

GAHC010071112020



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

Case No. : W.P.(Crl.) 2/2020

1:SANTANU BORTHAKUR
S/O. AWANI BORTHAKUR, R/O. GANESH MANDIR PATH, NEW GUWAHATI,
P.S. NOONMATI, DIST. KAMRUP (M), ASSAM.

VERSUS

1:THE UNION OF INDIA AND 4 ORS
REP. BY THE SECRETARY TO THE GOVT. OF INDIA IN THE MINISTRY OF
HOME AFFAIRS (FOREIGNERS DIVISION), MAJOR DHYAN CHAND
NATIONAL STADIUM, INDIA GATE, NEW DELHI-110002.

2:THE STATE OF ASSAM
REP. BY THE CHIEF SECRETARY TO THE GOVT. OF ASSAM
DISPUR
GUWAHATI-781001
DIST. KAMRUP (M)
ASSAM.

3:THE SECRETARY TO THE GOVT. OF ASSAM
HOME AND POLITICAL DEPTT.
DISPUR
GUWAHATI-781006.

4:THE COMMISSIONER AND SECY. TO THE GOVT. OF ASSAM
POLITICAL (B) DEPTT.
DISPUR
GUWAHATI-781006.

5:THE INSPECTOR GENERAL OF PRISONS
ASSAM PRISON HEADQUARTERS
KHANAPARA
GUWAHATI-781022
ASSAM

Advocate for the Petitioner : MS. P BORAH

Advocate for the Respondent : ASSTT.S.G.I.

Linked Case : W.P.(CrI.) 7/2020

1:ABANTEE DUTTA
CO FOUNDER AND DIRECTOR
STUDIO NILIMA- COLLABORATIVE NETWORK FOR RESEARCH AND
CAPACITY BUILDING D/O- NILAY DUTTA
R/O- 1A
DAMAYANTI MANSION
SATYA BORA LANE
DIGHALIPUKHURI EAST
DIST- KAMRUP(M)
GUWAHATI- 781001

VERSUS

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REP. BY THE SECRETARY TO THE GOVT OF INDIA IN THE MIN OF HOME
AFFAIRS (FOREIGNERS DIVISION) MAJOR DHYAN CHAND NATIONAL
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4:THE COMMISSIONER AND SECRETARY
TO THE GOVT OF ASSAM
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5:THE INSPECTOR GENERAL OF PRISONS

ASSAM PRISON HEADQUARTERS
KHANAPARA
GUWAHATI- 781022
ASSAM

Advocate for the Petitioner : MR N DUTTA
Advocate for the Respondent : ASSTT.S.G.I.

Linked Case : W.P.(Crl.) 6/2020

1:ABANTEE DUTTA
D/O- NILAY DUTTA
R/O- 1A
DAMAYANTI MANSION
SATYA BORA LANE
DIGHALIPUKHURI EAST
DIST- KAMRUP(M)
GUWAHATI- 781001

VERSUS

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2:THE STATE OF ASSAM
REP. BY THE CHIEF SECRETARY TO THE GOVT OF ASSAM
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GUWAHATI- 781001
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DISPUR
GUWAHATI- 781006

4:THE COMMISSIONER AND SECRETARY
TO THE GOVT OF ASSAM
POLITICAL (B) DEPTT
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GUWAHATI- 781006

5:THE INSPECTOR GENERAL OF PRISONS
ASSAM PRISON HEADQUARTERS
KHANAPARA
GUWAHATI- 781022
ASSAM

Advocate for the Petitioner : MR N DUTTA
Advocate for the Respondent : ASSTT.S.G.I.

Linked Case : W.P.(Crl.) 4/2020

1:DIPIKA SARKAR
D/O- SRI CHITTARANJAN SARKAR
R/O- JYOTIKUCHI
JYOTI SRINAGAR
GHY- 34

VERSUS

1:THE UNION OF INDIA AND 4 ORS
REP. BY THE SECY. TO THE GOVT. OF INDIA IN THE MINISTRY OF HOME
AFFAIRS (FOREIGNERS DIVISION)
MAJOR DHYAN CHAND NATIONAL STADIUM
INDIA GATE
NEW DELHI- 110002

2:THE STATE OF ASSAM
REP. BY THE CHIEF SECY. TO THE GOVT. OF ASSAM
DISPUR
GHY-01
DIST.- KAMRUP (M)
ASSAM

3:THE SECY. TO THE GOVT. OF ASSAM
HOME AND POLITICAL DEPTT.
DISPUR
GHY-06

4:THE COMM. AND SECY. TO THE GOVT. OF ASSAM
POLITICAL (B) DEPTT.
DISPUR GHY-06

5:THE INSPECTOR GENERAL OF PRISONS
ASSAM PRISON HEADQUARTERS
KHANAPARA
GHY-22
ASSAM

Advocate for the Petitioner : MR N DUTTA
Advocate for the Respondent : ASSTT.S.G.I.

