(1998) 03 GAU CK 0003

Gauhati High Court

Case No: Civil Rule (H.C) No. 106 of 1997

Phukan Daimary @ Fungjarang		APPELLANT
	Vs	
State of Assam and Others		RESPONDENT

Date of Decision: March 7, 1998

Acts Referred:

- Constitution of India, 1950 - Article 22(5), 226
- National Security Act, 1980 - Section 3(2), 3(3)
- Penal Code, 1860 (IPC) - Section 302, 34, 365
- Terrorist and Disruptive Activities (Prevention) Act, 1987 - Section 3, 4

Citation: (1998) 4 GLT 40

Hon'ble Judges: V.D. Gyani, J; K.K. Singh, J

Bench: Division Bench

Advocate: N. Dutta and T.J. Mahanta, for the Appellant; A.C. Bora, Addl. A.G. and K.P. Goswami, for the Respondent

Final Decision: Allowed

Judgement

V.D. Gyani, J.

By this petition xjnder Article 226 of the Constitution the Petitioner seeks to challenge the detention order dated 5.4.97 as passed against the detenue by the District Magistrate, Nalbari, Respondent No. 4 in exercise of its power u/s 3(2) of the National Security Act, 1980 (for short, the Act) and prays for issuance of a writ of Habeas Corpus. The impugned order is reproduced herein below for ready reference.

Whereas, I, Shri B. Bhattacharjee, District Magistrate, Nalbari have bepn empdwered by the State Govt. u/s 3(2) of tlie National Security Act, 1990 to pass orders of detention u/s 3(2) of the said Act and whereas it has been made to appear to me that the activities of Shri Phukan Daima''7 @ Fungjarang, S/o Late Bhoda Daimary of village Teteliguri, District Nalbari are prejudicial to the maintenance of public order

being a hard-core BDSF (NDFB) who has been perpetuating reign of terror in the area by indulging in murder, kidnapping and has instigated and abetted as the activities of unlawftil organisation to wage was against the State. I, therefore, direct that the aforementioned Sri Phukan Daimary @ Fungjarang Daimary, S/o Lt. Bhoda Daunary of village Teteliguri (Jolapra) P.O. Tamulpur, Dist. Nalbari be detained u/s 3(3) of the National Security Act, 1980 for a period of two months from the date of the order unless an order of revocation or modification or a fresh order is passed to the contrary before the expiry of this period.

For the purpose of the Assam Detention Order, 1980 this detenu Is to be classified as Class-II detenu.

Given under my hand and seal of this 5th day of April, 1997.

Sd/-
District Magistrate
Nalbari.

2. The detenu is stated to be a hard core activist of BDSF (NDFB). Mr. Dutta, learned Counsel appearing for the Petitioner has raised the following grounds:

(a) Denial of opportunity to make an effective representation by withholding vital documents;

(b) Undue and inordinate delay in disposing the representation both by the State and the Central Governments;

(c) The impugned order has been passed without any application of mind and the subjective satisfaction arrived at is vitiated;

3. Learned Additional Advocate General Mr. Bora on the other hand maintained that all the procedural safeguards have been complied with and there was no delay in considering the detenu''s representation, the same stand taken by the learned Standing Counsel for Union of India.

4. Adverting to the grounds of detention as contained in Annexure-B, the nature of unlawfiil and criminal activities allegedly indulged in and committed by the detenu, as is evident from the cases registered against him under Sections 365/302/34 IPC and 3/4 TADA(P) Act at various Police Stations leave no manner of doubt that these grounds are not only relevant and germane, but also proximate in point of time and do have a nexus with the object sought to be achieved by passing the impugned order.

5. It is the in built procedural safeguards of the Act that have to be observed fully and complied with by all concerned-the Detaining Authority, the State Government and the Central Government. Lapse on the part of either of them can lead to quashing of the order of detention as rightly said that the history of liberty is the history of compliance with the procedural safeguard.

6. Now taking up the question of delay in consideration and disposal of detenu''s representation, so far as the State Government is concerned, the representation dated 3.5.97 was rejected by the State Government on 12.5.97, thus it cannot be said that there was any delay on the part of the State Government. But same is not the case with the Central Government. Let us now see what the Central Government has to say on the matter.

It is stated that a representation dated 3.5.97 from the detenu was received by the Central Government m the Ministry of Home Affairs on 16.5.97 through Government of Assam. This representation of the detenu was put up before the Deputy Secretary, Ministry of Home Affairs on 29.5.97 who carefully considered the same and with his comments put up the same before the Joint Secretary, Ministry of Home Affairs on 30.5.97. The Joint Secretary considered the case and with his comments put up the same before the Special Secretary, Ministry of Home Affairs on 2.6.97. It is stated that the Special Secretary considered the matter and after processing the same put it before the Minister of State of Home Affairs, Government of India on 2.6.97. The Minister of State for Home Affairs himself duly considered the case of the detenu and rejected the representation of the detenu on 12.6.97.

