

(2007) 02 OHC CK 0045

In the Orissa High Court

Case No : Writ Petition (C) No. 13073 of 2006

Smt. Jayantibala Sahoo

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 12-02-2007

Acts Referred:

Constitution of India, 1950 — Article 21, 22(5)
Criminal Procedure Code, 1973 (CrPC) — Section 75

Citation : (2007) CLT 849 (Suppl CrI)

Hon'ble Judges : I.M. Quddusi, J;A.K. Samantaray, J

Bench : Division Bench

Advocate : A.K. Mohapatra, N.C. Rout, S.K. Padhi, M. Routray and A. Mohapatra, for the Appellant; Addl. Govt Advocate for O.Ps. 1 and 2 and B.K. Das, for Union of India, for the Respondent

Final Decision : Dismissed

Judgement

I.M. Quddusi, J.—By means of this writ petition, the Petitioner has challenged the impugned order passed by the District Magistrate, Mayurbhanj dated 8th September, 2006 under Sections 3(1) and 3(2) of the Prevention of Black-Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, (for short. "The Act"), directing detention of the Petitioner under the aforesaid Act which was served on the Petitioner on 11.9.2006 while she was detained in Circle Jail, Baripada. Pursuant to the impugned order, the Petitioner has been detained since 8.9.2006 although the impugned order was served on the Petitioner together with the grounds of detention on 11.9.2006.

2. The brief facts of the case are that the Petitioner was granted licence of a Sub-whole sale Dealership to deal in Kerosene oil under the public distribution system for Nuagaon and Kapadia Sub-Depots under the Saraskanda Block for the year 1996-97, which was renewed from time to time and it was lastly renewed on 1.4.2004 for a period of three years up to 31st March 2007 under the Orissa Public Distribution System (Control) Order, 2002. On 3rd September, 2006, some

villagers detained a pick-up van, Tata make No. OR-11B-8762 at Brushabhanapur at Birika Chhak and the same was found to be carrying nine barrels of kerosene oil. The Marketing Inspector, Sarskana as well as the police personnel reached the spot and conducted a joint inspection. The driver of the vehicle could not produce any document. Thereafter, the Marketing Inspector had gone to the Sub-wholesale depot of the Petitioner on 4th September 2006 and made an inspection of the registers and a physical verification of the stock. The Petitioner had taken a stand that she had sold 1950 liters of kerosene oil to retailer Sri Sudam Chandra Murmu of village Damana Sahi on the basis of a telephonic message from him and had also issued the stock in favour of one Sri Birendra Nath Patra, a retailer of village Ratila, but did not collect any money from him. Thereafter, the I.O. (Marketing Inspector) inquired from the two retailers who had denied to have purchased any kerosene oil on 3rd September 2006. The kerosene oil with vehicle and the stock available in the Sub-wholesaler depot were seized and the prosecution report u/s 6-A of the Essential Commodities Act was filed. It is also alleged in the counter affidavit that in the year 2004 the Petitioner has admitted to have committed mistakes in distribution and some quantity of kerosene oil were also seized and she was also suspended from lifting of further quota of kerosene oil. However, ultimately license of the Petitioner was at that time restored revoking the suspension. The impugned detention order has been passed on the grounds quoted below:

Under the above circumstances and after taking into account all the material facts and factors of this case, it is necessary at once to restore the supply of the kerosene oil to the community. The I.O. has prayed that to prevent Smt. Jayantibala Sahu from diverting further quantities of kerosene oil to black-marketing, it is essential to detain her u/s 3(1) and 3(2) of Prevention of Black-Marketing and Maintenance of Supplies of Essential Commodities Act, 1980. In the present instance, I am satisfied that you, Smt. Jayantibala Sahu were dealing in kerosene oil with a view of making gains in a manner that tends to defeat the provisions of the Essential Commodities Act, 1955, namely, by preventing the people from getting their entitled quantities of kerosene oil, and you were diverting kerosene oil to black-marketing with intentions of profiteering by selling it to a person who is not the concerned retailer, an act that violates Clause 3(2) of Orissa PDS Control Order 2002. I am satisfied that your immediate detention is necessary to prevent you from acting in a manner prejudicial to the maintenance of supplies of kerosene oil, an essential commodity, and in the interest of the people of Saraskana Block and in the interest of the smooth distribution of the kerosene oil under P.D.S. as envisaged under the E.C. Act, 1955.

