

(1984) 09 OHC CK 0007

In the Orissa High Court

Purusottam Khandai

APPELLANT

Vs

The District Magistrate and Collector and Others

RESPONDENT

Date of Decision : 18-09-1984

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities

Act, 1980 — Section 11, 3, 8

Citation : (1985) CriLJ 741

Hon'ble Judges : P.C. Misra, J;G.B. Patnaik, J

Bench : Division Bench

Judgement

P.C. Misra, J.—This is a petition under Articles 226 and 227 of the Constitution for an order in the nature of habeas corpus on the ground that the petitioner has been illegally detained. The detention order was passed by the District Magistrate, Cuttack on 25-5-84 in exercise of the powers conferred on him u/s 3 of the Prevention of Black-Marketing and Maintenance of Supplies of Essential Commodities Act (7 of 1980) (hereinafter referred to as the "Act"). The order of detention passed by the District Magistrate, Cuttack shows that he was satisfied that the petitioner who is a Storage Agent of Pattamundai was found acting in a prejudicial manner to the maintenance of supplies of essential commodities, essential to the community and was committing an offence under the Essential Commodities Act, 1955 and that he had acted in a manner for making wrongful gain which had defeated and, would tend to defeat the provisions of the Essential Commodities Act, 1955. The District Magistrate, Cuttack has directed the petitioner to be detained in the Circle Jail at Cuttack until further orders. A copy of the said order has been annexed to the said petition as Annexure-1.

2. The petitioner was served with the order of detention dated 25-5-84 (Annexure-1) on 29-5-84 along with the grounds of detention. He was taken into custody on 26-5-84. It is alleged that the State Government approved the order of detention passed by the District Magistrate on 5-6-84 which is beyond the statutory period and, as such, the order of detention is invalid and continuance of

further detention of the petitioner is without authority of law. It is also alleged that no report of the fact of detention of the petitioner has been sent to the Central Government together with grounds under which the order has been made along with the other particulars within the statutory period of 7 days from the date of detention as required u/s 3(4) of the Act for which the entire action of the Government is vitiated. On 4-7-84 the District Magistrate sent a Letter to the petitioner intimating him about the sitting of the Advisory Board on 6-7-84 at 2 P.M. to consider the case of the petitioner. Though the petitioner was asked to inform if he desires to be heard in person by the Advisory Board, the time allowed for the purpose was inadequate. The petitioner requested to defer the sitting of the Advisory Board for some time to enable him to get ready for defending himself. But no order was passed thereon. It is alleged that he was produced before the Advisory Board on 6-7-84 and in the circumstances it should be held that reasonable opportunity was given to the petitioner to place his case before the Advisory Board. The petitioner makes a grievance that the principle of natural justice has been violated and all the formalities prescribed under the law have not been complied with. It is alleged that the grounds of detention or at least some of them are vague, irrelevant and non-existent. Some of the grounds are said to be too remote and not proximate to the order of detention. The petitioner has also alleged that some of the grounds of detention are based on no evidence and the entire action of the authorities is tainted with mala fides. The order of detention as well as the grounds on which the same is based show that the plea of the petitioner was not at all considered and there was no application of mind by the authorities who exercised the power u/s 3 of the Act.

3. The District Magistrate, opposite party No. 1, in the affidavit in reply has denied the allegations made in the writ petition. It has been stated that the order of detention was passed on the basis of materials which are sufficient to support the order of detention. It is stated that the grounds of detention were served on the petitioner within the stipulated period of 5 days as required under the Act. The petitioner was given due opportunity to represent his case before the Advisory Board and the principles of natural justice have not been violated. All the other formalities were complied with and, therefore, the order of detention is said to be in accordance with law.

4. The Opposite Party No. 2 has filed a separate counter affidavit contending that the order of detention is backed by sufficient materials and all the formalities have been complied with by the prescribed provisions under the Act.

