

GAHC020007432023



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

Case No. : W.P.(Crl.)/15/2023

SHRI ASHULI
S/O LATE DARHU
PERMANENT R/O LAII VILLAGE, TADUBI SENAPATI, MANIPUR

VERSUS

THE STATE OF NAGALAND AND 3 ORS
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVT. OF
NAGALAND

2:THE SPECIAL SECRETARY TO THE GOVT. OF NAGALAND
HOME DEPT. (POLITICAL BRANCH) KOHIMA NAGALAND

3:THE SUPERINTENDENT OF JAIL
DIMAPUR NAGALAND

4:THE UNION OF INDIA
REPRESENTED BY THE JOINT SECRETARY(PITNDPS/COFEPOSA)
MINISTRY OF FINANCE
DEPT OF REVENUE 6TH FLOOR
B WING
JANPATH BHAWAN
NEW DELHI-11000

Advocate for the Petitioner : ALEZO KIRE

Advocate for the Respondent : GOVT ADV NL

BEFORE
HON'BLE MR. JUSTICE DEVASHIS BARUAH
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of Hearing : 23.02.2024

Date of Judgment : 23.02.2024

JUDGMENT AND ORDER (ORAL)

(D. Baruah, J.)

The instant writ petition under Article 226 of the Constitution is filed by the father of the detenu, i.e. Mr. Thorhu Thaoli (herei after referred to as 'the detenu') challenging the detention order dated 26.07.2023; rejection of the representation by the respondent No.2 dated 03.10.2023; rejection of the representation by the respondent No.1 vide the order dated 16.10.2023; the confirmation order dated 19.10.2023 issued by the respondent No.1 as well as the extension order dated 24.01.2024.

2. From the materials on record, it reveals that on 31.05.2023, the detenu along with five others were stopped by the police personnel near Khuzama Check Gate. From the materials on record, it reveals that on a search being conducted, 50 numbers of soap cases containing heroin weighing 650 grams approximately was recovered from the manually built chamber in the luggage boot of the vehicle. On the basis of the said search, an FIR was lodged which was registered and numbered as Narcotic P.S. Case No.0009/2023 under Sections 21(c)/60/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the Act of 1985'). The detenu thereupon continued to remain in custody.

3. On 12.07.2023, the Additional DGP (L&O), Nagaland issued a communication to the Secretary, Home Department, Government of Nagaland proposing for the detention of the detenu under the provisions of Preventive of Illicit Drugs of Narcotic Drugs and Psychotropic Substances Act, 1988 (for short, 'the Act of 1988'). The grounds of detention so mentioned in the proposal were that the detenu during his interrogation admitted to illegal trafficking of Narcotic Drugs and Psychotropic Substances in and around Dimapur Town. The second ground was that the detenu used his vehicle for transporting Narcotic Drugs and Psychotropic Substances from Senapati, Manipur to Dimapur, Nagaland. The third ground was that the State of Nagaland lies within the area highly vulnerable to such illicit trafficking as explained under Section 10 (v) (c) of the Act of 1988. The fourth ground is that if the detenu is bailed out, he is likely to indulge in illegal trafficking of Narcotic Drugs and Psychotropic Substances. The fifth ground was that from the statement of the detenu, it revealed that he continuously engaged in trafficking of contraband and there is all likelihood that he is to continue to indulge in illegal trafficking of the contraband and hence it was required that he be prevented from the said.

4. On the basis of the said proposal dated 12.07.2023, the respondent No.2 passed the detention order dated 26.07.2023 under Section 3(1) of the Act of 1988. It is admitted that the said order of detention was served upon the detenu on 26.07.2023 along with the grounds of detention. In terms with the said grounds of detention, it has been mentioned that 50 numbers of soap cases containing

narcotic drugs weighing 650 grams approximately were found concealed inside the manually built chamber of the luggage boot of the vehicle bearing registration No.AS-01-AZ-9448 which belonged to the detenu and the police investigation has revealed that the seized drugs belonged to the detenu. It was mentioned that the detenu had engaged in transportation of narcotic drugs from Senapati Manipur to Dimapur, Nagaland on five occasions since April 2023 for illegal gains which shows that the detenu's involvement in inter-State networking of drug trafficking. It was further mentioned that during the course of investigation, it revealed that the detenu has been involved in the illegal trafficking of the Narcotic Drugs and Psychotropic Substances and marketing the contraband in an around Dimapur confirming to the acts under Section 2 (e) of the Act of 1988. Further to that, it was stated that the detenu was presently under judicial custody and on the basis of the materials placed before the Detaining Authority, the Jail Authority was satisfied that the detenu was likely to indulge in similar prejudicial activity unless prevented from doing so by appropriate order of preventive detention. It is on these grounds of detention that the detenu was detained.

