

GAHC020006192023



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

Case No. : W.P.(Crl.)/12/2023

SMTI NANCY
WIFE OF ABI NEIKHA
R/O WARD -10, CHUMUKEDIMA NAGALAND

VERSUS

THE STATE OF NAGALAND AND 4 ORS
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVT.OF
NAGALAND

2:THE UNION OF INDIA
REPRESENTED BT THE JOINT SECREATRY, INTERNAL SECURITY-II,
DIVISION, MINISTRY OF HOME AFFAIRS, FIRST FLOOR, ROOM NO. 8,
HERITAGE BUILDING, MAJOR DHYAN CHAND STADIUM INDIA GATE,
NEW DELHI-110001

3:THE SPECIAL SECRETARY TO THE GOVT. OF NAGALAND
HOME DEPARTMENT, POLITICAL BRANCH, NAGALAND KOHIMA

4:THE SECRETARY
NSA ADVISORY BOARD, NAGALAND KOHIMA

5:THE DEPUTY COMMISSIONER AND DISTRICT MAGISTRATE
KOHIMA NAGALAND

Advocate for the Petitioner : KEDUVI ZHOTSO

Advocate for the Respondent : GOVT ADV NL

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

JUDGMENT & ORDER (ORAL)

Date : 07-12-2023
(D. Baruah, J)

Heard Mr. A. Sophie, learned counsel for the petitioner as well as Ms. Livika, learned Government Advocate for the respondent Nos. 1, 3, 4 and 5, and Mr. Z.N. Ngullie, learned CGC for the respondent No. 2.

2. Personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part-III thereof. The State has been granted the power to curb such rights under criminal laws as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens or seeks to disturb public law and order, warranting the issue of such an order. In the backdrop of the above, let this Court take into consideration the facts involved.

3. The petitioner in the instant writ proceedings is the wife of one Mr. Abi Neikha, who by invoking the jurisdiction under Article 226 of the Constitution, has challenged the Detention Order dated 26.07.2023 passed by the District Magistrate cum Deputy Commissioner, Kohima; the Government Approval Order dated 07.08.2023 issued by the Chief Secretary to the Government of Nagaland and the Confirmation Order dated 24.10.2023 issued by the Chief Secretary to the Government of Nagaland.

4. From a perusal of the writ petition it reveals that a complaint was lodged on 05.07.2023 at Kezocha Police Station, Kohima stating interalia

that information was received from reliable sources regarding transportation of ammunition from Phek District and as such, MVCP was conducted, whereby prohibited ammunition were seized from the possession of one UBC, Mr. Talimbo Zeliang, of DEF Phek. On the basis thereof, a case was registered, being Kezocha PS Case No. 005/23, under Section 25 (1A) of the Arms Act of 1959 (for short, 'the Act of 1959'), read with Section 120B of the Indian Penal Code. It was further mentioned in the writ petition that during the course of investigation, the UBC, Talimbo Zeliang revealed the name of the petitioner's husband, i.e. Abi Neikha and stated that the ammunition seized from his possession were to be delivered to the petitioner's husband and thereafter, basing on the statement of the said UBC, Talimbo Zeliang, the petitioner's husband was arrested and booked under section 25 (1A) of the Act of 1959, read with Section 120B of the Indian Penal Code and forwarded to judicial custody.

5. The record reveals that on 26.07.2023, the District Magistrate cum Deputy Commissioner, Kohima passed a Detention Order bearing No. DCK/CON/NSA/2023/01 (for short, 'the Detention Order'). This Court further finds it relevant to take note of the circumstances which led to the passing of the Detention Order. The records which have been produced before this Court reveals that on 24.07.2023, the Superintendent of Police, Kohima had submitted a proposal before the Deputy Commissioner cum District Magistrate, Kohima for detention under Section 3 (2) of the National Security Act, 1980, (for short, the Act of 1980), in respect of the husband of the petitioner. From a perusal of the said document, it reveals that 2 persons were arrested including the husband of the petitioner and both the persons were produced before the Chief Judicial Magistrate on

06.07.2023 and were remanded under Police custody for a period of 5 days. On completion of the Police remand period, on 10.07.2023, extension for another 5 days was prayed to the Court. The grounds of detention for which the proposal was made as is reflected in the communication dated 24.07.2023, are reproduced hereinunder:

- "1. The act committed by the arrested person, Abi Neikha (44 years) S/o- Lt. Nehosa, V/o- Khuzama, PS-Khuzama, P/Add- Chumudekima Ward 10, in connivance with anti-social elements had maliciously engaged a government servant to procure ammunitions belonging to the government for the consequent benefit of anti-social elements and non-state entities in the furtherance of harming the security and peace of the State.*
- 2. The requirement put forth by the arrested person for a specific caliber of ammunition meant for high powered assault rifles clearly establishes the outright knowledge of the potential damage it could have caused.*
- 3. His activities are detrimental to the security and peace in the society and if bailed, there is likelihood of the accused committing breach of peace and tranquility of the State thereby endangering the safety and security in the society."*

6. On the basis of the said proposal, the Detention Order was passed on 26.07.2023, duly acknowledging that the petitioner was arrested by the Police in connection with Kezocha PS Case No. 005/23 under Section 25 (1A) of the Arms Act, read with Section 120B of the Indian Penal Code. There was no mention, however, in the said Detention Order that the husband of the petitioner was likely to be released from custody in near future. Be that as it may, the Schedule appended to the said Detention Order reveals it was mentioned that keeping the accused at large (if bailed) is likely to endanger the safety and security of the State and the Union of India and also to prevent him from further indulging in activities, highly prejudicial to the maintenance of public security, peace and order.

7. The record further reveals that the petitioner was duly communicated with the Detention Order. The petitioner thereupon

submitted a representation on 02.08.2023 to the Detaining Authority, the State Government and Central Government. The petitioner's husband received an order bearing No. CON/NSA/01/2023/42 dated 07.08.2023, issued by the Chief Secretary to the Government of Nagaland, wherein it was reflected that the State Government of Nagaland was satisfied with the view taken by the District Magistrate, Kohima to prevent the husband of the petitioner from acting in any manner prejudicial to the security of the State of Nagaland and the maintenance of public order, for which the State Government of Nagaland approved the Detention Order of the District Magistrate, Kohima to detain the husband of the petitioner. It was also mentioned that in exercise of the powers conferred under Section 3(2) of the Act of 1980, the State Government of Nagaland ordered that the husband of the petitioner be detained and kept in Central Jail, Dimapur for an initial period of 3 months w.e.f. the date of detention till 25.10.2023 and within which period, the detention will be reviewed as required under the provisions of the Act of 1980. The said order was issued by the Chief Secretary to the Government of Nagaland on 07.08.2023 and is hereinafter referred as 'the Approval Order'. The record also reflects that the said order was communicated to the Central Government on 07.08.2023 itself as is the requirement in terms with Section 3 (5) of the Act of 1980.

8. The records further reveals that the petitioner's husband received an order bearing No. CON/NSA/01/2023/50 dated 14.08.2023, issued by the Chief Secretary to the Government of Nagaland whereby the husband of the petitioner was intimated that the representation submitted by the husband of the petitioner lacked merit, and accordingly, the same was not

acceded to by the State Government. The representation of the petitioner's husband to the Central Government was also rejected on 18.08.2023. It is also seen from the records that the matter pertaining to the petitioner's husband was referred to the Advisory Board, Nagaland. On 28.08.2023, the Advisory Board submitted the report opining that there was sufficient cause for detention of the husband of the petitioner. This Court has also duly perused the said report, as is available in the records so produced. The said report does not, in any manner, take into consideration that the petitioner's husband is in judicial custody in connection with Kezocha PS Case No. 005/23 and that the husband of the petitioner is likely to be released from custody in the near future or for that matter, from the materials available with the detention authority, there is likelihood for the petitioner's husband would be released on bail.

9. It further reveals from that pursuant to the report submitted by the Advisory Board on 26.08.2023, an order was passed on 24.10.2023 bearing No. CON/NSA/01/2023/86 by the Chief Secretary to the Government of Nagaland wherein it was mentioned that the detention of the husband of the petitioner was referred to the NSA Advisory Board constituted by the Government of Nagaland and the opinion of the Advisory Board was that there was sufficient cause for detention of the husband of the petitioner under the Act of 1980 and the continued detention of the husband of the petitioner would be necessary in order to prevent him from further indulging in activities which are prejudicial to the security of the State of Nagaland and maintenance of public order warranting his detention under the preventive law. Thereby, vide the said order dated 17.10.2023, the State of Nagaland had, in exercise of powers

conferred under Section 12 of the Act of 1980 confirmed the Detention Order issued against the husband of the petitioner and further ordered that the husband of the petitioner shall be detained for another period of 3 months, w.e.f. 26.10.2023 till 25.01.2024, within which period his detention will be reviewed as required under the provisions of the Act of 1980. The said order dated 17.10.2023 is hereinafter referred to as 'the Confirmation Order'.

