

GAHC020004942023



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

Case No. : W.P.(Crl.)/9/2023

DR. LIMHATHUNG JAMI,
UNCLE OF THE DETEBU (ESHENTHUG JAMI),
R/O DBS COLONY,
KOHIMA, NAGALAND

VERSUS

THE STATE OF NAGALAND AND 4 ORS.
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVERNMENT OF
NAGALAND,
KOHIMA, NAGALAND

2:THE UNION OF INDIA

REPRESENTED BY THE JOINT SECRETARY

MINISTRY OF HOME AFFAIRS

GOVERNMENT OF INDIA

FIRST FLOOR
ROOM NO.8

HERITAGE BUILDING
MAJOR DHYAN CHAND STADIUM

INDIA GATE
NEW DELHI

3:THE SPECIAL SECRETARY TO THE GOVERNMENT OF NAGALAND

HOME DEPARTMENT (POLITICAL BRANCH)

KOHIMA

NAGALAND

4:THE SECRETARY

ADVISORY BOARD NSA
GOVT. OF NAGALAND
KOHIMA

C/O SPECIAL SECRETARY (HOME)

POLICE AND POLITICAL
GOVT. OF NAGALAND

KOHIMA

5:THE DEPUTY COMMISSIONER

PHEK
NAGALAN

Advocate for the Petitioner : JOSHUA SHEQI

Advocate for the Respondent : GOVT ADV NL

BEFORE
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT & ORDER (ORAL)

(D. Baruah, J)

Heard Ms. Mika H. Aye, learned counsel appearing on behalf of the Petitioner and Ms. S. Mere, learned Government Advocate appearing on behalf of the State Respondents.

2. The present writ petition has been filed by the Petitioner who is the uncle of one Mr. Eshenthung Jami (hereinafter referred to as the "detenu") challenging the Detention Order No.DCP/CON/PT-1/88-89 dated 21.07.2023 (for short "the Detention Order") and the Approval Order bearing No.CON/NSA/03/2023/36 dated 31.07.2023 issued by the Chief Secretary to the Government of Nagaland (for

short "the Approval Order") and further sought for a direction that the detenu be released from detention forthwith.

3. It reveals from a perusal of the writ petition that on 05.07.2023, an F.I.R. was lodged before the Officer-in-Charge, Phek Police Station that on the said date, an information was received from the PHQ that a person travelling in a sumo taxi from Phek to Dimapur was arrested by personnels of Kezocha Police Station for possessing of illegal ammunition numbering to 200 live rounds. On being interrogated, it was ascertained that the ammunitions were bought from the detenu, who was the Armorer of Phek DEF. Thereupon, the detenu was detained at Phek Police Station for further investigation. It was also alleged in the said F.I.R. that the detenu admitted to have sold the ammunitions. The Phek Police Personnels also searched the detenu's residence and recovered 20 (twenty) live rounds of 7.62 x 39 mm, 2 (two) live rounds of 9 x 19 mm, 7.62 x 51 mm 4 (four) live rounds, 9 x 19 mm bullet head 6 (six) nos., 7.62 x 51 mm bullet head 2 (two) nos. and 7.62 x 39 mm bullet head 1 (one) no. Further, 500 currency notes amounting to Rs.26,000/- was also recovered. On the basis of the said F.I.R. so filed, a case was registered being Phek P.S. Case No.0004/23 under Section 381/409/120B of the Indian Penal Code read with Section 25(1)(a) & (h) of the Arms Act, 1959.

4. The detenu thereupon filed a bail application before the Judicial Magistrate, First Class, Phek. The said bail application was allowed vide an order dated 12.07.2023 and the detenu was granted bail. We have perused the said bail order dated 12.07.2023 which is enclosed as Annexure-B to the writ petition. It appears from the said order that though the detenu was granted bail but as

the detenu was unable to produce the sureties, he was remanded back to the judicial custody for 15 days.

