
(2008) 01 GAU CK 0074
In the Gauhati High Court

Najir Khan

APPELLANT

Vs

State of Manipur and Others

RESPONDENT

Date of Decision : 22-01-2008

Acts Referred:

Constitution of India, 1950 — Article 22, 226
Criminal Procedure Code, 1973 (CrPC) — Section 167
National Security Act, 1980 — Section 5A
Unlawful Activities (Prevention) Act, 1967 — Section 20

Citation : (2008) 2 GLT 779

Hon'ble Judges : M.B.K. Singh, J;B.D. Agarwal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.D. Agarwal, J.—The writ petitioner has been detained under National Security Act, 1980 vide order No. CRIL/NSA/No. 32 of 2007 dated 07.08.2007 issued by the District Magistrate, Imphal West, Manipur. By way of filing this writ petition under Article 226 of the Constitution of India, the detenu is challenging the aforesaid detention order.

2. We have heard Shri S. Rajeetchandra, learned Counsel for the petitioner and Shri R.S. Reisang learned Addl. Govt. Advocate for the State respondents (R-1, 2 and 3). The Union of India (R-4) was represented by Shri N. Ibotombi Singh, learned CGSC. We have also perused the impugned detention order, grounds of detention and other documents filed with the writ petition as well as the relevant files of the detention of the petitioner.

3. Shorn of the details, the facts of the case in brief are as follows:

The petitioner was initially arrested on 01.08.2007 in connection with Mayang Imphal Police Station Case No. 72(8) 2007 u/s 20 of the Unlawful Activities (Prevention) Act. While the petitioner was in police custody, he was brought under purview of the National Security Act vide impugned order dated 07.08.2007. It was followed by supply of grounds of detention on 10.08.2007

and thereafter, the detention order was approved on 18.08.2007 by the Government of Manipur. After such approval, the detenu submitted his representation to the State Government as well as to the Government of India on 23.08.2007. On the same day, another representation was submitted to the District Magistrate, Imphal West. The District Magistrate as well as State of Manipur considered and rejected the representations on 25.08.2007 and 27.08.2007 respectively. Thereafter, a copy of the joint representation was forwarded to the Central Government vide memo No. 17(1)1145/2007-H on 27.08.2007. The representation received the concerned officer in the Home Ministry of Central Government on 10.09.2007. Thereafter, the State Government was requested to send their para-wise comments through WT Message dated 10.09.2007. The State Government furnished their views vide letter dated 15.09.2007 whereupon the representation was considered by the Central Government and rejected the same on "24.09.2007. However, before the representation could be considered by the Central Government, this writ petition was filed on 01.09.2007.

4. The detention has been basically assailed on the following grounds:

- (i) that there was no imminent possibility of release of the detenu on bail;
- (ii) that the ground of detention mentioned in the order dated 07.08.2007 is in variance with the materials and grounds shown by the District Magistrate for detention; and
- (iii) that there was inordinate delay in considering the representation.

5. Point No. (I) -- Likelihood of release on bail:

Learned Counsel for the petitioner submitted that the impugned order of detention is bad in law inasmuch as the detaining authority had no material to draw a presumption that the petitioner was likely to be released on bail either immediately or in near future. According to the learned Counsel, on the date of issuing the preventive detention, the accused was still in police custody and no bail application till then was filed by him and as such, the satisfaction of the District Magistrate that the accused was likely to be released on bail is not supported by any material or evidence.

6. Per contra, Shri R.S. Reisang, learned Addl. Govt. Advocate submitted that it is the established principle of law that Court cannot substitute its own opinion about the possibility of release of a person from judicial custody and any such subjective satisfaction of the detaining authority cannot be interfered with. To bring home his submission, learned Govt. Advocate cited the decisions of Hon'ble Apex Court rendered in the case of Commissioner of Police and Ors. v. Smt. C. Anita AIR 2004 SC 4423; Senthamilselvi v. State of Tamil Nadu and Anr. reported in (2006) 7 SBR 385 and A. Geeta v. State of Tamil Nadu and Anr. (2006) 9 SBR 303 . Besides this, learned Govt. Advocate also submitted that the judgments of Kamarunnissa and Others Vs. Union of India and another, and T.V.

