
(2007) 02 GAU CK 0010
In the Gauhati High Court

Subrata Paul

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-02-2007

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 226
General Clauses Act, 1897 — Section 21
National Security Act, 1980 — Section 14, 3, 8

Citation : (2009) 4 GLR 639 : (2007) 2 GLT 350

Hon'ble Judges : D. Biswas, C.J.; B.D. Agarwal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

P.G. Agarwal, J.—By filing this writ petition under Article 226 of the Constitution of India, the petitioner is challenging his detention under the National Security Act, 1980 (briefly "NSA") by virtue of order dated 29.08.2006 issued by the District Magistrate, Kamrup (Metropolitan), Guwahati under Memo No. X/2006/NSA/48/CA (A) and also order dated 11.10.2006 issued by the Commissioner & Secretary to the Government of Assam, Home and Political Department under Memo. No. PLA. 459/06/279, confirming the detention for a period of 12 months (Annexures-A and E respectively).

2. We have heard Mr. P.C. Dey, learned Counsel for the petitioner, Mr. D.C. Chakraborty, learned Central Govt. Standing Counsel representing respondent No. 1 and Ms. B. Goyal, learned state counsel representing respondents 2 to 6.

3. The detention order has been basically challenged on the ground of long delay in considering and rejecting the representation. The learned Counsel for the petitioner submitted that delay and laches committed by the respondents in considering the representation has infringed fundamental rights of the detenu enshrined under articles 21 and 22(5) of the Constitution of India. To justify inordinate delay in considering the representation, the learned Counsel for the petitioner has drawn our attention to certain relevant dates and correspondences

that took place between different authorities.

4. On the other hand, the learned standing counsel for the respondents submitted that the representation was considered with all promptness and there was no negligence or delay in this regard.

5. From the dossiers of the writ petition and records, we find that the petitioner was detained under the NSA on 29.08.2006 and grounds of such detention was also supplied to the detenu along with the detention order. Thereafter, the petitioner submitted his representation to the appropriate authority through the Assistant Jailor, Central Jail, Dibrugarh on 08.09.2006. This representation was considered and rejected by the District Magistrate on 13.09.2006 and the same was communicated to the detenu on the same day. So far, there was no undue delay in consideration of the representation.

6. According to the learned Counsel for the petitioner, the delay was committed in forwarding the representation to the Central Government and thereafter the Central Government committed inordinate delay in disposing of the same. According to the learned Counsel, the detenu's representation was forwarded to the Central Government on 25.09.2006, i.e., nearly after 2(two) weeks from the date of submission of the same to the District Magistrate. However, for the best reasons known to the authorities, the said representation was received by the Central Government on 12.10.2006 and that too without any comment from the detaining authority. After few communications, comments were submitted and ultimately the representation was rejected only on 16.11.2006.

7. The District Magistrate as well as the Joint Secretary to the Government of Assam, Political (A) Department have submitted their affidavits. However, both the officers are conspicuously silent about the forwarding of the representation to the Central Government. According to them, no representation addressed to the Central Government was at all submitted by the detenu. On this plea, the respondents have also not explained the reasons for not early disposal of the representation by the Central Government.

8. The petitioner has admitted the fact of not submitting any separate representation to be examined and considered by the Central Government. In paragraph-11 of the writ petition it has been stated that the State Government is under obligation to forward the representation to the Central Government. Thereafter the Central Government is also obliged and duty bound to consider the representation expeditiously. Hence, the first question which falls for our consideration is whether the appropriate authority was bound to forward the representation to the Central Government and delay that took place in transit and thereafter should be taken into account to examine the alleged laches in consideration of the representation.

9. Identical question also came up before the Hon'ble Supreme Court in the case of Smt. Gracy Vs. State of Kerala and another, . In this case the petitioner's son was detained under the provisions of the Prevention of Illicit Traffic in Narcotic

Drugs and Psychotropic Substances Act, 1988. The said law provided for filing a representation before the detaining authority, Advisory Board and Central Government. Although the detenu had submitted a representation before the Advisory Board, no separate representation was submitted to the Central Government. However, the Central Government approved the detention on the basis of opinion of the Advisory Board without considering the representation of the detenu. Hence, a question was posed before the Hon'ble Supreme Court whether there was any infraction of the guarantee provided under Article 22(5) of the Constitution of India as a result of Central Government's omission to consider the detenu's representation independent of its consideration by the Advisory Board. The Apex Court held that both the authorities have to consider the representation independently in the following words:

8. It is undisputed that if there be only one representation by the detenu addressed to the detaining authority, the obligation arises under Article 22(5) of its consideration by the detaining authority independent of the opinion of the Advisory Board in addition to its consideration by the Advisory Board while giving its opinion. In other words, one representation of the detenu addressed only to the Central Government and not also to the Advisory Board does not dispense with the requirement of its consideration also by the Advisory Board. The question, therefore, is. Whether one of the requirements of consideration by government is dispensed with when the detenu's representation instead of being addressed to the government or also to the government is addressed only to the Advisory Board and submitted to the Advisory Board instead of the government? On principle, we find it difficult to uphold the learned Solicitor General's contention which would reduce the duty of the detaining authority from one of substance to mere form. The nature of duty imposed on the detaining authority under Article 22(5) in the context of the extraordinary power of preventive detention is sufficient to indicate that strict compliance is necessary to justify interference with personal liberty. It is more so since the liberty involved is of a person in detention and not of a free agent. Article 22(5) casts an important duty on the detaining authority to communicate the grounds of detention to the detenu at the earliest to afford him the earliest opportunity of making a representation against the detention order which implies the duty to consider and decide the representation when made, as soon as possible. Article 22(5) speaks of the detenu's "representation against the order", and imposes the obligation on the detaining authority. Thus, any representation of the detenu against the order of his detention has to be considered and decided by the detaining authority, the requirement of its separate consideration by the Advisory Board being an additional requirement implied by reading together Clauses (4) and (5) of Article 22, even though express mention in Article 22(5) is only of the detaining authority. Moreover, the order of detention is by the detaining authority and so also the order of its revocation if the representation is accepted, the Advisory Board's role being merely advisory in nature without the power to make any order itself. It is not as if there are two separate and distinct provisions

for representation to two different authorities viz. the detaining authority and the Advisory Board, both having independent power to act on its own.

10. In the case before us, the situation is a little bit improved one. In the grounds of detention the writ petitioner was informed of his right to make a representation to the District Magistrate, Government of Assam or the Government of India or the Advisory Board. However, the writ petitioner chose to submit only one representation to the District Magistrate, since he was the detaining authority. However, ultimately the appropriate authority as well as the Advisory Board considered the same representation. To uphold the principles of fairness and natural justice the same representation was also forwarded to the Central Government for consideration. Eventually, the Central Government also rejected the plea of the detenu on 16.11.2006.

11. The right of a person detained under preventive detention laws, including the NSA, for submitting representation against the detention flows from Article 22(5) of the Constitution of India. Apart from this fundamental right, such legal right has also been incorporated in the NSA. The role, duties and powers of the State and Central Government have been laid down u/s 3(5) and 14 of the NSA. The relevant part of the said provisions are reproduced below:

3(5) When any order is made or approved by the State Govt. under this section, the State Govt. shall, within seven days, report the fact to the Central Govt. 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.

14. Revocation of detention orders--(1) Without prejudice to the provisions of Section 21 of the General Clauses Act, 1897 (10 of 1897), a detention order may, at any time, be revoked or modified--

(a) Notwithstanding that the order has been made by an officer mentioned in Sub-section (3) of Section 3 by the State Government to which that officer is subordinate or by the Central Government;

(b) Notwithstanding that the order has been made by a State Government, by the Central Government.

(2) *** **

12. A special bench of Gauhati High Court had the occasion to examine the rights of a detenu under NSA to submit representation against his detention as provided u/s 8(1) and Article 22(5) of the Constitution. While examining the said legal question, this Court in the case of *Konsam Brojen Singh @ Basan v. The State of Manipur and Ors.* reported in 2006 (1) GLT 375 (KB) has defined the fundamental rights of the detenu in the following words:

37. It confers specific fundamental rights and imposes constitutional obligation and commands the authority making the order to communicate the grounds, as

soon as may be, on which the order has been made. The second right given to the detenu relates "the earliest opportunity" of making the representation against the order. The provision does not specify as to whom such a representation could be made but the representation to be made is against the order of detention passed by the authority. The right to make a representation against the detention order itself is a distinct fundamental right guaranteed under Article 22(5) of the Constitution. Even in the absence of any such provision, in a given preventive detention law, the detenu has fundamental right of making representation against the order of detention. The legislature in due recognition of such a guaranteed fundamental right may provide for the procedure and other details and may specify the authority to whom such a representation could be made. The right to make such a representation is, thus, traceable to guaranteed fundamental rights and not to any municipal law.

