

(2012) 01 OHC CK 0033

In the Orissa High Court

Case No : Writ Petition (Criminal) No. 1156 of 2011

Sankar Mishra

APPELLANT

Vs

State of Orissa and others

RESPONDENT

Date of Decision : 31-01-2012

Acts Referred:

National Security Act, 1980 — Section 10, 11, 3

Citation : (2012) 113 CLT 964 : (2012) CriLJ 3759

Hon'ble Judges : L. Mohapatra, J;B.K. Patel, J

Bench : Division Bench

Advocate : B. Mohanty, A. Tripathy and S. Mohanty, for the Appellant; Dillip Kumar Mishra, Addl. Govt. Advocate, for the Respondent

Judgement

L. Mohapatra, J.—The Petitioner in this Writ Petition challenges the legality of the Order Dated 16.7.2011 passed by the District Magistrate, Sambalpur in exercise of power conferred under Sub-Section (2) of Section 3 of National Security Act, 1980 (hereinafter referred to as "the Act") directing detention of the Petitioner in custody. The case of the Petitioner is that while he was in jail custody the impugned order was passed by the District Magistrate, Sambalpur on 16.7.2011 & the grounds of detention were served on him on 18.7.2011. The State Government approved the order of detention on 23.7.2011. On receipt of the grounds of detention the Petitioner submitted representation through jail authorities separately to the Advisory Board, the State Government as well as the Central Government on 30.7.2011. The matter was placed before the Advisory Board in compliance of Section 10 of the Act but the Petitioner was intimated on 15.9.2011 that the Advisory Board has confirmed the order of detention. The representation addressed to the State Government on 30.7.2011 was rejected on 24.8.2011 & there was delay of 24 days in rejecting the representation. Similarly the representation of the Petitioner dated 30.7.2011 addressed to the Central Government was rejected on 01.9.2011 & as such there was a delay of 31 days in disposal of the representation. It is also the case of the Petitioner that most of the cases, on the basis of which the impugned order of

detention has been passed by the District Magistrate, Sambalpur, were the subject matter of an earlier order of detention passed by the very same authority on 23.12.2005 & the said order of detention was quashed by this Court in W.P. (CRL) No. 128 of 2006 disposed of on 09.08.2006. It is therefore the case of the Petitioner that the detaining authority while passing the impugned order has not applied her mind.

2. A counter affidavit has been filed by the District Magistrate-cum-Collector, Sambalpur. It is stated therein that the Petitioner was involved in 23 number of criminal cases apart from other antisocial activities & in order to prevent the Petitioner from acting in any manner prejudicial to the maintenance of public order, the order of detention dated 16.7.2011 was passed. It is further stated that the order of detention has been passed basing on criminal antecedents, law & order situation & also maintenance of public order in the larger interest of the general public. In paragraph-9 of the counter affidavit it is specifically stated that the order of detention has been passed not only basing on criminal cases in which the Petitioner claims to have been acquitted but also taking into consideration of such other cases pending in High Courts & different Courts apart from such other incidents in which the conduct of the Petitioner was prejudicial to the maintenance of public order. In paragraph 13 of the counter affidavit it is stated that the State Government rejected the representation on 12.9.2011 & a copy of the said order was served on the Petitioner on 15.9.2011. The other averments made in the counter affidavit relate to each individual case on the basis of which the order of detention has been passed.

3. Central Government has also filed a counter affidavit wherein it is stated that the representation made to the Central Government was disposed of in time without delay. It is specifically stated that the report envisaged under Sub-Section (5) of Section 3 of the Act made to the Central Government by the State Government on 23.7.2011 was received in the Ministry of Home Affairs on 01.8.2011. The parawise comments of the detaining authority was received on 24.8.2011 through the State Government by its letter dated 12.8.2011. Identical representation & parawise comments were also received from the detaining authority on 23.8.2011. Both the representation were put before the Home Secretary for consideration on 25.8.2011. The representations were rejected by Order Dated 27.8.2011 & accordingly it is stated that the first representation having been received by the Central Government in the Ministry of Home Affairs on 24.8.2011 & the same having been rejected on 27.8.2011, there was no delay in disposal of the representation.

4. From the averments made in the Writ Petition, counter affidavit filed by the detaining authority & the Central Government, it appears that the Petitioner challenges the order of detention on the following grounds :-

(i) There was non-compliance of Section 10 of the Act, the Advisory Board having considered the representation & disposed of the same after the expiry of the period provided in the said Section.

(ii) The representation submitted by the Petitioner against the order of detention to the State Government was disposed of after inordinate delay & therefore the order of detention is liable to be set aside.

(iii) The order of detention has been passed with reference to some of the cases on the basis of which the order of detention was passed earlier in the year 2005 & the said order of detention was quashed by this Court on the ground that the fact of acquittal of the Petitioner in some of those cases had not been considered by the detaining authority. Therefore the detaining authority while passing the impugned order of detention had not applied her mind.