Saravanan @ S.A.R. Prasana Venkatachaariar Chaturvedi Vs. State through Secretary and Another, cited on behalf of the petitioner also support the view that subjective satisfaction of the detaining authority should not ordinarily be interfered with.

7. In the case of Ramesh Yadav Vs. District Magistrate, Etah and Others, as well as in the case of Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others, , the Hon''ble Supreme Court took a view that before forming an opinion that the accused was likely to be released on bail, the detaining authority could have opposed the bail application as well as the bail order could have also been challenged before any higher Court. Since these steps were not taken by the detaining authority, the detention orders were declared unsustainable in law. This principle of law was again approved in the case of Dharmendra Suganchand Chelawat and another Vs. Union of India and others, . In this case also, the detenu was released holding that the view of the detaining authority that the accused was likely to be released on bail was not supported by any material. In this cited authority, the bail application of the accused was rejected only a few days prior to the passing of the order of detention and in the opinion of the Hon''ble Apex Court, the ground of detention did not show that the detaining authority apprehended that further remand of the accused would not be granted by the Court.

8. The view taken by the Hon''ble Apex Court in the case of Ramesh Yadav and Binod Singh (supra) that proper course for the detaining authority, before taking a view that the accused was likely to be released on bail in near future, was to oppose the bail application or challenge the bail order before higher Court has somehow been diluted and negated in the case of Kamrunnissa (supra).

9. In the case of Kamrunnissa the legal principle has been discussed elaborately and the Hon''ble Supreme Court has clarified the theory of likelihood of release of the accused on bail as a ground for preventive detention. As per their Lordships, a person in custody can be put under preventive detention validly if (i) the authority passing the order is aware of the fact that any such person is actually in custody; (ii) if the detaining authority has reason to believe, on the basis of reliable materials placed before him, that (a) there is a real possibility of his being released on bail and (b) that on being so released, he would in all probability would indulge in prejudicial activity and (iii) if it is felt essential to detain such accused to prevent him from doing so. The Hon''ble Apex Court has held that if the authority passes the detention order after recording his satisfaction in this behalf, such order cannot be struck down on the ground that proper course for the authority was to oppose the bail or to question the bail order before higher Court.

10. The law expounded by the Hon''ble Supreme Court in the case of Kamrunnissa (supra) holds the field till date. Without multiplying authorities on this point, we would like to quote one passage from the judgment of Hon''ble Apex Court rendered in the case of Senthamilselvi (supra), which runs as below:

10. It was also submitted that since the detenu had not filed any bail application, the detaining authority could not have inferred that there was possibility of his being released on bail. Strong reliance is placed on several decisions of this Court. It has to be noted that whether prayer for bail would be accepted depends on circumstances of each case and no hard and fast rule can be applied. The only requirement is that the detaining authority should be aware that the detenu is already in custody and is likely to be released on bail. The conclusion that the detenu may be released on bail cannot be ipse dixit of the detaining authority. On the basis of materials before him, the detaining authority came to the conclusion that there is likelihood of detenu being released on bail. That is his subjective satisfaction based on materials. Normally, such satisfaction is not to be interfered with. On the facts of the case, the detaining authority has indicated as to why he was of the opinion that there is likelihood of detenu being released on bail. It has been clearly stated that in similar cases orders granting bail are passed by various Courts. Appellant has not disputed correctness of this statement. Strong reliance was placed on *Rajesh Gulati Vs. Govt. of N.C.T. of Delhi and Another*, . The factual scenario in that case was entirely different. In fact, five bail applications filed had been already rejected. In that background this Court observed that it was not "normal" case. The High Court was justified in rejecting the stand of the appellant.

11. What crystallizes from the aforesaid authorities is that the detaining authority's subjective satisfaction should not ordinarily be questioned. At the same time, if the inference of the detaining authority that there is imminent possibility of the accused coming out on bail is ipse dixit of the detaining authority, unsupported by any material, whatsoever, the detention order can be struck down.

