

(1997) 09 GAU CK 0020
In the Gauhati High Court
Case No : Civil Rule (HC) No. 94 of 1997

Supengnungla

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 23-09-1997

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3
Constitution of India, 1950 — Article 22, 22(4), 22(5), 226
National Security Act, 1980 — Section 11, 14, 3, 3(2), 3(5)
Unlawful Activities (Prevention) Act, 1967 — Section 10, 13

Citation : (1997) 3 GLR 116

Hon'ble Judges : V. Dutta Gyani, J; P.C. Phukan, J

Bench : Division Bench

Advocate : B. Choudhury, for the Appellant; C. Zamir, Government Advocate and K.P. Sarma, C.G.S.C., for the Respondent

Judgement

V.D. Gyani, J.—By this petition under Article 226 of the Constitution the Petitioner who is the wife of the detenu Nungshi Luen prays for a writ of habeas Corpus.

2. The detenu was arrested at Dimapur by the Army and after interrogation handed over to the West Dimapur P.S. where a case being Case No. 21/97/ u/s 7 of the National Security Act and u/s 10/13 of the Unlawful Activities (Prevention) Act was registered. On 5.2.97 he was produced before the Magistrate who remanded him to police custody till 6.2.97. Thereafter he was remanded to judicial custody which was extended from time to time upto 6.3.97. Detenu's bail petition was moved on 5.2.97 before the Deputy Commissioner (Judicial), Dimapur and was waiting disposal when the impugned detention order dated 20.2.97 as reproduced below was passed on the following grounds as per Annexure- A/2, further supported by a Schedule.

GROUND OF DETENTION

Shri Nungshi Luen Ao SS Political Organiser of NSCN (IM S/o Mangyangjiba of

Mangmetong village, Mokokchung, District, Nagaland.

Whereas the State Government of Nagaland have made detention order against you under Sub-section (1) and (2) of Section 8 of the National Security Act, 1980.

Now, therefore, in pursuance of the provisions of Section 3 of the said Act the State Government do hereby inform you that the said detention order has been made against you on the following grounds:

1. That your activities in the capacity of a Self Styled Political Organiser of NSCN (IM), an unlawful association are found to be prejudicial to -

(a) Defence, of India

(b) Security of the State of Nagaland; and

(c) Maintenance of Public Order.

2. That in the event of your release from custody you are likely to indulge in activities prejudicial to the above three matters unless you are detained under the provisions of aforesaid Act.

3. The particulars which have a bearing on the matters are specified in the Schedule attached.

4. You are also informed that you have a right to make a representation to the State Government, against the above said order through the concerned Jail authorities. You have also a right to claim a personal hearing before the Advisory Board constituted by the State Government under the aforesaid Act.

The Schedule annexed to the grounds of detention are as follows:

Shri Nungshi Luen Ao, Political Organiser of NSCN (IM) S/o Mangjarjiba of Mangmetong Village, Mokokchung District was apprehended by the Security Force from his Lungrijan incident at Dimapur area on 29.1.97 and handed over to West Police Station, Dimapur on 5.2.97 along with FIR, Dimapur West Police Station registered a case No. 0021/97/Under Section 7 NSA 10/13 UA(P) Act and investigated.

The subject is a strong minded and an able activist of the NSCN (IM) an unlawful association as the report reveals that he was an activist in the past also, he was earlier an activist in the NNC set up of underground, who joined it in the rank of SS Leut, 1956 and rose to the rank of SS Brigadier in 1973. The accused was a member in the accack of V.G. Camp in 1960 in TuenSang District from where took away 13 numbers of 303 Rifles and huge quantity of ammunitions. Lastly, he had surrendered before the Deputy Commissioner, Mokokchung on 15th August, 1975 along with 10 others but in January 1994 he had again joined the NSCN (IM) an unlawful association and took up the assignment as SS Folitical Organiser, since then he had been actively involved himself to strengthening the secessionist cause of the NSCN (IM) by motivat ing many Naga Youth to join hands for the cause of the illegal seperatist cause of NSCN (IM) an unlawful

association, which waging illegal war against the established Government of India and the State of Nagaland. He had joined the unlawful association wilfully after he had surrendered to the Government, so it shows that he is a strong minded and hardcore activist who had always pursued the illegal cause the secessionist and anti national activities.