38. In *Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others*, the Supreme Court in an authoritative pronouncement held "the object and purpose of the representation that is to be made by the person detained is to enable him to obtain relief at the earliest opportunity, the said representation has to be made to the authority which can grant such a relief, i.e., the authority which can revoke the order of detention and set him liberty. The authority that has made the order of detention can also revoke it. This right is inherent in the power to make the order. It is recognized by Section 21 of the General Clauses Act, 1897 though it does not flow from it. It can, therefore, be said that Article 22(5) postulates that the person detained has a right to make a representation against the order of detention to the authority making the order. In addition, such a representation can be made to any other authority which is empowered by law to revoke the order of detention.

13. Earlier to that, the Apex Court had also examined the right to make a representation to an authority not so specified in the provisions of NSA. In *Mohd. Yousuf Rather Vs. State of Jammu and Kashmir and Others*, the Supreme Court has observed that the interpretation of Article 22(5), consistently adopted by the Court, is perhaps, one of the outstanding contributions of the Court to advance the cause of human rights. It is therefore, obvious even in the absence of such a provision in National Security Act, 1980, the detenu still would have right to make a representation against the order of detention. The right to make a representation to the detaining authority by a detenu in addition to his right to make such a representation to the appropriate government is rooted in Article 22(5) of Constitution of India.

14. The role of the Central Government in the matter of preventive detention under the NSA also came up for consideration before this Court in the case of *Somi Angkang v. Union of India* (1985) 2 GLR 1J. Their Lordships summarized to the utility of Section 3(5) and 14(1) of the NSA in the following language.

6. ...There is no dispute at the Bar that on any order of detention made or approved by the State Government u/s 3 of the Act, it is bound to report the fact

of detention to the Central Government 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 of the order. This is a mandatory provision and one cannot overlook it. It is a compulsive necessity and direction to send the report and document within a stipulated time. The report must be sent expeditiously and the period for dispatch of the report has been specified. Section 3(5) commands the State to despatch the report expeditiously and limits the time. Further the essential facts and documents have directed to be despatched along with the record which includes the grounds of detention. The necessity of quick dispatch as well as the necessity for sending the grounds of detention is too obvious. In other words, the recipient is to perform his part of the obligation as designed u/s 3(5) of the Act. On receipt of the report, the Central Government is also obligated to dispose of the report as expeditiously as possible, otherwise, there is no purpose in submitting the report within a period of seven days. Further, there was no necessity to transmit the grounds of detention along with other materials and documents, unless it was meant to achieve certain objective. It is hardly possible to accept that the provision of Section 3(5) was so designed as not to serve any positive purpose. We are of the firm opinion that not only the Central Government is duty bound to consider the report, but it must do so with reasonable expedition and it must perform the duties and obligations enjoined u/s 14(1) of the Act.

15. u/s 3(5) of the NSA the State Govt. is required to submit a report to the Central Government and this report should be accompanied with grounds of detention and such other particulars that have bearing on the detention. In the light of the observations from the Apex Court and also from this Court in various decisions, referred herein-above, we have no hesitation to hold that the representation of detenu is certainly an important document to be considered by the Central Government for examining the detention and in performing its supervisory role u/s 14 of the Act. Hence, any report to the Central Government sans representation of the detenu can only be termed as an incomplete report and no judicious decision about the justification of the detention by the Central Govt. can be taken. On this analogy we also hold that in the case in hand even though the representation was not addressed to the Central Government, the same got the legal colour of addressing it to all competent authorities. It is because the Central Government is also a statutory authority to examine the legality of the detention, having supervisory power and the representation has direct bearing on the legality of the detention.

16. The main contention of the learned Counsel for the petitioner is that there was inordinate delay in considering the representation, which amounts to infringement of safeguards provided under Article 22(5) of the Constitution of India. On the other hand, Mrs. B. Goyal, learned state counsel submitted that the representation was promptly attended and there was no violation of constitutional mandate. The learned Counsel for the respondents further submitted that no time frame has been prescribed in NSA to consider and

dispose of the representations, submitted by the detenus. While defending the respondents, Mrs. Goyal, learned state counsel referred to the judgment of this Court rendered in the case of Abdul Kader Miah (MD) v. Union of India and Ors. 2007 (1) GLT3UJ. In this case it has been held that time imperative can never be absolute.

17. It is true that neither Article 22(5) of the Constitution of India nor NSA has prescribed time limit for consideration of representations. However, if one looks at various provisions of NSA, prescribing specific periods for furnishing grounds of detention, approval of the detention by the State Government, submitting report to the Central Government and Advisory Board, the period prescribed for considering the detention order and representations by the Advisory Board, etc. the intention of the legislature can safely be inferred that representations of detenus have to be considered with all promptitude.