5. The record further reveals that an application was filed by the Public Prosecutor under Section 437(5) of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") praying for cancellation of the bail order dated 12.07.2023. The learned Judicial Magistrate, First Class, Phek vide an order dated 18.07.2023 cancelled the bail so granted in favour of the detenu. The detenu thereafter filed an application before the District and Sessions Judge, Phek challenging the order of cancellation of the bail as well as seeking bail. The learned District and Sessions Judge, Phek vide an order dated 20.07.2023 in Misc. Application (Bail) No.35/2023 rejected the said application filed by the detenu.

6. While the above proceedings were going on, on 13.07.2023, the Superintendent of Police, Phek submitted a proposal for detention of the detenu under the provisions of Section 3(1) and (2) of the National Security Act, 1980. In the said proposal, the grounds for detention were mentioned which being relevant for deciding the writ petition are reproduced hereinunder:

"Grounds for detention"

1. *Subject sold ammunitions to Talimbo Zeliang who originally hails from State of Manipur, where current public order and law and order situation is grave. Criminal conspiracy regarding smuggling of restricted ammunition is still under investigation, therefore such act possess great threat to national security and maintenance of public order.*
2. *Criminal investigation against the accused and his co-suspects is still ongoing and his at large may hamper/effect the investigation. Hence his detention is necessitated in order to avoid his further indulgence, prejudice to the National Security and maintenance of*

public order.

3. It is pertinent to mention that, selling of arms and ammunitions belonging to Government by any Government servant is illegal and punishable under law. It also possess threat/endangers, putting the security and safety of public of the state and country at stake resulting chaos and confusion, which should be thwarted at any cause."

7. Before proceeding further, we find it pertinent to observe that the materials on record do not suggest that pursuant to the proposal submitted by the Superintendent of Police, Phek on 13.07.2023, there were further communications intimating the District Magistrate, Phek about the intervening developments of cancellation of bail dated 18.07.2023 by the Judicial Magistrate First Class, Phek as well as the rejection of the bail application by the District and Sessions Judge, Phek on 20.07.2023. This aspect is further clear from the Order of Detention passed by the District Magistrate, Phek on 21.07.2023 inasmuch as there is no mention whatsoever that the detenu was already in custody in connection with Phek Police Station Case No.0004/23. The grounds of detention which led to the passing of the Detention Order by the District Magistrate, Phek being relevant are quoted hereinbelow:

"GROUNDS FOR DETENTION

HAVILDAR ESHENTHUNG JAMI 43 YEARS S/O LT. KHOZAMA JAMI OF LIOLONGDUANG VILLAGE PO/PS BHANDARI UNDER WOKHA DISTRICT, NAGALAND UNDER THE NATIONAL SECURITY ACT, 1980

Whereas, the undersigned has served detention order against you under the provision of the National Security Act, 1980.

And whereas in pursuance of Section 5 of the said Act, it is expedient to detain you under the grounds mentioned below, the undersigned District Magistrate hereby informs you that the said

detention order has been issued against you on the following grounds:-

(a) To avoid further smuggling of restricted ammunitions.

(b) To avoid further threatening of the public peace & security of the people.

(c) To avoid further threatening of the security of the State of Nagaland, and

(d) To ensure the public peace and tranquility for maintenance of public order in the State of Nagaland.

The particulars which have a bearing on the above matters are specified in the Schedule attached.

You are also informed that you have a right to make a representation to the detaining authority, Central Government and State Government through the concerned Jail authorities. You also have a right to claim a personal hearing before the Advisory Board constituted by the State Government under the aforesaid Act."

8. To the said grounds of detention, there is a Schedule attached. However, it is surprising to note that neither in the Detention Order nor in the grounds of detention including in the Schedule attached, there is a single whisper that the detenu is already in custody. This aspect would therefore clearly show that the Detaining Authority at the time of arriving at its subjective satisfaction for passing the Detention Order had taken into consideration that the detenu was already in custody.

9. It further reveals from the records that on 26.07.2023, an order was passed by the District Magistrate, Phek on a request being made by Superintendent of Police, Phek to extend the period of detention under the exceptional circumstances for serving the detention order to the detenu. By the said order dated 26.07.2023, the District Magistrate, Phek exercising powers under Section 8 of the National Security Act, 1980 accorded 15 days time from the date

of detention to serve the detention order to the detenu. The contents of the order dated 26.07.2023 is indicative of the fact that the Superintendent of Police, Phek as well as the District Magistrate, Phek were oblivious that the detenu was already in judicial custody.

