IN THE GAUHATI HIGH COURT
(HIGH OF ASSAM:NAGALAND:MEGHALAYA:MANIPUR
TRIPURA:MIZORAM AND ARUNACHAL PRADESH)
SHILLONG BENCH

WP(Crl) No.(SH)275 of 2011

Shri Livingstone B Marak,
F/o Detenu Shri Sengnang D Shira,
@ Aski
R/o Dobetkolgre,
East Garo Hills District,
Williamnagar, Meghalaya. : Petitioner

Versus

1. The State of Meghalya,
Represented by the Commissioner and
Secretary to the Government of Meghalaya,
Political Department,
Shillong, Meghalaya.

2. The District Magistrate,
East Garo Hills,
Williamnagar.

3. The Union of India,
Represented by the Secretary,
Minister of Home Affairs,
North Block, New Delhi-1 : Respondents

B E F O R E
THE HON'BLE MR JUSTICE T VAIPHEI

For the petitioner : Mr R Kar,
Mrs S Bhattacharjee
Ms SG Momin
Advocates

For the respondents : Mr P Dey, GA
Mr R Deb Nath, CGC

Date of hearing : 29.5.2012

Date of judgment and order : 29.5.2012

JUDGMENT AND ORDER (ORAL)

Heard Mr R Kar, the learned counsel for the petitioner. Also heard Mr P Dey, the learned counsel for the State

and Mr R Deb Nath, the learned CGC appearing for the Union of India.

2. The petitioner is the father of Shri Sengnang D Shira, who was detained by the respondent No.2 under Section 3(1) of the Meghalaya Preventive Detention Act, 1995 (the Act) to prevent him from acting in any manner prejudicial to the security of the State and maintenance of public order in the District of East Garo Hills, Meghalaya, or in any manner which would contribute to consolidate militant activities in the District. This is the second round of litigation initiated by the petitioner on behalf of the detenu. The earlier writ petition being WP(Crl) No.(SH)173 of 2011 filed before the Division Bench of this Court was disposed of in the following terms:-

> *"12. For the foregoing reasons, we are not persuaded to interfere with the detention order at this stage. However, liberty is given to the detenu to seek clarification and the documents, which were relied upon by the detaining authority to issue the order dated 1.6.2011. We give this opportunity to the detenu since in our opinion there is no time limit for submitting a representation.*
> *13. We make it clear that the detaining authority or the Government of Meghalya shall furnish all the particulars and documents without any delay, if the detenu asks for the same to enable him to file representation. It is further made clear that if the detenu submits any representation, the same shall be considered by the Government without any delay if the detenu is aggrieved by the decision of the Govt. he shall be at liberty to approach this court."*

3. In terms of the aforesaid directions, the petitioner applied for and was issued all the relevant documents by the detaining authority. By means of this, the grievances of the petitioner dealt with in that judgment appeared to have been redressed by the respondent authorities. However, Mr R Kar, the

learned counsel for the petitioner submits that in terms of the decision of the Division Bench of this Court in ***Rongjam Momin vs Union of India & Ors, 2005(1)GLJ 285,*** which obliged the detaining authority to inform the detenu of his right to make representation before the Central Government and which was not done, the infirmity in the impugned order remains, which vitiates the detention. On the other hand, Mr P Dey, the learned counsel for the State forcefully submits that this issue has already been raised by the petitioner in the earlier petition and the same was not decided by this Court. According to the learned State counsel, in the aforesaid circumstances, the petitioner is barred by constructive *resjudicata* from raising this issue again. He also contends that this Court must take into account the deterioting law and order situation in the Garo Hills where the detenu hails: this is not a case of ordinary law and order problem but is a case of threat to maintenance of public order as well as the security of the State. It is thus contended by him that this is not a fit case for interference of this Court as otherwise it will send a wrong signal to others who are now waiting in a line to file similar petition. According to the learned State counsel, as per the direction of this Court, the respondent authorities have already furnished all the relevant documents sought for by the petitioner and as such there is no infraction of the fundamental rights guaranteed to the petitioner under Article 22(5) of the Constitution. He, therefore, that the writ petition is devoid of merit and is liable to be dismissed.

4. I have given my anxious consideration to the submissions advanced by the counsel of the rival parties. Admittedly, the provisions of the Act are conspicuous by the absence of the right of the detenu to make representation to the

Central Government unlike the provisions of the National Security Act. The obligation of the detaining authority to inform the detenu of his right to make representation to the Central Government in so far as this Act is concerned, appears to be obviated. However, the issue came up for consideration before the Division Bench of this Court in **Rongjam Momin case (Supra)**. After referring to the various decisions of the Apex Court in this field, the Division Bench of this Court held that notwithstanding the omission of such right in the Act, the detaining authority is still under the obligation to inform the detenu of his right to make representation, in addition to the detaining authority and the State Government, to the Central Government. The relevant judgment is found at para 9:

> *"9.The next point that would engage the attention of the Court is the right of the petitioner-detenue to file a representation to the Central Govt. Admittedly, the petitioner was not apprised that he has any such right and no representation was filed by the detenue-petitioner before the Central Govt. The arguments advanced on this question by the rival parties have been elaborately noticed in a preceding paragraph of this order. In the case of* ***Kamleshkumar (Supra)****, the Hon'ble Supreme Court, inter alia, was required to consider the question as to whether an officer empowered by the State Govt. under the provision of COFEPOSA/PIT NDPS Acts to pass an order of detention, becomes functus officio after passing of the order so as to denude any power in the said empowered officer to vary or revoke the detention made. While answering the aforesaid question, the Hon'ble Supreme Court exhaustively considered the provisions of the COFEPOSA/PIT NDPS Acts as well as the National Security Act and took the view that notwithstanding the fact that under the aforesaid Acts, there is no provision for approval by the State Govt. of the order of detention made by the officer empowered by the State Govt. as in the National Security Act, it cannot be said that an order of detention passed by such an empowered is so passed on the basis of a deemed approval by the State Govt. so as to denude the empowered officer of any power to revoke the detention order passed by him. While considering the provisions of the National Security Act in the above context, the following*

observations made by the Apex Court would be relevant to the point at issue in the present case:

> *"34. In the National Security Act, there is an express provision (section 3(4) in respect of orders made by the District Magistrate or the Commissioner of Police under section 3(3) and the District Magistrate or the Commissioner of Police, who has made the order is required to forthwith report the fact to the State Govt. to which he is subordinate. The said provision further prescribes that no such order shall remain in force for more than twelve days after the making thereof, unless, in the meantime, it has been approved by the State Govt. This would show that it is the approval of the State Govt. which gives further life to the order which would otherwise die its natural death of the expiry of twelve days after its making. It is also the requirement. It is also the requirement of section 3(4) that the report should be accompanied by the grounds on which the order has been made and such other particulars as, in the opinion of the said officer, have a bearing on the matter which means that the State Govt. has to taken into consideration the grounds and the said material while giving its approval to the order of detention. The effect of the approval by the State Govt. is that from the date of such approval the detention is authorized by the order of the State Govt. approving the order of detention and the State Govt. is the detaining authority from the date of the order of approval"*

In view of the aforesaid enunciation of the law under the provision of the National Security Act and the provisions of section 3(1) of the Meghalaya Act being pari materia with the relevant provisions of National Security Act, there can be no manner of doubt that after the approval was granted in the present case by the State Govt. by order dated 17.5.04, the Central Govt. was competent to revoke the detention order of the petitioner and, therefore, the petitioner has a right under Article 22(5) of the Constitution to be informed of his entitlement to file a representation to the Central Govt. The state at which the petitioner should have been apprised of the aforesaid right, a point on which much emphasis has been laid by Shri. U. Bhuyan, learned Govt. Advocate, according to us, would be of no consequence. It is not difficult to visualize a situation where the stage at which such a right of detenue accrues can be appropriately transposed.

For the aforesaid reasons, we unhesitatingly take the view that on both counts, i.e., the failure of

the detaining authority to inform the detenue/petitioner of this right to file a representation to the detaining authority as well as to the Central Govt., the fundamental right of the petitioner under Article 22(5) of the constitution has been infringed thereby vitiating, the impugned order of detention dated 17.05.04 as well as the order approving the same passed by the State Govt. on 27.05.04."

5. It is submitted by the learned counsel for the petitioner that this decision was discussed by a 5-Judge Bench of this Court in ***Konsam Brojen Singh vs State of Manipur & Ors, 2006 (1) GLJ (FB)568*** and was approved by that Bench at para 15 and 57 of the judgment. There is no dispute at the Bar that the detaining authority did not inform the detenu of his right to make representation before the Central Government, complaining of his detention. As the aforesaid decisions are of larger Benches, they are binding upon me sitting in a single Bench, which has now been conferred the jurisdiction to deal with a writ of Habeas Corpus. The ground reality, no matter how unfortunate it is, cannot be a ground to ignore or defeat the fundamental right of the detenu guaranteed under Article 22(5) of the Constitution of India. In other words, in the name of recognizing the ground reality, this Court cannot allow itself to be a party to violation of constitutional rights of a citizen. In the light of the law laid down by the Apex Court as approved by the Full Bench of this Court, the defect pointed out by the learned counsel for the petitioner is not a curable defect and as such the passage of time cannot give a stamp of approval to the impugned detention order by this Court as that will amount to failure to discharge my constitutional duty. The impugned detention order is liable to be quashed for this reason alone.

6. Resultantly, this writ petition succeeds. The order dated 01.06.2011 issued by the respondent No.2 at Annexure II

and the order dated 10.6.2011 issued by the State Government approving the detention order at Annexure V are hereby quashed. Consequently, the respondent authorities are directed to release forthwith the detenu from detention if he is not otherwise required in connection with some other case.

JUDGE

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