

GAHC020005902023



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

Case No. : W.P.(Crl.)/11/2023

SMTI. IMLILEMLA LONGKUMER
WIFE OF SHRI LANUSANEN PONGEN, R/O H.NO. 64, E-KHEL, DIPHUPAR-A
VILLAGE, DIMAPUR NAGALAND

VERSUS

THE STATE OF NAGALAND AND 4 ORS
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVT. OF NAGALAND,
KOHIMA 2:THE PRINCIPAL SECRETARY (HOME)
GOVT. OF NAGALAND
KOHIMA

3:THE SPECIAL SECRETARY(HOME)
GOVT. OF NAGALAND KOHIMA

4:THE COMMISSIONER OF POLICE AND DISTRICT MAGISTRATE
DIMAPUR NAGALAND

5:THE UNION OF INDIA
REPRESENTED BY THE SECRETARY
MINISTRY OF HOME AFFAIRS
DEPT. OF INTERNAL SECURITY
NORTH BLOCK
NEW DELHI-11000

Advocate for the Petitioner : LIMAWAPANG

Advocate for the Respondent : GOVT ADV NL

BEFORE
HON'BLE MR. JUSTICE NELSON SAILO
HON'BLE MR. JUSTICE BUDI HABUNG

Date of Hearing & Judgment : 13.02.2024

JUDGMENT & ORDER (ORAL)

(Nelson Sailo, J)

Heard Mr. Limawapang, learned counsel for the petitioner, Mr. E. Thiba Phom, learned State counsel for the State respondent Nos. 1 to 4 and Mr. Yangerwati, learned CGC for the respondent/Union of India.

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioner prays for issuance of writ in the nature of habeas corpus for setting the detenue detained in Central Jail, Dimapur, Nagaland, at liberty. Be it stated herein above that the instant petitioner is the wife of the detenue.

3. It is the case of the petitioner that pursuant to the Report submitted by the Deputy Commissioner of Police, Chumukedima, Nagaland, to the Commissioner of Police, Dimapur, on 24.07.2023, the detention of the detune was recommended under Section 3(1)&(2) of the National Security Act (NSA). The detenue was arrested in connection with Sovima P.S. Case No. 0014/23 under Section 120B IPC read with Section 25(1A)(1AA) Arms Act read with Rule 7/8 NSR wherein a large amount of prohibited ammunition was recovered by the Police. Accordingly, the Commissioner of Police vide Order dated 31.08.2023, in exercise of the powers conferred by Section 3(3) of the NSA ordered the detention of the detenue in Central Jail, Dimapur, Nagaland. The Commissioner of Police then sought the approval of the State Government vide his Communication dated 31.08.2023 and accordingly, the State Government, vide Order dated 11.09.2023, in exercise of the powers conferred under Section 3(2) of the NSA on being satisfied that the detention of the detenue was necessary directed his detention for

initial period of three (3) months w.e.f. the date of detention till 30.11.2023 and that the detention will be reviewed as per the NSA.

4. The detainee, through the Superintendent of Police of the Central Jail, Dimapur, filed his representation to the State Government in the Home Department and also to the Joint Secretary, Internal Security-II Division, Ministry of Home Affairs, New Delhi, amongst others. The representation was received by the Special Secretary to the Government of Nagaland, Home Department, Political Branch, on 18.09.2023 itself, and thereafter put up before the State Government. Consequently, the representation was rejected vide Order dated 29.09.2023 under the signature of the Chief Secretary to the Government of Nagaland and the Special Secretary to the Government of Nagaland, Home Department. Likewise the representation to the Ministry of Home Affairs was also rejected vide communication dated 13.10.2023. The Chief Secretary to the Government of Nagaland thereafter on 17.11.2023, passed the Confirmation Order in exercise of the powers conferred by Section 12(1) NSA and directed that he be detained for another three (3) months w.e.f. 01.12.2023 till 28.02.2024 and that his detention will be reviewed as per the provision of the NSA.