5. The record further reveals that the matter of detention of the detenu was referred to the Advisory Board on 10.08.2023 and the Advisory Board submitted its report on 15.09.2023 wherein the Advisory Board had observed and opined that there were sufficient cause for preventive detention of the detenu under the Act of 1988.

6. The detenu submitted representation on 26.09.2023 to the respondent No.1, i.e. the Chief Secretary, Government of Nagaland;

the Joint Secretary (PITNDPS/COFEPOSA), Ministry of Finance, Department of Revenue, Government of India; the Chairman, Advisory Board under the Act of 1988 and also to the AIG Prison, Central Jail. It is apparent from the records as well as the affidavit so filed by the respondent No.2 that the said representation was duly received on 26.09.2023 itself. The records further reveals that the Detaining Authority disposed of the said representation on 03.10.2023. However, the State Government who actually had the power in terms with Section 12 of the Act of 1988 to dispose of the said representation, disposed the same vide the order dated 16.10.2023 thereby rejecting the representation. It is also averred that the Central Government till date has not disposed of the said representation. Be that as it may, it is also relevant to take note of that on 19.10.2023, the State Government through its Chief Secretary, Government of Nagaland had confined the detention order w.e.f. 26.10.2023 till 25.01.2024. Further to that, on 24.01.2024, the said detention order had been further extended upto 25.04.2024. The petitioner who is the father of the detenu being aggrieved had therefore approached this Court seeking the reliefs as already stated herein above.

7. The instant writ petition was filed on 12.12.2023. Subsequently, in view of the issuance of the extension order dated 24.01.2024, the petition was amended and the amended petition was filed on 19.02.2024. The record further reveals that the respondent Nos.1 to 3 have jointly filed an affidavit-in-opposition on 07.02.2024. This Court also finds it relevant to take note of that the instant writ

petition was taken up for consideration on 21.02.2024 wherein this Court had sought for instructions from the Government Advocate, Nagaland as to whether the charge sheet has been filed in Narcotic P.S. Case No.0009/2023, and if not, whether the Special Court had extended the said period in terms with the proviso to Sub-Section (4) of Section 36A of the Act of 1985. Today, when the matter has been taken up, the learned Government Advocate has submitted that no charge sheet has been filed and he has no information as to whether there was grant of any extension by the Special Judge in terms with the proviso to Sub-Section (4) of Section 36A of the Act of 1985.

8. In the backdrop of the above pleadings, this Court has also heard the learned counsel appearing on behalf of the petitioner as well the learned counsel for the respondent. It is unfortunate to take note of that the counsel for the respondent No.4 has neither appeared nor the respondent No.4 cared to file any affidavit-in-opposition though notice was received by the Standing Counsel of the respondent No.4 on 14.12.2023.

9. Upon submissions made by the learned counsel for the parties which have duly noted of and the materials on record being perused the following points for determination arise for consideration before us are:-

(i) Whether the detention order dated 26.07.2023 as well as the consequential orders which have been passed requires an interference on the ground of being issued without having the subjective satisfaction of the official concerned of the Detaining Authority?

- (ii) Whether the delay in disposal of the representation by the respondent-State Government is fatal to the detention order?
- (iii) Whether the non-consideration of the representation by the Central Government is fatal to the detention order?
- (iv) What relief/reliefs the petitioner herein would be entitled to.

10. For determining the first point for detention, the question which is required to be taken note of is as to whether the detention order as well as the confirmation order are required to be interfered with on the ground of non-application of mind. For deciding the said aspects, this Court finds it relevant to take note of the judgment of the Supreme Court in the case of ***Amina Begum vs. State of Telengana and Others***, reported in **(2023) 9 SCC 587** 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 order of preventive detention. In paragraph No.29 of the said judgment, the Supreme Court observed that if the court finds that 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. Paragraph Nos.28 & 29 of the said judgment being pertinent to the issue are reproduced herein under:-

“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."

