(2015) CriLJ 2731

Gauhati High Court (Kohima Bench)

Case No: Writ Petition (Criminal) No. 6(K) of 2015

Bijon Kiho		APPELLANT
	Vs	
State of Nagaland and Others		RESPONDENT

Date of Decision: March 31, 2015

Acts Referred:

- Arms Act, 1959 - Section 25(1A), 8
- Constitution of India, 1950 - Article 22(5)
- Criminal Procedure Code, 1973 (CrPC) - Section 161, 162(1)

Citation: (2015) CriLJ 2731

Hon'ble Judges: Lanusungkum Jamir, J

Bench: Single Bench

Advocate: Imti Longjem, S.M. Ozukum, Esther and Vinitoli, for the Appellant; K. Wotsa, Sr. Govt. Adv., Advocates for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Lanusungkum Jamir, J
Heard Mr. Imti Longjem, learned counsel for the petitioner/detenue as well as Mr. K. Wotsa, learned Senior Government Advocate appearing for the State respondents. None appears for the respondent No. 5 i.e. Union of India. The petitioner/detenue was arrested on 27-11-2014 along with another from Dimapur and he was implicated in connection with Dimapur East P.S Case No. 252/14 under Sections 25(1A) of the Arms Act read with R. 7 of NSR. Thereafter, the petitioner/detenue was released on interim bail by an order dated 02-12-2014 passed by the learned Chief Judicial Magistrate, Dimapur. The petitioner/detenue was again rearrested on 12-12-2014 by detention order dated 08-12-2014 passed by the District Magistrate, Dimapur. The petitioner/detenue was also furnished with the detention order dated 08-12-2014, grounds of detention and the

schedule thereto the letter dated 08-12-2014 written by the District Magistrate, Dimapur, Nagaland to the Principal Secretary, Home, Nagaland, Kohima for approval of the detention order and the letter dated 08-12-2014 addressed to the detainees informing the right of representation against such detention.

2. The petitioner/detenue thereafter, submitted a representation dated 20-01-2015 which was forwarded by the Jail Authority by forwarding letter dated 20-01-2015 to the Central Government along with the copy endorsed to the State Government, detaining authority and the advisory board. Thereafter, the State Government issued order dated 15-12-2014 approving his detention. Consequently, confirmation order dated 27-01-2015 was issued by the State Government.

3. Mr. Imti Longjem, learned counsel for the petitioner/detenue submits that no affidavit has been filed by the District Magistrate explaining his subjective satisfaction before this Court. He submits that only one affidavit has been filed by the Chief Secretary on behalf of all the respondents wherein, he has tried to explain the subjective satisfaction of the District Magistrate. He, therefore, submits that the affidavit of the Chief Secretary can in no way explain the subjective satisfaction of the District Magistrate and the same is also not permissible in law. It is also submitted that the basis of the subjective satisfaction of the District Magistrate is based wholly on the statements made by the petitioner/detenue before the police under Section 161, Cr.P.C. This could not have formed the basis for the subjective satisfaction on the part of the District Magistrate and therefore, on this ground also, the impugned detention order deserves to be set aside and quashed. Thirdly, the learned counsel for the petitioner/detenue submits that the District Magistrate also formed an opinion that the petitioner/detenue is presently under judicial custody but there is likelihood of being released on bail and in the event of his release, he is likely to indulge in similar prejudicial activities unless an effective alternative measures is called for. He submits that when the detaining authority had come to the conclusion that the petitioner/detenue is likely to be released on bail, the fact that the petitioner/detenue was already released on interim bail by the order dated 02-12-2014 passed by the learned Chief Judicial Magistrate, Dimapur was not considered and such conclusion on the part of the District Magistrate/Detaining Authority was purely mechanical in nature without any application of mind. Therefore, on this ground alone, the detention order requires to be set aside and quashed. Fourthly, the learned counsel for the petitioner/detenue submits that the petitioner/detenue was not informed about his right to be represented by his next friend which has also become a requirement in law. Lastly, it is submitted that the seizure of revolver from the vehicle of the petitioner/detenue is not a ground for detaining the petitioner/detenue under NSA inasmuch as, such seizure of revolver can be dealt with effectively under the ordinary law of the land.

