
(1998) 2 GLT 358

Gauhati High Court

Case No: Civil Rule (H.C.) No"s. 10 and 11 of 1998

Pratap Das @ Pratap
Raj- Bangshi and
Others

APPELLANT

Vs

State of Assam and
Others

RESPONDENT

Date of Decision: April 7, 1998

Acts Referred:

- Arms Act, 1959 - Section 25IA, 27
- Constitution of India, 1950 - Article 19(1), 21, 22, 22(5), 226
- National Security Act, 1980 - Section 1(2), 14, 3(2), 3(3)
- Penal Code, 1860 (IPC) - Section 120B, 307
- Unlawful Activities (Prevention) Act, 1967 - Section 10, 13

Citation: (1998) 2 GLT 358

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

Bench: Division Bench

Advocate: A.C. Borbora, N. Zaman and B.D. Konwar, for the Appellant; C.G.S.C., Government Advocate, for the Respondent

Final Decision: Allowed

Judgement

V.D. Gyani, J.

By these petitions under Article 226 of the Constitution, the detenu-Petitioners challenged their preventive detention in pursuance to orders dated 29th November, 1997 (In Civil Rule 10/98 P. Das v. State) and 16th December, 1997 (In Civil Rule 11/98 Gobinda Deka v. State). The impugned orders are passed by the same authority, District Magistrate, Kamrup, Guwahati (Respondent No. 4, in Civil Rule 10/98 and Respondent No. 3 in Civil Rule No. 11/98). The impugned orders passed by the District Magistrate in exercise of his powers under Sub-section (2) of Section 3 of the national Security Act, 1980 (hereinafter

referred to as "the Act") are almost identical in terms except for the change in the name and address of the detenus and the dates. Both the detenus have been detained on the ground of their unlawful and criminal activities prejudicial to the security of the State and maintenance of public order. The impugned orders of detention, Annexure-A is based on the grounds of detention as contained in Annexure-B. There is a marked similarity even as regards the grounds of detention. Both the detenus are alleged to be active members of the ULFA, indulging in extremist activities, organizing youth camps to gather support for their unlawful activities prejudicial to the maintenance of public order and security of the estate. Several criminal cases of a very serious nature, such as, Sections 10 and 13 of the U.A. (P) Act; Section 3-07/120B IPC read with Sections 25(IA)/27 of the Arms Act. The other common feature is that the detenus were already in jail at the time of passing the impugned order for detention as is evident from the endorsement made on the orders, Annexure-A.

2. Going through the grounds of detention, we have no manner of doubt in our mind that these grounds as contained in Annexure-B are relevant, germane and proximate in point of time and having a direct nexus with the object sought to be achieved and served by passing the impugned orders of preventive detention, Annexure-A, to both the petitions. In view of this clear findings that we have arrived at, we are not reproducing the grounds as contained in Annexure-A. However, the impugned orders of detention are reproduced hereunder:

Annexure-A
(In C.R. 10/98)
Govt. of Assam

Office of the District Magistrate, Kamrup, Ghty.

(Confidential Branch)

ORDER OF DETENTION UNDER NSA, 1980.

Whereas the undersigned is satisfied on the basis of the dossier prepared by the Superintendent of Police, Kamrup, Guwahati in respect of the person known as Shri Pratap Das @ Pratap Rajbangshi @ Agni Narzaiy, son of Shri Madhab Das (cultivator) of village Singimari, P.S. Goreswar, Dist. Kamrup, Assam at present residing in village Singimari, P.S. Goreswar, Dist. Kamrup (Assam) that with a view to prevent him from acting in any manner prejudicial to the security of the State and from acting in any manner prejudicial to the maintenance of public order, it is necessary to detain him under the National Security Act, 1980, as amended.

Now, therefore, in exercise of the powers conferred by Sub-sections (2) and (3) of the Section 3 of the National Security Act, 1980, as amended, read with Government Notification No. PLA. 326/97/5, dated 27.8.97, the undersigned hereby directs that the said Shri Pratap Das @ Pratap Rajbangshi @ Agni Narzary, son of Shri Madhab Das of

village Singimari, P.S. Goreswar, Dist. Kamrup be detained in the District Jail, Nalbari under further orders.