Hence, having considered the prevailing situation not conducive for expeditious disposal of the Criminal cases of Ditnapur West Police Station FIR No. 0021/97 u/s 7 NSA and 10/13 UA (P) Act. registered against him by Police, it is likely that he may be enlarged on bail, and on consideration of the facts and circumstances of the matter, it is considered necessary to detain him so as to prevent him from acting in any manner prejudicial to the Defence of India, Security of the State of Nagaland and Maintenance of Public order that he is ordered to be detained under the provisions of the National Security Act, 1980.

3. Now going through the grounds of detention as set forth above except for alleged staleness thereof we have no slightest doubt in our mind that the seditious activities alleged against the detenu are relevant and germane to the object sought to be achieved by the impugned order of detention. So far as the criticism that the grounds are stale, vague to a certain extent the learned Counsel is correct in his criticism, but it cannot be ignored that there is an element of continuity secessionist activities as alleged and contained in Annexure- A-3, no doubt relate back, to the year 1975, but it cannot be overlooked that the grounds those contained a statement in the effect that the detenu has joined in unlawful association and he has always aded the illegal causes and secessionist and anti-social activities. It is specically alleged that in January 1994 the detenu again joined NSCN (IM) an unlawful association and took up the assignment as SS Political organiser, and since then he is actively involved in strengthening the secessionist cause of NSCN (IM). Thus there is element of continuity in the grounds of detention as contained in schedule-A-3 a reference has been made that the detenu having joined in the rank of SS Leut in the year 1956 rose up-to the rank of SS Brigadier in 1973, but he surrendered in 1975, but there is also an allegation that he has resumed his activities. Now this Court in exercise of its jurisdiction under Article 226 of the Constitution, that too in a petition for issuance of Writ of Habeas Corpus cannot go into the truth and (sic)sity of the allegations, all that it concerns is the relevance of the allegations, to the object sought to be achieved and in this view of the matter, criticism made by the learned Counsel for the Petitioner cannot be accepted.

4. Coming to the next point as regards non application of mind by the Detaining Authority to a vital relevant fact, namely, the detenu was in Jail at the time of passing of the detention order, but the Detaining Authority has not addressed himself to this aspect of the matter. There is not a whisper either in the detention order, Annexure- A-1 or the grounds of detention, Annexure-A-2. Of course there is a reference in the Schedule, Annexure-A-3 which is in support of the ground of detention, but this Schedule does not bear the signature of the detaining

authority so as to enable is to infer that he had applied his mind to this vital aspect of the matter, appending the Schedule to the grounds of detention in a mechanical manner would not serve the purpose. It is a basic requirement of law that the subjective satisfaction arrived at by the Detaining Authority must be based on proper application of mind to the vital facts.

5. It is an admitted position as is also evident from the detention order, Annexure-A1 that the detenu was already in Jail while the detention order was passed and served in the jail. The Petitioner has specifically alleged non application of mind on the part of the detaining authority in passing the impugned order in arriving at the requisite subjective satisfaction in paragraph 17 of the petition.

6. Let us now turn to the affidavit-in-opposition as filed by the Respondent State. So far as the averments made in paragraph 5 is concerned, the same is replied in paragraph 4 of the affidavit-in-opposition which reads as follows:

That the statements made in paragraphs 2 to 5 and 7 are being matters of record I do not admit anything which is beyond record.

7. The reply to paragraph 17 of the petition is to be found in paragraph 12 of the affidavit-in-opposition which reads as follows:

That the statement made in paragraph 17 of the writ petition are not admitted and denied by me. It is stated that the detention order was made and the grounds of detention were formulated by the detaining authority after proper application of mind and the detaining authority arrived at subjective satisfaction on consideration of all materials placed before it and as such the impugned order of detention is valid in the eye of law and is not liable to be set aside and quashed.