12. Returning back to the facts of the present case, we have already noted earlier that the order of preventive detention was passed within a week of arrest of the detenu under Unlawful Activities (Prevention) Act. The detention order also speaks that on the relevant day, the accused was still in police custody. This fact has been reiterated by the State respondents. In the affidavit of the respondent No. 2, it has been stated that the accused was remanded to police custody till 08.08.2007. The relevant statements made in the affidavit are reproduced below:

4. That regarding the averment made in para No. 5 of the writ petition, it is submitted that the petitioner/detenu was arrested on 01.08.2007 at around 4.45 a.m. by a column of 9 Section A.R. 22 Maratha Light Infantry led by Nb/Sub J.C. No. 459267, Kazi Sardar Mahamad from Irong Makha Leikai and recovered one 9 mm pistol with 2(two) live rounds Chinese made (Norinco) from his possession. Thereafter, he was handed over to the Mayang Imphal Police Station on 01.08.2007 at 3.30 p.m. with a written report of the seized articles. On the strength of the said report, the O.C. Mayang Imphal P.S. registered a regular case under FIR No. 72 (8) 2007 u/s 20 UA(P) Act and investigated into the case. During the course of the investigation, he was arrested in connection with the

said FIR case and remanded to Police custody till 08.08.2007.

13. At this stage, it may be mentioned here that as per State Amendment of Section 167 of the Code of Criminal Procedure, an accused could have been detained in judicial custody for a period of 180 days, for the offences alleged in the criminal case. Hence, the view taken by the District Magistrate that there was every possibility of the accused being released on bail in near future does not hold much water. We are also taking this view on the premise that no bail application till then was filed by the accused. Besides this, the impugned order of detention speaks about a "police report" but no such police report was made a part of the grounds of detention nor any such police report has been filed by the State along with its affidavit-in-opposition.

14. In the case of *Rajesh Gulati Vs. Govt. of N.C.T. of Delhi and Another*, , the Hon''ble Supreme Court has emphasized the necessity to ensure compliance of the procedural safeguards provided to a detenu in the following words:

We are of the view that the High Court erred in accepting the respondents' submissions and rejecting the appellant's writ application. This Court has repeatedly held that the law permitting a preventive detention must be meticulously followed both substantively and procedurally by the detaining authority.

15. Earlier to that also, in the case of *Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others*, , the Hon''ble Supreme Court made it clear in no uncertain words that the preventive detention should not be equated with detention under penal statutes. Their Lordships have held that since preventive detention infringes fundamental rights and personal liberty of a detenu, the detaining authorities have an obligation to adhere to the safeguards provided under such preventive law as well as under Article 22 of the Constitution. Their Lordships have further held that in case of violation of procedural safeguards by the detaining authority, the obligation to enforce the fundamental rights of the detenu shifts upon the Courts and any such untenable order of preventive detention has to be interfered with, oblivious to its consequences.

16. The valued observations of the Hon''ble Apex Court can be profitably taken note of which are as under:

...We are not unmindful of the harmful consequences of the activities in which the detenus are to be alleged to be involved. But while discharging our constitutional obligation to enforce the liberty, we cannot allow ourselves to be influenced by these considerations. It has been said that history of liberty is the history of procedural safeguards. The Framers of the Constitution, being aware that preventive detention involves a serious encroachment on the right to personal liberty, took care to incorporate, in Clauses (4) and (5) of Article 22, certain minimum safeguards for the protection of persons sought to be preventively detained. These safeguards are required to be zealously watched and enforced by the Court". Their rigour cannot be modulated on the basis of the

nature of the activities of a particular person. We would, in this context, reiterate what was said earlier by this Court while rejecting a similar submission:

May be that the detenu is a smuggler whose tribe (and how their numbers increase) deserves no sympathy since its activities have paralysed the Indian economy. But the laws of preventive detention afford only a modicum of safeguards to persons detained under them and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenus [See *Rattan Singh v. State of Punjab*]:

17. In the case before us, the subjective satisfaction of the District Magistrate that the accused was likely to be released on bail in near future is nothing but his ipse dixit satisfaction, sans any material. Hence, the detention order can be set aside on this count itself.

