
(2016) 04 GAU CK 0062
In the Gauhati High Court
Case No : W.P. (Crl.) No. 1 (K) of 2016

N. Akato Chishi

APPELLANT

Vs

State of Nagaland

RESPONDENT

Date of Decision : 05-04-2016

Acts Referred:

Citation : (2016) 5 GauLR 686 : (2016) 3 GauLT 846

Hon'ble Judges : L.S. Jamir, J.

Bench : Single Bench

Advocate : Mr. I. Suohu, Mr. N. Mozhui, Ms. K. Kire, Mr. L. Likhase Sangtam, Mr. R. Zhutso, Ms. N. Puyo & Ms. Apila, Advocates, for the Appellant; Mr. K. Wotsa, Sr. G.A. and Mr. Yangerwati, CGC, for the Respondent

Final Decision : Allowed

Judgement

L.S. Jamir, J. (Oral) - Heard Mr. N. Mozhui, learned counsel for the petitioner as well as Mr. K. Wotsa. learned Sr. Government Advocate for the State respondents and Mr. Yangerwati, learned CGC for the Union of India/respondent No.5.

2. The petitioner/detenu was arrested on 06.08.2015 by the Police and was implicated in Dimapur SBN P.S Case No. 067/2015 under Section 302 IPC read with Section 25 (IB) of the Arms Act. While the petitioner/detenu was under judicial custody, he was served with the detention order dated 17.8.2015 on 19.08.2015 passed by the District Magistrate, Dimapur, Nagaland. The said detention order was passed in exercise of the powers conferred by sub section (3) of section 3 of the NSA Act, 1980 (hereinafter referred to as the Act of 1980) along with the detention order, the detenu was served with the copy of the ground of detention, the Schedule and the letter dated 17.08.2015 informing him about his right to make representation to the appropriate authority as provided under Article 22(5) of the Constitution of India. The petitioner made a representation dated 28.08.2015 addressed to the Central Government as well as the State Government and the detaining authority through the jail authority. The said representation was forwarded by the letter dated 28.08.2015 to the

State Government as well as the Central Government. The detention order was approved by the State Government by an order dated 24.08.2015. The representation of the petitioner was rejected by the State Government by order dated 09.09.2015 and the Central Government also rejected the representation of the petitioner by W.T. message dated 23.09.2015. Being aggrieved, the present writ petition has been filed challenging the detention order of the petitioner.

3. Mr. N. Mozhui, learned counsel for the petitioner submits that while the detention order was given to the petitioner, certain relevant documents were not enclosed along with the detention order in order to allow the petitioner to make an effective representation before the Central Government as well as the State Government. He specifically submits that the letter dated 14.08.2015 written by the Commissioner of Police Dimapur Nagaland sponsoring for approval of the petitioner's detention addressed to the detaining authority was not enclosed with the documents furnished to the petitioner. Thereby, the petitioner could not make an effective representation before the appropriate authorities.

The learned counsel for the petitioner further submits that while the detaining authority came to the subjective satisfaction that there is likelihood of the petitioner/detenué being released on bail and in the event of his release is likely to indulge in pre-judicial activities unless an effective alternative measure is called for was taken without any materials placed before the detaining authority.

He also submits that in the grounds of detention dated 17.08.2015, the petitioner/detenué was not informed of his right to take the assistance of his next friend while making the representation before the detaining authority, Central Government as well as the Advisory Board. Therefore, he submits that on these 3 grounds alone, the detention order dated 17.08.2015 stands vitiated and the petitioner/detenué deserves to be released from detention forthwith.

In support of his case, learned counsel for the petitioner has placed reliance in the case of *Akan Swargiary @ Young Sangma @ Yanki Sharlee v. Union of India & Ors* reported in 2002 (3) GLT 333, *Veineikim Haokip v. State of Manipur & Ors.* reported in 2012 (2) GLT 1021 and also in the case of *Nameirakpam Inaotomba Singh v. Union of India & Ors.* reported in 2007 (4) GLT 200.

