

(2004) 12 GAU CK 0033

In the Gauhati High Court

Case No : Writ Petition (Criminal) No. 47 of 2004

Putul Gogoi

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 23-12-2004

Acts Referred:

Constitution of India, 1950 — Article 22(5), 226
Essential Commodities Act, 1955 — Section 7, 7(1)
Penal Code, 1860 (IPC) — Section 120(B), 379, 411, 420, 468
Petroleum Act, 1934 — Section 23, 24
Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980 — Section 10, 11, 11(4), 12, 3

Citation : (2005) 3 GLT 401

Hon'ble Judges : Amitava Roy, J; A.H. Saikia, J

Bench : Division Bench

Advocate : A.K. Bhattacharyya, K. Agarwal, R.J. Baruah and A.K. Choudhury, for the Appellant; K.N. Choudhury, B.J. Talukdar and H. Rahman, for the Respondent

Final Decision : Allowed

Judgement

A.H. Saikia, J.—By this application under Article 226 of the Constitution of India seeking a Writ in the nature of Habeas Corpus, the detention order dated 2.9.04 issued by the District Magistrate, Sivsagar has been assailed by the detenu-Petitioner who has been detained u/s 3(1) of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 (for short, "the Act") connecting him with Doomdoo P.S. Case No. 208/03 registered under Sections 379/411/468/420 IPC read with Section 7 of E.C. Act alongwith Kamargaon P.S. Case No. 34/04 registered under Sections 120(B)/379/471/472 IPC read with Section 7(1) of the Essential Commodities Act, 1993 read with Section 23/24 Petroleum Act as indicated in the impugned detention order.

2. The facts essential for determination of the question of legality as well as validity of the impugned detention order maybe succinctly noted as under:

Initially, the Petitioner was arrested on 17.4.04 for his alleged involvement in connection with Kamargaon P.S. Case No. 32/04 and detained in Golaghat Jail. Subsequently, on 20.04.04 an order of detention under the Act was issued against the Petitioner and the same was served on him while he was in jail custody at Golaghat. Against the said detention order, the Petitioner moved this Court through WP(Crl.) No. 25/04 and this Court, after hearing learned Counsel for the parties and also on proper scanning of the materials available on record so placed before it, quashed the detention order and allowed the writ petition by judgment and order dated 2.9.04 ordering that the Petitioner be set at liberty. However, before the compliance of the said order of release so rendered by this Court, the competent authority again issued the impugned detention, order detaining the Petitioner in connection with the above mentioned police cases and such detention order was served upon him in the Golaghat Jail on 3.9.04. Alongwith the detention order, the grounds for such detention were also served upon the detenu on the same date.

The State of Assam under the signature of Commissioner and Secretary to the Govt, of Assam, Food and Civil Supplies Department by order dated 7.9.04 approved the detention of the Petitioner/detenu and on the same day the said Govt, officer also referred the matter to the Advisory Board placing the entire materials including the order of detention as well as the approval order above mentioned for taking necessary action by the Board.

Against the said impugned order of detention, the Petitioner preferred two representations dated 13.9.04, one-to the detaining authority as well as Commissioner and Secretary, Govt. of Assam, Food and Civil Supplies Deptt. and Secretary to the Govt, of India, Ministry of Consumer Affairs, Food and Consumer Distribution Department, New Delhi and the other-to the Chairman, Advisory Board. Both those representations were sent to the competent authorities through the Superintendent, District Jail, Golaghat. In the representation sent to the detaining authority and Ors. , the detenu complained of non supply of certain vital documents and in consequence of the same, the detenu sought for revocation of the impugned order of detention. In the second representation addressed to the Chairman, Advisory Board, which has been annexed as Annexure-7 to this writ petition, the detenu interalia has prayed for allowing him to get the assistance of a friend during the hearing of his case by the Advisory Board. The relevant portion of the prayer made in the representation maybe noticed as under:

In view of what has been stated above it is respectively submitted that there is no cause for my detention under the aforesaid Act nor there is any cause for continuous detention under the said Act. My order of detention therefore may be revoked and set aside. I pray that the Advisory Board would hear me in person and allow me the assistance of a friend during the hearing.

