

(1992) 12 GAU CK 0006
In the Gauhati High Court
Case No : 2690 of 1992

P.K.Musahary

APPELLANT

Vs

State of Assam and Ors.

RESPONDENT

Date of Decision : 17-12-1992

Acts Referred:

Constitution of India, 1950 — Article 194, 194, 226, 226

Citation : (1993) 1 GLJ 107 : (1993) 1 GLR 210

Hon'ble Judges : R.K.Manisana Singh, J

Bench : Single Bench

Advocate : A.R.Barthakur, S.A.Laskar, D.Majumdar, A.S.Bhattacharjee, B.K.Das,
Advocates appearing for Parties

Judgement

1. In this application under Article 226 of the Constitution of India. The petitioner Shri PK Musahary has prayed that three members of Asaam Legislative Assembly Shri Parraeswar Brahma, Shri Tejendra Narzary and Smti Pramila Rani Brahma, who were arrested on 26.11.92 and detained since then in connection with Dispur PS Case No. 588/92 under sections 120B, 302, 307 and 427, IPC, read with section 3 and 4 of TAD A (P) Act as well as sections 4 and 5 of the Explosive Substances Act, be allowed to attend the session of Assam Legislative Assembly and to cast their votes in the election of the Speaker by the Assembly. An application was moved before the Designated Court at Guwahati for allowing them to cast their votes in the election of the new Speaker by the Assembly. The application was registered as Misc Cafe No. 38.03 of 1992. The Designated Court disposed of title petition holding that the Court is not competent to accord permission to cast vote and direct the petitioner to move the appropriate court for necessary permission and the petition.

2. Mr. AR Batrthakur, learned Advocate General, Assam, has contended that the writ petition is not maintainable on the facts and in the circumstances of the case Mr. BK Das, learned counsel for the petition, has submitted that the right of the members of the Legislative Assembly to cast their votes 178 of the Constitution

and the right to attend the session constitutional right under Article 194 of the Constitution.

3 The question which arises for consideration is whether the petition is maintainable on the facts and in the circumstances of the case. Where the privilege of freedom from arrest and detention of a member of Legislative Assembly of a State in civil cases are concerned section 135A, CPC, provides that, no member shall be liable to arrest or detention in prison under civil process during the continuance of any meeting of Legislative Assembly and (luring the forty days before and after such meeting, sitting or conference.

4 The question then is, Whether the privilege of freedom from arrest floes extend to criminal cases ? The powers, privileges and immunities of a House of the Legislature of a State and of the members and the committees of a House of such Legislature have not been defined by the Legislature by law as are provided under Article 194. But there are judicial decisions. In the matter of Venkatswarlu vs. District Magistrate, AIR 1951 Madras 269, it has been held that "privilege is not claimable for any indictable offence?. The decision of Madras High Court was approved by the Supreme Court in KA Nambiar's case, AIR 1966 SC 657. In that case, the Supreme Court has further held that rights of members of Parliament to attend the session of Parliament, to participate in the debate and to record their votes are not constitutional rights In the strict sense, and quite clearly, they are not fundamental rights at all. The true constitutional position, therefore, is that 40 far as a valid order of detention is concerned a member of Parliament can claim no special status higher than that of an ordinary citizen and is as much liable to be arrested and detained as any other citizen. The Supreme Court in Indira Nehru Gandhi vs. Raj Narain, AIR 1975 SC 2299, has observed that the privilege has been defined negatively in the claim of the Commons which specifically excepted treason, felony and breach of surety of the peace; and that, if the order of detention validly prevent them from attending a session of Parliament, no occasion arises for the exercise of the right of freedom of speech and no complaint can be made that the said right has been invalidly invaded.

5. In the above view of the matter, the right to attend the session of Assembly, to participate in the debate and to record their votes are not constitutional right nor are fundamental rights. It may be added here that right to attend the session of the Legislative Assembly, to participate in the debate and to record vote are derived from a provision of the Constitution, namely, Article 194, after becoming a member of the Legislative Assembly not created by the Constitution itself. For these reasons, a member of legislative Assembly, who has been arrested and detained in connection with an indictable offence and the detention is according to procedure established by law, cannot claim that he has the rights/privileges to attend the sitting or session of the legislative Assembly in the absence of statutory provisions granting such privilege of immunity.