11. From a reading of the above quoted paragraphs, it would transpire that the writ court would be whether its jurisdiction to examine as to whether the detention order was based on the requisite satisfaction, albeit subjective, of the detaining authority in as much as 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. It was further observed that 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. The Supreme Court further observed that the satisfaction which has to be arrived at has to be on the basis of the 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.

12. In the backdrop of the above settled proposition of law by the Supreme Court, let this Court consider as to whether the 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.

13. In the case of ***Dharmendra Suganchand Chelawat & Others vs. Union Of India And Others***, reported in ***(1990) 1 SCC 746***, the Supreme Court observed that an order of detention can validly be 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 detenu was already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The Supreme Court in the said judgment further clarified that the expression "compelling reasons" in the context of making an order for detention of a person already in custody to mean that there must be cogent material before the detaining authority on the basis of which it may satisfy that (a) the detenu is likely to be released from custody in the near future; and (b) taking into account the nature of the antecedent activities of the detenu, 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.

14. We further find 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 ***Amrit Lal*** (supra) that although in the ground of detention it has been mentioned there was a likelihood of the detenu moving an application for bail, for which the detention was necessary, but there must be cogent materials before the authority passing the detaining order that there was likelihood of him being released on bail. This judgment is very pertinent for the purpose of the instant case taking into account that in the proposal which was submitted on 12.07.2023 as well as also in the grounds of detention, there was only mention that the detenu was in judicial custody. There was no mention whatsoever that there are strong circumstances on the basis of cogent basis that the detenu is likely to be released on bail.

15. It is also pertinent to take note of the judgment of the Supreme Court in the case of ***Geetha vs. the State of Tamil Nadu & Another***, reported in ***(2006) 7 SCC 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 ipse-dixit of the detaining authority. The further exposition in respect to the said proposition of the said law can be seen in the judgment of the Supreme Court in the case of ***Huidrom Konungjao Singh vs State Of Manipur & Ors***, reported in ***(2012) 7 SCC 181*** wherein the Supreme Court culled out the three proposition as to when a person, who is in jail can be detained under detention law. Paragraph No.9 of the said judgment being relevant is reproduced herein under:-

“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.”

16. In the backdrop of the above, let this Court recapitulate the facts which have already been delineated supra. It would be seen that the Detaining Authority though knew that the detenu was in custody, but there is no mention whatsoever that the Detaining Authority had materials before it on the basis of which it could have reasons to believe that there was a real possibility of the detenu being released on bail and further on being released he would probably indulge in activities which are prejudicial to the public order. These aspects having not been taken into account while passing the detention order, we are of the opinion that the first point for determination has to be decided holding that there was no subjective satisfaction on the part of the Detaining Authority to detain the detenu.

17. Moving forward, let this Court take into consideration as to whether the delay in consideration of the representation by the State Government have rendered the detention fatal which is the second point for determination. The record reveals that the representation was duly received by the State Government on 26.09.2023. The representation was rejected on 16.10.2023 by the State Government. There is no explanation as to why it has taken 20 days for the purpose of disposal of the said representation. In fact, the affidavit which has been filed by the respondent Nos.1 to 3, there is not a single whisper as to why it took 20 days on the part of the respondent No.1 to dispose of the said representation. In the opinion of this Court the unexplained delay in disposal of the representation in the facts of the present case, has to be construed to have rendered the detention order fatal.

18. The third point for determination is as to whether the non-consideration of the representation by the Central Government has also rendered the detention order fatal. This Court finds it relevant to take note of Section 12 of the Act of 1988 which stipulates that the Central Government has a power to revoke any detention order. In this regard, this Court finds it relevant to take into account the judgment of the Supreme Court in the case of ***Kundanbhai Dulabhai Shaikh vs. the District Magistrate, Allahabad & Others***, reported in (1996) 3 SCC 194. In the said judgment, the Supreme Court observed that the representation so submitted has to be disposed of at the earliest and if there has been any delay in the disposal of the representation, the reasons for the delay must be indicated to the