5. Mr. B.M. Patnaik appearing for the petitioner has contended that there has been infraction of the mandatory provisions contained in Section 3(4) of the Act and the order of detention is liable to be quashed on that ground alone. According to him Section 3(1) of the Act vests the power of making orders detaining any person with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community on the authorities mentioned in the said section. Sub-section (2) of Section 3 of the said

Act provides that the District Magistrate and Commissioners of Police, wherever they have been appointed, may also, if satisfied as provided in Sub-section (1), exercise the powers conferred by the said Sub-section. Sub-section (3) of the said section requires that when any order is made under this section by an officer mentioned in Sub-section (2) he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof unless in the meantime it has been approved by the State Government. In Sub-section (4) of Section 3 it is required that when any order is made or approved by the State Government under this section or when any order is made under this section by an officer of the State Government not below the rank of Secretary in that Government specially empowered under Sub-section (1), the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order. In this case the District Magistrate in exercise of the powers vested in him u/s 3(1) of the Act has passed an order on 25-5-84 for detention of the petitioner (Annexure-1). The District Magistrate being an officer enumerated in Sub-section (2) of Section 3 has reported the fact to the State Government within the stipulated time provided under that section. There is no dispute that on receipt of the report from the District Magistrate, the State Government approved the order of detention. The petitioner alleges that the date of approval was 5-6-84 whereas the opposite party No. 2 in his counter affidavit stated that the detention order was approved by the State Government on 3-6-84 and 5-6-84 is the date of communication of the approval of the detention to the District Magistrate. In the said counter affidavit it has also been stated that the order of detention has been communicated within the statutory period of 12 days from the order of detention as required u/s 3(3) of the Act. Even if the date of the order of approval is taken to be 5-6-84 still it is within the period of 12 days from the date of order of detention. The real dispute that has been raised by Mr. Patnaik appearing for the petitioner is that the report required to be sent to the Central Government under Sub-section (4) of Section 3 has not been sent within 7 days from the date of the order of detention and therefore there has been violation of the mandatory provisions of the said section. On the other hand it has been contended on behalf of the opposite parties that the period of 7 days is to be calculated from the date of approval by the State Government and not from the date of order of the detention. Mr. Patnaik relied upon a decision reported in. *Sher Mohammad alias Seru Vs. The State of West Bengal*, as well as a decision of this Court reported in *Ram Bhagat Agarwala Vs. State of Orissa and Others*, which follows the aforesaid decision of the Supreme Court. In the decision of the Supreme Court referred to above identical provisions contained in Section 3, Sub-section (4) of the Maintenance of Internal Security Act (1971) (Act No. 26 of 1971) was the subject matter of discussions. Their Lordships after quoting the said Sub-section have observed as follows :

A fair reading of Section 3 indicates that the State Government may directly issue an order of detention or if it is done by a lesser authority approve of such detention order as provided in the Statute. Sub-section (4) of Section 3, which we have extracted, obligates the State Government to communicate, within seven days of the order of detention it makes or it approves, that fact to the Central Government, together with the grounds on which the order has been made and other relevant particulars. Even assuming that the order is made by the District Magistrate and is approved, by the State Government, the communication has to be made to the Central Government within the time specified. The procedural mandate is inviolable except on peril of the order being voided.

In the case before their Lordships the detention order was made on 21-11-72 by the District Magistrate and was approved by the State Government on 2-12-72 ; communication to the Central Government was made on 1-12-72 i.e. on the day previous to the date of approval by the State Government. In the circumstances of the case their Lordships held that the State Government could not have communicated the approval before the approval itself was made. Their Lordships have of course further indicated the said communication was not sufficient compliance of the statutory requirement. It has, however, been observed by their Lordships that the said communication was beyond seven days period, evidently meaning from the date of the order of detention as in that case there was no approval by the date of communication. On the basis of this observation it is contended by Mr. Patnaik that the period of seven days in Section 3(4) of the Act should be computed from the date of the order of detention and not from the date of its approval. The question as to whether the period of 7 days is to be reckoned from the date of the order of detention or from the date of the approval by the State Government was not required to be decided in that case. Their Lordships have not also expressed any opinion on the question. In the decision reported in *Ram Bhagat Agarwala Vs. State of Orissa and Others*, it was conceded that there has been some delay in compliance with the Section 3(4) of the Act, and the explanation furnished by the State Government was that the concerned officers were busy owing to natural calamity in the State for which the delay was caused. Their Lordships after considering the said submission held that even if the aforesaid explanation for the delay is accepted it cannot be said that the mandatory provisions contained in Section 3(4) of the Act have not been infringed. Consequently the order of detention was held to be invalid in view of the clear violation of the provisions made in Section 3(4) of the Act.