18. The Hon'ble Supreme Court, in the case of K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others, has held that the representation relates to the liberty of the individuals, the highly cherished right enshrined in Article 21 of the Constitution, Clause (5) of Article 22 casts a legal obligation on the Government to consider the representation as early as possible. It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words "as soon as may be" occurring in Clause (5) of Article 22 reflects the concern of the framers that the representation should be expeditiously considered and disposed of with the sense of urgency without any unavoidable delay.

19. Again, in the case of Rama Dhondu Borade Vs. V.K. Saraf, Commissioner of Police and Others, , the Apex Court reiterated that the detenu has an independent constitutional right to make his representation under Article 22(5) of the Constitution of India. Correspondingly there is a constitutional mandate commanding the concerned authority to whom the detenu forwards his representation questioning the correctness of the detention order clamped upon him and requesting for his release, to consider the said representation within reasonable despatch and to dispose of the same as expeditiously as possible.

20. In the case of Rajammal Vs. State of Tamil Nadu and Another, , the Apex Court restated the legal principle in the following words:

8. The position, therefore, now is that if delay was caused on account of any indifference, or lapse in considering the representation, such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing of the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So, test is not the duration or range of delay, but how it is explained by the authority concerned.

21. For brevity of judgment, we are refraining from adverting of scores of other authorities on this point. Suffice is to hold that even though there is no fixed period of time for disposal of representation the underline message in the law is that all the concerned authorities, who are empowered to issue, approve or revoke detention orders are duty bound to consider and dispose of the representations as expeditiously as possible. By now, it is also the settled principle of law that even if some delay in consideration of the representation may not become fatal to the detention but non-explanation of the same would certainly impeach the detention order.

22. Coming to the case at hand, we find that the writ petitioner was detained under NSA on 29.08.2006 and submitted a representation on 08.09.2006. It is true that the District Magistrate, Kamrup who was the detaining authority virtually took no time to consider the representation as the same was rejected on 13.09.2006. The District Magistrate also acted swiftly in forwarding the representation to the State Government. However, the State Government took nearly one month in disposing of the representation. According to the learned Counsel for the petitioner, the State Govt. disposed of the representation on 11.10.2006. This factual position has been admitted in the affidavit submitted by the Joint Secretary to the Government of Assam, Political(A) Department. The affidavit does not whisper as to why one month's period was taken for examining the representation. In this way, the state has failed to justify the period taken for consideration of the representation.

23. Now, we come to examine the second leg of delay for disposal of the representation at the end of the Central Government. The learned Counsel for the petitioner submitted that the Central Government received the representation on 12.10.2006 but it came to be rejected only on 16.11.2006. In this way, 35 days' time was taken by the Central Government to perform its legal duty.

24. From the affidavit submitted by the Under Secretary, Ministry of Home Affairs, Govt. of India, we find that the representation could not be considered for non-receipt of para-wise comments from the detaining authority. Strangely, the Central Government had to remind the detaining authority for submitting its comments on 26.10.2006. We have given our anxious consideration whether this could have been a proper explanation for withholding the representation. In our considered opinion both the State Government and the Central Government were at fault. We have already held earlier that the report from the State Government to the Central Government should be a complete one. It is true that in the present case, the detenu had submitted a representation, albeit only in the name of the detaining authority and the same was forwarded to the Central Government. However, the same could not be considered with prompt dispatch by the Central Government due to incomplete dossiers, that is, without comments from the State. This procedural lacuna resulted in loss of 35 days in considering the representation by the Central Government. Accordingly, there

was 66 days cumulative delay in disposal of the representation by the State and the Central Government. Having regard to the nature of detention and rigor of the law, we hold that there was disproportionate delay at both the ends.

25. Mrs. B. Goyal, learned state counsel appearing for the State submitted that in the case of *Sitthi Zuraina Begum Vs. Union of India (UOI) and Others*, the Hon''ble Supreme Court has held that if the delay is explained, the preventive detention need not be interfered with. In the said case only 20 days'' time was taken for considering the representation. Even this delay took place to translate the representation from Tamil to English. However, in the case before us, the representation was submitted in English and despite that both the State Government as well as the Central Government took long periods in considering the representation. Above all, both these authorities have failed to account for the time taken in disposing the representation.

26. In view of the reasons alluded hereinabove, we hold that the writ petitioner is entitled to be released on account of inordinate and unexplained delay in disposal of his representation. Consequently, the habeas corpus petition filed by Shri Subrata Paul stands allowed. He be set at liberty forthwith, if not otherwise required in other cases.