

(2007) 08 GAU CK 0005
In the Gauhati High Court
Case No : w.r(crl) no. 7 a/2007

Nameirakpam Inaotomba Singh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 02-08-2007

Acts Referred:

Constitution of India, 1950 — Article 22(5), 22(5)
National Security Act, 1980 — Section 8, 8

Citation : (2008) 2 GLR 672

Hon'ble Judges : K.Meruno, J and U.B.Saha, J

Bench : Division Bench

Advocate : M.I.Sharma, N.Ibotombi Singh, Advocates appearing for Parties

Judgement

1. Heard Mr. M.I. Sharma learned counsel appearing for the petitioner, Mr. Th. Ibohal, learned Addl. G.A. for the State respondents 2 to 3 and Mr. N. Ibotombi, learned CGC appearing for the respondent No. 1.

2. This is an application filed by the petitioner the brother of detainee, namely, Nameirakpam Gandhi Singh @ Robindro @ Inaocha @ Pakhanglakpa of Nambol Kongkham Awang Leikai, Bishnupur District, challenging the legality of the detention of the detainee, who has been detained by an order of the District Magistrate, Imphal West in exercise of his power under subsection (3) of section 3 of the National Security Act, 1980 ("the Act") issued by the District Magistrate, Imphal West on 1592006 (AnnexureA/1) while the aforesaid detainee was in police custody in connection with FIR No. 202(9)/06 under section 17/20 UA(P)A Act, 25(1B) Act 5, as the detaining authority was satisfied that the detainee was likely to be released on bail in near future.

3. State approved and confirmed the aforesaid order of detention vide order No. 17(1)/1054/200611, dated 25.9.2006 and Order No. 17(1)/1054/0611, dated 20.10.2006 respectively.

4. By this writ petition, petitioner assails the order of detention of his brother,

detenue and prayed for quashing the order of detention dated 15.9.2006 (AnnexureA/1) as well as the order of approval and confirmation and also to release his brother, detenue, on the grounds that (1) the detenue was not given a chance of being assisted by his next friend/local friend before the Advisory Board though he prayed for and (2) nonconsideration of his representation for a period of 4 months 8 days by the Central Government along with other grounds.

5. Pleaded case of the petitioner is that the detenue, namely, Nameirakpam Gandhi Singh @ Robindro @ Inaocha @ Pakhanglakpa was apprehended by 4th Assam Rifles and handed over to OC Imphal Police Station and registered a case vide FIR No, 202(9)/06 under section 17/20 UA(P)A. Act, 25UB) Act, 5 Expl. Subs. Act. Thereafter, the detenue was arrested as a formal arrest from the court of Chief Judicial Magistrate, Chandel on 13.9.2006 and the detenue was kept in the said Police Station under FIR No, 989(8)/94, IPC, under section 121 121A/302, IPC, 25(1B)A. Act and 3(2)(ii) TDA(P) Act and detenu, was remanded to judicial custody on 14.9.2006. He was also again arrested under so called formal arrest by the Molcham police static] under FIR No. 1(4)/2001 Molcham PS. under section 186/451/436, IPC 13 UA(P)Act, 25(1B)AAAct and 3 Expl. Subs. Act. The Superintendent of Police, Imphal West District, Manipur while the detenue was in police custody sent proposal to the District Magistrate/Imphal West, Manipu stating that the detenue may be detained under the provision i N.S.A.,1980. In pursuance to the proposal aforesaid, the stal respondent accordingly passed an order vide No. Cril/National Security Act/No. 48 of 2006, dated 15th September, 2006 to detain the detem under subsection (3) of section 3 read with section 3(2) of the N.S.A.,1980 while the detenue was in police custody.

6. The State filed counter affidavit stating that the detenue joined UNLF in November 1992 and he is a trained hand in toot & Arms drill, handling of different arms, jungle training etc. and he played important role in carrying out many crimes and as such prayer for quashing the detention order should not be allowed.

In the affidavit inopposition filed by the respondent No. 2, State of Manipur it is stated, among others, that the detenue is not entitled to appear before the Board of National Security Act through a lawyer or a legal practitioner. The representation of the detenue dated 9.10.2006, which was received by the Government on 11.10.2006, was considered under due process of law and application of mind and result thereof was communicated to the detenue on 12.10.2006 and the detenue received the same on 13.10.2006 and the representation filed by the detenue addressed to the Secretary to the Government of India, Ministry of Home Affairs which was forwarded to the Central Government on 12.10.2006 was considered by the Ministry and result thereof was communicated to the detenue on 23.2.2007. The detaining authority, District Magistrate, Imphal West also filed his affidavit inopposition wherein he stated that the detenue along with 28 cadres of UNLF were given training P.T.

foot. In the said affidavit, the detaining authority contends that the detainee is the active member of the said banned organization, UNLF and he had been acting in a manner which is prejudicial to the security of the State and maintenance of public order, for which his detention was extremely necessary so as to prevent him from doing such prejudicial activities.

