
(2002) 09 OHC CK 0032

In the Orissa High Court

Case No : Original Jurn. Case No. 5292 of 2002

Sudarsan Dash alias Daba

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 06-09-2002

Acts Referred:

National Security Act, 1980 — Section 3(2)

Citation : (2003) CriLJ 380 : (2002) OLR 644 Supp : (2003) 1 RCR(Criminal) 521

Hon'ble Judges : M. Papanna, J;A.K. Patnaik, J

Bench : Division Bench

Advocate : S. Ghosh, for the Appellant; S.K. Das, Additional Government Advocate (for Nos. 1 and 2) and M. Agrawal, Senior Standing Counsel (Central) (for No. 3), for the Respondent

Final Decision : Allowed

Judgement

A. K. Patnaik, J.—The petitioner was in judicial custody in Circle Jail, Berhampur in B. Town P. S. Case No. 181 dated 6-11-2001 and he was trying for bail. The District Magistrate, Ganjam passed an order dated 31-12-2001 u/s 3(2) of the National Security Act, 1980 (in short, "the Act") detaining him in custody with a view to prevent him from acting in any manner prejudicial to the maintenance of public order. The said order was served on the petitioner on 1-1-2002. The grounds of detention were served on the petitioner on 2-1-2002 and the petitioner was informed that he has a right to make a representation to the State Government in the Home Department/Central Government/Advisory Board against the order of detention. On 4-1-2002. the Government of Orissa in the Home Department approved the order of detention under Sub-section (4) of Section 3 of the Act. The petitioner was informed by letter dated 11-1-2002 of the District Magistrate. Ganjam that his case has been referred to the Advisory Board under the Act by the Government in the Home Department and if he wished, he may make a representation to the Advisory Board through the Superintendent of Circle, Jail, Berhampur. By another communication dated

16-1-2002 the petitioner was informed by the District Magistrate, Ganjam that the Advisory Board has been pleased to fix the hearing of his case on 23-1-2002 at 4.00 p.m. in the Chamber of the Chairman of the Advisory Board in the High Court premises, Cuttack. On 22-1-2002 the petitioner addressed a representation to the Chairman of the Advisory Board through the Senior Superintendent of Circle Jail, Berhampur. The said representation dated 22-1-2002 was received by the District Magistrate, Ganjam at 7.45 p.m. on 22-1-2002. Parawise comments on the said representation of the petitioner dated 22-1-2002 was prepared and signed by the District Magistrate, Ganjam and sent to the Secretary, Advisory Board by letter dated 27-1-2002 of the District Magistrate, Ganjam. The Advisory Board submitted its report dated 30-1-2002 and the State Government confirmed the order of detention on 5-2-2002 u/s 12(1) of the Act. Aggrieved, the petitioner has filed this Habeas Corpus petition under Article 226 of the Constitution for quashing the order of detention and for directing the opp. parties to set the petitioner free from custody.

2. At the hearing, Mr. S. Ghosh, learned counsel for the petitioner submitted that the representation dated 22-1-2002 of the petitioner was not placed before the Advisory Board which met on 23-1-2002 as the counter-affidavit filed by the District Magistrate, Ganjam would show that the said representation along with parawise comments was sent to the Secretary, Advisory Board only on 27-1-2002. He further submitted that it has now been settled by the Supreme Court in Smt. Gracy v. State of Kerala, AIR 1991 SC 1090 that even if a representation is addressed to the Advisory Board, there is an obligation on the detaining authority under Article 22(5) of the Constitution to consider the said representation of the petitioner. He argued that for the period from 2-1-2002 to 1-5-2002, the petitioner had not filed any other representation against the order of detention and the only representation of the petitioner dated 22-1-2002 having not been considered by the State Government during the aforesaid period, the right of the petitioner for making a representation against the order of detention has been affected and the continued detention of the petitioner was liable to be quashed.

3. We have perused the records produced before us by Mr. S. K. Das, learned Addl. Government Advocate and we find from the said records that although the Advisory Board met on 23-1-2002 it did not immediately submit its report and only after the representation dated 22-1-2002 of the petitioner along with parawise comments on the said representation of the District Magistrate, Ganjam sent to the Advisory Board on 27-1-2002 was received, the Advisory Board submitted its report to the Government. Paragraph 2 of the said report of the Advisory Board is extracted herein below:

"2. The detenu appeared before us on 23-1-2002. His representation addressed to the Chairman, Advisory Board, was also placed before us. We have perused the grounds of detention and the supporting materials. We have examined the

representation of the detenu mentioned above. The detenu pleaded his ignorance and denied his involvement in any of the cases mentioned in the grounds of detention".

