
(2005) 01 GAU CK 0068
In the Gauhati High Court

Tilak Barman

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-01-2005

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 11
Constitution of India, 1950 — Article 22
National Security Act, 1980 — Section 14, 3

Citation : (2007) 1 GLR 289 : (2005) 3 GLT 414 : (2005) GLT 786 Supp

Hon'ble Judges : Amitava Roy, J;A.H. Saikia, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Amitava Roy, J.—The preventive detention of the petitioner following the order dated 17.7.2004 passed by the District Magistrate, Kamrup (Metropolitan), Guwahati, under the National Security Act, 1980 (hereafter referred to as the Act) is in challenge in the instant proceeding.

2. We have heard Mr. N.N.B. Choudhury, learned Counsel for the petitioner, Mr. B. Choudhury, Additional Sr. Govt. Advocate, Assam for the State respondents and Mr. N. Bora, Additional CGSC for the Union of India.

3. The bare facts indispensably necessary for disposing of the petition have to be stated. The petitioner who was on 12.6.2004 arrested in connection with Noonmati P.S. Case No. 166/2004 and lodged in the Central Jail, Guwahati, was served with an order of detention dated 17.7.2004 under the Act as aforementioned. The grounds of detention were also served on the same date, i.e., 17.7.2004. He thereafter submitted a representation against his detention on 12.8.2004. His representation was addressed to the Commissioner to the Govt. of Assam, Department of Home and Political, Dispur, Guwahati, as well as the Secretary to the Govt. of India/Ministry of Home Affairs, New Delhi and was routed through the Superintendent of Jail, Guwahati. In the meantime, his

detention was approved on 23.7.2004 and subsequent to the opinion rendered by the Advisory Board on 29.8.2004 upholding the detention, his representation was rejected by the State Govt. on 2.9.2004. His detention was confirmed by the State Govt. on 4.9.2004 for a period of 12 months w.e.f. the date of detention.

4. The principle grievance of the petitioner as highlighted in the petition is that though the State Govt. was legally obliged to forward his representation to the Central Govt. which in turn, under the Act, was legally obligated to consider and dispose of the same on merits with utmost expedition, his detention was constitutionally impermissible on account of the lapse on the part of both the Governments on the above counts. According to the petitioner, his representation addressed to the Central Govt. remains undisposed till date.

5. The respondent No(s). 2 and 3 in their counter while endorsing the order of detention has contended, inter alia, that there are sufficient grounds justifying the same. They, however, have remained conspicuously silent with regard to the fate of the representation addressed to the Central Government. It is admitted that the representation submitted by the petitioner on 12.8.2004 was rejected by the State Government on 2.9.2004. In response to the categorical assertion in the writ petition that the representation addressed to the Central Government had not been forwarded by the State Government to the former for disposal, the answering respondents have chosen not to offer any comment.

6. The counter submitted on behalf of the detaining authority, i.e., the District Magistrate, Kamrup, Guwahati, is substantially in the same lines.

7. The Central Government has categorically pleaded in its affidavit that no representation of the petitioner had been received by it and, therefore, the question of considering it or disposing of the same did not arise.

8. Mr. Choudhury has emphatically urged referring to Article 22(5) of the Constitution of India and Section 14 of the Act that the inaction on the part of the State respondents in forwarding the petitioner's representation to the Central Government and the failure of the latter to dispose of the same is in blatant violation of the detenu's constitutional rights and on that ground alone his detention is liable to be adjudged invalid. He contended that as the grounds of detention served on the detenu indicated the petitioner's right to submit a representation also to the Central Government as is otherwise available to him under Article 22(5) of the Constitution of India as well as Section 14 of the Act and he having submitted such a representation, it was incumbent on the part of the State respondents to transmit the same to the Central Government for due disposal thereof expeditiously. In support of his contention that the unexplained inaction of the two Governments as above has rendered the preventive detention impermissible, Mr. Choudhury has placed reliance on the following decisions. Sabir Ahmed Vs. Union of India (UOI), , Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others,

9. The learned State Counsel in reply, submitted that the petitioner's

representation in fact was forwarded to the Central Government on 21.8.2004 and also drew our attention to the said communication in the records. According to him, therefore, there was no failure on the part of the State respondents in this regard and the petitioner's detention on this ground is not liable to be interfered with.