5. So far as the first ground taken by the Petitioner is concerned, it appears from the record produced by Learned Counsel for the State that the order of detention was passed on 16.7.2011 & the Advisory Board confirmed the order of detention on 02.9.2011. In the present case reference to Advisory Board has been made within the time prescribed in Section 10 of the Act. u/s 11 of the Act the Advisory Board is required to pass orders within seven weeks. The order by the Advisory Board having been passed on 02.9.2011 the same is within the prescribed period. Merely because the intimation was given to the Petitioner after expiry of the period does not amount contravention of Section 10 of the Act.

6. So far as the second ground taken by the Petitioner is concerned from the counter affidavit filed by the Central Government, it is clear that the representation of the Petitioner addressed to the Central Government was received by the Ministry of Home Affairs along with parawise comments on 24.8.2011. An identical copy of the representation with parawise comments of the detaining authority had also been received in the Ministry of Home Affairs on 23.8.2011. Both the representations were considered by the Home Secretary who has been delegated with the powers by Central Government on 25.8.2011. & the representations were rejected on 27.8.2011. Therefore, there is no delay in disposal of the representation by the Central Government.

6.1. So far as the State Government is concerned we find from the record that the order of detention was approved by the Principal Secretary to Government in Home Department on 22.7.2011 & the said order was also approved by the Chief Minister on 22.7.2011. The note sheet dated 11.8.2011 shows that the District Magistrate, Sambalpur had forwarded a copy of the representation of the Petitioner dated 06.8.2011 alongwith parawise comments & the same had been received on 11.8.2011. A copy of the representation along with parawise comments of the detaining authority were forwarded to the Ministry of Home Affairs, Government of India on the same day. The representation of the Petitioner dated 06.8.2011 was dealt with by Home Department & the Principal Secretary to Government in Home Department rejected the representation on 17.8.2011. The file was placed before the Chief Minister & the order passed by the Principal Secretary to Government in Home Department was confirmed on 20.8.2011. Therefore effectively the representation of the Petitioner addressed to the State Government dated 6.8.2011 was received on 11.8.2011 & was rejected

by the Principal Secretary to Government in Home Department on 17.8.2011. Therefore there is no delay also in disposal of the representation filed by the Petitioner to the-State Government.

7. So far as the third ground taken by the Petitioner is concerned, Learned Counsel for the State fairly submitted that cases appearing up to paragraph-12 might have been taken into account by the detaining authority in the year 2005 when the earlier detention order was passed. But the cases thereafter registered against the Petitioner from 2007 till the order of detention was passed were not the subject matter of earlier order of detention, Therefore it was contended by Learned Counsel for the State that the detaining authority applied her mind in respect of the incidents that had taken place after the earlier detention order was passed, as narrated from paragraph-14 onwards of the grounds of detention & mere reference to those cases on the basis of which the earlier order of detention was passed does not amount to non application of mind.

7.1. Learned Counsel for the Petitioner submitted that the detention order is not only based on the alleged incidents that had taken place from 2006 onwards but also on the basis of those cases for which the earlier order of detention was passed in the year 2005. In most of those cases the Petitioner had been acquitted & considering that the earlier order of detention was quashed by this Court. The fact that reference has been made to those cases in the order of detention clearly establishes non application of mind by the detaining authority.

7.2. Learned Counsel for the State in reply submitted that -mere reference to the old cases does not amount to non application of mind, as the order of detention is based on the antisocial activities, in which the Petitioner was involved after 2006. In this connection reference may be made to a decision of the Hon''ble Apex Court in the case of Chhagan Bhagwan Kahar Vs. N.L. Kalna and Others, . The order of detention had been passed in the reported case under Gujarat Prevention of Anti-Social Activities Act, 1985. The first order of detention was quashed & the second order of detention was again passed taking into consideration all grounds of earlier detention along with fresh facts. Second order of detention was held to be invalid on the above ground.

7.3. In the present case also though it is stated by Learned Counsel for-the State that the order of detention has been passed on the basis of cases registered against the Petitioner after 2006, reference has been made to all those cases prior to 2006 on the-basis of which an earlier order of detention was passed. This Court had quashed the earlier order of detention on the ground that the fact of acquittal in some of the cases referred to in the grounds of detention had not been taken into consideration by the detaining authorities. The same thing appears to have been repeated again by the detaining authority.

We are therefore, of the view that on this ground the Petitioner''s Writ Petition has to succeed. We accordingly allow the Writ Petition & set aside the impugned order of detention dated 16.7.2011 under Annexure-1 passed by the District

Magistrate, Sambalpur.

The Writ Petition is accordingly disposed of.