It will be clear from the aforesaid paragraph 2 of the report that the Advisory Board has considered the representation of the petitioner against the order of detention. Hence, we find no merit in the submission of Mr. Ghosh that the representation of the petitioner has not been placed before the Advisory Board.

4. But law has now been settled in *Smt. Gracy Vs. State of Kerala and another*, by the Supreme Court that the consideration of the representation of the detenu against the order of detention has to be done by the Government independently and separately from the consideration made by the Advisory Board. Thus, consideration of the representation dated 22-1-2002 of the petitioner by the Advisory Board does not relieve the State Government to consider the said representation of the petitioner even though the representation dated 22-1-2002 was addressed only to the Chairman, Advisory Board. In similar facts where the representation was addressed to the Advisory Board and not to the Central Government against an order of detention passed under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act. 1988, the Supreme Court held:

"It being settled that the aforesaid dual obligation of consideration of the detenu's representation by the Advisory Board and independently by the detaining authority flows from Article 22(5) when only one representation is made addressed to the detaining authority, there is no reason to hold that the detaining authority is relieved of his obligation merely because the representation is addressed to the Advisory Board instead of the detaining authority and submitted to the Advisory Board during pendency of the reference before it. It is difficult to spell out such an inference from the contents of Article 22(5) in support of the contention of the learned Solicitor General. The contents of Article 22(5) as well as the nature of duty imposed thereby on the detaining authority support the view that so long as there is a representation made by the detenu against the order of detention, the aforesaid dual obligation under Article 22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the Advisory Board or to both. The mode of address is only a matter of form which cannot whittle down the requirement of the constitutional mandate in Article 22(5) enacted as one of the safeguards provided to the detenu in case of preventive detention."

5. In view of the aforesaid position of law as explained by the Supreme Court in *Smt. Gracy Vs. State of Kerala and another*, , since there was only one representation dated 22-1-2002 of the petitioner-against the order of detention till 1-5-2002, the State Government was required to consider the said representation dated 22-1-2002 of the petitioner against the order of detention as early as possible independently and separately from consideration of the said representation of the petitioner by the Advisory Board. In *Karan alias Pradeep*

Sagar v. State of Orissa, represented by its Secretary to Government, Home Department (1997) 13 O C R 286 which was a case under the National Security Act, 1980, a Division Bench of this Court following the aforesaid decision of the Supreme Court in Smt. Gracy Vs. State of Kerala and another, held:

".....The obligation of the appropriate Government to consider the detenu's representation is separate from and independent of the consideration of the detenu's case by the Advisory Board. (See Smt. Gracy Vs. State of Kerala and another, ; Sk. Sekawat Vs. The State of West Bengal, and Vimalchand Jawantraj Jain Vs. Shri Pradhan and Others, The period of inaction is without justifiable reason, thereby infringing requirement of acting with utmost expedition."

6. Despite the aforesaid position of law that the State Government was required to separately and independently consider the representation dated 22-1-2002 of the petitioner addressed to the Chairman, Advisory Board we do not find from the counter-affidavit filed on behalf of the opp. party No. 1 that the said representation dated 22-1-2002 was at all considered by the State Government. The counter-affidavit filed on behalf of the opp. party No. 1 only indicates that the subsequent representation of the petitioner dated 10-5-2002 was considered and rejected by the State Government on 14-5-2002 and the said counter-affidavit is silent with regard to the said representation dated 22-1-2002 of the petitioner. On a perusal of the records of the State Government produced before us we find that after receipt of the report of the Advisory Board a note was put up by the Joint Secretary, Home on 2-2-2002 stating therein that the Advisory Board after perusing the documents including the representation of the detenu had opined that there is sufficient cause for his detention, but the said records do not reveal that there was any independent and separate consideration by the State Government of the said representation dated 22-1-2002 of the petitioner against the order of detention. The said records produced before us, however, reveal that the subsequent representation dated 10-5-2002 of the petitioner has been considered and rejected by the State Government on 14-5-2002. Under Article 22(5) of the Constitution, a detenu has to be afforded the earliest opportunity of making a representation against the order of detention. Hence, the representation of the detenu against the order of detention made at the earliest point of time has to be considered by the Advisory Board and the State Government. In this case, the representation dated 22-1-2002 of the petitioner against the order of detention was the earliest in point of time and the same though has been considered by the Advisory Board has not been considered by the State Government. For this reason alone, the continued detention of the petitioner is liable to be quashed and it is not necessary for us to consider the other grounds taken in this writ petition.

7. In the result, the writ petition is allowed, the order dated 31-12-2001 passed by the District Magistrate, Ganjam in Annexure 1 and the orders of the State Government approving and confirming the same are quashed and the petitioner-Sudarsan Dash alias Daba be released forthwith unless his detention is wanted in

connection with some other case.

M. Papanna, J.

8. I agree.