
(1998) 04 OHC CK 0002

In the Orissa High Court

Case No : Original Jurisdiction Case No. 15990 of 1997

Smt. Sumati Dash

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 15-04-1998

Acts Referred:

Constitution of India, 1950 — Article 21, 22
National Security Act, 1980 — Section 12, 3

Citation : (1998) 86 CLT 42 : (1998) CriLJ 3239 : (1998) 2 OLR 50

Hon'ble Judges : S.N. Phukan, C.J.;C.R. Pal, J

Bench : Division Bench

Advocate : Savitri Ratho, for the Appellant; Sr. Standing Counsel (Central) and S.P. Mishra, A.G.A., for the Respondent

Final Decision : Allowed

Judgement

S.N. Phukan, C.J.—The writ petitioner is the wife of Sri Harihar Das who is under detention under National Security Act since 30.7.1997. While the detenu was in custody in Special Jail, Boudh since 28.7.1997 in connection with Boudh P.S. Case No. 125 of 1997, he was served with detention order dated 30.7.1997 and grounds of detention dated 3.8.1997. A copy of the detention order passed by the District Magistrate is at Annexure - 1/A.

2. By order dated 7.8.1997, the Government of Orissa in Home (Special Section) Department in exercise of powers conferred by Sub-section (4) of Section 3 of the Act approved the detention order made by the District Magistrate, Boudh until further orders. After receiving the report of the National Security Advisory Board, the State Government passed an order dated 20.9.1997 in exercise of powers u/s 12(1) of the Act confirming the detention order and directed that detenu shall continue in detention for twelve months or until further orders.

3. Being aggrieved by the order of detention, the wife of the detenu has challenged the same.

4. It has been specifically stated that there was no material before the detaining authority that the detenu was, likely to be released on bail. It has also been alleged that no action of the detenu constituted any threat to public order and that ordinary law was sufficient to deal with the cases instituted against the detenu, more particularly Boudh P.S. Case No. 125 of 1997. Misbehaviour by the detenu to one lady has been denied. It has been stated that though in the grounds of detention, reference has been made to letter dated 29.7.1997 of the Superintendent of Police, Boudh, copy thereof was not supplied to the detenu, for which he could not make an effective representation to the Advisory Board, the State Government or the Central Government. The main point urged is that there is considerable delay in considering the representation by the State Government and also by the Central Government and therefore, the detention is illegal.

5. In the counter filed on behalf of the Union of India, it has been stated that report as envisaged under Sub-section (5) of Section 3 of the Act was forwarded by the Government of Orissa to the Central Government by letter dated 11.8.1997 which was received by the Central Government on 19.8.1997. The Central Government completed the examination of the report on 19.8.1997 and it was decided on 29.8.1997 that there was no necessity to interfere with the order of detention. The representation of the detenu dated 2.10.1997 was received by the Central Government on 24.10.1997 and was immediately processed and it was found that certain vital information required for its further consideration was needed to be obtained from the State Government. Therefore, crash wireless message was sent on 27.10.1997 and reminder on 3.11.1997. Information was received by the Central Government on 11.11.1997 as per letter of the State Government dated 10.11.1997 and the case was put up before the Deputy Secretary, Ministry of Home Affairs on 13.11.1997, who, after considering the same, put up before the Joint Secretary on the same day. Thereafter the Joint Secretary considered the case and with his comments put up the same before the Minister of State on 13.11.1997 and the Minister rejected the representation of the detenu on 19.11.1997. It has been pleaded that the Minister of Home Affairs took the decision within six days excluding the holidays on 14th, 15th and 16th November, 1997). The detenu was informed about the decision by crash wireless message followed by letter dated 21.11.1997. Therefore, it has been stated that the Central Government considered most expeditiously the representation of the detenu and there was no delay.

6. In the counter affidavit filed on behalf of opposite party No. 1, namely, the State of Orissa represented by the Secretary to Government, Home Department, it has been stated that the writ petition is not maintainable and the order of detention is valid and lawful. It has been stated that the order of detention was issued by the District Magistrate, Boudh on 30.7.1997 and not on 3.8.1997. The District Magistrate, Boudh intimated the same to the Government vide letter dated 30.7.1997 along with order sheets, report of the S.P., Boudh and other relevant papers, which were received by the State Government on 31.7.1997. The District Magistrate, Boudh in his letter dated 3.8.1997 also furnished the

detention order, grounds of detention and other relevant papers which were received by the State Government on 5.8.1997. The State Government after careful consideration, approved the detention order on 7.8.1997 within the statutory period of 12 days as per the provisions of Sub-section (4) of Section 3 of the Act. The approval was intimated to the District Magistrate, Boudh by message dated 7.8.1997.