Court or else the unexplained delay or unsatisfactory explanation in the disposal of the representation would fatally affect the order of the detention, and in that situation, continued detention would become bad. In the said case, the facts stated therein shows that the State Government therein duly received the representation on 25.08.1995 and it was disposed of on 12.09.1995 and the order was communicated to the detenu on 14.09.1995. The Supreme Court observed that the explanation provided in not taking up the representation for disposal for 6 days in the counter-affidavit on the ground that there were about 40 to 50 representations pending for disposal and they were taken up chronologically cannot be a good ground. Further to that in the said case, the Central Government could not dispose of the said representation in view of the inputs not being provided by the State Government. In that context, the Supreme Court observed in paragraph No.25 of the said judgment that though black-marketing is a social evil and the persons found guilty of economic offences have to be dealt with a firm hand, but when it comes to fundamental rights of the Constitution, irrespective of enormity and gravity of allegations made against the detenu, the Court has to intervene. It was further observed that the gravity of the evil to the community resulting from anti-social activities cannot furnish sufficient reason for invading the personal liberty of a citizen, except in accordance with the procedure established by law particularly as normal penal laws would still be available for being invoked rather than keeping a person in detention without trial. Paragraph Nos.18, 21 & 25 of the said judgment being relevant are

reproduced herein under:-

“18. Turning now to the main question relating to the early disposal of the representation, we may immediately observed that this Court. in a large number of cases, has already laid down the principle in clear and specific terms that the representation has to be disposed of at the earliest and if. there has been any delay in the disposal of the representation, the reasons for the delay must be indicated to the court or else the unexplained delay or unsatisfactory explanation in the disposal of the representation would fatally affect the order of the detention, and in that situation, continued determination would become bad. This has been the consistent view of this Court all along from its decision in [Sk, Abdul Karim & Ors. v. State of West Bengal](#), Durga Show, In re⁵ [Jayanarayan Sukul v. State of W.B.](#), [Sk. Hanif v. State of W.B.](#), , [Frances Coralie Mullin v. W.C. Khambra & Ors.](#), [Mohinuddin v. District Magistrate](#), [Rama Dhondu Board v. V.K. Saraf](#). Commr. of Police, [Aslam Ahmed Zahire Ahmed Shaik v. Union of India](#), Mahesh Kumar Chauhan alias [v. Union of India](#) , right upto its reiteration in Gazi Khan v. Slate of Rajasthan.

21. In spite of law laid down above by this Court repeatedly over the past three decades, the Executive, namely, the State Government and its officers continue to behave in their old, lethargic fashion and like all other files rusting in the Secretariat for various reasons including red-tapism, the representation made by a person deprived of his liberty, continue to be dealt with in the same fashion. The Government and its officers will not give up their habit of maintaining a consistent attitude of lethargy. So also, this Court will not hesitate in quashing the order of detention to restore the "liberty and freedom" to the person whose detention is allowed to become bad by the government itself on account of his representation not being disposal of at the earliest.

25. Black-marketing is a social evil. Persons found guilty of economic offences have to be dealt with a firm hand, but when it comes to fundamental rights under the Constitution, this Court, irrespective of enormity and gravity of allegations made against the detenu, has to intervene as was indicate in Mahesh Kumar Chauhan's case(supra) and in an earlier decision in [Mahesh kumar Deorah v. District Magistrate, Kamrup & Ors.](#), AIR (1974) SC 183, in which it was observed that the gravity of the evil to the community resulting from anti-social activities cannot furnish sufficient reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the particularly as normal penal laws would still be available for being invoked rather than keeping a person in detention without trial."

19. Taking into account that in the instant case, there has been an unexplained delay of disposal of the representation by the State Government and further the Central Government till date has not disposed of the representation, we are of the opinion that the detention order and the further consequential orders have become bad on account of the delay in disposal of the representation as well as the non-consideration of the representation by the Central Government for which the detention order as well as all consequential orders passed thereafter have been rendered fatal.

20. In the backdrop of the above, let this Court therefore take note of the fourth point for determination as to what relief or reliefs the petitioner herein would be entitled.

21. In view of the above analysis, we set aside the detention order dated 26.07.2023; the confirmation order dated 19.10.2023 as well as the extension order dated 24.01.2024. In view of the setting

aide of the detention order, the confirmation order and extension order, nothing further require to be decided in respect to the orders impugned, i.e. dated 03.10.2023 and 16.10.2023 as the same have been rendered nugatory.

22. This Court, however, is not inclined to release the detenu as the detenu is still remains in custody in connection with Narcotic P.S. Case No.0009/2023. This Court, however, observes that the release of the detenu shall be subject to such order(s) to be passed by the jurisdictional Court in respect to Narcotic P.S. Case No.0009/2023.

23. With the above observations and directions, the instant petition stands allowed.

JUDGE

JUDGE

Comparing Assistant