5. Mr. Limawapang, learned counsel for the petitioner submits that the detainee was detained vide Order dated 31.08.2023 purportedly on the subjective satisfaction of the Commissioner of Police but however, instead of the Commissioner of Police, it is the Principal Secretary to the Government of Nagaland, Home Department, who has filed the affidavit-in-opposition, against the writ petition. Referring to paragraph No. 8 of the affidavit-in-opposition the learned counsel submits that the Principal Secretary has stated that he was well aware that the detainee was in judicial custody and was fully satisfied with the materials placed on record, and after thorough application of mind, the Detention Order was passed directing the detainee to be detained under Section 120B IPC read with Section 25(1A)(1AA) of the Arms Act read with Section 7/8 NSR. The learned counsel for the petitioner submits that the said statement is not only misconceived as the Principal Secretary to the

Government of Nagaland, Home Department, could not have expressed subjective satisfaction on behalf of the Commissioner of Police who had ordered the detention of the detainee vide Order dated 31.08.2023, but also misquoting the provision of law for detention of the detainee clearly shows non-application of mind. In support of his submission the learned counsel relies upon the case of ***Phukan Daimary@Fungjarang vs. State of Assam & Ors.***, reported in ***1998 (4) GLT 40***, the case of ***Ananta Gogoi vs. Union of India & Ors.***, reported in ***2009 (4) GLT 216***, and also the case of ***Jagdish Prasad vs. State of Bihar and Another***, reported in ***(1974) 4 SCC 455***.

6. The learned counsel further submits that the impugned Order dated 31.08.2023 also does not indicate that the detainee was already in detention and is likely to be released on bail unless a Detention Order was passed against him. In absence of the same the detention of the detainee is only vitiated. In support of his submission the learned counsel relies upon the case of ***Union of India vs. Paul Manickam and another***, reported in ***(2003) 8 SCC 342***.

7. The learned counsel further submits that the representation submitted by the detainee on 18.09.2023 was belatedly considered and rejected by the State Government vide Order dated 29.09.2023, and by the Union of India, Ministry of Home Affairs, vide communication dated 13.10.2023 and for which grave injustice has been caused to the detainee. The learned counsel submits that no explanation has been given by the respondent authorities as to why it took twelve (12) days' time for the State Government to consider his representation and almost a month's time for the Ministry of Home Affairs to take a decision to reject the representation of the detainee. Therefore, in view of the inordinate delay on the part of the respondents to consider the representation of the petitioner, the impugned orders of detention are liable to be set aside and the detainee be set at liberty. In support of his submission the learned counsel relies upon the case of ***Pebam Ningol Mikoi Devi vs. State of Manipur and Ors.***, reported in ***2010 5 GLT(SC) 41***, ***Rajammal vs. State of T.N. and another***, reported in

(1999) 1 SCC 417. The learned counsel under the facts and circumstances of the case submits that the impugned Order of Detention be set aside and the detainee be set at liberty.

8. Mr. E. Thiba Phom, learned State counsel submits that the submissions made by the learned counsel for the petitioner about the Principal Secretary to the Government of Nagaland claiming to have subjective satisfaction for the detention of the detainee is beyond the pleadings of the petitioner, and therefore, cannot be a ground to reject the affidavit-in-opposition. He submits that although it has not been indicated in the Detention Order that the detainee is likely to be released on bail if not detained but the same has clearly been mentioned by the proposal submitted by the Deputy Commissioner of Police, Chumukedima, Nagaland. Therefore, non-mentioning the same in the Detention Order does not vitiate the detention of the detainee. The learned State counsel submits that the State Government was satisfied that the detention of the detainee is necessary as per Section 3(2) of the NSA, and therefore, there is nothing wrong in the Principal Secretary to the Government of Nagaland swearing the said affidavit-in-opposition on behalf of the State. In this connection the learned State counsel draws the attention of this Court to the third paragraph of the Order dated 11.09.2023 (Annexure-G) and submits that the State Government had clearly expressed its satisfaction with the view taken by the Commissioner of Police for detention of the detainee. The learned counsel, thus, submits that the writ petition has no merit and it should be dismissed.