7. It is submitted that as required u/s 10 of the Act, the State Government referred the case of the detenu to the Advisory Board on 11.8.1997, i.e., within three weeks from the date of detention, and the Advisory Board was of the opinion that the detention is legal and valid. The State Government, after careful consideration of the opinion and the report of the Advisory Board and other relevant aspects including the report of the proceedings and in exercise of the power conferred u/s 12(1) of the Act, confirmed the detention order and directed that the detenu shall continue in jail for twelve months vide letter of the State Government dated 20.9.1997 which was served on the detenu on 26.9.1997.

8. According to the petitioner, the detenu had filed two separate representations, one for release on parole and another addressed to the Government of India. The first representation was made on 1.10.1997 which was received by the Government on 25.10.1997. It has been stated that the District Magistrate, Boudh was requested on 29.10.1997 by Fax message to furnish specific comments. Reminder was also issued on 6.11.1997. Para-wise comments of the District Magistrate, Boudh on the parole petition was received by the Home Department on 10.11.1997. Thereafter it was processed and examined at different levels and ultimately the file was submitted to the Chief Minister on 1.12.1997, who passed the order rejecting the representation for parole on 3.12.1997 and the said order was intimated to the detenu through the District Magistrate on 4.12.1997. Regarding the second representation which is dated 2.10.1997 the same was received by the State Government on 21.10.1997 and was sent to the Government of India, as it was addressed to the Home Ministry of the Government of India. After receipt of para-wise comments from the District Magistrate, Boudh, it was considered by the Government of India. The Central Government by letter dated 20.11.1997 informed the State Government that the representation of the detenu was rejected.

9. In the counter affidavit filed on behalf of the District Magistrate, it has been stated that anti-social activities of the detenu created fear psychosis and sense of insecurity in the minds of the peace-loving citizens of Boudh P.S. area in particular and other areas of Boudh district in general. The detenu is involved in 20 criminal cases for various offences including outraging modesty of a lady. As the ordinary laws of the land failed to restrain the detenu from doing such antisocial acts, his free movement at large was considered to be prejudicial to public order and, therefore, the detention order was passed after proper application of mind. Regarding non-supply of the report of the S.P., it has been stated that before the Advisory Board, the detenu admitted in his representation

that he had received the report of the S.P. Hence this plea is not tenable. It has been specifically averred that all relevant documents along with the report of the S.P. were also sent to the Government. The detenu was informed that he may make a representation before the Advisory Board vide letter dated 22.8.1997 as at Annexure C/3. Regarding the mercy petition dated 2.10.1997 it has been stated that the same was received on 8.10.1997 and was forwarded to the State Government vide letter dated 14.10.1997 as the Puja holidays intervened. It was sent to the Central Government by the State Government on 27.10.1997. The Central Government asked for para-wise comments which was received by the Collector on 31.10.1997 and was sent to the S .P. who was on leave from 2.11.1997 to 4.11.1997 and was busy in connection with the visit of the Deputy Chief Minister. Therefore, he could send his report only on 9.11.1997. The Collector sent the para-wise intimation to the State Government. Copies of letters are at Annexure G/3 and H/3. It has also been stated that the detenu assaulted the Executive Magistrate at Boudh daily market and a police case, viz. Boudh P.S. Case No. 20 dated 9.2.1997 under Sections 341, 294, 323 and 506, IPC was registered."

10. Before going into the merits of the case, let us refer to some decisions of the Apex Court on the point.

In *Kanti Lal Bose Vs. State of West Bengal*, , the apex Court considered the provisions of West Bengal (Prevention of Violent Activities) Act, (19 of 1970), and held that the delay of 28 days in considering the representation by the State Government without any cogent ground would invalidate the order of detention.