10. The petitioner, who is the wife of the detenue, has filed the instant writ petition challenging the Detention Order, the Approval Order as well as the Confirmation Order and has sought for immediate release of her husband. The record reveals that vide order dated 15.11.2023, this Court issued notice and further observed that the respondent should file their responses on or before the next returnable date. The matter was listed on 06.12.2023, however, no affidavit-in-opposition was filed by the respondents. Taking into account that this is a matter relating to preventive detention which requires an early disposal and the records being available, this Court posted this matter today.

11. We have duly heard the learned counsels appearing on behalf of the parties. The learned counsel for the petitioner submitted that although various grounds have been alleged, challenging the Detention Order, the Approval Order, as well as the Confirmation Order, but he would specifically rely upon 2 grounds. First, that the Detaining Authority, while issuing the Detention Order did not take into account that the husband of the petitioner was already in custody and therefore, unless there were cogent materials available that the husband of the petitioner was likely to be released on bail, the Detaining Authority could not have exercised its

powers under the Act of 1980 for passing the Detention Order. He further submitted that, while passing the Approval Order; the order dated 14.08.2023 by which the representation of the petitioner's husband was rejected; as well as in the Confirmation Order, there is no reflection that the husband of the petitioner was in custody and there were cogent materials available that the husband of the petitioner was likely to be released on bail. He further submits that even the Advisory Board, in its opinion dated 28.08.2023 did not take note of the said aspect of the matter. Further to that the learned counsel for the petitioner submitted that the husband of the petitioner was detained on 26.07.2023 and as per Section 10 of the Act of 1980, the appropriate Government was under the statutory obligation to place the matter before the Advisory Board within 3 weeks from the date of detention of the person. He submitted that the materials on record would show that it was only on 26.08.2023, the matter was placed before the Advisory Board and therefore, the mandate of Section 10 of the Act of 1980 was not complied with. In regards to the above submissions, the learned counsel for the petitioner had referred to a judgment of the Supreme Court in the case of **Huidrom Konungjao Singh –Versus- State of Manipur & Others**, reported in (2012) 7SCC 181, as well as the judgment of the Division Bench of this Court in the case of **Islamuddin Khan –Versus- District Magistrate and Others**, reported in *MANU/GH/0339/2011*.

12. Per contra, the learned counsel appearing on behalf of the respondents submitted that though the respondents have not filed their affidavits but the records have been placed. The learned counsel submitted that the Detaining Authority must have certain reasons to

believe that the petitioner was likely to be released on bail and as such, the Detaining Authority had passed the Detention Order. Further to that, the learned counsel submits that from the records it is not available as to when the matter was placed before the Advisory Board, but it is seen from the report of the Advisory Board dated 28.08.2023 that the matter was taken up by the Advisory Board on 26.08.2023.

13. On the basis of the above submissions by the parties, two points arise for consideration:

- i) Whether in the facts of the instant case, the Detention Order, the Approval Order, as well as the Confirmation Order can be interfered with on the ground of not reflecting the existence of cogent materials that the husband of the petitioner was likely to be released on bail?
- ii) Whether the Detention Order, Approval Order, as well as the Confirmation Order is required to be interfered with on the ground of violation of Section 10 of the Act of 1980?

14. The question of personal liberty of a person is sacrosanct and the State cannot be permitted to take it away without following the procedure prescribed by law, otherwise it would be violative of the Fundamental Rights guaranteed under Articles 21 and 22 of the Constitution. The Supreme Court, in the case of **Ayya Alias Ayub –Versus- State of Uttar Pradesh**, reported in *(1989) 1SCC 374* observed that the law of preventive detention is based and could be described as “jurisdiction of suspicion” and the compulsion of values of freedom, of democratic society, and of social order sometimes might compel a curtailment of individual’s liberty.

15. The first point for determination which arises in the instant proceedings is as to whether a person who is in jail can be detained under the detention laws, taking into account that the husband of the petitioner herein is already in judicial custody. In the case of **Dharmendra SuganChand Chelawat –Versus- Union of India**, reported in *(1990) 1SCC 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 detainee is likely to be released from custody in near future; and
- b) Taking into account the nature of the antecedent activities of the detainee, 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.

16. This Court further finds it relevant to take note of another judgment of the Supreme Court in the case of **Amrit Lal –Versus- Union of India**, reported in *(2001) 1SCC 341*, wherein a similar issue arose as the Detaining Authority recorded its satisfaction for detention under the Act of 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 detenu 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.