The person against whom this order of preventive detention is made for compelling reasons is already in judicial custody but is likely to be released whereupon it is highly probable that he will indulge in activities prejudicial to the security of the State and prejudicial to the maintenance of public order after his release.

Given under my hand and seal on this 29th day of November, 1997.

(SANJEEVA KUMAR)
DISTRICT MAGISTRATE, KAMRUP
GUWAHATI

Memo No. VII/97/NSA/916/GA, Dt. Guwahati, the 29th Nov., 1997

Annexure-B
(In C.R. 11/98)

GOVERNMENT OF ASSAM
OFFICE OF THE
DISTRICT MAGISTRATE,
KAMRUP, GUWAHATI
(CONFIDENTIAL BRANCH)
ORDER OF DETENTION UNDER
N.S.A. 1980

Whereas the undersigned is satisfied on the basis of the dossier prepared by the Superintendent of Police, Kamrup, Guwahati in respect of the person known as Shri Gobinda Deka @ Prasanta Buragohain, son of Shri Lohit Chandra Deka of village Athgaon, P.S. Kamalpur, that with a view to prevent him from acting in any manner prejudicial to the security of the State and from acting in any manner prejudicial to the maintenance of public order, it is necessary to detain him under the National Security Act, 1980, as amended.

Now, therefore, in exercise of the powers conferred by Sub-sections (2) and (3) of Section 3 of the National Security Act, 1980, as amended, read with Government Notification No. PLA. 326/97/6, dated 18th November 1997, the undersigned hereby directs that the said Gobinda Deka @ Prasanta Buragohain, son of Shri Lohit Chandra Deka of village Athgaon, P.S. Kamalpur, District Kamrup (Assam) be detained in the District Jail, Nalbari until further orders.

The person against whom this order of preventive detention is made for compelling reasons is already in judicial custody but is likely to be released whereupon it is highly probable that he will indulge in activities prejudicial to the security of the State and

prejudicial to the maintenance of public order after his release.

Given under my hand and seal on this 16th day of December, 1997.

(SANJEEVA KUMAR)
DISTRICT MAGISTRATE, KAMRUP
GUWAHATI

Memo No. VII/97/NSA/960/CA, Dated Guwahati, the 16th December, 1997.

Apparently, the source of authority of the District Magistrate is Notification No. PLA.326/97/5 dated 27.8.97 (in Civil Rule (HC) No. 10/98) and No. PLA. 326/97/6 dated 18.11.97 (in Civil Rule (HC) No. 11/98). But for the change of Notification both these notifications are identical. One of the notification dated 27.8.97 is reproduced hereunder:

ORDERS BY THE GOVERNOR
NOTIFICATIONN

Dated Dispur, the 27th Aug., '97

No. PLA. 326/97/5: Whereas having regard to the circumstances prevailing or likely to prevail in the districts of (1) Cachar, (2) Karimganj, (3) N.C. Hills, (4) Karbi Anglong, (5) Dibrugarh, (6) Sibsagar, (7) Jorhat, (8) Nagaon, (9) Lakhimpur, (10) Sonitpur, (11) Dhubri, (12) Nalbari, (13) Barpeta, (14) Goalpara, (15) Dhubri, (16) Morigaon, (17) Kokrajhar, (18) Golaghat, (19) Darrang, (20) Tinsukia, (21) Dhemaji, (22) Bongaigaon and (23) Hailakandi, the Governor of Assam is pleased that it is necessary so to do and in exercise of the powers conferred under the proviso to Sub-section (3) of Section 3 of the National Security Act, 1980, the Governor of Assam is pleased to extend hereby, the period of validity of the Notification No. PLA. 326/97/2 dated 31.5.97 for a further period of 3 (three) months with effect from 1.9.1997.

3. It was just the other day, on 31st March, 1998 by the judgment delivered in Civil Rule (HQ No. 12/98 (Naren Neog v. State of Assam and Ors.) and Civil Rule (HC) No. 13/98 (Pranab Bora v. State of Assam and Ors.) this order has been held to be invalid in view of the Supreme Court judgment delivered in [Abhay Shridhar Ambulkar Vs. S.V. Bhawe, Commissioner of Police and Others](#). An identical notification issued by the Government of Maharashtra conferring powers on the Police Commissioner, Bombay u/s 3(2) of the Act has been struck down by the Supreme Court. The Maharashtra notification as quoted in the judgment, is also reproduced for ready reference:

No. NSA-2390/1/SPL-3(B) - Whereas the Government of Maharashtra is satisfied that having regard to circumstances prevailing or likely to prevail in the Greater Bombay Police Commissionerate, it is necessary that during the period commencing on 30th January, 1990 and ending on 29th April, 1990, the Commissioner of Police and the said Commissioner should also exercise the powers conferred by Sub-section (2) of Section 1

of the National Security Act, 1980 (65 of 1980) (hereinafter referred to as "the said Act").