In *Kala Chand Saran Vs. State of West Bengal*, , the detention was under the Maintenance of Internal Security Act, 1971. The detenu filed a representation on 10.1.1972, which was considered by the Government on 19.2.1972. A point was raised that the representation was not considered as expeditiously as possible and it took nearly one month and nine days to do so. Though some explanation was given, it was not accepted by the apex Court. The apex Court referred to Articles 21 and 22 of the Constitution regarding personal liberty guaranteed by the Constitution. Referring to Article 22(5) in particular, the apex Court held that some safeguards are there against preventive detentions and those have to be complied with by the detaining authority. As there is no trial in cases of preventive detention, the representation and its consideration are designed by the Constitution to afford the earliest opportunity to the detenu to have his version in defence considered. The undue delay in considering the detenu's representation in that case having not been satisfactorily explained, the detention order was quashed.

In *Raghavendra Singh Vs. Superintendent, District Jail, Kanpur and Others*, , the detenu was detained under the National Security Act. There was undue delay of 76 days in considering the representation of the detenu by the Central Government. The order of detention was passed by the District Magistrate, Kanpur. It was held that the representation addressed to the President must be

considered to be a representation properly addressed to the Central Government. Since there was wholly unexplained and unduly long delay in the disposal of the representation by the Central Government, further detention of the detenu was illegal.

In *Piara Singh Vs. State of Punjab*, , the detenu was detained by the Government and there was unexplained delay of one month and ten days in disposal of the representation. Therefore, the order of detention was set aside.

In *Mahesh Kumar Chauhan alias Banti Vs. Union of India and others*, , the detenu was detained under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The order was passed by the Central Government. The detenu filed a representation on 18.8.1989, which was received by the Department on 23.8.1989. It was sent to the concerned sponsoring authority on 25.8.1989: The sponsoring authority sent its comments only on 11.9.1989. It was processed and put up before the Minister of State for Revenue, who rejected the same on 15.9.1989 subject to approval of the Finance Minister. On 18.9.1989, the file was received back from the Finance Minister's Office and memorandum was issued on 19.9.1989 rejecting the representation. In view of the undue delay, the detention order was set aside. It was also held by the apex Court that it is obvious from Article 22(5) of the Constitution that the obligation to furnish the earliest opportunity to make a representation loses both its purpose and meaning, if the representation is not considered and disposed of as expeditiously as possible.

In *Smt. Gracy Vs. State of Kerala and another*, , the detenu was detained under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988. The apex Court held that it is the dual obligation of consideration of the detenu's representation by the Advisory Board and independently by the detaining authority, even when only one representation is made and addressed to the detaining authority. It was further held that it cannot be said that the detaining authority is relieved of its obligation merely because the representation is addressed to the Board instead of the detaining authority.

Similar view was expressed in *Moosa Husein Sanghar Vs. State of Gujarat and others*, .

In *B. Alamelu v. State of TamilNadu* AIR 1995 SC 539, the detention was under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The detenu furnished a copy of the representation to the jail authority. There was delay of about 84 days in forwarding the representation to the Central Government. The detention order was held to be illegal.

In *Jai Prakash Vs. District Magistrate, Bulandshahar, U.P. and others*, , the detention was under the provisions of the National Security Act, 1980. On 3.8.1991, the detenu submitted nine copies of the representation to the Superintendent of Jail addressing only to the Home Secretary without specifying

the State or Central Government. The Jail Superintendent kept one copy for his office, sent another copy to the Advisory Board and forwarded the remaining copies to the State Government. The representation was rejected by the State Government on 9.8.1991. It was held that when the detenu gave sufficient number of copies of his representation and left it to the jail authorities to forward the same to authorities as specified in the grounds of detention, the Jail Superintendent was legally bound to send one copy to Central Government also. That having not been done, the detenu was denied his right to make an effective representation, and, therefore, the detention order was quashed.

11. From the aforesaid decisions we find that law is well settled that the representation of the detenu must be considered by the Government as expeditiously as possible and failure on the part of the Government to do so would make the order of detention invalid. This is so because a person detained under any preventive law has no right of trial. The only remedy is to file a representation as envisaged under Clause (5) of Article 22 of the Constitution which inter alia provides that when any person is detained in pursuance of an order made under any law for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. It follows from the above decisions that even if the representation is made to the Advisory Board, it is obligatory on the part of the State Government as well as the Central Government to consider the representation as expeditiously as possible and delay in doing so will invalidate the detention order. Sub-section (5) of Section 3 of the National Security Act, 1980 imposes a duty on the State Government to report to the Central Government the fact of detention, the grounds on which the order has been made and such other particulars as in the opinion of the State Government have a bearing on the necessity of the order. The Central Government after receiving the report has to consider whether the detention is just and proper and pass appropriate orders.