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

ORDER

Date : 07-10-2020

Heard Mr. N. Dutta, learned senior counsel for the petitioner. Also heard Mr. RKD Choudhury, learned Senior Govt. Advocate for the respondents in the State of Assam as well as Ms. A. Gayan, learned counsel for the authorities under the Union of India.

2. The petition relates to the issue as to in what manner the detention centers are required to be operated by the authorities for the purpose of keeping the foreigners/illegal migrants and others who are awaiting deportation/repatriation to the countries of their origin or waiting an adjudication of their respective claims.

3. The Supreme Court in *Bhim Singh –vs- Union of India* reported in (2012) 13 SCC 471 in paragraph 5 and 6 has provided as follows:-

“5. In Para 11 of the additional affidavit filed Shri Payingattery Venkiteswaran Sivaraman, it is stated that there are 37 Pakistani prisoners who have completed their sentence but they could not be repatriated as their nationality has not been confirmed by the Pakistan High Commission so far. It is also stated that besides, in respect of 11 Pakistani fishermen, Government of Gujarat has informed that no offence has been registered and they have no objection to their repatriation to Pakistan. However, in respect of these 11 Pakistani fishermen also, nationality has yet not been confirmed by the Pakistan High Commission. The list of these 37 Pakistani prisoners and 11 Pakistani fishermen is placed on record as Annexure G. Of the 37 Pakistani prisoners who have completed their sentence, 21 are stated to be mentally challenged. Most of these 21 persons have completed their sentence in 2007, 2008 and 2009, but their nationality has not been confirmed by the Pakistan High Commission though it appears that the consular access with regard to them was provided a few months before the completion of their sentence. It is indeed unfortunate that these 37 Pakistani prisoners who have served out their sentence and are not required under the Indian laws have been kept in jail because their nationality has not been confirmed. Whatever may be the reason for delay in confirmation of their nationality, we have not even slightest doubt that their continued imprisonment is uncalled for. In no way, can these 37 Pakistani prisoners be treated as prisoners once they have served out their sentence. It is true that unless their nationality is confirmed, they cannot be repatriated and have to be kept in India but until then, they cannot be confined to prison and deprived of basic human rights and human dignity.

6. It is stated in the additional affidavit of Shri Payingattery Venkiteswaran Sivaraman that

in respect of these 37 prisoners that the Ministry of Home Affairs has advised the State Governments/Union Territory Administrations concerned to set up detention centres for restricting their movements. A Communication dated 15-2-2012/16-2-2012 has been sent by the Ministry of Home Affairs advising the State Governments/Union Territory Administrations concerned to release such foreign nationals from jails and to restrict their movements in detention centres in terms of the powers delegated under Section 3(2)(e) of the Foreigners Act, 1946 and under Para 11 of the Foreigners Order, 1948 pending their deportation/repatriation. However, in the case of Jammu and Kashmir, it has been advised that the existing procedure i.e. detention under Section 8 of the Public Safety Act may continue. We are presently not concerned with the validity and legality of the detention of these prisoners under the above-referred provisions. However, suffice it to say that these 37 persons have to be formally released from jail immediately and be kept at appropriate place with restricted movements pending their deportation/repatriation. The places where they are to be kept—detention centres or by whatever name such places are called—must have basic facilities of electricity, water and hygiene. Twenty-one persons out of these 37 persons who are mentally challenged, on release, have to be given proper medical help/assistance or treatment in suitable government hospitals or the hospitals/clinics run by NGOs.”

4. The Supreme Court had clearly provided that the detenues be kept at an appropriate place with restricted movements pending their deportation/repatriation and the places where they are to be kept may be detention centres or whatever name such places are called but must have the basic facilities of electricity, water and hygiene etc.

5. In compliance of the said direction of the Supreme Court in Bhim Singh (Supra), the Govt. of India in the Ministry of Home Affairs issued the communication dated 07.03.2012 addressed to all the Principal Secretaries to all the State Governments and Union Territories which inter alia provides that such category of persons be released from jail immediately and they may be kept at an appropriate place outside the jail premises with restricted movement pending repatriation. In the said communication, it was taken note of that the Supreme Court had provided that if such persons cannot be repatriated and have to be kept in jail, they cannot be confined to prison and be deprived of the basic human rights and human dignity.