7. Mr. Sharma, learned counsel for the petitioner, in support of the contention in the writ petition, submits that he will not press other grounds except the aforesaid two grounds and also he contends that though the order of detention was issued on 15.9.2006, but the ground of detention was furnished to the detainee, brother of the petitioner, on 19.9.2006 on which date the same was issued and in para 7 of the ground of detention the detainee was informed that he has the right to make representation to the Government of Manipur as well as to the Central Government against the order of detention if he wants to submit such a representation and that has to be made within 3 weeks from the date of detention and further he was also informed that he has the right to make representation to the detaining authority within 12 days from the date of detention or till the order is approved by the State Government whichever is earlier and the detainee accordingly made a representation within 3 weeks before the Chief Secretary of the State of Manipur for providing him a next friend at the time of hearing him by the Advisory Board, which was denied, which itself is violative of his right as he is entitled under article 22(5) of the Constitution of India read with section 8 of the Act. He also contends that though in the grounds it is informed to the detainee that he has the right to make a representation to the appropriate Government, i.e. Government of Manipur as well as to the Central Government within the 3 weeks from the date of detention, but the detainee was produced before the Advisory Board before completion of the 3 weeks from the date of detention and as a result he could not make any representation to the appropriate authority before his production to the Advisory Board. As he has right to file representation even on the last day of completion of 3 weeks and the Advisory Board failed to give any opportunity to consider his representation at the time of hearing him and he also could not express his grievance to the Board as he was not provided his next friend, which he is entitled in accordance with law. In support of the ground No. 2, Mr. Sharma, submits that though the detainee made representation to the Central Government on 9.10.2006 through the State Government, the Central Government did not consider the representation of the detainee for about 4 months and 8 days though ultimately the Central Government rejected the representation on 20.2.2007 [AnnexureB/1 to the Masc. WP(C) No. 3 of 2007] arising out of the present writ petition(CrI) which was communicated to the detainee vide letter No. 11/5023/78/2006NSA, dated 23.2.2007 and the same received by him on 8.3.2007.

8. He also contends that the Central Government did not file any counter affidavit before this court denying the statements made in the petition to the effect that the Central Government did not consider the representation of the

detenue for about 4 months by way of filing counter affidavit meaning thereby the Central Government admitted the contention of the petitioner, in the writ petition so far the delay in consideration of the representation is concerned and for nonconsideration of the representation of the detenue for about 4 months 8 days is itself infringement of the right of the detenue under article 22(5) of the Constitution of India read with section 8 of the Act and as a result the said action of the Central Government vitiates further detention of the detenue and as such the detention order is liable to be set aside for such infraction of law.

9. In support of his contention regarding providing of next friend to the detenue Mr. Sharma relies upon the decision of the case of Anil Vats v. Union of India & Ors., AIR 1991 SC 979, particularly para 9 of the said judgment wherein the Apex Court said, "we do not see any valid reason why the detenue should have been refused the assistance of a friend."

10. Per contra Mr. Ibohal, learned Addl. G.A. producing the records, submits that the detenue was not denied from providing next friend as asked for, rather the detenue himself fails to take the help of the next friend as he made representation before the Chief Secretary after sitting of the Board. Therefore, according to him, that cannot be violation of his right as protected by the provisions of Constitution as well as by the Act. Mr. Ibohal also placing the report of the Advisory Board submits that the detenue was heard in person by the Board and he did not make any grievance at the time of proceeding of the board and also he did not request the board to provide him next friend as he requires now and so he cannot raise the said grounds of nonproviding of next friend before the court by writ petition. Regarding non consideration of the representation of the detenue by the Central Government Mr. Ibohal submits that the State respondents sent the representation of the detenue to the Central Government in time. He further contends that there is no infraction of law in the instant case so far detention of the detenue is concerned. Therefore, it is not the case where court should interfere with the detention as well as the confirmation order.

11. Mr. Ibohal also submits that the case of Anil Vats (supra] has no application in the present case as in that case also the detenue applied for next friend before he was produced before the Board. In the said case the Apex Court said that to get the benefit of next friend the detenue has to approach to the appropriate authority in time. In the instant case, as the detenue did not request the authority for next friend in time, his request could not be acceded to by the appropriate authority.

12. Mr. Ibotombi, CGC, on query by this court, very fairly submits that detaining authority is bound to inform a detenue regarding his right to make representation against the detention order to the appropriate Government under article 22(5) and section 8 of the Act and also a right of being heard before the Advisory Board. In the instant case, the detenue was informed about his right in time. He also submits that the detenue was well aware regarding his right to be

heard by the Board as well as of his next friend which will be evident from his representation to the Chief Secretary of the State (Annexure 10 to the writ petition) wherein he was asked for providing his next friend before the Board. Regarding nonconsideration of the representation of the detainee by the Central Government, Mr. Ibotombi submits that he is helpless as he could not file the counter affidavit due to non availability of instructions from the Central Government. Therefore, he is not in a position to submit as to what was the reason for the delay of nonconsideration of the representation of the detainee for about 4 months and 8 days.