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

18. 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) 7SCC 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."*

19. In the said judgment, i.e. in the case of **Huidrom Konungjao Singh** (*Supra*), the Supreme Court also observed that merely because somebody else in similar cases had been granted bail, there could be no presumption that in that case also if the detenu applied for bail could have been released on bail. Paragraph 15 of the said judgment being relevant is reproduced hereinbelow:

"15. In the instant case, admittedly, the said bail orders do not relate to the co-accused in the same case. The accused released in those cases on bail had no concern with the present case. Merely, because somebody else in similar cases had been granted bail, there could be no presumption that in the instant case had the detenu applied for bail could have been released on bail. Thus, as the detenu in the instant case has not moved the bail application and no other co-accused, if any, had been enlarged on bail, resorting to the provisions of the Act was not permissible. Therefore, the impugned order of detention is based on mere ipse dixit statement in the grounds of detention and cannot be sustained in the eye of the law. "

20. In the backdrop of the above, we would like to revert to the facts already delineated supra. The proposal which was sent by the Superintendent of Police, Kohima on 24.07.2023 to the Deputy Commissioner cum District Magistrate, Kohima do not, in any manner, state that there were reliable materials on the basis of which one could have reasons to believe that there was a real possibility of the detainee to be released on bail and further, on being released he would probably indulge in activities which are prejudicial to public order. The Detention Order was passed on 26.07.2023. In the Schedule to the Detention Order, there is no mention that there are materials available with the authorities on the basis of which it could have reasons to believe that there was a reasonable possibility of being released on bail. In the Schedule it was stated that keeping the accused at large (if bailed) would endanger the safety and security of the State and the Union of India. There is no mention of any cogent materials on the basis of which there were reasons

to believe that the husband of the petitioner had a likelihood of being released on bail.

21. This Court has also taken note of the Approval Order dated 07.08.2023, the order by which the representation of the husband of the petitioner dated 14.08.2023 was rejected, the Advisory Board's opinion dated 28.08.2023 as well as the Confirmation Order dated 24.10.2023, and in neither of these orders and opinions there is any material that mention that these authorities were fully aware of the fact that the detainee was actually in custody; that there were reliable materials before the Detaining Authority on the basis of which the Detaining Authority had reasons to believe that there was real possibility of the detainee, i.e., the husband of the petitioner would be released on bail. Under such circumstances, this Court, therefore, is of the opinion that the Detention Order, the Approval Order as well as the Confirmation Order are based upon mere *ipsi dixit* statement in the grounds of detention and cannot be sustained in the eyes of law.

22. The second point for determination is as to whether the mandate of Section 10 of the Act of 1980 was violated for which the Detention Order, the Approval Order, as well as the Confirmation Order are required to be interfered with. For the purpose of adjudicating the said point for determination, this Court finds it relevant to quote Section 10 of the Act of 1980, which is reproduced herein below:

"10. Reference to Advisory Boards.—*Save as otherwise expressly provided in this Act, in every case where a detention order has been made under this Act, the appropriate Government shall, within three weeks from the date of detention of a person under the order, place before the Advisory Board constituted by it under section 9, the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer mentioned in sub-section (3) of*

section 3, also the report by such officer under sub-section (4) of that section."

23. From a perusal of the above quoted provision it reveals that in every case where the Detention Order has been made under the Act of 1980, the appropriate Government shall within 3 weeks from the date of detention of the person under the order, place before the Advisory Board constituted by it under Section 9, the grounds on which the order has been made and the representation, if any made by the person affected by the order. In the instant case, the Detention Order was passed on 26.07.2023.

24. This Court had perused the records which were placed before this Court and the said records do not, in any manner, reflect as to when the matter was placed before the Advisory Board. The report submitted by the Advisory Board on 28.08.2023 only reflects that the sitting was held on 26.08.2023. Under such circumstances, taking into account the Detention Order dated 26.07.2023, the matter ought to have been placed before the Advisory Board on or before 16.08.2023. However, the records do not show in any manner as to when the said matter was placed before the Advisory Board. At this stage, this Court finds it relevant to take note of the judgment of the Division Bench of this Court in the case of **Islamuddin Khan (Supra)**, wherein it was held that the representation dated 28.06.2010 was not placed before the Advisory Board in its meeting held on 24.07.2010 and 25.07.2010 and it was declared that the continued detention of the petitioner under the Act of 1980 was illegal. Accordingly, the Detention Order, Approval Order as well as the Confirmation Order passed in that case were all set aside.

25. In the instant case, as the order of detention was passed on 26.07.2023, the State of Nagaland was under the statutory obligation to

place the matter before the Advisory Board on or before 16.08.2023. However, as the same was not placed and the records only show that sitting was held on 26.08.2023, the same amounts to an infraction to the provisions of Section 10 of the Act of 1980 for the Detention Order, the Approval Order as well the Confirmation Order, are required to be interfered with.

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

27. The records, which were produced during the course of hearing, is hereby returned.

JUDGE

JUDGE

Comparing Assistant