10. Mr. Bora on the other hand, reiterated the stand of the Central Government, and submitted that no representation in fact was received by it and therefore, the contention that the Central Government had failed to act in terms of the mandates to Article 22(5) of the Constitution of India and Section 14 of the Act is untenable.

11. We have carefully taken note of the rival submissions. From the pleaded stand of the State-respondents, it is amply clear that the petitioner had submitted a representation addressed to both the Governments on 12.8.2004 and that the same was received by the Superintendent of Central Jail, Guwahati, on the very same date. A bare perusal of the representation discloses that the same was addressed to both the Governments. It transpires from the official records placed before us that two copies of the said representation were forwarded to the detaining authority by the Superintendent of Central Jail, Guwahati, by his communication dated 12.8.2004 for onward transmission to the concerned addresses. The detaining authority in turn by his communication dated 16.8.2004 had forwarded the representations to the Commissioner and Secretary to the Government of Assam, Political (A) Department, Dispur, for taking necessary action. By two separate communications dated 21.8.2004, the representations were forwarded to the Advisory Board as well as to the Secretary to the Government of India, Ministry of Home Affairs, New Delhi.

12. The marked silence of the State respondents about this fact of transmitting the representation to the Central Government in their affidavits is, therefore, intriguing. The official records also do not disclose the mode of despatch of the representation to the Central Government Except the communication No. PLA 519/2004/32 dated 21.8.2004 issued by the Deputy Secretary to the Government of Assam, Political (A), Dispur, there is no semblance of any proof that the representation was in fact so forwarded to the Central Govt., for disposal on merits. As alluded herein above, the State respondents have avoided to deal with this aspect of the matter in their counter. According to us, the approach of the State-respondents have been ex facie casual, indifferent and evasive on the issue, more particularly, when the affidavits on their behalf had been filed much after that of the Central Government wherein it had taken a stand that no representation was in fact received by it. The order sheet of the instant proceeding also indicates that sufficient time had been granted to the State-respondents on the prayers being made on their behalf to enable them to file their affidavits. In view of the above state of the pleadings and the records we are not a wee bit convinced that the petitioner's representation addressed to the Central Government had in fact been forwarded to it for consideration and

disposal.

13. The Constitutional prescription under Article 22(5) of the Constitution of India makes it obligatory on the detaining authority to communicate as soon as may be to a person preventively detained the grounds on which the detention order had been made and to afford him the earliest opportunity of making a representation against the order. Section 14 of the Act authorizes, inter alia, the Central Government to revoke or modify a detention order, notwithstanding that the same had been made by an officer u/s 3(3) of the Act.

14. While dealing with the scope and amplitude of Section 11 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereafter referred to as "COFEPOSA") which is in pari materia with Section 14 of the Act, the Apex Court, in Sabir Ahmed, (supra), had held that the power u/s 11 is a supervisory power and is intended to be an additional check or safeguard against improper exercise of the power of detention by the detaining authority or the State Government and that if this statutory safeguard is to retain its meaning and efficacy, the Central Government must discharge its supervisory authority with constant vigilance and watchful care. The detention was held to be invalid and unjustified as in that case the representation made by the detenu to the Central Government had been ignored and left unattended for a period of four months.

15. On the failure on the part of the State authorities in forwarding the detenu's representation to the Central Government, the Apex Court in Jaiprakash, (supra), held that the same had resulted in denial of his right in making an effective representation rendering the detention illegal.

16. A more explicit and emphatic note was struck by the Apex Court in Kamallesh Kumar Iswar Das, (supra), where it ruled, thus:

Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke order for detention and thereby give relief to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation.

17. In the face of the overwhelming judicially enunciated principle as above we have no hesitation in the backdrop of the prevailing facts that the petitioner's invaluable right of representing against his detention has been contravened without any justification whatsoever. The approach of the State authorities is inexplicably negligent and patently opposed to the binding constitutional and

statutory mandates. The incurable lapse on the part of the State authorities in transmitting the petitioner's representation to the Central Government and the undue and unexplained delay in the disposal thereof, in our view, therefore, have rendered his detention invalid.

18. In the wake of the above, we adjudge the petitioner's detention under the Act as illegal and unsustainable in law. Resultantly we quash the order of detention dated 17.7.2004, the approval and confirmation thereof and direct that he be set at liberty forthwith, if he is not required to be detained in connection with any other case. The petition stands allowed. No costs.