The representation dated 13.9.04 submitted to the Govt, was rejected by the Govt. vide communication dated 20.9.04 expressing its inability to accede to the

request of the detenu made in the said representation as there was no valid or sufficient ground warranting revocation of the detention order. The Central Govt, also by its communication dated 21.9.04 rejected the representation preferred by the Petitioner. But the representation placed before the Advisory Board has not yet been disposed of.

3. In the backdrop of factual matrix above noted, the Petitioner/detenu, questioning the propriety and correctness of the impugned order of detention, has sought for quashment of the impugned order dated 2.9.04 and his release forthwith.

4. Heard Mr. D.K. Hazarika and Mr. A.K. Bhattachajee, learned Sr. counsel assisted by Mr. K. Agarwal, Mr. R.J. Baruah, Mr. A.K. Choudhury, learned Counsel appearing for the Petitioner. Also heard Mr. K.N. Choudhury, learned Addl. Advocate General, Assam assisted by Mr. B.J. Tahikdar, learned Counsel on behalf of the State Respondents and Mr. H. Rahman, learned Sr. CGSC representing the Union of India.

5. Mainly five points have been argued while challenging the impugned detention order by Mr. A.K. Bhattacharjee, learned Sr. counsel representing the Petitioner. Firstly-the detaining authority failed to make out fiesh facts in order to enable it to make a fresh detention order after quashment of earlier detention order dated 20.4.04 passed u/s 3 of the Act by this Hon"ble High Court in W.P. (Crl.) No. 25/04 disposed of on 2.9.04. Secondly-the grounds set forth for such detention are no grounds at all but simply anarrationof factual position. Thirdly-the relevant documents, which ought to have accompanied the grounds of detention itself, were not furnished to the detenu at the time of serving the detention order. Fourthly-the malafide was sit large in passing of the impugned order of detention on 2.9.04 inasmuch as manifestly it was a deliberate attempt to circumvent the release order passed by this Court on 2.9.04 after setting aside the earlier order of detention which was never served upon the detenu who was in the Golaghat Jail. Fifthly and finally-the assistance of a friend as requested by the Petitioner/detenu in his representation dated 13.9.04 to the Govt, as well as Advisory Board has been denied in violation of the settled law of the land.

6. We have meticulously scanned the entire records so placed before us and found that on 20.9.04 and 21.9.04, both the State Govt. and the Central Govt. rejected the representations submitted by the Petitioner. It is evident from the record that the representation made to the Advisory Board was also placed before the said authority by the Govt. vide communication dated 17.9.04 and the said communication may be read as under:

Government of Assam Food and Civil Supplies (A) Department Dispur:::
Guwahati-6 No. FSE.264/2004/196 Dated Dispur, the 17th September, 2004.

From: Dr. A.K. Singh, IAS, Commissioner and Secretary to the Govt. of Assam, Food and Civil Supplies Department, Dispur, Ghy-4.

To: The Secretary, Advisory Board, constituted under the prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980, Gauhati High Court, Guwahati-1.

Sub: Representation submitted by the detenu, Shri Putul Gogoi, under the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980.

Sir,

In inviting a reference to the subject cited above, I am directed to enclose herewith the representation dated the 13th September, 2004 submitted by the detenu. Shri Putul Gogoi, who is under preventive detention under the prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980, received through the District Magistrate, Sivsagar alongwith the para-wise comments and other documents received from the District Magistrate, Sivsagar, for placing the same before the Advisory Board and further necessary action.

Enclo-As stated (23 pages)

Yours faithfully, Commissioner and Secretary to the Govt, of Assam, Food and Civil Supplies Department. Memo No. FSA. 264/2004/196-A, Dtd. Dispur, the 17th Sept./04.

7. The Advisory Board sat on 13.10.04 and by its report and opinion dated 13.10.04 held that after perusal of the grounds of detention and materials made available on the records including the representation submitted by the detenu, it was of the view that there was sufficient cause of detention of the detenu, Shri Putul Gogoi under the Act.