7. The first question that arises why there was so much delay in forwarding the representation which was admittedly received by the State Government on 8.5.97. The State Government in its affidavit has deposed that it was forwarded to the Central Government on 12.5.97 (See Rabindra Nath Misra''s affidavit) and this was done after rejecting the detenu''s representation. The forwarding of representation to the Central Government does not depend on rejection of the representation by the State Government, there was not a word by way of explanation why it could not be forwarded to the Central Government on the date it was received i.e. 8.5.97. Now admittedly, it was received by the Central Government on 16.5.97 and the representation was placed before the Deputy Secretary on 29.5.97 on the 14th day. Now this delay of fourteen days in not putting the representation before the concerned Officer is not even attempted to be explained by the Deponent Rohtash Singh, an Under Secretary in the Ministry of Home Affairs who has filed his affidavit on behalf of Union of India, Respondent No. 2. It is thus evident that there is delay form stage to stage which has not even attempted to explain. Now after 29.5.97 the representation was placed before the Joint Secretary on 30.5.97 and thereafter before the Special Secretary on 2.6.97. On the same day i.e. 2.6.97 it was placed before the Minister of State for Home Affairs rejected the representation on 12.6.97, again there was delay of 10 days and not a word by way of explanation as to occasion this delay form 3.5.97 to 12.6.97. it is not the number of days, but the concern that the authority shows for such representations being promptly considered which really matters. A casual approach on the part of the authorities, in such matters has been criticised by the Apex Court in umpteen cases. The delay causes can always be explained on some justifiable grounds. But in the instant case the delay remains unexplained. Continued detention of detenu, therefore, is

rendered illegal and is liable to be quashed, accordingly quashed.

8. There is yet another ground raised by the Petitioner which relates to non-supply of basic facts and materials constituting the grounds of detention the Detaining Authority attributing malafide and non-application of mind to him and challenging his subjective satisfaction. The Detaining Authority has not filed any affidavit. The affidavit is filed by the successor in office. Ordinarily the affidavit-in- opposition must come from the Detaining Authority, more so in a case where malafide is alleged and subjective satisfaction challenged as in the instant case. There is not even a whisper as to why the Detaining Authority who passed the impugned order, Annexure-A could not file an affidavit. Assuming he was transferred, yet he was very much available for filing an affidavit. The affidavit filed by the District Magistrate Sri Ashish Kumar Bhutani, caimot say anything about the subjective satisfaction arrived at by the then District Magistrate, Nalbari Sri B. Bhattachaijee who passed the impugned order on 5.4.97. Now let us examine the affidavit as sworn and filed by Sri Ashish Kumar Bhutam. The verification appended to reads as follows:

That the statements made in this affidavit and in paragraphs 1, 2, 8, 10, 16, 17, 18 and 19 are true to my knowledge while those made in paragraphs 3, 4, 5, 6, 7, 9, 11, 12, 13, 14, 15 and 20 are true to my information derived from the records which I believe to be true and the rest are my humble submission before this Hon''ble Court.

The deponent Ashish Kumar m his affidavit in paragraph 8 states:

The District Magistrate duly applied his mind to the facts of the case and was satisfied to pass the detention order on the basis of the grounds. The deponent denies that the order of detention is fraud on power and has been made for ulterior purpose.

How can he say about the subjective satisfaction of some one else? There is a glaring discrepency. The impugned order of detention speaks of the activities that are prejudicial to the maintenance of public order, whereas the ground of detention referred to security of State and maintenance of public order. But the order does not refer to Security of State, but it could only be explained by the authority who passed the detention order. It is significant to note that the Successor m office is a step ahead. What the District Magistrate passed the Detention Order does not even claim, is claimed by the successor in office as quoted above is speaks about the satisfaction of the Detaining Authority, the impugned order as quoted above merely states "whereas it has been made to appear to me". There is not remotest suggestion that the then District Magistrate was satisfied about the necessity of passing the detention order. The order does not anywhere say that the detaining authority was satisfied on the basis of materials placed before him that a detention order should be passed. It was a compulsive necessity. This cannot be allowed to be substituted by proxy. The subjective satisfaction of B. Bhattachaijee cannot be

approved by the affidavit of Ashish Kumar, more so m face of the discrepant nature of the impugned order which has been passed on mere appearance and not satisfaction. The order is liable to be set aside on this ground as well, as for non supply of basic facts and materials. The law on the point is well settled. Grounds mean all the basic facts and materials which have been taken into account by the Detaining Authority in making the order of detention and on which therefore, the order of, detention is based. It is the factual constituent of the "groimds" on which the subjective satisfaction of the authority is based. Therefore, nothing less than all the basic facts and materials which influenced the detaining authority in making the order of detention must be communicated to the detenu. That is the plain requirement of the first safeguard in Article 22(5). The grounds under Article 22(5) of the Constitution do not mean mere factual inference but mean factual inferences plus factual materials which led to such factual inferences. While the expression "grounds" includes not only conclusions of fact but also all the basic facts on which those conclusions were founded. They are different from subsidiary facts or further particulars of the basic facts. (See Khudiram Das Vs. The State of West Bengal and Others, , Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others, , and Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others, Admittedly basic facts have not been supplied. Making a mere reference to a particular case as registered at some Police Station without even supplying the FIR and other documents relating to the case to the detenu hardly serves the purpose of furnishing the grounds of detention. The justification that the Detaining Authority did not refer to such document is again indicative of non-application of mind. Due application of mind demands that the Detaining Authority should himself ask for basic facts and materials pertaining to the case, if it is not asked, it again vitiate the subjective satisfaction of the Detaining Authority.

9. In view of the foregoing discussions, this petition deserves to be allowed, it is accordingly allowed. The impugned order is liable to be set aside, it is accordingly set aside. The detenu be released forthwith.