4. Mr. K. Wotsa, learned Senior Government Advocate appearing for the State respondents submits that during the course of interrogation the petitioner/detenue had voluntarily admitted that he is an active member of NSCN (KK) and while detaining the petitioner/detenue under NSA, all relevant documents pertaining to the case of the

petitioner/detenue were placed before the detaining authority and upon careful examination of the records, the detaining authority had found it a fit case to book the petitioner/detenue under NSA. Considering the seriousness of the matter and also the prejudicial activities of the petitioner/detenue, he has been kept under preventive detention in accordance with the established procedure as required by the law. He also submits that there is no provision under NSA where a detenue has the right of assistance of a friend before the advisory board. The petitioner/detenue was also given a personal hearing by the advisory board and thereafter the advisory board had come to the finding that there was sufficient cause for extension of detention of the petitioner/detenue and accordingly the confirmation order was issued on 27-01-2015. He further submits that there has been no violation of the requirement of the National Security Act and therefore the detention order of the petitioner/detenue may not be interfered and the present petition be dismissed.

5. I have heard the learned counsel appearing for the parties.

6. This Court in a catena of cases has held that the subjective satisfaction of the detaining authority has to be explained by the detaining authority himself. In the present case in hand, no affidavit has been filed by the detaining authority and it is only the Chief Secretary that has filed the affidavit trying to explain the subjective satisfaction of the detaining authority. This is not permissible in law and the same view has been taken by the Division Bench of this Court in the case of Ananta Gogoi Vs. Union of India (UOI) and Others, (2009) 4 GLR 11 : (2009) 4 GLT 216 .

7. In the case of Smt. Pebam Ningol Mikoi Devi Vs. State of Manipur and Others, (2010) 10 JT 456(1) : (2010) 10 SCALE 248 : (2010) 9 SCC 618 : (2010) 10 UJ 5119 , the Hon"ble Supreme Court has held as under:-

30. Insofar as the documents on which reliance is placed, in our opinion, none of these documents provide any reasonable basis for passing the detention order. The primary reliance has been on the accused"s own statement made to an investigating officer. This cannot be said to be sufficient to form the subjective satisfaction of the detaining authority. Statements under Section 161, Code of Criminal Procedure, 1973, (hereinafter Cr.P.C.) cannot be taken as sufficient grounds in the absence of any supportive or corroborating grounds. Section 161 statements are not considered substantive evidence, but can only be used to contradict the witness in the course of a trial. The same is clear from the wording of Section 162(1), Cr.P.C. and has been so held time and again by this Court."

Again, in the case of Haobijam Kenjit Singh alias Kenedy Vs. State of Manipur and Others, (2007) CriLJ 689 : (2006) GLT 577 Supp), it has been held as under:-

In the present case, if we may reiterate, there was no materials available to the detaining authority or considered by the detaining authority for coming to the conclusion, which it

did, that the detenue is "likely to be released on bail in the near future". The satisfaction reached by an authority that a person is likely to be released on bail may be regarded as his subjective satisfaction, yet the fact remains that in order to reach such subjective satisfaction, the authority concerned must consider the materials placed before it objectively. In the case in hand, there was no room for reaching subjective satisfaction that the detenue was "likely to be released on bail in the near future" inasmuch as there was no material placed before the detaining authority to enable it to objectively consider the same and arrive at the conclusion, which it has reached, namely, that the detenue is "likely to be released on bail in the near future." If there were any material, which had impelled the detaining authority to form the opinion that the detenue was "likely to be released on bail in the near future", such material ought to have been furnished to the detenue and also to this Court. Neither any such material was furnished to the petitioner nor has any such material been made available to this Court. There can, therefore, be no escape from conclusion there was no material available to corroborate or support the detaining authority"s conclusion that the detenue was "likely to be released on bail in the near future." Situated thus, we are constrained to take the view that there was no material available before the detaining authority to come to the conclusion, which it has reached, namely, that the detenue is "likely to be released on bail in the near future." In the absence of any material pointing that the detenue was "likely to be released on bail in the near future", no order of preventive detention could have been made against the petitioner."