6. In the present case, it has already been stated that the three members were arrested in connection with the FIR registered against them tinder sections 120B,

302, 307 and 427, IPC, read with sections 3 and 4 of TADA (P) Act as well as sections 4 and 5 of the Explosive Substances Act, and that the powers, privileges and immunities have not been defined by the Legislature by law. Almost all the offences registered against them are indictable offences (major offences) and, therefore, the three cannot claim that they have rights and privileges to attend the sitting or session of Legislative Assembly.

7. The view taken by me finds support from a decision of the Supreme Court reported as *A. Kunjan Nadar vs. The State*, AIR 1955 TC 154. In that case a member of TravancoreCochin Legislative Assembly was arrested in connection with two criminal cases pending against him. And it was held that where a member of Legislative Assembly has been arrested and detained and his detention is legal and under due process of law, he cannot claim that his detention should be subordinated to his right to attend the proceedings of the Legislative Assembly.

8. The next contention of Mr. Das is that a direction may be made for recording the votes of the three members from the place where they are detained, if the recording of votes is required for choosing of the Speaker In Rule 7 of the Rules of Procedure and Conduct of Business in Assam Legislative Assembly ("Rules" for short), the procedure for election or choosing of the Speaker by the Legislative Assembly is provided. Rule 7 (4) of the Rules provides : "In the case of new Assembly, the member appointed by the. Governor to perform the duties of the office of Speaker pending the election of a Speaker and in any other case the Deputy Speaker or other member presiding shall read out to the Assembly the names of the members who have been duly nominated together with those of the proposers and seconders and if only one member has been so nominated, shall declare that member to be elected. If more than one member has been so nominated, the Assembly shall proceed to elect a Speaker by ballot." Rule 7 (4) indicates that the election or choosing of the Speaker by the Legislative Assembly is a proceeding in the Legislature and votes shall be recorded, if required, with in the precincts of the House, and that recording of votes is not required if there is only one candidate. Right to vote, therefore, can only be exercised if the members attend the session or sitting of the Legislative Assembly. In *MN Kaol and SL Shakhdar's Practice and Procedure of Parliament*, Fourth Edition, 1991, referring to Lok Sabha debate held on 24.11.66, it is stated that "a member released on parole cannot attend the sittings of the House." In this view of the matter, no vote can be recorded outside the precincts of the House and, therefore, the submission of Mr. Das cannot be accepted.

It may be noted here that the application was not filed by the three members themselves. The petition was filed by Shri PK Musahary under the garb of public interest litigant. In *Janata Dal vs. HS Choudhary*, (1992) 4 SCC 305, at para43, the Supreme Court observed

"The expression "litigation" means a legal action including all proceedings therein, initiated in a court of law with the purpose of enforcing a right or seeking

a remedy. Therefore, lexically the expression "PIL" means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of community have pecuniary interest or some interest by which their legal rights or, liabilities are affected?

Therefore, even if there are various questions of the law to be deeply gone into and examined in a case of this nature, it is for the three members and the three alone to raise all such questions and not for the third party under the garb of Public Interest Litigation. That apart, in *Ushman Bhai*, AIR 1988 SC 922, the Supreme Court has held that under the scheme of the TADA (P) Act, there is complete exclusion of the jurisdiction of the High Court in any case involving the arrest of any person on an accusation of having committed an offence punishable under the Act or any Rules made thereunder. However, I am of the view that if fundamental rights are infringed this Court has jurisdiction under Article 226 of the Constitution to make appropriate order. The present is not a case of violation of fundamental rights. Allowing the three arrested members of the Legislative Assembly to attend the proceedings of the Assembly will amount to a sort of bail, and, as such, it will be against the above decision of the Supreme Court.

10. For the foregoing reasons, the petition is dismissed. No costs.