13. For better appreciation of the submission of the learned counsel of the parties, it will be proper for this court to extract the relevant portion of the paragraph 9 of the case of Anil Vats (supra) and to quote the same below:

"9. We do not see any valid reason why the detainee should have been refused the assistance of a friend. It is true that the Advisory Board has to report within the prescribed period and the meeting may brook no delay. But a timely request of the detainee for being allowed to be assisted by a friend or to be considered. It has not been denied in this case that the person proposed to assist the detainee was present at the relevant time and place. Mr. Bhandari submits A. K. Roy's case is distinguishable on the ground that the detainee therein was not? graduate in this case. We are of the view that it cannot be a sufficient ground. The position of the detainee in custody has to be appreciated. He may not properly be served by his memory, he may be nervous, incoherent and his faculties may be benumbed. Assistance of friend would result in fairness of procedure towards the detainee. We, therefore, feel that the procedural safeguard, as envisaged under article 22(5) was not satisfied in this case, with the result that continuation of detention of the petitioner would be rendered illegal."

The relevant portion of the paragraph 18 of the case of Wasi Uddin Ahmed v. the District Magistrate Aligarh. U.P. & Ors. (1981) SC 2166 is also quoted as under:

"18. It is unfortunate that there was a failure to mention in the grounds of detention, that the detainee had the right to make a representation against the order of detention as envisaged by article 22(5) of the Constitution read with section 8 of the Act and also the right of being heard before the Advisory Board while he was served with the order of detention. It is expected of a detaining authority while serving an order of detention, as a rule, to mention in the grounds of detention, that the detainee has a right to make a representation against the order of detention and also a right to be heard by the advisory board. In the present case, the grounds of detention served upon the detainee do not contain any such recital. It, however, appears that the detainee was furnished a copy of the Constitution on 25th March, 1981 at the Central Jail Fatehgarh presumably at his own request, for the purpose of making a representation against the order of detention. The words, "and shall afford" in article 22(5) have a positive content in matters of personal liberty. The law insists upon the literal performance of a procedural requirement. The leave for observance of procedural

safeguards, particularly in cases of deprivation of life and liberty is of prime importance to the body politic. It is, therefore, imperative that the detaining authority must "apprise" a detainee of his constitutional right under article 22(5) to make a representation against the order of detention and of his right to be heard before the Advisory board. The right of the detainee to make a representation under article 22(5) would be, in many cases, of little avail if the detainee is not "informed" of the right. The failure to comply with the requirement, however, does not have the effect of vitiating the impugned order of detention or render the continued detention of the detainee illegal in this case for the reason that the detainee is an enlightened person and has been in active politics and was therefore fully cognizant of his right to make a representation under article 22(5) of the Constitution and under section 8 of the Act. In fact, the detainee appeared before the Advisory Board and filed a representation against the order of detention and was also personally Board by the advisory board."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 opinion that 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 the rights which includes rights to make representation to the said Board. Unless a detainee 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 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 detainee 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 detainee as a right to make a representation before the advisory board. Nonmentioning of such requirement as stated above may not vitiate the order of detention, but the valuable right of the detainee 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 detainee 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 detainee has a right to make representation to the appropriate

Government 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 detainee 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 detainee 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 detainee to file a representation before the board and while the Apex Court decided that the detainee is entitled to get the assistance of his next friend before the board. The detainee 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 detainee is to be heard, which is not mentioned in the order and for such non mentioning of the right of the detainee, this court is of 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 detainee 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 detainee 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.

15. As it is the admitted position that the representation of the detainee was not considered by the Central Government within the earliest opportunity though the same was communicated to Central Government by the State on 12.10.2001 and the Central Government received the same but there is no explanation from the side of the Central Government for such non consideration of the representation for about 4 months 8 days by filing counter affidavit. In this situation, there is no other alternative before this court except to hold that for nonconsideration of the representation of the detainee for about 4 months 8 days itself vitiates the order of detention thereby infringed the right of the detainee protected under article 22(5), hence, the continued detention of the petitioner is illegal. Therefore, we are of the opinion that the detainee, namely Nameirakpam Gandhi @ Hobindro @ Inaocha? Pakhanglakpa and the approval and confirmation thereof is unconstitutional, null and void and as a result the detainee, Nameirakpam Gandhi @ Robindro @ Inaocha @ Pakhanglakpa is set at liberty and he shall be released forthwith if he is not required to be detained in connection with any other case. The petition is thus allowed.