3. A perusal of the above shows that the impugned order of detention has been passed, inter alia, on the grounds that (1) to prevent the Petitioner from diverting further quantity of kerosene oil to black marketing; (2) to restore supply of kerosene oil to the public at once; and (3) to prevent her from acting in any manner prejudicial to the maintenance of supply of kerosene oil essential for

the community in the interest of smooth distribution of kerosene oil under public distribution system (in short, "PDS").

4. The Government approved the impugned detention order dated 8.9.2006 on 19.9.2006. The detention order thereafter was confirmed by the State Government vide order No. 22225 dated 26.10.06 after obtaining opinion of the Advisory Board on 26.10.2006. A copy of the said confirmation order was sent to the Government of India, vide letter No. 22538 dated 31.10.2006. The report regarding detention was already sent to the Govt. of India vide letter No. 19564 dated 19.9.2006 by Speed Post.

5. The impugned detention order has been challenged on the following grounds:

(i) The detention order was passed on 8.9.2006, but the same was not served upon the Petitioner on that date. However, she was detained in the prison with effect from that date, but the copy of the order with grounds were served on 11.09.2006.

(ii) The order of detention was liable to be communicated to the Government of India within seven days from the date of detention order, but the same was communicated on 19.9.2006.

(iii) No reason was disclosed in the approval order passed by the State Government on 19.9.2006 and also in the confirmation order on 26.10.2006. Therefore, the detention order dated 8.9.2006 and its approval dated 19.9.2006 and confirmation dated 26.10.2006 were passed without application of independent mind and hence the detention order cannot be sustained in the eye of law.

(iv) In the grounds of detention the detaining authority has considered a past incident dated 11.9.2004 but those proceedings were already set aside by the Collector, Mayurbhanj vide order dated 30.3.2005 pursuant to this Court's directions passed in a writ petition filed against this order and therefore the same was not liable to be considered in the detention order. Hence, the detention order is based on an incident, which was set aside and the said incident could not have been taken into consideration. Thus excluding the above incident there was only solitary incident on the basis of which the detention order could not have been passed.

6. With regard to the first point regarding detention of the Petitioner from 8.9.2006 and service of order and grounds on 11.9.2006, it is necessary to consider the provisions of Section 4 of the Act, according to which detention order may be executed at any place in India in the manner provided for the execution of warrant of arrest under the Code of Criminal Procedure, 1973 (2 of 1974).

Section 75 of the Code of Criminal Procedure lays down notification of substance of warrant, according to which the police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested,

and, if so required, shall show him the warrant.

In the counter affidavit it is specifically mentioned that at the time of arrest the Petitioner was informed about the reason of arrest on 8.9.2006 at 5 P.M. In view of the above-mentioned facts, it cannot be said that the substance of warrant was not notified to the Petitioner. Further, Section 8 of the Act provides that when a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing not later than ten days from the date of detention, communicate to him the grounds on which the order has been made.

In the instant matter, the Petitioner was detained on 8.9.2006 and the grounds of detention was served upon her on 11.9.2006, i.e., within four days from the date of detention. Therefore, the first point is not sustainable in the eye of law.

7. In respect of second point regarding communication of the detention order together with the grounds to the Central Govt, it is pertinent to mention here that Sub-section (4) of Section 3 of the Act provides that when any order is made or approved by the State Government under this Section or when any order is made under this Section by an officer of the State Government not below the rank of Secretary to that Government specially empowered under Sub-section (1), the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made.