12. From the counter affidavit filed on behalf of the Union of India, opposite party No. 2, it appears that though the order of detention was passed on 30.7.1997 and was confirmed on 7.8.1997, the State Government intimated the fact to the Central Government by letter dated 11.8.1997 which was received by the Central Government on 19.8.1997.

13. Regarding the representation dated 2.10.1997 of the detenu, it has been stated that it was received by the Central Government on 24.10.1997 and was processed. It was found that certain vital information were required to be obtained from the State Government. Accordingly the State Government was informed by crash wireless message on 27.10.1997 and subsequent reminder was issued on 3.11.1997. Required information was received on 11.11.1997 from the State Government by letter dated 10.11.1997 and the matter was put up before the Deputy Secretary, Ministry of Home Affairs, on 13.11.1997 and before

the Joint Secretary on the same day. Thereafter, it was put up before the Minister of State for Home Affairs, Government of India, on the same day. The Minister rejected the representation on 19.11.1997. It has been stated that the decision was taken within six days by the Minister including three days' holidays i.e., 14th, 15th and 16th November, 1997 and the detenu was informed by a crash wireless message on 20.11.1997 through the Secretary to Government of Orissa, Home Department and the Superintendent, Special Sub-Jail, Boudh which was followed by letter dated 21.11.1997.

14. Under the provisions of Sub-section (5) of Section 3 of the National Security Act, 1980, it is the duty of the State Government to report the fact to the Central Government within seven days together with the grounds on which the order has been made and such other particulars as in the opinion of the State Government have a bearing on the necessity for the order. The fact that the Central Government asked for further particulars clearly shows the lapse on the part of the State Government to comply with the statutory provisions.

15. In the counter filed on behalf of opposite party No. 1 ; it is admitted that the representation dated 1.10.1997 was received by the State Government on 25.10.1997 and the District Magistrate was requested on 29.10.1997 by Fax message to furnish his specific comments for consideration of the Government. The District Magistrate was reminded on 6.11.1997 and para-wise comments were received on 10.11.1997. It was processed and examined at different levels and file was submitted to the Chief Minister on 1.12.1997 who rejected the representation on 3.12.1997 and the order was communicated to the detenu on 4.12.1997.

16. From the above facts, it is clear that the representation dated 1.10.1997 for release on parole, which was addressed to the Secretary-cwm-Commissioner, Government of Orissa was ultimately rejected on 3.12.1997. Thus, there was delay of more than two months and 2 days. It is also clear that there was delay in dealing with the representation at every stage which has not been properly explained. In view of the law laid down by the apex Court, this delay in absence of proper explanation is fatal and on this ground alone, the impugned detention order is liable to be quashed. In the counter filed on behalf of the District Magistrate, opposite party No.3, the delay was tried to be justified by stating that the Superintendent of Police was on leave, the Puja holidays intervened and the Superintendent of Police was busy in connection with the visit of the Deputy Chief Minister. Such explanations are not at all satisfactory and we are unable to accept the same. Learned Addl. Government Advocate has also tried to justify the delay in disposal of the representation by making oral and written submissions. We are of the opinion that the explanations offered are not satisfactory.

17. The next submission of the learned counsel for the petitioner is non-supply of vital document to the detenu such as report of the Superintendent of Police. In paragraph 17 of the counter affidavit filed on behalf of the District Magistrate,

opposite party No. 3, it has been stated that copy of the report of the Superintendent of Police was duly supplied and it is admitted by the detenu in his representation to the Advisory Board. Therefore, we need not consider this point.

18. Learned counsel for the petitioner has attached the grounds of detention and also pleaded that there was no material before the detaining authority to show that the detenu was trying to come out on bail. We need not consider this point as on the technical ground of delay in consideration of the representation, the impugned detention order is liable to be quashed.

19. In the result, the order of detention of the detenu is quashed. The detenu be released from the custody and set at liberty forthwith if his detention is not required in connection with any other case.

C.R. Pal, J.

20. I agree.