18. Point No. (II) -- Discrepancy in the grounds of detention:

Shri Rajeetchandra, learned Counsel for the petitioner submitted that the petitioner was detained under National Security Act on the ground that he is acting in a manner prejudicial to the maintenance of public order whereas in the grounds of detention, the detaining authority has improved the grounds by adding that the accused was also acting in a manner prejudicial to the security of the State. According to the learned Counsel, this amounts to non-application of mind. This submission was made on the basis of the judgment of the Hon'ble Supreme Court rendered in the case of *G.M. Shah Vs. State of Jammu and Kashmir*, . On the other hand, Shri R.S. Reisang, learned Addl. Govt. Advocate submitted that the detention order cannot be declared unsustainable in law even if there is overlapping of grounds. In support of this submission, learned Counsel relied upon the judgment of Hon'ble Apex Court rendered in the case of *Commissioner of Police and Ors. v. Smt. C. Anita* AIR 2004 SC 4423.

19. We find that the authority cited on behalf of the petitioner i.e. the case of *G.M. Shah* (supra) stems out of a preventive detention law from the State of Jammu & Kashmir, whereas the impugned order has been passed under National Security Act, 1980. This Central law came to be amended in the year 1984 inserting Section 5-A. Under this amended provision, a person can be detained on more than one ground, which are mutually severable. The relevant portion of Section 5-A is hereby extracted for ready reference:

5-A. Grounds of detention severable--

Where a person has been detained in pursuance of an order of detention whether made before or after the commencement of the National Security (Second Amendment) Act, 1981 u/s 3 which has been made on to or more grounds, such order of detention shall deemed two have been made separately on each of such grounds and accordingly--

(a) such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are--

- (i) vague;
 - (ii) non-existent;
 - (iii) not relevant;
 - (iv) not connected or not proximately connected with such person; or
 - (v) invalid for any other reason whatsoever, and it is not, therefore, possible to hold that the Government or Officer marking such order would have been satisfied as provided in Section 3 with reference to the ground or grounds and made the order of detention;
- (b) **** *
**** *

20. In our opinion Section 5-A has been introduced to clear the confusion about the consequences of detaining a person on more than one ground. Section 5-A has also cleared the obstacles in defending the preventive detention even if one of the grounds is found to be untenable on facts on the doctrine of "severability."

21. After going through the nature of activities in which the petitioner was found involved, it cannot be said that he is not a threat to the security of the State. Even for a moment it is presumed that this additional ground, taken by the District Magistrate to justify the detention of the petitioner, is left out of consideration the ground mentioned in the order dated 07.08.2007 is still sustainable on facts. It is the established principle of law that Courts cannot substitute its own opinion for that of the detaining authority when the grounds of detention are precise, pertinent, proximate and relevant. Hence, we do not see any reason to set aside the detention on this ground.

22. Point No. (III) - Delay in consideration of the representation:

It was also contended by the learned Counsel for the petitioner that the representation was submitted to the Central Government on 23.08.2007, which came to be rejected on 24.09.2007 i.e. nearly after one month. From the affidavits of the respondents, we find that the representation was forwarded to the Central Government on the very same day on which the representation was considered and rejected by the State. In our considered opinion, no fault can be found on the State to withhold the representation till the same is considered by the State, more particularly, when it was a joint representation. Besides this, forwarding of the representation within a week cannot be said to be grossly belated. Similarly, the time taken in disposal of the representation by the Central Government has been well explained in their affidavit. It was due to want of para-wise comments and also due to intervening holidays. Hence, this ground is also not sustainable on facts.

23. In view of the findings recorded hereinabove, we hold that although the detention order is not liable to be interfered with on the grounds like delay in consideration of the representation or overlapping grounds of detention, the detention order is vitiated in law due to non-application of mind for taking the

petitioner under preventive law at a time when the accused was in police custody. Besides this, there are no materials to support the view taken by the detaining authority that he was likely to be released on bail.

24. In the result, the writ petition succeeds. It is ordered that the writ petitioner, namely, Md. Najir Khan, shall be set at liberty forthwith, unless wanted in any other case.

25. With the aforesaid direction, the writ petition stands disposed of.