9. Mr. Yangerwati, learned CGC, submits that the Ministry of Home Affairs received the representation of the detainee dated 18.09.2023 only on 05.10.2023 whereafter the same was examined at different levels and ultimately the Ministry did not find any justification for revocation of the Detention Order which was communicated to the State as well as to the detainee through Wireless Message on 13.10.2023. He, therefore, submits that writ petition being without merit should be dismissed.

10. We have heard the learned counsels for the rival parties and we

have perused the materials available on record.

11. Pursuant to the proposal submitted by the Deputy Commissioner of Police on 24.07.2023, the Commissioner of Police, Dimapur, vide Order dated 31.08.2023 upon being satisfied ordered the detention of the detainee under Section 3(3) NSA. The detainee was then informed about the grounds of his detention on 31.08.2023 and also his right to make a representation to the Detaining Authority, Central Government and the State Government through the Jail authorities. It is the case of the petitioner that the Commissioner of Police having the subjective satisfaction for detaining the detainee passed the Detention Order and also sought for approval from the State Government vide his Letter dated 31.08.2023, and therefore, it should have been none other than the Commissioner of Police who should have filed the affidavit-in-opposition showing subjective satisfaction for the detention of the detainee. The Apex Court, in the case of **Jagdish Prasad** (supra) in the given facts of that case which was also a matter relating to a petition for issuance of a writ in the nature of habeas corpus held that the affidavit that was sworn was by the Upper Division Assistant (Special), Home Department, whereas it should have been the District Magistrate who should have sworn the affidavit. Therefore, the affidavit sworn was not with personal knowledge but with paper wisdom. A Division Bench of this Court, in the case of **Ananta Gogoi** (supra) in the given facts of that case held that filing of an affidavit on behalf of the Detaining Authority and not by a Detaining Authority having regard to the provision of NSA was not proper. In fact the Order of Detention is made by the Detaining Authority after having subjective satisfaction for detaining the detainee, and therefore, it will not be proper for someone else to swear an affidavit against the habeas corpus petition stating that the detention of the detainee was made with the subjective satisfaction of the Detaining Authority. Accordingly, the impugned Detention Orders were set aside by the Court and the detainee set at liberty.

11. In the case of **Phukan Daimary@Fungjarang** (supra) a Division Bench of this Court similarly held that the detention of the detainee was

not sustainable in view of the fact that the Detaining Authority has not filed any affidavit but it was filed by the Successor in Office. The Court found that the affidavit filed by the Successor in Office cannot say anything about the subjective satisfaction arrived at by the earlier District Magistrate, and therefore, the Detention Order was not sustainable and was accordingly interfered with.

12. In the present case as well there is no dispute to the fact that the Detention Order dated 31.08.2023 was passed by the Commissioner of Police, who was also the District Magistrate of Dimapur. Section 3(3) of the NSA may be abstracted herein for ready perusal:-

“(3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section: Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.”

13. From the above abstract it may be seen that the District Magistrate or a Commissioner of Police or the State Government, upon being satisfied by an Order in writing direct the detention of any person with a view to prevent him or her from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order etc. direct his detention. Therefore, it can be seen that there has to be a subjective satisfaction of the Detaining Authority to detain a person. Such detention shall however be for a specific time-frame of twelve (12) days and can continue subject to the approval of the State Government. From the various authorities as referred to herein above, it is the subjective satisfaction of the Detaining Authority, i.e. the Commissioner of Police/District Magistrate which is required for the detention of the person concerned. The Commissioner of

Police in the instant case has otherwise not filed the affidavit-in-opposition, and therefore, the Principal Secretary to the Government of Nagaland could not have explained the subjective satisfaction of the Commissioner of Police for the detention of the detenu.

