

GAHC010187192022



IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

WRIT APPEAL No.299 OF 2022

Sharukh Ahmed @ Muktar,
Son of Late Baten Miya,
Resident of Village: Palhaji,
Pubpara, PS & District: Barpeta,
Assam.

.....Appellant

-Versus-

1. The Union of India, represented by the Secretary to the Government of India, Ministry of Home, New Delhi-1.
2. The State of Assam, represented by the Commissioner & Secretary to the Government of Assam, Home & Political Department, Dispur, Guwahati – 781006.
3. The Secretary to the Government of Assam, Home & Political Department, Dispur, Guwahati – 781006.
4. The Director General of Police, Assam, Ulubari, Guwahati – 781005.

5. The Commissioner of Police, Guwahati City, Guwahati, Kamrup (Metro), Assam.

6. The Advisory Board, PITNDPS Act, 1988, C/o The Commissioner & Secretary to the Government of Assam, Home & Political Department, Dispur, Guwahati – 781006.

.....Respondents

- B E F O R E -
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SOUMITRA SAIKIA

For the Appellant : Mr. N.J. Dutta, Advocate.
Mr. N. Ahmed, Advocate.

For the Respondent No.1 : Ms. B. Sarma,
Central Government Counsel.

For the Respondent Nos.2 to 6: Mr. D. Mozumdar,
Additional Advocate General, Assam.

: Mr. D. Nath, Senior Government
Advocate, Assam.

: Ms. R.B. Borah, Junior Government
Advocate, Assam.

Date of Judgment & Order : **24th February, 2023.**

JUDGMENT & ORDER (ORAL)

[Soumitra Saikia, J.]

This intra-Court appeal is filed by the detenu, namely, Sharukh Ahmed @ Muktar, challenging the detention order dated 16.03.2022 passed by the respondent authorities under the provisions of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (hereinafter referred to as "1988 Act") as well as the order dated 05.09.2022

passed by the learned Single Judge in WP (Crl.) No.18/2022.

2. The case in brief is that the detenu/appellant was detained by Order No.HMA.19011/9/2022-PoL(A)/eCF-194872/192 dated 16.03.2022 passed by the Commissioner & Secretary to the Government of Assam, Home & Political Department. By the aforesaid order, the authorities on the basis of the purported information that the detenu/appellant being engaged in illegal and harmful activities of illicit business of narcotic drugs and came to a conclusion that the detenu/appellant was responsible for repeated violations of the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act"). According to the authorities, the detenu/appellant was persistently involved in the trade of illicit drugs since many years and was also arrested under the provisions of the NDPS Act. As many as 7(seven) numbers of cases were registered against the detenu/appellant at the Barpeta Police Station under various Sections of the NDPS Act as well as under Arms Act. As per the police report, relied upon by the authorities, the samples seized from the detenu/appellant tested positive for "Heroin" as per the FSL report. Accordingly, vide the impugned order dated 16.03.2022, the detenu/appellant was detained under the provisions of the 1988 Act until further orders.

3. Being aggrieved by the order of preventive detention under the 1988 Act and urging non-supply of the relevant documents, as mandated under Article 22(5) of the Constitution of India, the writ petitioner/appellant challenged the detention order before this Court by way of a writ petition being WP(Crl.) No.18/2022.

4. The matter was contested by the respondent authorities disputing the claims of the detenu/appellant. The respondent authorities submitted before the learned Single Judge that all required documents and in terms of the provisions of Section 3 of the 1988 Act, the detention order was served on the detenu/appellant along with the grounds of detention in detail in separate sheets, both in English and in vernacular, i.e. Assamese, language. These were furnished to the detenu/appellant on 21.03.2022 and due acknowledgement was also received from the detenu/appellant. It was further submitted by the respondent authorities that the representation preferred by the detenu/appellant was considered and rejected by the detaining authority, i.e. the respondent No.2, vide order dated 26.04.2022 and a copy thereof was served on the detenu/appellant on 28.04.2022 at Abhayapuri District Jail. The respondent authorities urged that there was no procedural lapse and all steps were taken as per the procedure prescribed under the 1988 Act. The matter was also referred before the Advisory Board and the Advisory Board by its opinion dated 14.06.2022 opined that there were

sufficient grounds for detention of the detenu/appellant under Section 3(1) of the 1988 Act.

