

(1991) 03 GAU CK 0018
In the Gauhati High Court
Case No : Civil Rule (HC) No. 4 of 1990

Shri Bacha Bora

APPELLANT

Vs

The State of Assam and Others

RESPONDENT

Date of Decision : 20-03-1991

Acts Referred:

Armed Forces (Special Powers) Act, 1958 — Section 3, 4, 5
Constitution of India, 1950 — Article 21, 22, 226
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 3, 4

Citation : (1991) CriLJ 2782

Hon'ble Judges : Manisana, J; M. Sharma, J

Bench : Division Bench

Advocate : A.C. Borbora and R. Borbora, for the Appellant; K.N. Chaudhury, Central Government Standing Counsel, M.A. Laskar, A.A.G., K.P. Sarma, Addl. Sr. Government Advocate and J. Singh, Government Advocate, for the Respondent

Judgement

Manisana, J.—In this application under Article 226 of the Constitution of India, the petitioner Bacha Bora complains against the arrest and detention of his sons Rituraj Barua aged 19 and Padmaraj Barua aged 21 as illegal and wrongful and prays for a writ of habeas corpus and compensation.

2. It appears from the records that on 1-12-90 the army personnel arrested Rituraj Barua from his house at Tingrai within Digboi Police Station of the district of Tinsukia and on 2-12-90 Padmaraj Barua from Margherita within Tinsukia District. Army authority made over them to Tinsukia Police Station on 16-12-90. Thereafter, a case was registered on 16-12-90 being Tinsukia Police Station Case No. 389 of 1990 Under Sections 3 and 4 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 on the accusation that the two are accomplice in the ULFA activities. After the formal arrest of the two by the civil police, they were produced before the Additional District Magistrate on the very same day for remand order. The Additional District Magistrate transferred the case to Digboi Police Station and the Digboi Police Station renumbered the case as its police station case No. 200 of 1990. As ordered by this Court the two arrested persons

were produced on 21-12-90 before this Court. There are allegations that after the arrest the two were assaulted and tortured by the army personnel. The army authority denies the allegations.

3. The Central Government declared the whole of the State of Assam as a disturbed area u/s 3 of the Armed Forces (Special Powers) Act, 1952, for short, "the Act". The Act authorises the army authority to arrest, or to search and arrest, of arrestable person as provided u/s 4 of the Act. u/s 5 of the Act, any person arrested and taken into custody under the Act shall be made over to the officer in charge of the nearest police station with least possible delay with a report of the circumstances occasioning the arrest.

4. Sri A. C. Borbora, learned counsel for the petitioner put forward the following grounds for challenging the legality of the arrest and detention of Rituraj Barua and Padmaraj Barua by the army authority. First, the initial arrest and detention of the two by the army authority was illegal because they were arrested and detained without being informed of the grounds of their arrest as required by Clause (1) of Article 22 of the Constitution. Secondly, the detention by the army personnel for 15 or 16 days was illegal as it was in violation of Section 5 of the Act and consequently violation of Article 21 of the Constitution. Thirdly, the detention by the civil police was also in violation of Article 21 of the Constitution for the remand order was made without production of the two arrested persons.

5. In two decisions of the Supreme Court, namely Naranjan Singh Nathawan Vs. The State of Punjab, and Ram Narayan Singh Vs. The State of Delhi and Others, it has been held that in habeas corpus proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of the proceedings. In A.K. Gopalan Vs. The Government of India, the Supreme Court has held that in dealing with a petition for habeas corpus the Court has to see whether the detention on the date on which the application is made to the Court is legal, if nothing more has intervened between the date of application and the date of hearing. In Talib Hussain Vs. State of Jammu and Kashmir, it has been held that in habeas corpus proceedings the Court has to consider the legality of the detention on the date of hearing. In Col. Dr. B. Ramachandra Rao Vs. The State of Orissa and Others, the Supreme Court has held that in habeas corpus proceedings the Court is to have regard to the legality and otherwise of the detention at the time of return and not with reference to the institution of the proceedings following the earlier decisions of the Supreme Court, namely Naranjan's case and Ram Narayan's case (supra).

6. There are three views of the Supreme Court with regard to the point in time for consideration of the legality or otherwise of the detention, that is to say (1) on the date of application, (2) at the time of return and not on the date of filing of petition, and (3) on the date of hearing.

7. In Kanu Sanyal Vs. District Magistrate, Darjeeling and Others, after discussing

the earlier decisions of the Supreme Court referred to above, the Supreme Court observed that of the three views taken by the Supreme Court at different times, the second view (at the time of return) appears to be in consonance with the law and practice in England and may be taken as having received the largest measure of approval in India, though third view also cannot be discarded as incorrect, because an enquiry whether the detention is legal or not at the date of hearing of the application for habeas corpus would be quite relevant, for the simple reason that if on that date the detention is legal, the Court cannot order release of the person detained by issuing a writ of habeas corpus.

8. In *Saptawna Vs. The State of Assam*, The Supreme Court has held that, where initial arrest and detention of the accused by the army authority is illegal and the detention becomes lawful when subsequently he was arrested by civil police and produced before the Magistrate as under trial prisoner, the Court cannot order release by issuing writ of habeas corpus.