6. The learned Advocate General has placed reliance on a decision reported in *Sk. Salim Vs. The State of West Bengal*, where the aforesaid question directly came to be decided with reference to the provisions contained in Section 3(4) of the Maintenance of Internal Security Act. In para 13 of the judgment their Lordships held as follows :

It is contended that Section 3(4) has been violated because the State

Government did not make a report to the Central Government within 7 days of the date of the order of detention. The short answer to this contention is that the period of 7 days has to be reckoned from the date on which the State Government approved the order and not from the date on which the District Magistrate passed the order. If the order were made by the State Government, the report would have been required to be made to the Central Government within 7 days of the date of the order but the order in the instant case was approved and not made by the State Government.

It has been already stated that the provisions of Section 3(4) of the M.I.S. Act are identical with the provisions of the Act with which we are now concerned. In view of the authoritative decision of the Supreme Court *Sk. Salim Vs. The State of West Bengal*, referred to above, the contention raised by Mr. Patnaik that the period of 7 days is to be reckoned from the date of the order of detention and not from the date of approval must be rejected. In the present case the report of the State Government was communicated to the Central Government within 7 days from the date of approval of the order of detention (by the State Government) and hence there has been no infraction of the provisions of Section 3(4) of the Act.

7. It was next contended that the petitioner was noticed on 4-7-84 to appear before the Advisory Board on 6-7-84. On receipt of the notice the petitioner sent a representation to opposite party No. 1 through opposite party No. 3 for granting him time to make representation and to defend himself before the said Advisory Board, as on account of the short time available to him it was not possible on the part of the petitioner to defend himself effectively. It is said that the petitioner could not get ready for personal hearing and could not contact his relations and friends for the purpose within a short span of two days. In other words it is alleged that he has been deprived of a fair and reasonable opportunity to make his representation before the Advisory Board and therefore, the order of detention has to be quashed. This submission of Mr. Patnaik does not appeal to us. Admittedly, the grounds of detention written in the order in mothertongue of the petitioner were served on him on 29-5-84. The last para thereof gives a notice to the petitioner that he (petitioner) may if he so chooses make any representation against an order of detention before the State Government or the Advisory Board and in the event he requires to be heard in person, he may accordingly mention the said fact in his representation. The petitioner was again noticed on 4-7-84 that sitting of the Advisory Board has been fixed to be held on 6-7-84 at 2 P.M. and if he desires to be heard in person by the Advisory Board he should intimate his desire immediately. It is not disputed that the petitioner did not submit any representation after receipt of the grounds of detention for which he had enough time. The notice dated 4-7-84 purports to intimate the petitioner that the sitting of the Advisory Board would be held on 6-7-84 and he is called upon to be heard in person by the Advisory Board.

8. In the circumstances we do not think that there has been denial of reasonable

opportunity to the petitioner to make his representation or defend himself before the Advisory Board

9. Mr. B.M. Patnaik, the learned Counsel appearing for the petitioner relied on a decision reported in *Mrs. Hamida Sarfaraz Qureishi Vs. M.S. Kasbekar and Others*, in support of his contention that the petitioner was denied reasonable opportunity to defend himself. In the said case the detenu who was admitted into the hospital for heart attack had expressed his desire to appear before the Advisory Board to be heard in person. But it was only about one or two hours before the sitting of the Advisory Board that the police officer went to the hospital in which the detenu was confined to inform about the meeting of the Board and even that information was given only to the wife of the detenu for further transmission to the detenu who was then disabled from doing anything. In these circumstances, their Lordships held that the so called opportunity of being heard in person by the Advisory Board was a farce and amounted to a negation of the right conferred on him u/s 11(1) of the Act. It is well established that whether reasonable opportunity was given is to be judged with reference to the facts of each case. There cannot be a strait jacket formula which can be applied to the test as to whether the reasonable opportunity was given to the detenu in a given case. In the facts and circumstances of this case we have no hesitation to conclude that reasonable opportunity was given to the petitioner to make representation before the Advisory Board.

10. It has been next contended by M. Patnaik, the learned Counsel for the petitioner that some of the grounds on the basis of which the detention orders are made are vague, nonexistent and untenable. It is well settled by a series of decisions of the Supreme Court] and followed by this Court in number of cases that if one of the grounds of detention fails the order of detention is bad and cannot be sustained in law. Reference to the decisions reported in *Manu Bhusan Roy Prodhon Vs. State of West Bengal and Others*, , *Magan Gope Vs. The State of West Bengal*, and *Shiv Parsad Bhatnagar Vs. State of M.P. and Another*, may be made for the aforesaid principles.