8. After thoroughly going through the records, as noticed above, we are of the firm opinion that ex-facie it appears that there is a total denial of the service of a friend inspite of the detenu making a request for it inasmuch as the Advisory Board did not even consider the said prayer of the detenu and accordingly, we feel that the sustainability of the detention order can be decided only on the fifth and last ground alone advanced by the learned Sr. Counsel mentioned above. Therefore, according to us, it is not necessary for this Court to proceed to examine the remaining points so urged by the learned Sr. counsel as referred above. There is no denial of the fact that the Petitioner has sought for assistance of a friend in his representation made before the Advisory Board but the Petitioner was not afforded a friend by the Advisory Board as reflected from the report dated 13.10.04 submitted by the said Board.

9. Now question is whether the Advisory Board was justified in not allowing the detenu the assistance of a friend as prayed by him. In order to answer this question, it would be pertinent to refer the provisions of law pertaining to the procedure and functioning of the Advisory Boards enumerated in the Act. Sections 9, 10, 11 and 12 would be, in our opinion, relevant and the same are

accordingly extracted herein under:

9. Constitution of Advisory Boards:

(1) The Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards for the purpose of this Act.

[(2) Every such Board shall consist of three persons who are, or have been, or are qualified to be appointed as Judge of a High Court, and such persons shall be appointed by the appropriate Government].

(3) The appropriate Government shall appoint one of the members of the Advisory Board who is, or has been, a Judge of a High Court, to be its Chairman, and in the case of a Union territory the appointment to the Advisory Board of any person who is a Judge of the High Court of a State shall be with the previous approval of the State Government concerned.

10. Reference to Advisory Boards: Save as otherwise expressly provided in this Act, in every case where a detention order has been made under this Act, the appropriate Government shall, within three weeks from the date of detention of a person under the order, place before the Advisory Board constituted by it u/s 9, the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order, has been made by an officer referred to in Sub-section (2) of Section 3, also the report by such officer under Sub-section (3) of that Section.

11. Procedure of Advisory Boards:

(1) The Advisory Boards shall, after considering the materials placed before it and, after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if, in any particular case, it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submits its report to the appropriate Government within seven weeks from the date of detention of the person concerned.

(2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.

(3) When there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(4) Nothing in this Section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with reference to the Advisory Board, and the proceedings of the Advisory Board, and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

12. Action upon the report of Advisory Board:

(1) In a case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.

(2) In any case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith.

10. From a bare perusal of the above provisions of law it is clear that the Section 11(4) puts an exclusive bar for representation through a legal practitioner. However the Board, if so desired by the detenu, may hear him but in any case the detenu cannot be allowed to be represented by a lawyer of his choice. Now, the point is whether there is any embargo on the part of the detenu in getting assistance or aid by a friend who is not a lawyer at all.

11. This issue put before us has been decided time and again by the Apex Court in a catena of decisions reiterating that the denial of assistance of a friend, if such request has been made by the detenu, would violate the constitutional mandate as well as vitiate the detention.

12. Referring to A.K. Roy's Case A.K. Roy and Others Vs. Union of India (UOI) and Others, , being the basic case on the point of "assistance of friend", the Apex Court, in Anil Vats Vs. Union of India and others, held in paragraph 9 as follows:

9. We do not see any valid reason why the detenu 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 detenu for being allowed to be assisted by a friend ought to be considered. It has not been denied in this case that the person proposed to assist the detenu was present at the relevant time and place. Mr. Bhandari submits that A.K. Roy case is distinguishable on the ground that the detenu therein was not a graduate as in this case. We are of the view that it cannot be a sufficient ground. The position of the detenu in custody has to be appreciated. He may not properly be served by his memory, he may be nervous, incoherent and his faculties maybe benumbed. Assistance of a friend would result in fairness of procedure towards the detenu. 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.

13. Having regard to the aforesaid judicial authorities and upon hearing learned Counsel for the parties, we find that the present case is squarely covered by the proposition of law laid down in those cases because in the instant case also the case of the Petitioner who sought for the service of a friend has not been considered at all by the Advisory Board and applying the ratio of the precedents

mentioned above, we unhesitatingly say that the denial of the request made by the Petitioner to get the assistance of friend is clearly violative of Article 22(5) of the Constitution of India and consequently, the detention order itself is vitiated.

14. Accordingly, the impugned detention order is hereby quashed and set aside. We direct for the release of the Petitioner/detenu forthwith provided he is not wanted by any other order or in any other case.

15. In the result, the Habeas Corpus petition stands allowed. No costs.