6. By the subsequent communication dated 10.09.2014 of the Govt. of India in the Ministry of Home Affairs, Foreigners Division addressed to the Principal Secretaries of all the State Governments and the Union Territories in paragraph-3 thereof, it has been provided as follows:-

“3. Further, in this Ministry’s letter No.F.14011/55/09-F.VI dated 23.11.2009 addressed to all State Governments/UT Administrations conveying the detailed procedure to be adopted for deportation of illegal immigrants from Bangladesh, State Governments/UT Administrations were requested to set up sufficient number of detention centres in each State/UT where the

suspected illegal immigrants would be detained pending their deportation.”

In paragraph-5 thereof, it has been provided as follows:-

“5. The issue of setting up of Detention Centres/Holding Centres/Camps in various States/UTs for restricting the movements of illegal immigrants/foreign nationals awaiting deportation after completion of sentence due to non-confirmation of nationality has been reviewed by this Ministry and the following decisions have been taken with the approval of the competent authority.

- (1) All State Governments/UT Administrations should set up sufficient number of Detention Centres/Holding Centres/Camps for restricting the movement of illegal immigrants/foreign nationals awaiting deportation/repatriation after completion of sentence due to non-confirmation of nationality, under the provisions of Section 3(2) (e) of Foreigners Act, 1946. State Governments/UT Administrations concerned may decide on the number of such Detention Centres/Holding Centres/Camps to be set up in the State/UT, area space required, security measures required to be provided etc. keeping in view the actual requirements based on the number of such illegal immigrants etc. to be housed as well as the progress of deportation proceedings. This action should be completed within 3 months.*
- (2) Such Detention Centres/Holding Centres/Camps should be set up outside the jail premises and it may please be ensured that all the basic amenities like electricity with generator, drinking water (including water coolers), hygiene, accommodation with beds, sufficient toilets/baths with provision of running water, provision for kitchen, round the clock security arrangement, sentry posts and guard room etc are provided. There should be sufficient open space within the compound for detainees to move around in a secure environment. There should be properly segregated accommodation for male and female detainees. There should be a proper boundary wall with dense barbed wire fencing above the boundary wall. The staff posted should be well trained to ensure that the detainees are treated with due dignity. Provision may also be made for medical attendance for the detainees.*
- (3) No specific approval is required from the Ministry of Home Affairs for setting up of Detention Centres/Holding Centres/Camps.*

- (4) *Naming of such places i.e. whether as Detention Centre or Holding Centre or Camp may be decided by the State Governments/UT Administration concerned.*
- (5) *Pending acquisition of land and construction of building, State Governments/UT Administration may consider hiring of suitable accommodation of this purpose. In case of non-availability of Government buildings, State Governments/UT Administrations concerned may look in for hiring private building subject to production of non-availability certificate and rent assessment by CPWD/PWD. If it is decided to hire a private building for the Detention Centres/Holding Centres/Camps, it may be ensured that all existing codal formalities under General Financial Rules (GFRs) are strictly followed.*
- (6) *In NCT of Delhi, the Detention Centres are being maintained by the Social Welfare Department which is working satisfactorily. All other State Governments/UT Administrations may consider adopting this pattern i.e. entrusting the maintenance of such Detention Centres/Holding Centres/Camps to the Social Welfare Department in the State/UT.*
- (7) *All State Governments/UT Administrations should submit a monthly report to the Ministry of Home Affairs (Foreigners Division) by the 15th day of the following month indicating the progress in setting up Detention Centres/Holding Centres/Camps.*

7. From the provision of the communication it is discernible that for the purpose of setting up of detention centres, the State Government should set up sufficient numbers of detention centres/holding centres/camps for restricting the movement of illegal migrants/foreign nationals and the State Government may decide as to how many number of detention centres that are required to be set up in the State.

8. Further the requirement is that such detention centres/holding centres/camps should be set up outside the jail premises. The State Government is also to ensure that the places where they are being kept must have basic facilities of electricity, water and hygiene etc. and that there is appropriate security at these places

9. Clause 5(5) of the communication dated 10.09.2014 provides that pending acquisition of lands and construction of buildings, the State Governments/UT Administrations may consider hiring of

suitable accommodations for the purpose and further in case of non availability of government buildings, the State Governments may look for hiring private building subject to production of non-availability certificate and rent assessment by CPWD/PWD.

10. From the aforesaid, it is discernible that the detention centres must be outside the jail premises and secondly pending any acquisition of lands and construction of buildings, the State Government may find suitable accommodations for the purpose and if government buildings are not available, the State Government may look for hiring private buildings for the purpose.