9. It is clear from the above decisions of the Supreme Court that in habeas corpus proceedings if the detention is legal at the time of the disposal of the petition the Court cannot order release of the person detained by issuing a writ of habeas corpus. Therefore, the legality or otherwise of the detention shall also be considered on the date of final disposal of the petition.

10. In the present case the application was filed on 17-12-90. Army authority made over the two arrested persons to the civil police on 16-12-90. The civil police arrested them under FIR case referred to above. If the two are in the custody of the armed forces a question may arise as to whether the two would be entitled to be released or they would be made over to the civil police. But the question does not arise because the two are under-trial prisoners. The only question which, therefore, requires to be considered is whether the remand order was illegal. The submission of Mr. Borbora, as already stated, is that at the time of passing remand order the two were not produced before the Magistrate. Mr. Borbora has submitted that in the affidavit of the State, it is stated that the two were made over to civil police on 16-12-90 at about 6-25 p.m. This statement suggests that the remand order was made after the Court hours and therefore, it supports his contention that the two were not produced when the remand order was made. We are not expressing any opinion about the effect of the remand order, it made, without production of accused before the Magistrate, as the records produced by the State show that the two arrested persons were produced before the Magistrate. We presume that the judicial and official acts have been regularly performed. In that view of the matter, we are unable to accept the contention of Shri Borbora. Therefore, the detention became lawful when the two were arrested and produced by the civil police before the Magistrate for remand order as under-trial prisoners. In that view of the matter, the prayer for writ of habeas corpus has become infructuous.

11. The next contention of Mr. Borbora is that the detention of Rituraj and Padmaraj by the army authority was wrongful and army personnel also assaulted

them and, therefore, they are entitled to compensation.

12. u/s 5 of the Act, the person arrested by the army authority shall be made over to the officer in charge of the nearest police station with least possible delay. We reiterate what we have held in Civil Rule (HC) 3 of 1991 between Purnima Barua v. Union of India as regards the span of time, which is designated by the words "least possible delay". The word "least possible delay" may be said to do a thing within the shortest possible time. But no arbitrary time limit can be set down as it may not be possible in many cases to affirmatively say or precisely quantify the period of time by reference to hours, dates or months. However, it will be possible having regard to the circumstances of the case, to say whether thing was done or was not done with "least possible delay". Therefore, whenever the question of "least possible delay" arises for decision in computing the period of time the Court has to have regard to the particular circumstances of the case, for example, physical impossibility or otherwise to make over the arrested person to the nearest police station, and how, where and in what circumstances the arrest was effected. Therefore, when an act is done after an interval of time and there is no explanation forthcoming for delay, it cannot be said to have been done with least possible delay.

13. Admittedly, Rituraj Barua and Padmaraj Barua were arrested by the army authority on 1-12-90 and 2-12-90 respectively and both of them were made over to the civil police at Tinsukia on 16-12-90 whereas the nearest police station was Digboi Police Station. There is no explanation forthcoming as to why the two were detained for more than two weeks. The affidavit of the Union has been modelled in such a casual manner that it would be difficult to rely on it. In the absence of any explanation, it cannot be said that Rituraj and Padmaraj were made over to civil police with least possible delay. Therefore, the detention was in violation of Section 5 of the Act. The violation of Section 5 of the Act will not only amount to wrongful detention but also violation of constitutional and legal rights.

14. As regards the assault on Rituraj and Padmaraj, they were medically examined on 21-12-90 as directed by this Court. The medical reports indicate that the doctor found the following injuries -- Haematoma over right side chest, tenderness over the upper abdomen, tenderness over the right flank, and scars (old) over the knees and dorsum of left wrist on the body of Padmaraj; and soft tissue haematoma over the right side chest, tenderness over the coccyx region, and scar marks on the kness (old and healed) and left elbow on the body of Rituraj. The medical reports further indicate that Padmaraj was sent to Urology unit and Rituraj was sent to cardio thoracic and orthopaedic units for further examination. The medical reports furthermore indicate that the wounds are simple in nature caused by blunt weapon. However, age of the injuries has not been given. There is definite assertion that the army personnel assaulted the two. It has already been held that affidavit of the Union has been modelled in a casual manner.

15. This Court in a series of cases has held that the High Court in exercise of its jurisdiction under Article 226 of the Constitution can award compensation in appropriate cases. On the facts and in circumstances of the case, we are of the view that if we award Rituraj Barua and Padmaraj Barua Rs. 5000/- each as monetary compensation in the nature of a palliative, it would meet the ends of justice.

16. For the foregoing reasons, it is ordered and directed that the respondents shall pay Rituraj Barua and Padmaraj Barua Rupees 5000/- each as monetary compensation in the nature of a palliative. It is made clear that the order of monetary compensation will not preclude the aggrieved party from bringing an action to recover appropriate damages from the respondents or their erring officials in accordance with law. It is further ordered and directed that the respondents shall see that in future no such violation of constitutional and/ or legal rights of the citizens are permitted to be committed by the army personnel.

17. In the result, the petition is partly allowed. No costs.

M. Sarma, J.

18. I agree.