Now, therefore, in exercise of the powers conferred by Sub-section (3) of the Section 3 of the said Act, the Government of Maharashtra hereby directs that for the period commencing on the 30th January 1990 and ending on 29th April, 1990 the Commissioner of Police, Greater Bombay may also if satisfied as provided in Sub-section (2) of Section 3 of the said Act exercise the powers conferred on the State Government by Sub-section (2) of Section 3 of the said Act.

The Supreme Court while holding the above notification invalid held as follows:

The subjective satisfaction cannot be lightly recorded by reproducing both the alternative clauses of the statute. The subjective satisfaction on the prevailing circumstances, or circumstances that are likely to prevail at a future date is the sine qua non for the exercise of power. The use of the word "or" signifies either of the two situations for different periods. That, however, is not to say that the power cannot be for a future period by taking into consideration circumstances prevailing on the date of the order as well as circumstances likely to prevail in future. The latter may stem from the former. For example, there may disturbance on the date of the order and the same situation may be visualised at a future date also in which case, the power may be conferred on the subordinate officers keeping both the factors in mind, but in that case the two circumstances would have to be joined by the conjunctive word "and" not the disjunctive word "or". The use of the disjunctive word "or" in the impugned Government order not only indicates non-application of mind and obscurity in thought. The obscurity in language. Apparently, the Government seems to be uncertain as to the relevant circumstances to be taken into consideration, and that appears to be the reason why they have used the disjunctive word "or" in the impugned order.

4. In view of the above, the impugned orders as passed by the District Magistrate, Kamrup are liable to be quashed in this sole ground alone and they are accordingly quashed.

5. The other grounds of challenge are: non-application of mind resulting in vitiation of subjective satisfaction of the detaining; noncompliance of the inbuilt procedural safeguard engrafted in the Act and non-supply of basic facts and materials constituting the grounds of detention and non-consideration of undue, unreasonable and unexplained delay in disposing of the representation dated 14.12.97 as filed by detenu Pratap Das and representation dated 26.12.97 as filed by detenu Govinda Deka, filed as Annexure-3 to both the petitions.

6. We shall first examine the last two grounds as indicated above. Non-supply of basic facts and materials and delay in disposal of representation. A grievance has been made about non-supply of these facts and materials which have been taken into account by the detaining authority in making the order of detention and on which ground, therefore, the

order of detention is based. It is the factual constituent of the "grounds" 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. (See *Khudiram v. State of West Bengal* AIR SC 1975 . Admittedly, the documents referred to in the Dossier have not been supplied and adventitious reproduction of Dossier submitted by the Superintendent of Police is itself an indication of non-application of mind (see [Jai Singh and Others Vs. State of Jammu and Kashmir](#), . All these factors vitiate the order of detention.

7. By their very nature the grounds are conclusions of facts and not a complete detailed recital of all the facts. The conclusions drawn from the available facts will show in which of the categories of prejudicial acts mentioned in the statute the suspected activities of the particular person is considered (see [The State of Bombay Vs. Atma Ram Sridhar Vaidya](#),

8. "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 "grounds" on which the subjective satisfaction of the 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). See *Khudiram Das* (supra).

