

V.GOPALA GOWDA, CJ & B.N.MAHAPATRA, J.

W.P.(C) NO.17844 OF 2010 (Decided on 30.11.2010)

**S.BADRI NARAYAN PATRO
@ BADRINATH**

..... Petitioner.

.Vrs.

STATE OF ORISSA & ANR.

..... Opp.Parties.

CONSTITUTION OF INDIA, 1950 ART.22(5)

For Petitioner - M/s. Subash Ch.Lal, M.K.Das, S.Mallik,
S.K.Das, J.Nayak, S.Lal & S.Rout.

For Opp.Parties - Government Advocate.

V. GOPALA GOWDA, C.J. This writ petition has been filed by the petitioner-detenu praying to quash the order of detention dated 11.8.2010 (Annexure-1) passed by the Collector and District Magistrate, Ganjam under sections 3 (1) and 3 (2) of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (hereinafter referred to as 'the Act') as well as the order dated 23.9.2010 (Annexure-4) passed by the State Government under section 12(1) read with section 13 of the aforesaid Act confirming the order of detention passed by the Collector & District Magistrate against the petitioner urging various legal contentions.

2. The facts of the case are that the petitioner is the Managing Director and proprietor of Simla Silk Sortex Rice Mill and Biswanath Rice Mill located at Surada in the district of Ganjam. The aforesaid two mills deal in rice and paddy as Miller Agent-cum-Custom Miller for different Government agencies including Orissa State Civil Supplies Corporation Ltd. for delivery of common raw rice. On the basis of allegation that the petitioner is involved in illegal dealing in essential commodities like rice and paddy, the allegation was enquired into by a team of officers which conducted raid in the godown and premises of the aforesaid two Mills on 7.6.2010. During raid, one of the workers present produced six numbers of purchase and stock registers of both the Mills but he failed to produce other relevant and required documents for verification. The team found entries of purchase of paddy in the Purchase Register of Simla Silk Sortex Mill. They also verified some of the receipts as per the said register regarding purchase and payment of minimum support price to the farmers named therein. To ascertain the genuineness of the entries, the named farmers were contacted but they denied to have sold any paddy or to have received any cheque from the petitioner that has been mentioned in the register to have been issued to them. The team further found that Biswanath Rice Mill is a Boiler Plant, which was found to be in operational condition and producing both common raw rice and common boiled rice in the mill without any permission for producing the same. There was also boiled paddy on the drying yard and boiling tank and huge stock of boiled rice in heaps at the rice milling outlet point of the Mill from which the team was of the opinion that the petitioner had indulged in illegal trading of boiled rice when he was appointed as custom miller for common raw rice. He had also not maintained separate registers for each mill which according to the team

was apparently done to avoid inspection by higher authorities. In the register the petitioner had shown to have issued four cheques in favour of the farmers in token of payment of minimum support price but the concerned farmers denied to have received the cheques. Also the cheques had not been presented for encashment till the order of detention was passed. The team also found that there was no signature of the farmers on the vendor receipts issued by the petitioner. On verification of the stock, the team found that there was shortage of Q.342.87.200 of paddy and excess of Q.85.00 of common raw rice. Therefore there was contravention of the provisions of Clauses 4, 7, 9, 10 and 14 of the Orissa Rice and Paddy Procurement (Levy) and Restrictions on Sale and Movement Order, 1982. Accordingly, action under section 6(A) of the Essential Commodities Act was initiated and prosecution report under section 7 of the said Act was filed. Further the investigating officer filed report for detaining the petitioner under section 3 (1) of the Act so as to prevent him from acting in a manner prejudicial to the maintenance of supplies of commodities essential to the community. On the basis of the aforesaid, the Collector & District Magistrate was satisfied that the petitioner has been committing offence punishable under the provisions of the Essential Commodities Act read with the Orissa Rice and Paddy Procurement (Levy) and Restriction on Sale and Movement Order, 1982. Being satisfied that the detention of the petitioner was necessary to prevent him from acting in a manner prejudicial to the maintenance of supplies of the commodities essential to the community at large, the Collector and District Magistrate passed the order of detention in exercise of the power conferred on him under sections 3(1) and 3(2) of the Act referred to supra. The said order was confirmed by the State Government vide Annexure-4.

3. Counter affidavit has been filed by the detaining authority traversing the petition averments. With regard to the allegation of non-consideration of the petitioner's representation, it is stated that the representation dated 26.8.2010 of the petitioner was forwarded to the State Government on 2.9.2010 and the State Government referred the matter to the Advisory Board and in conformity with the opinion of the Advisory Board, the Government confirmed the order of detention. No counter has been filed on behalf of the State.

