

GAHC010104342023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/2681/2023

RAKA JYOTI KAKOTI
W/O PRANABJIT CHALIHA,
R/O PHUKAN NAGAR,
P.O.- SIVASAGAR,
P.S.- SIVASAGAR,
DIST.- SIVASAGAR, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY THE PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM, HOME
AND POLITICAL DEPTT., DISPUR, GUWAHATI- 06, ASSAM.

2:DISTRICT MAGISTRATE
SIVASAGAR
ASSAM- 785640

Advocate for the Petitioner : MR S BORTHAKUR

Advocate for the Respondent : GA, ASSAM

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 26.05.2023

Heard Mr. S. Borthakur, learned counsel for the petitioner and Mr. D.

Nath, learned senior Govt. advocate appearing for the State.

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioner who is the mother of Srinkhal Chaliha, who is a detenu under the National Security Act and was taken in custody on 03.05.2023, is praying for a direction to the respondent authority so as to direct the District Magistrate, Sivasagar to allow the petitioner to meet her son and/or their legal counsel or any other close relatives.

3. The background fact relating to the arrest and detention of the son of the petitioner is not essential for the nature of relief which has been sought for. Accordingly, the same has not been adverted to.

4. At the outset, the learned senior Govt. advocate has produced a copy of order No. SVMJ/NSA/16/2023/64 dated 19.05.2023 and has submitted that the said authority has already allowed the counsel and the family members of the petitioner to visit District Jail, Sivasagar to meet the detenu.

5. In this regard, it would be relevant to quote paragraphs 3 and 8 to 12 of the case of *Francis Coralie Mullin Vs. Administrator, Union Territory of Delhi and Ors.*, (1981) 1 SCC 608.

“(3) The principal ground on which the constitutional validity of sub-clauses (i) and (ii) of clause 3 (b) of the Conditions of Detention Order was challenged was that these provisions were violative of Articles 14 and 21 of the Constitution inasmuch as they were arbitrary and unreasonable. It was contended on behalf of the petitioner that allowing interview with the members of the family only once in a month was discriminatory and unreasonable, particularly when undertrial prisoners were granted the facility of interview with relatives and friends twice in a week under Rule 559a and convicted prisoners were permitted to have interview with their relatives and friends once in a week under Rule 550 of the Rules set out in the Manual for the Superintendence and Management of Jails in the Punjab. The petitioner also urged that a detenu was entitled under Article 22 of the Constitution to consult and be defended by a legal practitioner of her choice and

she was, therefore entitled to the facility of interview with a lawyer whom she wanted to consult or appear for her in a legal proceeding and the requirement of prior appointment for interview and of the presence of a Customs or Excise Officer at the interview was arbitrary and unreasonable and therefore violative of Arts. 14 and 21. The respondents resisted the contentions of the petitioner and submitted that sub-clauses (i) and (ii) of Clause 3 (b) were not violative of Arts. 14 and 21, since the restrictions imposed by them were reasonable, fair and just, but stated that they would have no objection if instead of a monthly interview, the petitioner was granted the facility of interview with her daughter and sister twice in a week as in the case of under-trial prisoners and so far as interview with the lawyer is concerned, they would not insist on the presence of a customs or excise officer at the interview. Though these two concessions were made on behalf of the respondents at the hearing of the petition before us, the question still remains whether sub-clauses (i) and (ii) of Clause 3 (b) are valid and it is necessary that we should examine this question in the context of our constitutional values, since there are a large number of detenus under the COFEPOSA Act and the conditions of their detention in regard to interviews must be finally settled by this Court.

(8) But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it , namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable fair and just procedure established by law which stands the test of other fundamental rights. NOW obviously, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness : it would plainly be unconstitutional and void as being violative of Articles 14 and 21. It would thus be seen that there is implicit in Article 21 the right to protection

against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Art. 7 of the International Covenant on Civil and Political Rights. This right to live which is comprehended within the broad connotation of the right to life can concededly be abridged according to procedure established by law and therefore when a person is lawfully imprisoned this right to live is bound to suffer attenuation to the extent to which it is incapable of enjoyment by reason of incarceration. The prisoner or detenu obviously cannot move about freely by going outside the prison walls nor can he socialise at his free will with persons outside the jail. But, as part of the right to live with human dignity and therefore as a necessary component of the right to life, he would be entitled to have interviews with the members of his family and friends and no prison regulation or procedure laid down by prison regulation regulating the right to have interviews with the members of the family and friends can be upheld as constitutionally valid under Articles 14 and 21. unless it is reasonable, fair and just.

(9) The same consequence would follow even if this problem is considered from the point of view of the right to personal liberty enshrined in Article 21. for the right to have interviews with members of the family and friends is clearly part of personal liberty guaranteed under that Article. The expression personal liberty occurring in Article 21 has been given a broad and liberal interpretation in Maneka Gandhis case (AIR 1978 SC 597) (supra) and it has been held in that case that the expression personal liberty used in that Article is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and it also includes rights which "have been raised to the status of distinct Fundamental Rights and given additional protection under Article 19". There can therefore be no doubt that personal liberty would include the right to socialise with members of the family and friends subject, of course, to any valid prison. regulations and under Arts. . 14 and 21, such prison regulations must be reasonable and non-arbitrary. If any prison regulation or procedure laid down by it regulating the right to have interviews with members of the family and friends is arbitrary or unreasonable, it would be liable to be struck down as invalid as being violative of Articles 14 and 21.