4. Mr. K. Wotsa, learned Government Advocate appearing on behalf of the State respondents submits that the allegation of the petitioner that relevant documents were not given to him in order to allow him to make an effective representation is not correct. Learned Senior Government Advocate referring to Annexure-3 of the writ petition, which is the ground of detention, submits that in the enclosures therein, it is shown that all relevant documents pertaining to the case were enclosed including detail report of Police. He therefore, submits that all material documents were placed before the petitioner. The learned Government Advocate further submits that the petitioner/detenué belonged to a banned organisation in the State of Nagaland and the activities that he was taking was pre-judicial to

the interest of the Union as well as the State of Nagaland. It was in public interest that the detaining authority on consideration of all the relevant materials that were placed before him had taken the decision to place the petitioner/detenué under preventive detention. He also submits that after the detention order dated 17.08.2015 was passed, the same was placed before the State respondents without any delay and the State Government on consideration of all facts and circumstances of the case had given its approval on 24.08.2015. Therefore, considering the nature of the case, the detention order was passed and therefore, no interference is required in the impugned detention order dated 17.08.2015.

5. Mr. Yangerwati, learned C.G.C. appearing on behalf of the Union of India while adopting the submissions made by the learned Government Advocate also submits that on consideration of the detention order dated 17.08.2015 as well as the representation of the petitioner that was placed before the Central Government and also the comments of the State Government, the Central Government had taken a decision that there was nothing wrong in the detention order. Accordingly, the representation of the petitioner was rejected by W.T. message dated 23.09.2015.

6. I have considered the submissions forwarded by the learned counsel appearing for the parties.

7. With regard to the first contention of the learned counsel for the petitioner that the letter dated 14.08.2015 of the Commissioner of Police Dimapur, Nagaland/sponsoring authority addressed to the detaining authority was not given to the petitioner, this Court has verified the records. In the writ petition, the petitioner has made a categorical statements in paragraph 5 that on 26.08.2015 the petitioner/detenué was furnished with 11 documents in the Central Jail Dimapur including the letter dated 14.08.2015. Further, at paragraph 9 of the writ petition, it has also been stated that the copy of the report of the sponsoring authority along with its annexures were furnished to the detenué on 26.08.2015. Replying to the allegation made by the petitioner/detenué, the respondent No. 3 i.e. the detaining authority has stated at paragraph 10 of his affidavit-in-opposition that a copy of the proposal letter of the sponsoring authority was furnished to the petitioner/detenué along with the approval letter dated 24.8.2015 as per the own statements of the petitioner. This statement of the respondent No.3, who is the detaining authority amounts to admission to the allegation made by the petitioner that the letter dated 14.08.2015 of the sponsoring authority was furnished to the petitioner only in the Central Jail on 26.08.2015. Therefore, the submissions of the learned Sr. Government Advocate that all relevant documents pertaining to the case was furnished to the petitioner as indicated in the grounds of detention dated 17.08.2015 cannot be accepted.

Section 8 of the Act of 1980 provides that when a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances

and for reasons to be recorded in writing, not later than ten days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity to make representation against the order to the appropriate Government. In the present case, from a perusal of the statement made by the detaining authority in the affidavit filed, clearly indicates that the letter dated 14.08.2015 was furnished to the petitioner/detenué only on 26.08.2015. This would indicate that the same was furnished to the petitioner way beyond the prescribed period of 5 days, further, it appears no reasons have been recorded in writing as to why the letter dated 14.08.2015 was furnished to the petitioner only after expiry" of 5 days. In that view of the matter, this Court is also of the considered opinion that on this ground alone, the detention order dated 17.08.2015 stands vitiated.

In the case of Khudiram Das v. State of West Bengal reported in (1975) 2 SCC 81, the Hon''ble Supreme Court has held as under:-

"9. The Supreme Court has held that 'grounds' mean all the basic facts and materials which have been taken into consideration by the detaining authority in making the order of detention and on which, therefore, the order of detention is based. Nothing less than all the basic facts and materials which influenced the detaining authority in making the order of detention would suffice and meet the requirement of the Constitution."

8. The second contention of the learned counsel for the petitioner with regard to subjective satisfaction of the detaining authority that there was every likelihood of the petitioner/detenué being released on bail and in the event of his release is likely to indulge in pre-judicial activities has also been considered by this Court. The subjective satisfaction of the detaining authority that there was every likelihood of the detenué being released on bail and in the event of his release is likely to indulge in prejudicial activities has been explained by the respondent No.3 i.e. the detaining authority at paragraph-9 of his affidavit which is quoted herein below:-

"9. That with regard to the statements made in paragraph 8 of the writ petition is denied. Though the petitioner was in judicial custody at the time of passing the detention order, there was likelihood of him being released on bail in the criminal case in which he was arrested is in connection with Dimapur Sub-Urban P.S. Case No. 067/15. It may be mentioned herein that the offences for which he has been booked in the said case are under Section 302 of the IPC and Section 25(1B) of the Arms Act which are very grave and serious. However, since the rejection of bail by the Criminal Court is rare, the detenué has been detained under the provision of the National Security Act to prevent him from acting in prejudicial activities in the event of his release."