The order of the District Magistrate was liable to be approved by the State Government otherwise it could not have remained in force for more than 12 days and, therefore, the expression "any order is made" in Sub-section (4) would mean the order made by the Central Government or State Government or any officer of the Central Government not below the rank of Secretary to that Government specially empowered for the purposes of this Section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this Section by that Government, or any order has been passed by the District Magistrate and approval granted by the State Government thereon. The period of seven days cannot be counted from the date of the detention order passed by the District Magistrate. The order of the District Magistrate cannot remain in force without approval of the State Government. The liability to communicate the order to the Central Government vests upon the State Government and not upon the District Magistrate. The detention order was approved by the State Government on 19.9.2006 and the Central Government was communicated the same on the same date. Therefore, the second point is also not sustainable.

8. With regard to the third point regarding non-existence of any reason in the orders of approval as well as confirmation passed by the State Government, the provisions of Sub-section (3) of the Act are relevant. It is provided therein that

approval of the State Government is to be given to the order of detention passed by the District Magistrate together with the grounds on which the order has been made and such other particulars which have a bearing on the matter. Therefore, it is the subjective satisfaction of the State Government only to approve the order.

9. On perusal of the grounds and other materials sent by the District Magistrate along with the detention order to the State Government for the opinion thereon, we are of the view that no reasons were required to be given in approving the detention order. On receipt of the report of the Advisory Board that there is sufficient cause for detention of the person concerned, the Government have confirmed the detention order u/s 12 of the Act. The very purpose to constitute the Advisory Board under the statute is to consider the matter and submit a report to the Government together with the reasons as to whether or not there is sufficient cause for detention of the person concerned. Therefore, there is no necessity to give the reasons for confirming the detention by the State Government u/s 12 of the Act, acting on the report of the Advisory Board. Therefore, the third contention is also not sustainable.

10. With regard to 4th contention that the past incident was taken into consideration and on the basis of the solitary incident excluding the past incident, the detention order could not have been passed, it is necessary to have a look into the preamble of the Act according to which it is an Act to provide for detention in certain cases for the purpose of prevention of black marketing and maintenance of supplies of commodities essential to the community and for matters connected therewith. Therefore, even for one incident if the District Magistrate or the State Government, as the case may be, is satisfied that with a view to prevent a person from acting in any manner prejudicial to supply of essential commodities to the community, it is necessary to detain a person, an order can be made for his detention. The object of detention is to prevent the person from acting in any manner prejudicial to the maintenance of supply of commodities and to prevent the black marketing. Therefore it is not material whether there is only solitary incident or more than that. Hence this contention also is not sustainable.

11. In the case of *Brij Mohan Sharma Vs. District Magistrate and Others*, the Division Bench of this Court held as under:

A preventive detention is not punitive but precautionary measure. The object is not to punish a man for having done something but to prevent and intercept him before he does it again. No offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonable probability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities (See *Rex v. Halliday*; 1917 A.C. 260, *Mr. Kubic Dariusa v. Union of India and Ors.* AIR 1990 SC 605). But at the same time a person's greatest of human free dom, i.e., personal liberty is deprived, and therefore, the