10. Subsequent thereto, on 31.07.2023, the State Government approved the detention order of the District Magistrate, Phek to detain the detenu in Central Jail, Dimapur and further to that, the State Government of Nagaland ordered that the detenu be detained and kept in Central Jail, Dimapur for an initial period of 3 (three) months w.e.f. the date of detention till 20.10.2023 and within which period, the detention would be reviewed as required under the provisions of the National Security Act, 1980.

11. The detenu submitted representations dated 25.08.2023 before various authorities through the Jailor, Central Jail, Dimapur for revoking the Detention Order dated 21.07.2023 as well as the Approval Order dated 31.07.2023. The said representations were forwarded to the Detaining Authority, the Government of Nagaland i.e. the Approving Authority as well as to the Central Government by the Senior Superintendent of Central Jail, Dimapur on 25.08.2023. By an order dated 31.08.2023, the representation so filed to the Government of Nagaland was rejected stating that there was no merit in the said representation. The record further reveals that thereafter, the Petitioner filed the instant writ petition seeking the relief(s) as already aforementioned.

12. This court vide an order dated 20.09.2023 issued notice making it returnable by 4 (four) weeks. From the records, it reveals that all the respondents have filed their affidavit-in-opposition.

13. The Respondent Nos. 1, 3 and 4 filed their joint affidavit-in-

opposition on 01.11.2023 thereby supporting the Detention Order as well as the Approval Order. This Court however finds it relevant to note that in the said affidavit-in-opposition, the said Respondents are completely silent as regards what was the subjective satisfaction arrived at to pass the Detention Order when the detenu was already in custody.

14. In the affidavit-in-opposition filed by the Respondent No.2, it was mentioned that the representation dated 25.08.2023 submitted by the detenu for revocation of the Detention Order dated 21.07.2023 was not acceded to by the Central Government and the Authorities concerned along with the detenu were duly informed vide an Wireless Message No.15024/01/2023-NSA dated 06.09.2023.

15. The Detaining Authority i.e. the Respondent No.5 had also filed an affidavit-in-opposition. It surprises this Court to note that the said Detaining Authority did not mention anything about the arrest of the detenu in connection with Phek P.S. Case No.0004/23 and that the detenu was already in judicial custody. The affidavit is further silent as to on what subjective satisfaction the order of preventive detention was passed against the detenu when the detenu was already in custody.

16. We have heard the learned counsels for the parties at length. The gist of the submissions so made by the learned counsels for the Petitioner noted hereinunder:

(a) The learned counsel for the Petitioner submitted that the Detention Order as well as the Approval Order are on the face of it without application of mind and this aspect of the matter can be clearly demonstrated by the fact that the Detaining Authority as well

as the Approving Authority did not take into consideration that the detenu was already in custody and his bail applications were rejected. The learned counsel further submitted that as the Detaining Authority and the Approving Authority were unaware that the detenu was already in jail, the subjective satisfaction so arrived at was without any basis for which the Detention Order as well as the Approval Order should be set aside and quashed. In that regard, the learned counsel for the Petitioner referred to the judgment of the Supreme Court in the case **of Huidrom Konungjao Singh Vs. State of Manipur and Others** reported in **(2012) 7 SCC 181** as well as a recent judgment of the Supreme Court in the case of **Ameena Begum Vs. State of Telangana and Others** reported in **(2023) 9 SCC 587**.

(b) The learned counsel for the Petitioner further submitted that it is the mandate as per Section 10 of the National Security Act, 1980 that upon a Detention Order being passed, the same along with the representation, if any, has to be placed before the Advisory Board within 3 (three) weeks from the date of the Detention Order. The learned counsel submitted that the same was not done for which the Detention Order as well as the Approval Order was liable to be interfered with.