11. We further take note of that pursuant to the requirement of the order of the Supreme Court in Bhim Singh (supra) as well as the other communication referred above, the model manual for the detention centres/holding centres had been prepared by the Govt. of India in the Ministry of Home Affairs. Clauses 4.1 and 4.4 of the model manual is extracted below:-

“4.1. Detention Centres/Holding Centres/Camps shall be set up outside the jail premises.

4.4 pending acquisition of land and construction of building, State Governments/UT Administrations may consider hiring of suitable accommodation for this purpose. In case of non-availability of Government buildings, State Government/ UT Administration concerned may look in for hiring private building, subject to production of non-availability certificate and rent assessment by CPWD/PWD. If it is decided to hire a private building for the Detention centre/Holding centre/Camp, it may be ensured that all existing codal formalities under General Financial Rules (GFRs) are strictly followed.”

12. It is noted that even the model manual for the detention centres provides that the detention centres shall be set up outside the jail premises. If suitable accommodations are not available, the State Government may look for hiring of private buildings for the purpose.

13. The petition is instituted on the premises that in the State of Assam a part of the existing jail premises in Goalpara, Kokrajhar, Jorhat, Silchar, Dibrugarh and Tezpur had been declared by the appropriate notification to be detention centres for the purpose of detaining the persons pending their deportation/repatriation, whose movements are required to be restricted. It does not require any adjudication that the declaration of a part of the jail premises in the aforesaid places are not the complete requirement of the provisions in Bhim Singh (supra) and the two aforesaid communications dated 10.09.2014 and 07.03.2012 of the Govt. of India in the Ministry of Home Affairs, Foreigners Division as well as the provision of Clause 4.1 of the model manual for the detention centres. The

communication infact requires that if appropriate suitable accommodation is not available and the acquisition of land and construction is pending for the purpose of setting up the detention centres, the State Government may hire suitable building for setting up the detention centres.

14. Considering the above, we are of the view that there is a requirement on the part of the State authorities to set up the detention centres. Although the authorities in the State of Assam refers to a subsequent communication of the Govt. of India, Ministry of Home Affairs, Foreigners Division dated 07.09.2018 wherein, in paragraph 3 it is provided that in case the setting up of such detention centres/holding centres/camps outside jail premises is pending, a specific area in jail premises has to be earmarked by the State Government for housing such foreign nationals/illegal migrants who are awaiting deportation as purely temporary measure and that such premises are well segregated from the prisons and the prison procedure applicable to the under trials and prisoners are not made applicable to the foreigner nationals/illegal migrants detention centres.

15. We have also taken note of that the provisions in the communication dated 07.09.2018 is more in the nature of an enabling provision providing that in cases where the setting up of the detention centres/holding centres are pending, a specific area in the jail premises is to be earmarked for housing the foreign nationals/illegal migrants and that such earmarking of the jail premises to be the detention centres/holding centres would be purely as a temporary measure. In the instant case, a part of the jail premises in Goalpara have been notified as detention centre by the notification dated 01.12.2019 as well as a part of the jail premises in Jorhat, Dibrugarh and Tezpur have been notified as detention centres by the notification dated 24.09.2015 and also a part of the jail premises in Silchar and Kokrajhar have been declared to be dentention centres by the notification dated 05.04.2010.

16. From the above notifications, it is discernible that more than 10 years have gone by, since a part of the jail premises in Goalpara, Kokrajhar and Silchar had been declared to be detention centres. Certainly a period of more than 10 years cannot be understood to be a temporary arrangement. Even in respect of Jorhat, Dibrugarh and Tezpur a period of 5 years is almost over which also again cannot be strictly said to be a temporary arrangement.

17. Considering the said aspect, it cannot be accepted that the respondents can still rely upon the communication dated 07.09.2018 to project the case that it would be permissible to declare a part of the jail premises to be detention centres .

18. The communication dated 07.09.2018 also refers to the earlier communication of 10.09.2014 which requires that pending acquisition of land and construction of building the State Governments/UT

Administrations may consider hiring of suitable accommodation for the purpose.

19. We require the authorities in the State Government, Home and Political Affairs to submit an action taken report within the next returnable date on the steps that have been taken to set up detention centre outside the jail premises and if necessary by following the requirement of the two communication dated 07.03.2012 and 10.09.2014 as well as the Clause 4.1 and 4.4 of the model manual which requires that if suitable government accommodations are not available for the purpose, the authorities may also be required to hire any private premises for the purpose.

20. List on 16.10.2020 for the action taken report.

21. A copy of the order be provided to Mr. RKD Choudhury, learned counsel for the respondent.

JUDGE

Comparing Assistant