not applied his mind to

the aforesaid fact is not correct and on this ground the order of detention cannot be said to be vitiated.

5. The next and the most important aspect which is highlighted by the petitioner is that the Central Government has failed to comply with the mandatory requirements of Section 14(1) of the Act on receipt of the intimation from the State Government u/s 3(5) of the Act. It has been stated earlier that the Central Government has not thought it proper to file a counter affidavit in this regard. The further grievance of the petitioner is that the representation made to the State Govt. from jail custody has not been taken care of in accordance with the statutory provisions by the State Govt. The State Govt. in its counter affidavit has refuted the fact and stated that no representation has been received by the State Govt. so far. However, in the absence of a counter affidavit from the District Magistrate as well as the Superintendent of Circle Jail at Choudwar, it is not possible to ascertain the fact whether such a representation has been made through the District Magistrate to the Central Government and the State Govt. from jail custody. In the absence of any counter, we have no other alternative than to accept the fact stated in the writ petition on affidavit that the representation filed from the jail through the Superintendent has not been attended to. Law is well settled in this regard that the right of representation is a valuable constitutional right. To make representation against the detention has been incorporated in Article 22(5) of the Constitution. It is also obligatory on the part of the State Govt. to whom the representation is addressed to deal with the same with utmost expedition. The representation is to be considered in its proper perspective keeping in view the fact that the detention of the detenu is based on subjective satisfaction of the authority concerned, and infringement of the constitutional right conferred under Article 22(5) invalidates the detention order. In the instant case, there being nothing on record to show that the representation of the detenu either has not been made by him or has been dealt with and disposed of, the order of detention so also the order of approval, in our view, cannot stand. There has been clear violation of Article 22(5) of the Constitution and accordingly the order of detention of the detenu cannot stand. We, therefore, quash the impugned order of detention vide Annexure-1 and also the order of approval vide Annexure-4. We direct that the detenu be set at liberty forthwith if his detention is not required in connection with any other case or proceeding.

Before parting with the case, we record our displeasure that in a case of this nature where public order is at jeopardy, the District Magistrate, who is the detaining authority, as well the Superintendent of Jail through whom the representation is alleged to have been sent by the detenu have failed to file counter affidavit substantiating their case that no representation has been made by the detenu. We are also surprised to note that manner in which the Central Govt. has chosen to be a passive onlooker for which the case has ended in allowing the prayer of the detenu although there are valid grounds for his detention. The order of detention is quashed for failure on the part of the State

authorities and the Central Govt. to comply with the statutory provisions.

P.C. Naik, J.

I agree.