Further in the case of Md. Monisur Islam Vs. Union of India (UOI) and Others, (2003) 1 GLR 80 : (2002) 3 GLT 249 , Division Bench of this Court has also held as under:-

"There is nothing on record also to indicate that the bail applications submitted by the petitioner along with the orders of bail granted to him were furnished to him before he had submitted his representation. We are of the view that having regard to the observations made by the Apex Court in Ahamedkutty (supra), the non-consideration of the fact that the petitioner was at the relevant time before the order of detention was passed, was on bail in the criminal cases including the one reference whereof had been made in the grounds of detention, had impaired the satisfaction of the detaining authority about the necessity of preventive detention of the petitioner. In the instant case, no affidavit has been filed by the detaining authority. The affidavit is on behalf of the respondent No. 2 alone. No explanation has been furnished as to why the detaining authority though a party to the proceedings has not filed its affidavit. This assumes importance in view of the observations made by the Apex Court in Mohinuddin alias Moin Master Vs. District Magistrate, Beed and Others, AIR 1987 SC 1977 : (1987) 3 JT 173 : (1987) 2 SCALE 128 : (1987) 4 SCC 58 : (1987) 3 SCR 668 . There is nothing in the affidavit filed by the respondent No. 2 that the deponent had either personally dealt with the case or had processed the same. The parawise comments submitted by the Superintendent of Police, Dhubri indicates that the said authority was aware that the petitioner was granted bail in Gouripur P.S Case No. 157/2001. If therefore, assuming that the detaining authority had

also taken note of the said fact, though not spelt out in the grounds of detention, the non-furnishing of the bail application and the bail orders, in view of the pronounced judicial opinion recorded in the above decision amounts to a denial of a meaningful opportunity to the petitioner to submit his representation against the impugned order of detention. This, in our opinion, is sufficient to hold that there has been a violation of the Constitutional right of the petitioner guaranteed under Article 22(5) of the Constitution of India rendering the continued detention of the petitioner illegal. We thus uphold the contention of the learned counsel for the petitioner in this regard.

8. In the present case in hand, what has been noticed is that the detaining authority has formed his subjective satisfaction only on the basis of the police report and on the statement made by the petitioner/detenue before the police authority. Following the ratio laid down by the Supreme Court in the case of Haobijam Kenjit Singh alias Kenedy Vs. State of Manipur and Others, (2007) CriLJ 689 : (2006) GLT 577 Supp , this Court is of the considered opinion that the detaining authority could not have formed his subjective satisfaction basing only on the statement made by the petitioner/detenue before the police. Another important point of note in the present case is that when the detaining authority had passed the detention order, the petitioner/detenue was already on interim bail on the strength of the interim bail passed by the learned Chief Judicial Magistrate, Dimapur by order dated 02-12-2014. What this Court has noticed is that the interim bail of the petitioner/detenue was not at all considered and the finding of the detaining authority that he may be released on bail is found to be purely non application of mind and the detention order was passed in a mechanical manner. This by itself, would vitiate the issuance of the detention order dated 08-12-2014.

9. With regard to the submission made by the learned counsel for the petitioner/detenue that the petitioner/detenue was not informed of his right of having the assistance of his next friend, a Division Bench in the case of Nameirakpam Inaotomba Singh Vs. Union of India (UOI) and Others, (2007) 4 GLT 200 has held as under:-

