

(2015) 03 GAU CK 0030
In the Gauhati High Court
Case No : WP (Criminal) No. 4(K) of 2015

Nagaho Ayemi

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 31-03-2015

Acts Referred:

Constitution of India, 1950 — Article 22(5)
Criminal Procedure Code, 1973 (CrPC) — Section 161, 162(1)
Explosive Substances Act, 1908 — Section 5
National Security Act, 1980 — Section 3
Penal Code, 1860 (IPC) — Section 120 (B), 463

Citation : (2015) CriLJ 3191 : (2015) 2 GLT 437 : (2015) 4 RCR(Criminal) 386

Hon'ble Judges : Lanusungkum Jamir, J

Bench : Single Bench

Advocate : Imti Longjem, S.M. Ozukum, Esther and Vinitoli, for the Appellant;
K. Wotsa, Sr. GA, Advocates for the Respondent

Final Decision : Allowed

Judgement

Lanusungkum Jamir, J.—Heard Mr. Imti Longjem, learned counsel for the petitioner/detenué as well as Mr. K. Wotsa, learned Senior Government Advocate appearing for the State respondents. None appears for the respondent No. 5 i.e. Union of India. The petitioner/detenué was arrested on 26.12.2014 and was implicated in connection with Dimapur East P.S. Case No. 269/14 under Sections 463/120 (B) IPC read with Section 5 of the Explosive Substance Act. Thereafter, the District Magistrate, Dimapur passed the detention order dated 04.01.2015, detaining the petitioner/detenué under Sub-section (1) and (2) of Section 3 of the National Security Act, 1980 and was kept in the Central Jail, Dimapur. Along with the detention order dated 04.01.2015, the petitioner/detenué was also furnished with the grounds of detention, schedule attached thereto, letter dated 04.01.2015 informing the petitioner/detenué to make representation to the appropriate authority and also the letter dated 04.01.2015 addressed to the Principal Secretary, Home, Nagaland, Kohimaby the District Magistrate, Dimapur

for approval of the detention of the petitioner/detenué. The said documents were served on the petitioner/detenué on 06.01.2015 while he was under police remand. Thereafter, the petitioner submitted representation dated 16.01.2015 against his detention and the said representation was forwarded by the Jail Authority by forwarding letter dated 17.01.2015 to the Central Government along with copy endorsed to the State Government. Thereafter, by an order dated 04.02.2015, the representation submitted by the petitioner/detenué was not acceded to by the State Government.

2. Mr. Imti Longjem, learned counsel for the petitioner/detenué submits that no affidavit has been filed by the District Magistrate explaining his subjective satisfaction before this Court. He submits that only one affidavit has been filed by the Chief Secretary on behalf of all the respondents wherein, he has tried to explain the subjective satisfaction of the District Magistrate. He, therefore, submits that the affidavit of the Chief Secretary can in no way explain the subjective satisfaction of the District Magistrate and the same is also not permissible in law. It is also submitted that the basis of the subjective satisfaction of the District Magistrate is based wholly on the statements made by the petitioner/detenué before the police under Section 161 Cr.P.C. This could not have formed the basis for the subjective satisfaction on the part of the District Magistrate and therefore, on this ground also, the impugned detention order deserves to be set aside and quashed. Thirdly; the learned counsel for the petitioner/detenué submits that the District Magistrate also formed an opinion that the petitioner/detenué is presently under judicial custody but there is likelihood of being released on bail and in the event of his release, he is likely to indulge in similar prejudicial activities unless an effective alternative measures is called for. Such an opinion was taken by the Detaining Authority without any material basis and the same is therefore not maintainable in law. Lastly, the learned counsel for me petitioner/detenué submits that the petitioner/detenué has not been informed about his right to be represented by his next friend which has become a requirement in law.

3. Mr. K. Wotsa, learned Senior Government Advocate appearing for the State respondents submits that all the relevant documents pertaining to the case of the petitioner/detenué were placed before the detaining authority and on careful examination of the case records, the detaining authority has found a fit case to book the petitioner/detenué under the National Security Act and considering the prejudicial activities of the petitioner/detenué, he has been kept under preventive detention in accordance with the established procedure as warranted by the law. He also submits that there is no provision under the National Security Act where a detenué has the right of assistance of a friend before the advisory board. The advisory board has also given a personal hearing to the petitioner/detenué and after coming to the conclusion that there is sufficient cause for detaining the petitioner/detenué, the confirmation order, confirming the detention of the petitioner/detenué was issued on 17-02-2015. In the facts and circumstances of the case, he submits that there has been no violation of the

requirements as provided under the National Security Act and therefore, it is a fit case where the detention order of the petitioner/detenu should not be interfered with and the petition should be dismissed.

4. I have heard the learned counsel appearing for the parties.

5. This Court in a catena of cases has held that the subjective satisfaction of the detaining authority has to be explained by the detaining authority himself. In the present case in hand, no affidavit has been filed by the detaining authority and it is only the Chief Secretary that has filed the affidavit trying to explain the subjective satisfaction of the detaining authority. This is not permissible in law and the same view has been taken by the Division Bench of this Court in the case of *Ananta Gogoi v. Union of India and Ors.*, reported in 2009 (4) GIT216.