8. Now reading the averments made by the Petitioner in paragraphs 3,4 and 5, it is abundantly clear that bail petition moved on behalf of the detenu was not granted and the detaining authority in his affidavit does not say a word about having considered this particular aspect of the matter at the time of passing of the detention order. The affidavit to be filed by the Detaining Authority, must be specific, because it is his subjective satisfaction, it is he who alone can explain the application of mind to relevant fact. It is in this context that the Schedule appended to the grounds of detention not signed by the Detaining Authority and for that matter by none, assumes importance, it is non application of mind to a vital relevant facts, it is not a mechanical process. It must be in solemnity and seriousness since the question of an individual's freedom and liberty is involved.

9. The Petitioner has averred the necessary facts although in a Habeas Corpus petition, the strict rules of pleadings are not applied a one line post card complaining wrongful detention, can be and has been entertained as a petition for writ of Habeas Corpus for the reason that the justification for detention must come from the detaining authority. In the instant case the averments made by

the Petitioner so far as grant of bail is concerned, is more than sufficient, it is the detaining authority who is silent in his affidavit. The Supreme Court had occasion to consider the question of pleadings in a writ petition in *Bharat Singh and Others Vs. State of Haryana and Others*, although it was a case arising out of land acquisition proceeding, but the principles enunciated applied with greater force to a petition for Habeas Corpus as the case at hand -

In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ Petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the Respondent, from the counter-affidavit. If the facts are not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the CPC and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it.

10. Nothing was easier for the detaining authority then to make a plain statement of the fact that at the time of passing the detention order he was aware of the fact that the detenu was already in jail, yet compelling necessity for passing the detention order. There is no such averments in the affidavit in-opposition filed by the detaining authority. Merely saying that the detaining authority passed the impugned order after proper application of mind is not sufficient. More so, when the Petitioner has specifically averred about his being in jail and the bail petition not being disposed till the date of filing of the petition. As pointed out above, a specific reply to the averment should have been made. The fact that a person sought to be detained is already in jail, or detention, is a relevant fact, but is not per se determinative of the validity of the detention order. If a person is already in jail custody, as a result of a remand order passed by a competent authority, it can not rationally be postulated that if he is not detained, he would act in a prejudicial manner. At the point of time when an order of detention is going to be served on a person, it must be patent that the said person would act prejudicially if he is not detained and that is a consideration which would be absent when the authority is dealing with a person already in detention. The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus the basis of the order of detention, and this basis is clearly absent in the case of a person already in jail custody. See *Rameshwar Shaw Vs. District Magistrate, Burdwan and Another*,

11. In such a situation the detaining authority must show awareness of the fact although the person sought to be detained is already in jail, yet the compelling necessity of making an order of preventive detention. This awareness should be reflected in the detention order. See *Biru Mahato Vs. District Magistrate*

Dhanbad, If this subjective satisfaction is reached without this awareness, the order is likely to be vitiated. See *Merugu Satyanarayana Vs. State of Andhra Pradesh and Others*, . It is in this case that the Apex Court has held that awareness can be shown in the affidavit justifying detention.

12. In the instant case, the affidavit is silent on the point. Just look at the affidavit, it is sworn by the detaining authority himself. The deponent throughout in his affidavit has referred to the detaining authority as if the deponent and the detaining authority are two different persons. An affidavit must invariably be in first person singular. Going through the affidavit, as quoted above, the deponent has stated that "the detaining authority after proper application of mind and the detaining authority arrived at the subjective satisfaction" instead of mentioning his own satisfaction.

13. Now, the learned Govt Advocate referred to the schedule Annexure-A/3. As discussed above, it not signed by any one much less the detaining authority. It is not established that the detaining authority had the Schedule Annexure-A/3 before him at the time of passing the detention order. While Annexures-A/1 and A/2 bear the signature of the Secretary to the Govt of Nagaland, the Annexure-A/3 is not even initialled or endorsed by any one. Even going by the recital contained in Schedule Annexure-A/3 assuming it to have been made by the detaining authority that the detenu was likely to be released on bail, the fate of the bail petition remained undecided and there was no bail order, such circumstances, as has been pointed out by the Supreme Court in *Abdul Razak Abdul Wahab Sheikh Vs. S.N. Sinha, Commissioner of Police, Ahmedabad and Another*, subjective satisfaction of detaining authority cannot be said to have been reached on relevant materials hence the detention order was liable to be set aside. The Supreme Court in *P.U. Abdul Rahiman Vs. Union of India and others*, quoting from *M. Ahamedkutty Vs. Union of India (UOI) and Another*, has held as follows-