(c) The learned counsel for the Petitioner further submitted that there is also an infraction to Section 3(5) of the National Security Act, 1980 inasmuch as the Approval Order was never communicated to the Central Government within the period of 7 (seven) days. Relying on the judgment in the case of **Ameena Begum (supra)**, the learned counsel for the Petitioner submitted that the timeline as provided under the National Security Act, 1980 had to be strictly

adhered to.

17. Per contra, Ms. S. Mere, the learned counsel representing the Respondent Nos. 1, 3, 4 and 5 submitted that the timelines as stipulated in the National Security Act, 1980 were duly adhered to. The learned Government Advocate for the Respondents submitted that as the date of the detention of the detenu was on 21.07.2023, the matter was required to be placed before the Advisory Board on or before 11.08.2023. The learned Government Advocate submitted on the basis of the records that on 08.08.2023, the aspect pertaining to the detention of the detenu was placed before the Advisory Board constituted under Section 9 of the National Security Act, 1980. The learned Government Advocate further submitted that as per Section 3(5) of the National Security Act, 1980, it is the requirement to intimate the Approval Order of the Government within 7 (seven) days before the Central Government and in the instant case, the Approval Order was passed on 31.07.2023 which was duly intimated to the Central Government on the very date itself. The learned Government Advocate further submitted that the Advisory Board held the sitting on 26.08.2023 wherein the detenu was heard in person in Nagamese and a report was submitted on 28.08.2023 opining that there were sufficient cause for detaining the detenu. The learned Government Advocate for the Respondents submitted that the said report was also submitted by the Advisory Board within the timeline stipulated in Section 11 of the National Security Act, 1980. She further submitted that the State of Nagaland taking into account the opinion of the Advisory Board had passed the Confirmation Order on 19.10.2023 whereby the detention of the detenu was further extended for another period of 3 (three) months

w.e.f. 21.10.2023 till 20.01.2024. The learned Government Advocate further submitted that the said Confirmation Order dated 19.10.2023 is not the subject matter of challenge before this Court. The learned Government Advocate however submitted that the materials on record do not show that the Detaining Authority as well as the State of Nagaland had taken into consideration that the detenu was in custody in connection with Phek P.S. Case No.0004/23.

18. Before further proceeding, this Court finds it relevant to observe that the records pertaining to the detention of the detenu was placed before this Court by Ms. S. Mere, the learned Government Advocate for the Respondent Nos. 1, 3, 4 and 5. We have duly perused the records so produced. From the records, it reveals that on 08.08.2023, the detention order of the detenu was placed before the Advisory Board by the Special Secretary to the Government of Nagaland, Home Department. The records also shows that pursuant to the Approval Order dated 31.07.2023, the Central Government was duly intimated on 31.07.2023 itself. Further to that, this Court has also perused the opinion submitted by the Advisory Board dated 28.08.2023 which also shows that within 7 (seven) weeks from the date of Detention Order, the report was duly submitted by the Advisory Board. Therefore, from the said records, it reveals that the timelines as stipulated in the National Security Act, 1980 pertaining to Section 10, Section 3(5) as well as Section 11 of the said Act were duly adhered to.

19. In the backdrop of the above, the sole question which arises for consideration is as to whether the Detention Order, the Approval Order and the consequential Confirmation Order are required to be

interfered with on the ground of non-application of mind. This Court finds it relevant to take note of the judgment of the Supreme Court in the case of **Ameena Begum (supra)** wherein at paragraph No.28 and its sub-paragraphs, the Supreme Court enumerated the circumstances when a Constitutional Court would be entitled to examine the legality of the orders of preventive detention. In paragraph No.29 of the said judgment, the Supreme Court observed that if the Court finds the exercise of power to be bad and/or vitiated applying any of the tests which were enumerated in paragraph No.28 thereby rendering the detention order vulnerable, it shall be the duty of the Constitutional Court for righting the wrong. The said paragraph Nos. 28 and 29 are quoted hereinbelow:

"28. In the circumstances, of a given case, a constitutional Court when called upon to test the legality of orders of preventive detention would be entitled to examine whether:

28.1 The order is based on the requisite satisfaction, albeit subjective, of the detaining authority, for, the absence of such satisfaction as to the existence of a matter of fact or law, upon which validity of the exercise of the power is predicated, would be the sine qua non for the exercise of the power not being satisfied;

28.2. In reaching such requisite satisfaction, the detaining authority has applied its mind to all relevant circumstances and the same is not based on material extraneous to the scope and purpose of the statute;

28.3. Power has been exercised for achieving the purpose for which it has been conferred, or exercised for an improper purpose, not authorised by the statute, and is therefore ultra vires;

28.4. The detaining authority has acted independently or under the dictation of another body;

28.5. The detaining authority, by reason of self-created rules of policy or in any other manner not authorised by the governing statute, has disabled itself from applying its mind to the facts of each individual case;

28.6. *The satisfaction of the detaining authority rests on materials which are of rationally probative value, and the detaining authority has given due regard to the matters as per the statutory mandate;*

28.7. *The satisfaction has been arrived at bearing in mind existence of a live and proximate link between the past conduct of a person and the imperative need to detain him or is based on material which is stale;*

28.8. *The ground(s) for reaching the requisite satisfaction is/are such which an individual, with some degree of rationality and prudence, would consider as connected with the fact and relevant to the subject matter of the inquiry in respect whereof the satisfaction is to be reached;*

28.9. *The grounds on which the order of preventive detention rests are not vague but are precise, pertinent and relevant which, with sufficient clarity, inform the detenu the satisfaction for the detention, giving him the opportunity to make a suitable representation; and*

28.10. *The timelines, as provided under the law, have been strictly adhered to.*

29. *Should the Court find the exercise of power to be bad and/or to be vitiated applying any of the tests noted above, rendering the detention order vulnerable, detention which undoubtedly visits the person detained with drastic consequences would call for being interdicted for righting the wrong."*

20. From the circumstances enumerated by the Supreme Court in paragraph No.28 of the judgment in the case of **Ameena Begum (supra)**, it transpires that the Writ Court would be within its jurisdiction to examine as to whether the Detention Order was based on requisite satisfaction, albeit subjective, of the Detaining Authority inasmuch as the absence of such satisfaction as to the existence of a matter of fact or law, upon which validity of exercise of the power is predicated, would be the *sine qua non* for the exercise of the power not being satisfied. The Constitutional Court can also examine as to whether in reaching such requisite

satisfaction, the Detaining Authority had applied its mind to all relevant circumstances and the same is not based on material extraneous to the scope and purpose of the statute. It was also observed that the satisfaction which has to be arrived at has to be on the basis of the existence of a live proximate link between the past conduct of a person and the imperative need to detain him or is based on material which is stale.

21. In the backdrop of the said proposition settled by the Supreme Court in the case of ***Ameena Begum (supra)***, let this Court consider as to whether a preventive Detention Order ought to have been passed in the instant case that too when the detenu was already in custody or for that matter whether the non-consideration of the fact that the detenu is already in custody would have a vital bearing on the subjective satisfaction arrived at for passing the Detention Order.

22. In the case of ***Dharmendra SuganChand Chelawat Vs Union of India reported in (1990) 1 SCC 746***, it was observed that an order of detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that:

- (i) the Detaining Authority was aware of the fact that the detainee was already in detention; and
- (ii) there were compelling reasons justifying such detention despite the fact that the detainee is already in detention.

The Supreme Court further clarified the expression "compelling reasons" in the context of making an order for detention on a person already in custody to mean that there must be cogent materials before the Detaining Authority on the basis of which it

may satisfy that:

- a) The detenue is likely to be released from custody in near future; and
- b) Taking into account the nature of the antecedent activities of the detenue, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.

23. We further finds it relevant to take note of another judgment of the Supreme Court in the case of ***Amrit Lal Vs. Union of India*** reported in ***(2001) 1 SCC 341***, wherein the Detaining Authority recorded its satisfaction for detention under the National Security Act, 1980 in view of the fact that the person who was already in jail was going to move a bail application. The Supreme Court observed in the case of ***Amrit Lal (Supra)*** that although in the grounds of detention it has been mentioned that there was a likelihood of the detenue moving an application for bail, for which the detention was necessary, there must be cogent materials before the authority passing the Detaining Order that there was likelihood of his release on bail.