3. The first ground of attack is that the representation made by the petitioner to the State Government against the order of detention as required under section 8 of the Act has not been considered by the State Government and no order of rejection has been communicated to him. Non-consideration of the representation violated the constitutional right guaranteed under Article 22(5) of the Constitution of India. Therefore, the order of detention is void in law as held by the Supreme Court in the case of **Rahmattullah v. State of Bihar**, AIR 1981 SC 2069 and **K.M.Abdullah Kunhi and another v. Union of India**, AIR 1991 SCW 362 wherein the Supreme Court has held that clause (5) of Article 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. The obligation of the Government to afford to the detenu an opportunity to make representation is distinct from the Government's obligation to refer the case of the detenu along with the representation to the Advisory Board to enable it to form its opinion and send a report to the Government. Therefore, it is implicit in clauses (4) and (5) of Article 22 that the Government while discharging its duty to consider the representation cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. Learned counsel for the petitioner has also placed reliance upon an unreported decision of this Court in **Pankaj Kumar Tibrewal v. Government of Orissa**, O.J.C.No.3550 of 2002 disposed of on 17.6.2002. On similar facts of the case

after referring to the decisions of the Supreme Court in **Jagan Nath Biswas v. The state of West Bengal**, AIR 1975 SC 1516, **Sk.Serajul v. State of West Bengal**, AIR 1975 S.C. 1517, **T.A.Abdul Rahman v. State of Kerala and others**, AIR 1990 S.C. 225 and **Pradeep Nilkanth Paturkar v. S.Ramamurthi**, 1994 CrI.L.J.620, this Court held that the delay in initiating the proceeding is bad in law and on that ground itself the order of detention is liable to be quashed. The Division Bench in the aforesaid unreported decision referred to the decision of the Supreme Court in **Kundanbhai Dulabhai Shaikh v. Dist. Magistrate, Ahmedabad** and others, 1996 CrI.L.J 1981 wherein the Supreme Court quashed the detention order on the ground of delay in disposing of the representation and quashed the order of detention. Mr.Lal, learned Senior Counsel appearing for the petitioner, submits that the said decision with all fours is applicable to the case on hand. Therefore, the detention order is liable to be quashed. Another ground of attack is that the allegations made in the ground of detention can at best relate to contravention of the Levy Control Order for which normal action/proceedings can be taken in appropriate court of law instead of exercising the drastic power under the Act. Therefore, the detention order is an abuse of the process of law inasmuch as none of the grounds of detention show that the acts alleged against the petitioner are prejudicial to the maintenance of supplies of commodities essential to the community for the reason that (a) the levy order has nothing to do with the common man, (ii) the levy order is intended to offer minimum support price to the farmers while paddy is procured by any rice mill (iii) every Miller is obliged to pay levy of 75% of the total quantity of rice of each variety conforming to specification milled by him every day out of the stock of paddy owned by him and (iv) a rice miller can be a custom miller for milling of paddy not belonging to the mill. Other restrictions contained in the levy order have been done away with by the Central Government by issuing notification GSR No. 104(E) dated 15.2.2002. It was next contended that the grounds of detention were vague, indefinite, irrelevant and extraneous and there was no proper application of mind by the Collector and District Magistrate in passing the order of detention as also there was no subjective satisfaction of the Collector for passing the order of detention.

4. Learned Government Advocate with reference to the record sought to justify both the orders contending that the District Magistrate after applying his mind to the records/materials which were seized at the time of raid and spot verification which revealed that so many illegalities were committed by the petitioner which are prejudicial to the maintenance of supply of commodities essential to the community passed the order of detention. The grounds are in detail set out in the grounds of detention which was communicated to the detenu and the same has been perused by the State Government which passed the order of confirmation under sub-section (4) of Section 3. Thereafter the State Government has discharged its function in communicating the same to the petitioner and given opportunity to submit his representation. All the materials were placed before the Advisory Board which considered the same in detail and after calling for further information from the appropriate Government submitted its report holding that there is sufficient cause for the detention of the petitioner. On the basis of the said report, the State Government confirmed the order of detention. The representation submitted by the petitioner was placed before the Advisory Board for consideration which has been carefully considered by the Advisory Board which in its report opined that the order of detention passed against the petitioner is on valid grounds. The State Government has accepted the same and passed the order of confirmation. Therefore,

learned Government Advocate submits that no ground is made out for interference with the order of detention.