9. The concept of "Ground" has to receive an interpretation which will keep it meaningfully in tune with the contemporary notions of the realities of the society and the purpose of the Act in question in the light of concepts of liberty and fundamental freedoms guaranteed by Articles 19(1), 21 and 22 of the Constitution, (see [Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others](#),

10. Communication of grounds pre-supposes the formation of the grounds and formulation of grounds require and ensures the application of mind of the detaining authority to the fact and materials before it, that is to say, to pertinent and proximate matters in regard to each individual case and excludes the elements of arbitrariness and automation. There would be vitiation of the detention of grounds of non-application of mind if a piece of evidence, which was relevant though not binding, had been considered. If a piece of evidence which might reasonably have affected the decision whether or not to pass an order of detention, is excluded from consideration, there would be a failure of application of mind which, in turn, vitiates the detention. The detaining authority might very well have come to the same conclusion after considering this material, but in the facts of the case the omission to consider the material assumed materiality (see. [Ayya alias Ayub Vs. State of U.P. and Another](#), In [Dharamdas Shamlal Agarwal Vs. Police Commissioner and Another](#), the Apex Court observed that at the time of passing the detention order, the vital fact regarding acquittal of the detenu in two criminal cases had not been brought to the notice of the detaining authority and was given to understand that the trial of those cases were pending. The non-placing of the material facts resulted in

non-application of mind of the detaining authority to the said fact which the requisite subjective satisfaction, rendering the detention order invalid. There is nothing like unfettered discretion immune from judicial review ability. The Court can always examine whether the requisite satisfaction was arrived at by the authority, if it is not, the condition precedent to the exercise of power would not be fulfilled and the exercise of the power would be had (see [Pushpa Devi M. Jatia Vs. M.L. Wadhavan, Additional Secretary, Government of India and Others](#),

11. In Civil Rule No. 11/98 (Gobinda Deka v. State) admittedly the representation was rejected on 24.2.98. Instead of disclosing the actual date of receiving the representation, the affidavit sworn on behalf of the Respondent Union of India states:

That the representation from the detenu along with all the required information became effectively available to the Central Government in the Ministry of Home Affairs for consideration only on 9.2.98. That a final decision to reject the said representation was taken by the Central Government in the Ministry of Home Affairs within 12 days (including 14, 15, 21 and 22.2.98 being holidays) of its effectively becoming available for consideration.

Although there is no such thing as "effectively available" in law it is an expression coined by the authorities to cover up the delay. Nothing was easier for the deponent to state the actual date of receipt of the representation. Even if one takes the date as 9.2.98, there is absolutely no explanation for fifteen days delay. It took 56 days for the authorities to reject the detenu's representation. The expression "effectively available", really speaking, is no explanation but a device, a self-serving expression coined by the authorities, which cannot be accepted as explanation in cases involving deprivation of personal freedom and liberty.

12. In Civil Rule No. 10/98 (P. Das v. State) the representation dated 14.12.97 was forwarded on 31.12.97 and received by the Central Govt. on 8.1.98. There is 17 days unexplained delay. It does not stand to reason why the representation could not be straightway sent to the Central Govt.? An argument is advanced [Sat Pal Vs. State of Punjab and others](#), it was contended that the State is not obliged to explain the delay, it is based on a misreading of the judgment, which if read as a whole, particularly paragraphs 6, 8, and 11 thereof, does not support the argument advanced by the learned Addl. Advocate General. Subsequent judgments of the Supreme Court as reported in [Amir Shad Khan and another Vs. L. Hmingliana and others](#), [Jai Prakash Vs. District Magistrate, Bulandshahar, U.P. and anothers](#), [Smt. Gracy Vs. State of Kerala and another](#), [K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India \(UOI\) and Others and State of Karnataka and Others](#), Amalendu v. State of T.N. AIR 1995 SC 539, enjoins the State not only to forward the representation with all despatch but even to prepare copies, if necessary and send the same to the Central Govt. putting the correct address. Why go that far, the second volume of [Vijay Kumar Vs. State of Jammu and Kashmir and Others](#), itself contains Vijay Kumar v. State of Punjab, directly communicating authorities

to move with all promptitude and emphasises the obligation of the State in this behalf Any slackness if not properly explained would be denial of the protection conferred by the Act and the Constitution, would invalidate the order.

13. The power of revocation vesting in the Central Govt. u/s 14 of the Act is quite independent of the decision to be taken by the State Govt. and the report submitted by the Advisory Board. It is a power independent of the power of confirmation of the report of the Advisory Board.

14. This apparent delay in both cases vitiates the detention of the detenus. It is liable to be set and afid is accordingly set aside.

15. In view of the foregoing discussion, both these petitions are deserve to be allowed, they are accordingly allowed. The continued detention of the detenus are set aside. They be set at liberty forthwith, unless otherwise wanted in connection with some other case or cases.