

(2011) 09 GAU CK 0077
In the Gauhati High Court
Case No : WP(Criminal) No. 24 of 2011

Senchamo Ezung @ Mark

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-09-2011

Acts Referred:

National Security Act, 1980 — Section 3(3), 3(3)

Citation : (2011) 5 GLT 139

Hon'ble Judges : A.K.Goel, J and Amitava Roy, J

Bench : Division Bench

Advocate : By Advocates : Mr. D. K. Mishra, Sr. Advocate. Mr. Y. IJ. Singh, Mrs. S. Jahan, Mr. B. Prasad, Ms. S. Goswami, Ms. M. Mahanta, Advocates., By Advocates: Mr. C. Baruah, Central Govt. Counsel. Ms. A. Aier, Govt. Advocate, Nagaland., Advocates appearing for Parties

Judgement

A. K. Goel, J.—This petition seeks quashing of order dated 13.06.2011 passed by the District Magistrate, Kohima, Nagaland under Section 3(3) of the National Security Act, 1980 (hereinafter referred to as the Act), directing detention of the petitioner to prevent him from acting in manner prejudicial to the defence of India, security of the State of Nagaland and maintenance of public order, as approved by the Govt. of Nagaland by order dated 23.06.2011.

2. It appears that the petitioner was already in judicial custody as undertrial in a criminal case alleging extortion of money from the Taxi drivers at the Taxi Stand, Kezieki, Kohima. He was alleged to be a member of FGN (an Insurgent Organization in the State of Nagaland). A proposal was received from the Superintendent of Police, Nagaland, that the petitioner be detained under the Act. On that basis impugned order of detention was passed.

3. Case of the petitioner is that his detention was illegal. His representation was not considered as required under the law and was mechanically rejected on 07.07.2011. No decision was conveyed on the representation by the State Government. Conferment of power of detention on the District Magistrate did not

meet the requirement of the Section 3(3) of the Act. The order of detention was composite for 3(three) persons and material particulars in support of grounds of detention have not been furnished. The satisfaction required for detention was vitiated.

4. Notice was issued. Reply has been filed on behalf of the State Government by Deputy Resident Commissioner, Govt. of Nagaland, stating the notification dated 23.05.2011 has been issued by the State, authorizing the District Magistrates in the State to exercise the power of detention. Other averments made in the petition have been denied.

5. We have heard Mr. D.K. Mishra, Senior Counsel, assisted by Ms. Jahan, Advocate for the petitioner, Mr. C. Baruah, learned Central Govt. Counsel and Ms. A. Aier, learned Govt. Advocate, Nagaland.

6. Main contention on behalf of the petitioner is that extension of period for exercise of power of detention by District Magistrates for the period from 01.06.2011 to 31.08.2011 does not comply with the statutory requirement of satisfaction by the State Government in terms of Section 3(3) of the Act. Learned counsel for the State defends the impugned order.

7. We have given our consideration to the issue raised.

8. Notification dated 23.05.2011 is as under:

?In continuation of this Department's Notification of even number dated 24th February 2011, the Governor of Nagaland is pleased to extend the period in which the District Magistrates in the State can detain certain persons for a period of 12(twelve) days under the National Security Act, 1980 as empowered by the State Government in accordance with Section 3(3) of the said Act for another 3(three) months w.e.f. 01.06.2011 to 31.08.2011 till further orders.?

9. Section 3(3) of the Act is as under:

?If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as many be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in subsection (2), exercise the powers conferred by the said subsection:

Provided that the period specified in an order made by the State Government under this subsection shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.?

10. Learned counsel for the petitioner has submitted that as per scheme of the Act, the power of detention under Section 3(1) is with the Central Government or

the State Government, but under sub Section (3) such power can be allowed to be exercised by the District Magistrates also in circumstances mentioned therein, i.e. on State Government being satisfied that having regard to the circumstances prevailing or likely to prevail in any area within the local limits or limits, it was necessary to confer such power of detention on the District Magistrates up to three months. The order conferring power can be amended to extend the period further by three months at a time on being satisfied as to necessity thereof. In the impugned notification under proviso to Section 3(3), circumstances prevailing or likely to prevail leading to satisfaction of the State Government are not mentioned nor it was mentioned that the Govt. was satisfied as to the necessity to confer power on the District Magistrate nor the records show existence of satisfaction of the State Government. In these circumstances exercise of power by the District Magistrate was illegal. Consequently, the detention of the petitioner was without jurisdiction.

11. Reliance has been placed on judgments of the Hon"ble Supreme Court in Smt. Icchu Devi Choraria vs. Union of India and others, reported in (1980) 4 SCC 531 and in Mohiuddin alias Moin Master vs. District Magistrate, Beed and others, reported in (1987) 4 SCC 58, to submit that the burden of providing that the detention is in accordance with the procedure established by law is on the State; and in Abhay Shridhar Ambulkar vs. S. V. Bhawe, Commissioner of Police, reported in AIR 1991 SC 397, to submit that for conferment of powers on District Magistrates, the State Government must record satisfaction that having regard to circumstances prevailing or likely to prevail, such conferment was necessary. Reliance has also been placed on a judgment of Rajasthan High Court in Ram Singh and etc. etc. vs. State of Rajasthan and another reported in 1994 CRI. L.J. 512.

12. Learned counsel for the respondents have not been able to show that the impugned order complied with the legal requirement for conferment of power on the District Magistrates either initially or while amending the order by extending the period by three months.

13. Power of preventive detention has been expressly conferred under the Constitution to ensure security and safety of the country and welfare of the people, but the same has to be exercised strictly in accordance with law. Burden of showing that the detention is in accordance with procedure established by law is on the detaining authority. Even though the power can be exercised on subjective satisfaction, whether or not such satisfaction has been formed is open to judicial review. Sub section (3) lays down circumstances in which power can be conferred on the District Magistrate. In the impugned notification there is no recital that the State Government was satisfied as to necessity of conferment/extension of power. We are conscious that mere absence of recital is not conclusive of absence of requisite satisfaction if existence of such satisfaction can be otherwise shown from the records. In the present case, no record has been produced showing reaching of such satisfaction. The affidavit has not been filed

by the detaining authority. While failure to file affidavit by the detaining authority may not always be enough to reject stand taken in an affidavit filed by any other officer, in the present case, the affidavit does not even explain that there was any application of mind to reach the requisite satisfaction. Mere fact that generally Nagaland may be disturbed area cannot, by itself, be treated to be compliance of SubSection (3). This being the factual position, only irresistible conclusion is that the conferment of power on the District Magistrate has to be held to be ultra vires Section 3(3) of the Act. Once it is so, order passed by the District Magistrate cannot be sustained.

14. Accordingly, this petition is allowed and the order of detention is quashed. The detenu may be released forthwith, if his detention is not otherwise required.