7. Counsel refers to the principle stated by one of us (K.N. Saikia, J.) in the case of *M. Ahamedkutty Vs. Union of India (UOI) and Another*, and submits that the facts of the present case are squarely covered by that decision in paragraph 27 of that judgment, this Court after summarising the relevant decisions on the point stated:

Considering the facts in the instant case, the bail application and the bail order were vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have been impaired, and if those had been considered, they would be documents relied on by the detaining authority though not specifically mentioned in the annexure to the order of detention and those ought to have formed part of the documents supplied to the detenu with the grounds of detention and without them the grounds themselves could not be said to have been complete. We have, therefore, no alternative but to hold that it amounted to denial of the detenu's right to make an effective representation and that it resulted in violation of Article 22(5) of the Constitution

of India rendering the continued detention of detenu illegal and entitling the detenu to be set at liberty in this case.

14. The above case is noted not so much for non-supply of bail petition and order, but to highlight the importance of the fact that bail was very much present to the mind of the detaining authority at the time of passing the impugned order. This awareness, on his part is throughout missing and the Schedule - Annexure-A-3 is a poor substitute for establishing such awareness, it is not even as already discussed above, the Schedule-Annexure-A-3 itself is not before the detaining authority who had all the opportunity of explaining the same in his affidavit-in-opposition which again totally silent on the point the inevitable inference, therefore, is one of non-application of mind to a vital fact vitiating the requisite subjective satisfaction on the part of the detaining authority, a condition precedent for passing any detention order. It was contended by the learned Counsel for the Petitioner that there was no Advisory Board constituted by the Government of Nagaland and was not in existence when the impugned order of detention was passed. This averments as contained in paragraph 9 of the petition and reply thereof is in paragraph 6 of the Affidavit-in-opposition filed by the detaining authority. They are reproduced below:

That the Petitioner humbly states that no Advisory Board has been constitution by Govt. of Nagaland to consider the order of detention of the detenu and hence his continuous detention has become, unconstitutional, illegal and ultra vires.

That the statements made in paragraphs 9, 10 and 11 are not correct and denied by me. It is stated that the case of the detenu was referred to the Advisory Board constituted by the State Government on 1.3.97 and the Advisory Board heard the detenu in person on 7.3.97 and the Advisory vide its report dated 9.3.97 was of the opinion that there were good and sufficient reason for continued detention of the detenu in order to prevent him from further indulging in activities prejudicial to the defence of Indian security of the State of Nagaland and maintenance of public order. In view of the above the contentions of the Petitioner are liable to be rejected.

15. The impugned order of detention was passed on 20.2.97 and the Constitution of an Advisory Board is governed by Section 9 of the National Security Act, we specifically pointed out to the learned Govt. Advocate if there is any notification issued by the Government of Nagaland constituting the Advisory Board in the State? and learned Govt. Advocate submitted that it was by the same order, dated 1.3.97 that the Advisory Board was constituted and the detenu was also referred to the Advisory Board so constituted by the same order. It is inconceivable situation that the State Government would pass a detention order in exercise of its power u/s 3(2) of the Act. Article 22(4)(a) enjoins constitution of Advisory Board and Clause 5 of Article 22 mandates affording the earliest opportunity for making a representation against the detention order. It is this Constitutional mandate which is reflected in Sections 8 and 9 of the Act. Going by the affidavit submission made by the Govt, Advocate appearing for the