6. In the case of *Smt. Pebam Ningol Mikoi Devi Vs. State of Manipur and Others*, (2010) 10 JT 456(1) : (2010) 10 SCALE 248 : (2010) 9 SCC 618 : (2010) 10 UJ 5119 , the Hon'ble Supreme Court has held as under:--

"30. Insofar as the documents on which reliance is placed, in our opinion, none of these documents provide any reasonable basis for passing the detention order. The primary reliance has been on the accused's own statement made to an investigating officer. This cannot be said to be sufficient to form the subjective satisfaction of the detaining authority. Statements under Section 161, Code of Criminal Procedure, 1973, (hereinafter Cr.P.C.) cannot be taken as sufficient grounds in the absence of any supportive or corroborating grounds. Section 161 statements are not considered substantive evidence, but can only be used to contradict the witness in the course or a trial. The same is clear from the wording of Section 162(1) Cr.P.C. and has been so held time and again by this Court."

Again, in the case of *Haobijam Kenjit Singh @ Kennedy v. State of Manipur and Ors.* reported in 2006 (Suppl.) 1 GUT 577, it has been held as under:--

"In the present case, if we may reiterate, there was no materials available to the detaining authority or considered by the detaining authority for coming to the conclusion, which it did, that the detenu is "likely to be released on bail in the near future". The satisfaction reached by an authority that a person is likely to be released on bail may be regarded that a person is likely to be released on bail may be regarded as his subjective satisfaction, yet the fact remains that in order to reach such subjective satisfaction, the authority concerned must consider the materials placed before it objectively. In the case in hand, there was no room for reaching subjective satisfaction that the detenu was "likely to be released on bail in the near future" inasmuch as mere was no material placed before the detaining authority to enable it to objectively consider me same and arrive at the conclusion, which it has reached, namely, that the detenu is "likely to be released on bail in the near future." If there were any material, which had impelled the detaining authority to form the opinion that the detenu was "likely to be released on bail in the near future", such material ought to have been furnished to the detenu and also to this Court. Neither any such material was

furnished to the petitioner nor has any such material been made available to this Court. There can, therefore, be no escape from conclusion there was no material available to corroborate or support the detaining authority's conclusion that the detainee was "likely to be released on bail in the near future." Situated thus, we are constrained to take the view that there was no material available before the detaining authority to come to the conclusion, which it has reached, namely, that the detainee is "likely to be released on bail in the near future." In the absence of any material pointing that the detainee was "likely to be released on bail in the near future", no order of preventive detention could have been made against the petitioner."

Further, in the case of *Mrs. Veineikim Haokip Vs. State of Manipur and Others*, (2012) CriLJ 1336, a Division Bench of this Court has also held as under:--

"18. It is fairly well settled law that legality or otherwise of the order is to be decided by looking into the very words mentioned in the order itself and not by basing on the affidavit of the concerned authority which is filed when the order itself is questioned in the judicial proceedings or in writ proceeding. Regarding the settled position of law, we need not burden ourselves by referring to a number of decisions of the Apex Court. It would be sufficed to refer to decisions of the Apex Court (Constitution Bench): (1) *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, AIR 1978 SC 851 : (1978) 1 SCC 405 : (1978) 2 SCR 272 wherein the Apex Court held that:

"when a statutory functionary makes an order based on the certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, orders bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."

And (2) *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, AIR 1952 SC 16 : (1952) 1 SCR 135

19. Since it being the settled position of law we are afraid to accept the submission of Mr. Reisang, learned GA that there are materials for coming to the subjective satisfaction of the detaining authority that the petitioner is likely to be released on bail and it is based on materials that the petitioner-detainee is a lady who is suffering from some ailments."

7. In the present case in hand, what has been noticed is that the detaining authority has formed his subjective satisfaction only on the basis of the police report and on the statement made by the petitioner/detainee before the police authority. Following the ratio laid down by the Supreme Court in the case of *Prebam Ningol Mikoi Devi* (supra), and also in the case of *Haobijam Kenjit Singh* (supra), this Court is of the considered opinion that the detaining authority could not have formed his subjective satisfaction basing only on the statement made by the petitioner/detainee before the police and that the petitioner/detainee was

likely to be released on bail without any cogent materials before him.

8. With regard to the last submission made by the learned counsel for the petitioner/detenu that the petitioner/detenu has not been informed of his right of having the assistance of his next friend, a Division Bench of this Court in the case of Nameirakpam Inaotomba Singh Vs. Union of India (UOI) and Others, (2007) 4 GLT 200 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 right to be heard by the Board is not an empty formality. But, to safeguard the right of life and liberty of a citizen and it is the duty of a detaining authority to inform regarding his all the rights which includes rights to make representation to the said Board. Unless a detenu is informed that he will ask for the same to the 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 from 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 Govt., Central Govt. and to the advisory board is curtailed, which is a right protected under Art. 22(5) of the Act. As the words," and shall afford in Art. 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 Art. 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 the case 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 or to be heard in person with the

assistance of friend and in the instant case though in the ground No. 8 of 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 safeguard, as envisaged under Art. 22(5) was not satisfied in the 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 detneu 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".

A mere reading of the letter dated 04.01.2015 clearly indicates that the petitioner/detenu was not informed of his right of having the assistance of his next friend and that he was only informed of his right to make representation to the appropriate authority. This Court is therefore of the opinion that the continued detention of the petitioner/detenu is illegal and that the submission of the learned Senior Government Advocate that there is no provision in the Act that the petitioner/detenu should be informed of his right of having the assistance of his next friend is not acceptable.

9. After considering the settled position of law, this Court is of the considered opinion that the impugned detention order dated 04.01.2015 stands vitiated and accordingly the same is set aside and quashed. Consequently, all other consequential order(s) are also set aside and quashed.

10. The petitioner/detneue, namely, Nagaho Ayemi shall be set at liberty forthwith unless he is wanted in some other cases.

11. Petition is allowed. No costs.