14. The next issue to be considered is regarding the delay in disposing the representation filed by the detenu. The detenu filed his representation through the Jail Superintendent, Central Jail, Dimapur on 18.09.2023 and the representation came to be rejected vide Order dated 29.09.2023. As admitted by the State respondents, it took twelve (12) days to dispose of the said representation. The explanation given in the affidavit-in-opposition about the disposal of the representation is that the representation dated 18.09.2023 was forwarded to the State Government for consideration on 22.09.2023, and thereafter the same was rejected on 29.09.2023 on the ground that there was no merit in the prayer for consideration. The Apex Court in the case of **Rajammal** (supra) in the given facts of that case in paragraph Nos. 7, 8 & 11 held as follows:-

“7. It is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay. Though no period is prescribed by Article 22 of the Constitution for the decision to be taken on the representation the words "as soon as may be" in clause (5) of Article 22 convey the message that the representation should be considered and disposed of at the earliest. But that does not mean that the authority is pre-empted from explaining any delay which would have occasioned in the disposal of the representation. The Court can certainly consider whether the delay was occasioned due to permissible reasons or unavoidable causes. This position has been well delineated by a constitution Bench of this Court in K.M. Abdulla Kunhi v. Union of India and others. The following observations of the Bench can profitably be extracted here:

"It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words 'as soon as may be' occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this

regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. The requirement however, is that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal."

8. The position, therefore, now is that if delay was caused on account of any indifference or lapse in considering the representation such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned.

11. We are, therefore, of the opinion that the delay from 9-2-1998 to 14-2-1998 remains unexplained and such unexplained delay has vitiated further detention of the detenu. The corollary thereof is that further detention must necessarily be disallowed. We therefore allow this appeal and set aside the impugned judgment. We direct the appellant-detenu to be set at large forthwith."

15. From the above abstract it may be seen that the Apex Court came to a finding that no explanation was given as to why the Minister concerned could not deal with the representation from 09.02.1998 to 14.02.1998. No explanation was made in this regard, and therefore, the Apex Court interfered with the Order of Detention. In the present case, apart from stating that the matter was forwarded to the State Government for consideration on 22.09.2023, and thereafter the order of rejection was passed on 29.09.2023, no other explanation has been made. Therefore, considering the provision of the NSA and the fact that the liberty of a person has been curtailed in such a manner, the delay in disposing of his representation cannot be accepted.

16. In the case of ***Union of India vs. Paul Manickam and another***, the Apex Court in the given facts of that case held that if the

Detaining Authority is reasonably satisfied with cogent materials that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time, he must be detained in order to prevent him from indulging in such prejudicial activities, the Detention Order can be validly made. Where a person already in custody does not indicate that the detainee was likely to be released on bail, the Order would be vitiated. In the present case as well the Order of Detention dated 31.08.2023 passed by the Commissioner of Police does not indicate that the detainee is likely to be released on bail, and therefore, in view of what has been held by the Apex Court, the order dated 31.08.2023 is only unsustainable. This principle of law was also explained by the Apex Court in the case of ***N. Meera Rani vs. Government of Tamil Nadu and another***, reported in ***(1989) 4 SCC 418***, ***Dharmendra Suganchand Chelawat vs. Union of India and Others***, reported in ***(1990) 1 SCC 746*** and ***Kamarunnisa vs. Union of India and another***, reported in ***(1991) 1 SCC 128***.

17. In view of what has been stated above, we do not consider it necessary to go into the other points raised as we are satisfied that the writ petition deserves to be allowed. In the result, the impugned Orders dated 31.08.2023 and 11.09.2023 are hereby set aside and the detainee is directed to be set at liberty, if not otherwise wanted in any other case.

18. The writ petition accordingly stands disposed of.

JUDGE

JUDGE

Comparing Assistant