(10) Now obviously when an under-trial prisoner is granted the facility of interviews with relatives and friends twice in a week under Rule 559a and a convicted prisoner is permitted to have interviews with his relatives and friends once in a week under Rule 550, it is difficult to understand how sub-clause (ii) of Clause 3 (b) of the Conditions of Detention Order, which restricts the interview only to one in a month in case of a detenu can possibly be regarded as reasonable and non-arbitrary, particularly when a detenu stands on a higher pedestal than an

under-trial prisoner or a convict and, as held, by this Court in Sampath Prakashs case (1969 Cri LJ 1555) (supra) restrictions placed on a detenu must "consistent with the effectiveness of detention. , be minimal. " We would therefore unhesitatingly hold sub-cl. (ii) of clause 3 (b) to be violative of Articles 14 and 21 in so far as it permits only one interview in a month to a detenu. We are of the view that a detenu must be permitted to have at least two interviews in a week with relatives and friends and it should be possible for a relative or friend to have interview with the detenu at any reasonable hour on obtaining permission from the Superintendent of the Jail and it should not be necessary to seek the permission of the District Magistrate, Delhi, as the latter procedure would be cumbrous and unnecessary from the point of view of security and hence unreasonable. We would go so far as to say that even independently of Rules 550 and 559a, we would regard the present norm of two interviews in a week for prisoners as furnishing a criterion of what we would consider reasonable and non-arbitrary.

(11) The same reasoning must also result in invalidation of sub-clause (i) of clause 3 (b) of the Conditions of Detention Order which prescribes that a detenu can have interview with a legal adviser only after obtaining prior permission of the District Magistrate, Delhi and the interview has to take place in the presence of an officer of Customs/central Excise/enforcement to be nominated by the local Collector of Customs/central Excise or Deputy Director of Enforcement who has sponsored the case for detention. The right of a detenu to consult a legal adviser of his choice for any purpose not necessarily limited to defence in a criminal proceeding but also for securing release from preventive detention or filing a writ petition or prosecuting any claim or proceeding, civil or criminal, is obviously, included in the right to live with human dignity and is also part of personal liberty and the detenu cannot be deprived of this right nor can this right of the detenu be interfered with except in accordance with reasonable, fair and just procedure established by a valid law. A prison regulation may, therefore, regulate the right of a detenu to have interview with a legal adviser in a manner which is reasonable, fair and just but it cannot prescribe an arbitrary or unreasonable procedure for regulating such an. interview and if it does so, it would be violative of Articles 14 and 21. Now in the present case the legal adviser can have interview with a detenu only by prior appointment after obtaining permission of the District Magistrate, Delhi. This would obviously cause great hardship and inconvenience because the legal adviser would have to apply to the District Magistrate, Delhi well in advance and then also the time fixed by the District Magistrate, Delhi may not be suitable to the legal adviser who would ordinarily be a busy practitioner and, in that event, from a practical point of view the right to consult a legal adviser would be rendered illusory. Moreover, the interview must take place in the presence of an

officer of Customs/central Excise/enforcement to be nominated by the local Collector of Customs/central Excise or Deputy Director of Enforcement who has sponsored the detention and this too would seem to be an unreasonable procedural requirement because in order to secure the presence of such officer at the interview, the District Magistrate, Delhi would have to fix the time for the interview in consultation with the Collector of Customs/central Excise or the Deputy Director of Enforcement and it may become difficult to synchronise the time which suits the legal adviser with the time convenient to the concerned officer and furthermore if the nominated officer does not, for any reason, attend at the appointed time, as seems to have happened on quite a few occasions in the case of the petitioner, the interview cannot be held at all and the legal adviser would have to go back without meeting the detenu and the entire procedure for applying for an appointment to the District Magistrate, Delhi would have to be gone through once again. We may point out that no satisfactory explanation has been given on behalf of the respondents disclosing the rationale of this requirement.

(12) We are therefore of the view that sub-clause (i) of clause 3 (b) regulating the right of a detenu to have interview with a legal adviser of his choice is violative of Articles 14 and 21 and must be held to be unconstitutional and void. We think that it would be quite reasonable if a detenu were to be. entitled to have interview with his legal adviser at any reasonable hour during the day after taking appointment from the Superintendent of the Jail, which appointment should be given by the Superintendent without any avoidable delay. We may add that the interview need not necessarily take place in the presence of a nominated officer of Customs/central Excise/ enforcement but if the presence of such officer can be conveniently secured at the time of the interview without involving any postponement of the interview, then such officer and if his presence cannot be so secured, then any other Jail official may, if thought necessary, watch the interview but not so as to be within hearing distance of the detenu and the legal adviser."

6. In view of the categorical observation of the Supreme Court of India in paragraphs 11 and 12 quoted above, insofar as the present petitioner and the detenu, namely, Srinkhal Chaliha is concerned, the Court is inclined to observe that it would not be necessary for the petitioner to approach the District Magistrate, Sivasagar for an order to meet her son along with her counsel and it would be appropriate that such an appointment be given by the Superintendent

of District Jail, Sivasagar and if required any jail official may watch the interview without being present within hearing distance of the detenu and his counsel and regulate it as allowed in para 11 of the above quoted order. It is clarified that this order to qua the present writ petition and the detenu, namely, Srinkhal Chaliha only.

7. As the District Magistrate, Sivasagar had already allowed the family members and the engaged counsel of the detenu to meet him, this writ petition has served its purpose and therefore, there would be no point to keeping it alive and accordingly, this writ petition stands closed.

8. The petitioner is permitted to produce a certified copy of this order before the Superintendent of District Jail, Sivasagar.

JUDGE

Comparing Assistant