5. With reference to the above said rival legal contention, we have carefully examined the orders of detention passed by the Collector and District Magistrate and the State Government. The District Magistrate has no doubt passed the order on 11.8.2010 on which date the stock verification was completed. On the same day the order of detention was passed. So there was little time left for the detaining authority to apply his mind to the various grounds mentioned in the grounds of detention. The Supreme Court in the case of **Dhananjaya Das v. District Magistrate and another**, AIR 1982 SC 1315 held that the grounds of detention must be in existence on the date when the order was passed and the authority concerned has to be satisfied about the grounds of detention on the date of the order and the satisfaction of the detaining authority must be clear on the face of the grounds of detention. The order of detention is dated 11.8.2010. The grounds of detention are signed on 12.8.2010 as it appears from the date below the initial of the detaining authority. Under sub-section (3) of Section 3 of the Act, the detaining authority is obliged to forthwith report the fact of detention to the State Government together with the grounds on which the order has been made. We have perused the relevant file produced by the learned Government Advocate. The note dated 12.8.2010 of the Under Secretary reveals that the Collector has not furnished the grounds of detention along with other papers for approval of the State Government.

6. It is the case of the petitioner that he submitted a detailed representation pointing out that the allegations made in the grounds of detention do not call for resort to the drastic provisions of the Act. It is his further case that the State Government confirmed the order of detention without considering his representation. We have perused the Government file from which it appears that on 4.9.2010, the representation of the detenu was ordered to be placed before the Advisory Board. On 22.9.2010, the Advisory Board opined that there are sufficient grounds for detention of the detenu, i.e., the petitioner. From the file it further appears that on 23.9.2010 suggestion was given to reject the representation of the petitioner as the same has been found by the Advisory Board to be unsatisfactory. On the same day, order was passed to reject the representation. It therefore appears that the State Government has neither applied mind nor independently considered the representation of the petitioner but rejected the same being influenced by the opinion of the Advisory Board. At this stage it is profitable to note what the apex Court said in **Rahamatullah**' case (supra):

"The law is well settled that in case of preventive detention of a citizen, the obligation of the appropriate government is two fold (i) to afford the detenu the opportunity to make a representation and to consider the representation which may result in release of the detenu and (ii) to constitute a Board and to communicate the representation of the detenu along with other materials to the Board to enable it to form its opinion and to obtain such opinion. The former is distinct from the latter. As there is a two fold obligation of the appropriate government, so there is a two fold right in favour of the detenu to have his representation considered by the appropriate government and to have the representation once again considered by the Government in the light of the circumstances of the case considered by the Board for the purpose of giving its opinion.....The opportunity of making a representation is not for nothing. The representation if any submitted by the detenu is meant for consideration by the appropriate authority without any unreasonable delay, as it involves the liberty of a citizen guaranteed by Article 19. The non-consideration or an unreasonably

belated consideration of the representation tantamounts to non-compliance of Clause (5) of Article 22....Where the State Government waited till the receipt of the Advisory Board's opinion and there was an unexplained period of twenty four days on non-consideration of the representation and, thus there was no independent consideration of the representation by the State Government, there was clear non-compliance of Article 22(5) and detention was, consequently, liable to be quashed."

Similar view was also taken by the Constitution Bench of the Supreme Court in **K.M.Abdullah Kunhi's** case (supra) wherein the Supreme Court observed as under:

" It is now beyond the pale of controversy that the constitutional right to make representation under Clause (5) of Article 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. Secondly, the obligation of the Government to afford to the detenu an opportunity to make representation is distinct from the Government's obligation to refer the case of detenu along with the representation to the Advisory Board to enable it to form its opinion and send a report to the Government. It is implicit in clauses (4) and (5) of Article 22 that the Government while discharging its duty to consider the representation cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. The obligation of the Government to consider the representation is different from the obligation of the Board to consider the representation at the time of hearing of the reference..... The consideration by the Board is an additional safeguard and not a substitute for consideration of the representation by the Government. The right to have the representation considered by the Government is safeguarded by Clause (5) of Article 22 and it is independent of the consideration of the detenu's case and his representation by the Advisory Board....."

7. The file does not reveal that there was any independent consideration of the representation of the petitioner by the State Government. Rather from the notes in the file it appears that since the Advisory Board found the representation unsatisfactory, suggestion was made to reject the representation. Of course, no reason has been assigned to reject the representation. From the file it appears that the representation of the petitioner was sent to the State Government by the Collector & District Magistrate on 2.9.2010 and the representation was rejected on 23.9.2010. No reason has been ascribed for the delay in disposing of the representation. The State Government has also not filed counter affidavit explaining the delay.

8. In view of the aforesaid, we are of the opinion that there was no independent consideration of the representation of the petitioner by the State Government and non-consideration of the representation and non-communication of the order on the representation by the State Government independent of any opinion of the Advisory Board constitutes violation of the constitutional right given under Article 22 of the Constitution of India and failure to discharge the statutory function of the State Government under section 8 of the Act. Therefore, for this reason alone the writ petition must succeed. Accordingly, the writ petition is allowed and the impugned orders Annexures-1 and 4 are quashed. The Jail authorities are hereby directed to release the detenu-petitioner forthwith if his detention is not required in connection with any other criminal case pending against him.

There would be no order as to costs.

Writ petition allowed.