11. In this case the grounds of detention enumerate various incidents and actions on the part of the petitioner from which the District Magistrate came to a conclusion that the petitioner has acted in a manner with a view to make wrongful gain which has defeated and tends to defeat the provisions of the Essential Commodities Act, 1955. One of the grounds mentioned therein is that the petitioner has sold away 48 quintals of sugar in black market. In support of the said allegation it was stated that on 22-3-84, 5 quintals of sugar has been noted in the books of accounts of the petitioner to have been issued to Khadiana Seba Samabaya Samiti. But from the statements of the Joint Secretary of the Samiti it appeared that the Samiti had not taken any stock of sugar from the petitioner nor deposited any amount towards the price thereof. On a verification of the books of accounts of the Samiti no such stock of sugar appeared to have been bought by the Samiti from the petitioner. Similarly no sugar was taken by

Badapada Seba Samabaya Samiti on 2-3-84 from the petitioner which was evident from the statement of the Joint Secretary of the said Samiti, though 12 quintals of sugar has been noted to have been issued in favour of the aforesaid samiti by the petitioner against an issue order mentioned in the books of accounts of the petitioner. Some other transactions relating to issue of sugar of some date find mention in the Issue Register of the petitioner, namely, (i) that one Bholanath Padhi of Pattamundai was issued six quintals of sugar, (ii) one Damodar Swain of the same village was issued 5 quintals and (iii) one Laxman Lenka of Badapada was issued 3 quintals of sugar. In order to ascertain as to whether the petitioner had issued any sugar to the aforesaid persons they were noticed to produce their books of accounts but they did not produce the same in spite of notice. From all these alleged fake transactions it has been inferred that the petitioner had sold 48 quintals of sugar by black market falsely showing that the same were issued to authorised dealers and that thereby the petitioner had made an illegal gain. It is apparent from the aforesaid assertion made in the grounds of detention that the petitioner has been found fault with as Bholanath Padhi and Damodar Swain of Pattamundai and one Laxman Lenka of Pattamundai did not produce their stock register and furnish relevant books of accounts in spite of notice to them. In our opinion, the petitioner was not responsible for non-production of the account books by the aforesaid persons and as such it is an untenable ground. It is evident from the recitals made in the grounds of detention that the authority who passed the order of detention was influenced by the aforesaid ground, which in fact did not exist. Another ground which is marked as ground No. (1) shows that the petitioner was always keeping his depot closed for which the retailers could not take the essential commodities from the petitioner who was the Government Storage agent of the said commodities. The aforesaid allegation appears to us to be vague, inasmuch as the details as to the period when the shop was closed and the name of the retailers who could not take essential commodities on account of closer of the depot had not been mentioned therein. The petitioner could not have made effective representation refuting the said allegations.

12. The act gives extraordinary power to the executive to detain a person without trial and, therefore, the requirements provided in the statute must be meticulously followed in order to support the order of detention. Section 8 requires 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 of making a representation against the order to the appropriate Government. Therefore, the detenu is entitled to be communicated all the grounds of detention to enable him to make an effective representation against the order of detention. If no grounds are given, it amounts to denial of the opportunity to make an effective representation. It has already been observed

that if one of the grounds of detention is found to be vague, irrelevant or non-existent, the order of detention stands vitiated. The reason is that in such cases it cannot be reasonably predicted as to what extent the irrelevant, non-existent or vague ground had influenced the subjective satisfaction of the detaining authority. Their Lordships of the Supreme Court have held in the decision reported in Francis Coralie Mullin Vs. Administrator, Union Territory of Delhi and Others, that there is vital distinction between "preventive detention" and "punitive detention". It had been stated that punitive detention is intended to inflict punishment on a person, who is found by the judicial process to have committed an offence, while preventive detention is not by way of punishment at all, but it is intended to prevent a person from indulging in conduct injurious to the society. Their Lordships have further indicated that the power of preventive detention is a frightful and awesome power with drastic consequences affecting personal liberty, which is the most cherished and prized possession of man in a civilised society. The power of preventive detention should, therefore, be exercised with great care and caution.

13. We need not elaborately discuss some of the other grounds of detention which according to the petitioner were also vague, irrelevant and remote as we have already found that two of the grounds which might have influenced the detaining authority in making the order were irrelevant and vague.

14. For the aforesaid reasons, we would allow the writ application, quash the impugned order of detention and direct release of the petitioner forthwith. We make no order as to costs.

G.B. Patnaik, J.

15. I agree.