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**(2006) 03 GAU CK 0037**

**In the Gauhati High Court**

**Case No : Writ Petition (Criminal) No. 1 of 2006**

Rajesh Kumar Borah

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

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**Date of Decision : 02-03-2006**

**Acts Referred:**

Constitution of India, 1950 — Article 22(5)  
National Security Act, 1980 — Section 3(2), 3(3)

**Citation : (2006) 4 GLT 764**

**Hon'ble Judges : H.N. Sharma, J;D. Biswas, J**

**Bench : Division Bench**

**Advocate : B.D. Konwar, J.M. Konwar and D. Talukdar, for the Appellant; H. Rahman and B.J. Talukdar, for the Respondent**

**Final Decision : Allowed**

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## **Judgement**

D. Biswas, J.—Heard Mr. B.D. Konwar, learned Counsel for the Petitioner and Mr. H. Rahman, learned Assistant Solicitor General of India. Also heard Mr. B.J. Talukdar. learned State Counsel.

2. This habeas corpus petition has been filed by Sri Rajesh Kr. Borah challenging the order dated 12.10.2005 passed by the District Magistrate, Jorhat in exercise of powers conferred upon him under Sub-section (2) of Section 3 read with Sub-section (3) of Section 3 of the National Security Act, 1980 directing that the Petitioner be detained for a period of three months with effect from the receipt of this order and until further orders at the Central Jail at Jorhat. The detention order has been challenged on the ground that the Government of Assam has not passed any order under Sub-section (3) of Section 3 of the National Security Act empowering the District Magistrate to exercise the powers conferred under the said Section; that the order is vitiated for non-application of mind on the part of the detaining authority; that there has been abnormal delay in disposing of the representation filed by the detenu to the State as well as Central Government etc.

3. Apart from the above pleaded grounds, during the course of argument, Mr.

Konwar, learned Counsel for the Petitioner submitted that the order of detention is liable to be quashed only on the ground that the detenu has not been informed of his right to make representation against the order of detention to the detaining authority. According to Mr. Konwar, though this ground has not been pleaded in the petition, yet while disposing of a habeas corpus petition, the Court may take notice of any violation or infringement of the constitutional right of the detenu, more particularly when it is a fundamental right.

4. In Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, the Hon"ble Supreme Court observed that in case of an application for a writ of habeas corpus, the practice evolved is not to follow strict rules of pleading nor place undue emphasis on the question as to on whom the burden of proof lies. It is incumbent on the detaining authority to satisfy the Court that the detention is legal and in conformity with the mandatory provisions of law authorising such detention.

5. In Mohinuddin alias Moin Master Vs. District Magistrate, Beed and Others, the Hon"ble Supreme Court was of the view that imperfect pleadings in a habeas corpus petition would not stand on the way in granting the relief to which a detenu is entitled to. The Hon"ble Supreme Court observed that normally writ petitions are decided on the basis of affidavits and the Petitioner cannot be permitted to raise grounds not taken in the petition at the time of hearing. But the said rule, according to the Hon"ble Supreme Court, cannot be applied to a petition for grant of a writ of habeas corpus. It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention of the Petitioner-detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accordance with the constitutional safeguards embodied in Article 22(5) of the Constitution.

6. Therefore, though the plea that the detenu was not informed by the District Magistrate (detaining authority) of his right to make representation to him is not a pleaded ground, yet the Court is competent to take note of the same and pass appropriate orders in accordance with the provisions of the Act and the rights guaranteed under Article 22(5) of the Constitution.

7. The detention order has been appended with the writ petition as Annexure-1. The excerpt relevant for the purpose at hand reads as follows:

The subject is hereby informed that he has right to make a representation against the order of detention. If he wishes to make representation he should address it to the State Government, Central Government (Home and Political Department) and Chairman, Advisory Board, Guwahati High Court as soon as possible.

8. Apparently, there is no mention of any representation to the detaining authority in the order dated 12.10.2005. Mr. B.J. Talukdar, learned State Counsel was specifically asked during the course of hearing as to whether the official

records indicate anything with regard to the information to the detenu of his right to make representation before the detaining authority. To this, the learned State Counsel stated that there is nothing on record to show that the detenu was, at any point of time, informed of his right to make representation to the detaining authority. We have also examined the affidavits filed by the Union as well as by the State Government. No mention is made of any such information to the detenu in the said affidavits.

9. The question that now arises for consideration is whether omission on the part of the detaining authority to inform the detenu of his right to make representation before him against the order of detention would render the order of detention invalid, being violative of the provisions of Article 22(5) of the Constitution?

10. This question came up before a Full Bench of this Court for consideration in W.P. (Crl.) No. 35/2005 and other similar writ petitions. The Full Bench by the judgment and order dated 27.2.2006 disposing of the writ petitions held as follows:

57. for all the aforesaid reasons, we hold:

(1) ....

(2) ....

(3) The detaining authority is under the constitutional obligation to inform the detenu of his right to make such a representation to the detaining authority;

(4) The failure to inform the detenu of such right to make representation to the detaining authority vitiates the detention order made even under the provisions of the National Security Act, 1980.

11. The law has been settled by this Court in the aforesaid judgment. The law as interpreted in the given circumstances of the case leads to the irresistible conclusion that the order of detention challenged in this petition is a nullity and, therefore, has to be set aside.

12. In view of the above finding on our part with regard to the question formulated hereinabove, we consider it redundant to address other points urged by the learned Counsel.

13. In the result, the petition is allowed. The order dated 12.10.2005 is hereby set aside. The Respondent authorities (The Union as well as the State Government) are hereby directed to release the detenu forthwith, if not wanted in connection with any other case.