"14. The argument advanced by the parties has been duly considered. From the arguments of the learned counsel as well as from the law reports stated above and records available before the Court, this Court is of the opinion that right to be heard by the Board is not an empty formality. But, to safeguard the right of life and liberty of a citizen and it is the duty of a detaining authority to inform regarding his all the rights which includes rights to make representation to the said Board. Unless a detenu is informed that he will ask for the same to the appropriate authority, i.e. the State Government, Central Government and the advisory board. In the instant case, though it is mentioned in para 8 of the ground of detention that advisory board may call him for such information as it may deem necessary from him and if he desires to be heard in person, an arrangement may be made to produce him before the advisory board for the purpose. The said ground in para 8 does not indicate that the detenu has the right to take assistance of his friend before the advisory board to be represented himself before the advisory board with representation and/or the detenu as a right to make a representation before the advisory

board. Non mentioning of such requirement as stated above may not vitiate the order of detention, but the valuable right of the detenu to make an effective representation to the State Govt., Central Govt. and to the advisory board is curtailed, which is a right protected under Art. 22(5) of the Act. As the words, "and shall afford in Art. 22(5) have a positive content in the matter of personal liberty, the needs for observance of procedural safeguard, particularly in cases of deprivation of life and liberty is of prime importance to the body politic" as the Apex Court said and it is the duty of the detaining authority to inform or apprise the detenu regarding his right under Art. 22(5) of the Constitution read with Section 8 of the Act including to make representation against the order of detention before the appropriate authority as well as to the advisory board. Mere right to be heard mentioned in the grounds of detention will be a mere formality unless it is mentioned that a detenu has a right to make representation to the appropriate Govt. including the advisory board with the assistance of his next friend and/or by way of filling representation. For fairness it is the duty of the detaining authority to inform the detenu regarding his aforesaid right and entitlement in his grounds of detention.

If we read conjointly paragraph 9 of the case of Anil Vats Vs. Union of India and others, AIR 1991 SC 979 : (1991) CriLJ 605 : (1990) 4 JT 691 : (1991) 2 SCC 661 Supp and para 18 of the case of Wasiuddin Ahmed Vs. District Magistrate, Aligarh, U.P. and Others, AIR 1981 SC 2166 : (1981) CriLJ 1825 : (1981) 3 SCALE 1629 : (1981) 4 SCC 521 , it can be easily presumed that a detenu has the right to be heard by the advisory board either by filing representation in person with the assistance of his next friend or to be heard in person with the assistance of friend and in the instant case though in the ground No. 8 of detention it is mentioned that he has the right of being heard by the board but the same is not enough as the word "right to be heard" does not exclude the right of the detenu to file a representation before the board and while the Apex Court decided that the detenu is entitled to get the assistance of his next friend before the board. The detenu has to be informed by detaining authority that he has right to make a representation as right to be heard include right to representation and hearing in person and also he is entitled to get assistance of his friend before the board at the time when the detenu is to be heard, which is not mentioned in the order and for such non mentioning of the right of the detenu, this Court is of the considered opinion that the procedural safeguard, as envisaged under Art. 22(5) was not satisfied in the case and as a result, the continued detention of the detenu would be rendered illegal. And in the preventive detention, the right to representation and consideration thereof by the appropriate authority at earliest time and entitlement of next friend of the detenue for representing him before the Board as a procedural safeguard and any infraction of law relating to such procedural safeguard vitiates the order of detention and the subsequent action would render the order of detention illegal."

Here too, a reading of the letter dated 08-12-2014 clearly indicates that the petitioner/detenue was never informed of his right to have the assistance of his next friend and that he was only informed of his right to make a representation to the

appropriate authority. This Court is therefore of the opinion that the procedural safeguard as envisaged under Article 22(5) of the Constitution has not been satisfied.

10. As regard the last submission of the learned counsel for the petitioner/detenue that mere seizure of revolver from the vehicle of the petitioner/detenue is not a ground for detaining the petitioner/detenue under National Security Act, this Court is in agreement with the learned counsel for the petitioner/detenue. The same view has been taken by the Division Bench of this Court in the case of Lottongbam Dhiren Vs. State of Manipur and Others, (1998) 4 GLT 70 .

11. In view of the settled position of law, this Court is of the considered opinion that the impugned detention order dated 08-12-2014 stands vitiated. Accordingly, the same is set aside and quashed. Consequently, all other consequential order (s) are also set aside and quashed.

12. The petitioner/detenue, namely, Ghutoshe Sema shall be set at liberty forthwith unless he is wanted in some other cases.

13. Petition is allowed. No costs.