Respondent- State, the Advisory Board came into being on 10th day of making the detention order. The time limit prescribed in Section 8 for communicating the grounds of detention to the detenu, is the outer limit. What is more significantly important is the absence of Advisory Board yet invoking and exercise the power of preventing detention affording the earliest opportunity for making the representation and placing the material before the Advisory Board within 7 weeks from the date of detention of the person concerned does not absolve or exonerate the State of its duty to constitute an Advisory Board u/s 9 of the Act and at least to have in existence such in Advisory Board duly so constituted, u/s 9 of the Act of being affording the earliest opportunity for making a representation is not confined to the outer time limits as envisaged by Sections 8 and 11 of the Act. It is the Respondents case that the case of the detenu was referred to the Advisory Board on 1.3.1997 and that he was produced on person on 7.3.97 and the Board submitted its report on 9.3.97. Admittedly, the Petitioner submitted a representation, Annexure-B which according to the Respondents does not bear any date, all the same it is admitted that it was received by jail Superintendent, Central Jail, Dimapur on 12.3,1997. This representation, according to the Respondents was rejected on 24.3.97 and the detenu informed accordingly on 26.3.97 soon thereafter on 1.4.97 he was transferred from Central Jail, Dimapur to Central Jail, Vanarasi vide order dated 30.3.97 for security reasons. A grievance has been made by the Petitioner against this transfer, but we are not inclined to go into this grievance at this stage and so far as the representation is concerned, it is not even the Petitioner's case, Petitioner's case is not about any delay in its disposal, but about the vagueness of grounds which we have already dealt with above.

16. The Union of India has been impleaded as Respondent No. 3 in this petition, instead of filing any counter and affidavit-in opposition, learned Standing Counsel has placed on record a Message as received by him, it is re-produced below:

Reference your letter dated 1.8.97 forwarding therewith the Civil Rule (HC) No. 97 of 1997 filed by Smt. Supongaum Gla wife of NSA Detenu Shri Mungshi Luen in the Gauhati High Court. The Union of India has been made Respondent No. 3 in the petition, but no specific allegation has been levelled against the Union of India. As such it is not desirable to file an affidavit in this case. As regards consideration of 3(5) report by the Central Govt, it is submitted that the Government of Nagaland had sent the report about the detention of Shri Mungshi Luen vide their order dated 20.2.97 as required u/s 3(5) of the Act. The said report has reed in this Ministry on 4.3.97 and the concerned auththorised Joint Secretary examined the report on 11.3.97 and he was satisfied that sufficient reasons existed for the detention of Shri Nungshi Leen under NSA. No action was considered necessary on the part of the Central Govt. on the report. It is also submitted that no representation from the detenu on his behalf is received by us so far. Please confirm the action taken.

17. In the light of the above stand as taken by the Central Government, two

points arise for consideration. Indisputably, the Central Govt. has power for revocation of detention order u/s 14 of the Act. It has now been held by the Supreme Court in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, that-

Having regard to the provisions of Article 22(5) of the constitution and the provisions of the COFEPOS A Act and the PIT NDPS Act the question posed is thus answered where the detention order has been made u/s 3 of the COFEPOSA Act and the PIT NDPS Act by an officer specially powered for that purpose either by the Central Government or the State Government the person detained has a right to make a representation to the said Officer and the said Officer is obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on the person detained to make a representation against the order of detention. This right of the detenu is in addition to his right to make the representation to the State Government and the Central Government where the detention order has been made by an officer specially authorised by a State Government and to the Central Government where the detention order has been made by an officer specially empowered by the Central Government, and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as the failure to do so resulted in denial of the right of the person detained to make a representation.

18. Having recognised the right of the representation by the Central Government as well as a mere glance of the impugned order of Detention, Annexure-A-1 would go to show that the deteny was not apprised of this right. The other point, which relates to Union of India is the report u/s 4(5) of the Act. It was admittedly received in the Ministry on 4.3.97 whereas the order was passed on 20.2.97. Sub-section (5) of Section-3 requires of the State Government to report the fact to the Central Government within 7 days, of course there is no specific date given by the State, but if the promptness of despatch and receipt of communication as regards transfer of detenu is any indication, the report received in the Home Ministry on 4.3.97 is certainly beyond the period of 7 days as prescribed u/s 3(5) of the Act. The power of revocation of detention order u/s 14 of the Act is a statutory power which can be exercised by the Central Government either in its own information or on the basis of a report submitted by State Government u/s 3(5) of the Act or on representation submitted by the Detenu.

19. In view of the foregoing discussions, the subjective satisfaction arrived at by the Detaining Authority is vitiated by non-application of mind, the non-existence of the Advisory Board on the date when the impugned order of detention was passed is yet another vitiating factor coupled with non-compliance of Section 3(5) of the Act rendering the continued detention illegal. The impugned order of

detention, Annexure-A-1 is liable to be quashed it is accordingly quashed. The detenu is ordered to be released forthwith unless otherwise wanted in connection with some other case or cases.