24. It is also pertinent to take note of the judgment of the Supreme Court in the case of ***Geetha Vs. State of Tamil Nadu*** reported in ***(2006) 7 SCC 603*** wherein the Supreme Court observed that the Detaining Authority should be aware that the detenue is already in custody and is likely to be released on bail. The conclusion that the detenue may be released on bail cannot be *ipsi dixit* of the Detaining Authority.

25. Further to the above, we find it apt to note the judgment in the case of ***Huidrom Konungjao Singh –Versus- State of Manipur &***

Others reported in (2012) 7 SCC 181, wherein the Supreme Court culled out the three propositions as to when a person, who is in jail can be detained under the detention laws. Paragraph 9 of the said judgment being relevant is quoted hereinbelow:

"9. In view of the above, it can be held that there is no prohibition in law to pass the detention order in respect of a person who is already in custody in respect of criminal case. However, if the detention order is challenged the Detaining Authority has to satisfy the Court the following facts:

- (1) The authority was fully aware of the fact that the detenu was actually in custody.*
- (2) There was reliable material before the said authority on the basis of which it could have reasons to believe that there was real possibility of his release on bail and further on being released he would probably indulge in activities which are prejudicial to public order.*
- (3) In view of the above, the authority felt it necessary to prevent him from indulging in such activities and therefore, detention order was necessary."*

26. In the backdrop of the above, if this Court reverts back to on the facts already delineated supra, it would show that the Detaining Authority was completely ignorant that the detenu was actually in custody. It would also show that the Detaining Authority seemed to be unaware that though on 12.07.2023, the bail was granted to the detenu but he remained in judicial custody and thereupon the same was cancelled on 18.07.2023. The Detaining Authority seemed to be also unaware that the District and Sessions Judge, Phek had upheld the cancellation order and rejected the bail application. Under such circumstances, the subjective satisfaction so arrived at for passing the Detention Order dated 21.07.2023 was without any basis and suffers from non-application of mind. Further to that, the said

Detention Order was clearly contrary to the principles laid down by the Supreme Court in the case of ***Huidrom Konungjao Singh (Supra)***.

27. We also finds it relevant to note that a perusal of the Approval Order dated 31.07.2023; the order by which the representation of the Petitioner was rejected on 31.08.2023; the opinion so submitted by the Advisory Board as well as also the Confirmation Order dated 19.10.2023 did not take into consideration in any manner whatsoever that the detenu was already in custody in connection with Phek P.S. Case No.0004/23. It is also not known as to whether the Advisory Board was informed that the detenu was already in custody. We believe, that as the Advisory Board was headed by a retired High Court Judge, had the said Board been informed about that the detenu is already in custody, the opinion so rendered by the Advisory Board would have been otherwise, taking into account the well settled principles of law laid down by the Supreme Court.

28. Therefore, it reveals from the above that the said Detention Order, the Approval Order as well as the Confirmation Order are based upon mere ipse dixit statements in the grounds of detention and cannot be sustained in the eyes of law.

29. Before concluding, this Court also finds it relevant to deal with the submission made by Ms. S. Mere, the learned Government Advocate for the Respondent Nos. 1, 3, 4 and 5 who submitted that the Confirmation Order dated 19.10.2023 was not challenged for which an effective relief can be granted. It is our opinion that the Confirmation Order dated 19.10.2023 loses its substratum, if the Detention Order ceases to exist and under such circumstances, the non-challenging of the Confirmation Order dated 19.10.2023 cannot be a ground to deprive the detenu of his valuable rights under

Article 21 of the Constitution of India and more particularly when it is a well settled that Article 22(3) of the Constitution of India which empowers preventive detention, is an exception to Article 21 of the Constitution.

30. In view of the above analysis and observations, the Detention Order, Approval Order as well as the Confirmation Order are all set aside and quashed.

31. The records which were produced during the course of hearing are hereby returned.

Sd/-
JUDGE

Sd/-
JUDGE

Comparing Assistant