After considering the explanation given by the respondent No.3/detaining authority, this Court is of the considered opinion that the subjective satisfaction of the detaining authority was formed not on materials placed before him but the

same was done basing on extraneous consideration.

9. This Court has also considered the grounds of detention that has been annexed to the writ petition as Annexure-3. In the grounds of detention, no mention has been made that the petitioner could take the assistance of his next friend while making a representation before the Central Government, State Government and the Advisory Board.

In the case of Nameirakpam Inaotomba Singh v. Union of India & Ors., reported in 2007 (4) GLT 200, this Court has held as under:-

"14. The argument advanced by the parties has been duly considered. From the arguments of the learned counsel as well as from the law reports stated above and records available before the Court, this Court is of the opinion that the right to be heard by the Board is not an empty formality. But, to safeguard the right to life and liberty of a citizen and it is the duty of a detaining authority to inform regarding his all rights which includes rights to make representation to the said Board. Unless a detenu is informed that he is entitled to be represented before the advisory board with the assistance of a friend how he will ask for the same to appropriate authority, i.e. the State Government, Central Government and the advisory board. In the instant case, though it is mentioned in para 8 of the ground of detention that advisory board may call him for such information as it may deem necessary for him and if he desires to be heard in person, an arrangement may be made to produce him before the advisory board for the purpose. The said ground in para 8 does not indicate that the detenu has the right to take assistance of his friend before the advisory board to be represented himself before the advisory board with representation and/or the detenu as a right to make a representation before the advisory board. Non mentioning of such requirement as stated above may not vitiate the order of detention, but the valuable right of the detenu to make an effective representation to the State Government, Central Government and to the advisory board is curtailed, which is a right protected under Article 22(5) of the Constitution of India and Section 8 of the Act. As the words, "and shall afford in Article 22(5) have a positive content in the matter of personal liberty, the needs for observance of procedural safeguard, particularly in cases of deprivation of life and liberty is of prime importance to the body politic" as the Apex Court said and it is the duty of the detaining authority to inform or apprise the detenu regarding his right under Article 22(5) of the Constitution read with Section 8 of the Act including to make representation against the order of detention before the appropriate authority as well as to the advisory board. Mere right to be heard mentioned in the grounds of detention will be a mere formality unless it is mentioned that a detenu has a right to make representation to the appropriate Govt, including the advisory board with the assistance of his next friend and/or by way of filing representation. For fairness it is the duty of the detaining authority to inform the detenu regarding his aforesaid right and entitlement in his grounds of detention.

If we read conjointly paragraph 9 of Anil Vats(supra) and para 18 of the case of

Wasi Uddin Ahmed (supra), it can be easily presumed that a detenu has the right to be heard by the advisory board either by filing representation in person with the assistance of his next friend and in the instant case though in the ground no.8 of the detention it is mentioned that he has the right of being heard by the board but the same is not enough as the word "right to be heard" does not exclude the right of the detenu to file a representation before the board and while the Apex Court decided that the detenu is entitled to get the assistance of his next friend before the board. The detenu has to be informed by detaining authority that he has right to make a representation as right to be heard include right to representation and hearing in person and also he is entitled to get assistance of his friend before the board at the time when the detenu is to be heard, which is not mentioned in the order and for such non mentioning of the right of the detenu, this Court is of the considered opinion that the procedural safeguards, as envisaged under Article 22(5) was not satisfied in this case and as a result, the continued detention of the detenu would be rendered illegal. And in the preventive detention, the right to representation and consideration thereof by the appropriate authority at earliest time and entitlement of next friend of the detenu for representing him before the Board as a procedural safeguard and any infraction of law relating to such procedural safeguard vitiates the order of detention and the subsequent action would render the order of detention illegal."

10. In the facts and circumstances of the case, this Court is of the considered opinion that the detention of the petitioner made by the detention order dated 17.08.2015 stands vitiated and therefore further detention of the petitioner/detenu is not necessary. Accordingly, the impugned detention order dated 17.08.2015 is set aside and quashed along with all other consequential orders.

The detenu namely, Shri. N. Akato Chishi shall be released from custody forthwith unless he is wanted for some other case.

11. Writ petition is allowed.

12. No cost.