laws of preventive detention are strictly construed, and meticulous compliance with the procedural safeguards, however, technical is mandatory. The compulsions of the primordial need to maintain order in society, without which enjoyment of all rights including the right of personal liberty would lose all their meaning, are the true justifications for the laws of preventive detention. Sometimes, the deprivation of personal liberty of individual becomes imperative to protect the society from denigrating. Laws that provide for preventive detention pose it that an individual's conduct prejudicial to the maintenance of supplies of commodities necessary for the community can provide grounds for a satisfaction that similar propensities on the part of the person concerned are likely and there is a possible future manifestation. This jurisdiction has been described as a jurisdiction of suspicion; and the compulsions to preserve the values of freedom, of a democratic society and of social order sometimes merit the curtailment of the individual liberty (See *Ayya alias Ayub Vs. State of U.P. and Another*,) "To lose our country by a scrupulous adherence to the written law" said Thomas Jefferson "would be to lose the law itself, with life, liberty and all those who are enjoying with us, thus absurdly sacrificing the end to the needs. No law is an end itself and the curtailment of liberty for reasons of State's security and national economic discipline as a necessary evil has to be administered under strict constitutional restrictions". No carte blanche is given to any organ of the State to be the sole arbiter in such matters. A constitutional protection is given to every detenu which mandates the grant of liberty to the detenu to make a representation against the detention as impeached in Article 22(5) of the Constitution. It also imperates the authority to whom the representation is addressed to deal with the same with utmost expedition. The representation is to be considered in its right perspective keeping in view the fact that the detention of the detenu is based on subjective satisfaction of the authority concerned and infringement of the constitution rights conferred under Article 22(5) in validates the detention order. Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. The stringency and concern of the judicial vigilance that is needed was aptly described in the following words in *Thomas Pelham Dames*" case 1881 (6) Q.B.D. 376.

Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of Anr. he must take care to do so by steps all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the Court will not allow the imprisonment to continue.

Whenever there is executive invasion on personal liberty, the Court has to weigh in golden scales whether the personal liberty is to be placed at a high pedestal regardless of the social cost involved in the release of possible renegade. Observations to similar effect were made by the Supreme Court in *Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others*, . Judged in this background,

the question is whether the detention as directed in the instant case is one where the procedural sinews suffered from any weakness to warrant interference.

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It is appropriate to deal with the grounds relating to the surrender of licence, alleged non-application of mind to material factors and the desirability of specific mention regarding inadequacy of procedures under the common law together as they are inter lined. The factum of surrender of licence has been stressed to submit that in the absence of license, the possibilities of further trade vanished and therefore, the apprehension of future detrimental acts also consequently disappeared. It is relevant to indicate here that the order of detention was passed on 29.8.1990, while it was served on the detentu on 23.10.1990 at 1.30 p.m. and he was lodged in the Circle Jail, Cuttack on 24.10.1990 at 10.15 a.m. This position is undisputed. Intimation of intention to discontinue business and to surrender the license issued under the Orissa Pulses Edible Oil seeds and Edible Oil Dealers" (Licensing) Order, 1977 (hereinafter referred to as the "Licensing Order") was filed on 31.8.1990. The contention that after the licence is surrendered, there is no possibility of dealing with the essential commodities has no substance. One of the grounds indicated in the order of detention was non reflection of sale of 2600 tins of Konark Brand Vanaspati received from the manufacturers during April, 1990. This was also not a part of the stock exhibited by the detenu for sale. Mere non-possession of licence is no guarantee for non-involvement of a person in clandestine activities. Similar contention raised by a detenu did not find acceptance by the Supreme Court (See Dinanath Pansari Vs. Collector and D.M., Keonjhar and Another,). In that case the contention of the detenu was that by virtue of an executive order, there was no possibility of getting any stock and there was no necessity to continue the detention. The plea was not accepted by the Supreme Court.

12. There is no allegation in the writ petition that there was any delay in disposal of the representations against the impugned order of detention. Therefore is no question of consideration regarding filing of representation and its disposal. However, it has been alleged that the Petitioner filed a petition on 25.9.2006 before the Commissioner-cum-Secretary, Government of Orissa u/s 15 of the Act for temporary release from prison, but the same is not against the impugned order of detention which is not liable to be considered in the instant writ petition.

13. In view of the above-mentioned facts and circumstances, this Court has come to the conclusion that there is no force in this writ petition and the same is liable to be dismissed. Therefore, the writ petition is dismissed accordingly. There is no order as to costs.

A.K. Samantray, J.

13. I agree.