5. The learned Single Judge upon consideration of the matter in its entirety as well as the submissions made by the respective counsels dismissed the writ petition by holding that there were no procedural lapses. The learned Single Judge held that the opinion of the Advisory Board was rendered within 12 weeks 6 days, which is marginally beyond the period of 11 weeks, as required under Section 9(C) of the 1988 Act. The learned Single Judge also held that the opinion of the Advisory Board was not under challenge in the writ petition. The learned Single Judge found no substantive violation of the procedure prescribed in Section 9 of the 1988 Act, which may be said to have rendered the impugned detention order made under Section 3 of the 1988 Act in question to be illegal. Relevant Paragraphs of the impugned judgment passed by the learned Single Judge are extracted herein below:-

“34. The aforesaid opinion of the Advisory Board, it is noticed, was rendered within 12 weeks 6 days, which is marginally beyond the period of 11(eleven) weeks as required under Section 9(c) of the Act. As stated above, the opinion of the Advisory Board has not been challenged by the petitioner in the instant petition. In totality, therefore, this Court finds no substantive violation of the procedure prescribed in Section 9 of the Act which may be said to have rendered the impugned Detention Order made under Section 3 of the Act in question illegal.

CONCLUSION:

35. It is respectfully stated that the judgment of a Division Bench of this Court in Yumnam Brojen Singh

@ Kunjo @Boss (supra), which is related to a matter pertaining to the procedure in National Security Act, 1980 dwelt on the procedure followed by the detaining authority so far the petitioner's factual matrix was concerned and as such, in absence of focus on principle of law for general application, the same could not be applied to the instant case.

36. In view of the above analysis on the respective cases of both sides, the grounds alleged by the petitioner regarding procedural lapses being factually not correct, all the aforesaid grounds challenging the Detention Order are not tenable.

37. For the reasons, set forth above, the petition being devoid of merits, the same stands dismissed.

Accordingly, the writ petition is disposed of."

6. Being aggrieved by the judgment & order passed by the learned Single Judge in the aforesaid writ petition, the detenu/appellant has preferred the instant writ appeal.

7. Before this Court, the arguments advanced before the learned Single Judge by the respective counsels were reiterated. Perusal of the 1988 Act reveals that under Section 9, there are certain procedures which will have to be strictly complied with. Under Section 9(f), there is a prescription for the appropriate Government to issue confirmation of the detention order pursuant to the opinion of any Advisory Board that there were sufficient causes for the detention of the person concerned. Section 9(f) of the 1988 Act reads as under:-

"(f) in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the

person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith.”

8. During the course of hearing, although several arguments were made by the learned counsels appearing for the parties, on a pointed query of this Court to the respondents' counsels as to whether any confirmation order as required under Section 9(f) of the 1988 Act was issued by the appropriate Government pursuant to the opinion of the Advisory Board, the Government has filed a short affidavit which has been placed before this Court today during the course of hearing of the matter.

9. The said affidavit was filed through the Office of the Senior Government Advocate, Government of Assam. In Paragraph 3 of the said affidavit, it is categorically stated that process of confirmation of detention order as contemplated under Section 9(f) of the 1988 Act is still pending before the higher authority for approval and for issuance of the consequential order of confirmation. Such categorical admission is a pointer to the fact that the provisions of Section 9 of the 1988 Act, more particularly 9(f), have not been complied with inspite of the fact that the Advisory Board having issued its opinion as far back on 14.06.2022. Non-compliance of a provision of 1988 Act, in the opinion of this Court, will render the continued detention of the petitioner/appellant illegal. The respondent authorities are duty bound in law to follow the prescription of law in its strictest terms. Non-compliance of any of these

provisions, as mandated by the statute, will render any detention illegal and unauthorized.

10. In the context of detention of any person, it is the mandate of Article 21 of the Constitution of India that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. In the context of detention, the Apex Court in ***Union of India -Vs- Paul Manickam & Anr.***, reported in **(2003) 8 SCC 342** has laid down the law that a machinery was required to examine the question of illegal detention with utmost promptitude. The writ of habeas corpus is a device of this nature. The writ has been described as a writ of right which is *ex debito justitiae*. The Apex Court held that though it is a writ of right, it is not a writ of course. The applicant must show a prima facie case of his unlawful detention. However, once he shows such a cause and the return is not good and sufficient, he is entitled to this writ as of right. The Apex Court held that personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. However, the constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of the State's security, public order, disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions.

11. In view of the above discussion, since the authorities on oath have stated that no confirmation order has yet been issued as required under Section 9(f) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, the provisions of the said Act, as prescribed, have not been followed. In view of such failure to comply with the provisions of Section 9(f) of the 1988 Act, it must be held that the continuation of the detention of the detenu/appellant is not as per the mandate of the Act. We, therefore, hold the detention of the detenu/appellant to be illegal. The impugned judgement & order dated 05.09.2022 passed by the learned Single Judge in WP(Crl.) No.18/2022 is hereby set aside. Consequently, the order of detention dated 16.03.2022 is set aside. The detenu/appellant, namely, Sharukh Ahmed @ Muktar, is directed to be set at liberty forthwith.

Accordingly, the detenu is directed to be released forthwith from detention, if he is not required to be detained in connection with any other cases.

12. The appeal is allowed in the above terms.

JUDGE

CHIEF JUSTICE