SUPREME COURT OF INDIA

B. K. Khopkar

Vs.

State of Maharashtra

Cr.A.Nos.225 to 227 of 1964

(P. B. Gajendragadkar, C.J.I., J. C. Shah, S. M. Sikri, V. Ramaswami and P. Satyanarayana Raju, JJ.)

17.01.1966

JUDGEMENT

SIKRI, J.:

1. These appeals by certificate granted by the Bombay High Court are directed against its judgment, dated April 13, 1964 in applications filed by the applicants under Art. 226 of the Constitution, and S. 491 of the Criminal Procedure Code. Criminal Appeal No. 143 of 1964 has become infructuous because the appellant, S. V. Parulekar, has died.

2. Mr. R. K. Garg appears on behalf of the appellant in Criminal Appeal No. 142 of 1964. It is common ground that the points arising in all the appeals are common, and in order to appreciate the points, it would be sufficient if the facts in Criminal Appeal No. 142 of 1964, relevant to the arguments addressed to us, are only given. The relevant facts given in Paras. 2 and 3 of the affidavit filed by the Under Secretary to the Government of Maharashtra are as follows:

"2. With reference to Para 1 of the said Petition I say that the petitioner was detained under order, dated the 7th November 1962 issued by the District Magistrate, Thana, under the Preventive Detention Act, 1950. On 10th November 1962, the Government of Maharashtra revoked the order of detention, dated the 7th November 1962 issued by the District Magistrate, Thana, and the revocation order was served on the petitioner on the 11th November 1962. Thereafter the petitioner was served with another order of detention, dated the 10th November 1962 issued by the Government of Maharashtra under R. 30 of the Defence of India Rules, 1962. Further by its order, dated the 25th September 1963, the Government of Maharashtra cancelled the said order of detention, dated the 10th November 1962 and in pursuance of the said cancellation order the petitioner was released from detention on 27th September 1963. After she actually came out of the Yeravda Central Prison gates and was a free woman, the fresh orders of detention and committal dated the 25th September 1963 issued by the Government of Maharashtra were served on her and she was again detained in the Yeravda Central Prison, Yeravda, Poona. Thereafter, by its order, dated the 3rd February, 1964, the Government of Maharashtra cancelled its order of detention, dated the 25th September 1963 and the petitioner was again released on the 4th February 1964. After the actually came out of the Arthur Road District Prison gates and was a free woman, she was served with a fresh order of detention, dated the 3srd February 1964 issued by the Government of Maharashtra under R. 30 of the Defence of India Rules. 1962 and redetained with a view to prevent her from acting in a manner prejudicial to the defence of India, the public safety and maintenance of public order. The last two orders of cancellation and detention, dated the 3rd February 1964 are attached to the said petition as Annexures A and B, respectively.

(3) With reference to Para. 2 of the said petition I say that what is stated therein is generally correct. I further say that the petitioner is a Communist belonging to the Ranadive Group, which maintains that China has not committed any aggression on India and which actively propagates that view."

3. The High Court of Bombay held that the detention of the appellant from May 1963 to February 1964 was illegal but the order of detention passed on February 3, 1964 was legal, and accordingly the appellant could not be ordered to be released. It is this order of February 3, 1964, which is now the subject-matter of challenge.

4. Mr. Garg for the appellant raised the following points before us:

(1) That the State Government having delegated its powers conferred upon it under R. 30 of the Defence of India rules, 1962, by Notification "Home Department (Special) No. S. B. III/DOR.1162-1, dated the 9th November 1962' to all District Magistrates within the limits of their jurisdiction subject to the conditions mentioned in the Notification, the State Government was not competent to pass an order of detention under R 30.

(2) That the order of detention is bad because two Ministers cannot legally jointly pass an order of

detention.

(3) That the order of detention is vitiated by malice in law.

(4) That on the facts of this case the High Court should have insisted on an affidavit being filed by the Ministers.

(5) That there was no material to show that there was any apprehension that maintenance of public order would be prejudicially affected.

5. Relying on Emperor v. Sibnath Banerji, 72 Ind App 241: (AIR 1945 PC 156), Mr. Garg argues that the State Government had divested itself of its powers to detain. The Privy Council observed at p. 265 (of Ind App): (at p. 162 of AIR) as follows:

"It is for the same reasons that their Lordships are unable to accept the respondents contention, also agreed to by the majority judges in the Federal Court, that the provision of sub-s. (5) of S. 2 of the Offence of India Act, provides the only means by which the Governor can relieve himself of a strictly personal function. Their Lordships would also add on this contention that sub-s. 5 of S. 2 provides a means of delegation in the strict sense of the word, namely, a transfer of the power or duty to the officer or authority defined in the sub-section, with a corresponding divestiture of the Governor of any responsibility in the matter, whereas under S. 49, sub-s. 1 of the Act of 1935 the Governor remains responsible for the action of his subordinates taken in his name."

We are unable to agree with Mr. Garg that the Privy Council laid down that the Governor was divested of its power of passing an order when the above notification was issued. It seems to us that the Privy council was thinking of and comporting the responsibility of the Governor for the orders passed by the delegate and by an officer acting under S. 49 (1) of the Act of 1935. In the case of the delegate the Privy Council held that the Governor was not responsible, but that does not mean that the Governor could not have acted under R. 26 of the Defence of India Rules made under the Defence of India Act, 1939.

6. In Huth v. Clarke, (1890) 25 QBD 391, Wills, J., observed at p. 395:

"Delegation, as the word is generally used, does not imply a parting with powers by the person who

grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself."

In our opinion, by issuing the aforesaid notification the State Government has not denuded itself of the power to act under R. 30.

7. Coming to the second point, namely, whether the two ministers can jointly pass an order of detention, it is necessary to give a few relevant facts. In Godavari Shamrao Parulekar v. State of Maharashtra, (1964) 6 SCR 446 at p. 458: (AIR 1964 SC 1128 at p. 1133), this Court observed:

"The order, therefore, in the present case could only be made by a Minister who was in-charge both of subjects allotted to the General Administration Department and subjects allotted to the Home Department (Special)."

Basing on this passage, Mr. Garg contends that it is only if a Minister is in-charge of both the subjects that an order of detention can be passed. He further elaborates his point by saying that once one Minister is satisfied that it is necessary to detain a person under one head, say for the maintenance of public order, there is no question of another satisfaction by another Minister that it is necessary to detain that very person, say for the reason of preventing him from acting in a manner prejudicial to the defence of India. He says that as soon as the first Minister is satisfied that it is necessary to detain a person for reasons of maintenance of public other, no power remains to consider other reasons. We are unable to accept the above line of reasoning. We do not see any difficulty in two Ministers successively being satisfied that it is necessary to detain a person for different reasons, and then their decision being carried out by one order of detention duly authenticated. We agree with the High Court that this Court did not mean to lay down an absolute proposition of law that unless all the relevant subjects in respect of which the orders of detention are passed are concentrated in the hands of one Minister, valid orders of detention cannot be passed.

8. Regarding the next point, namely, whether the order of detention is vitiated be malice in law, Mr. Garg urges that no order of detention can be passed to defeat habeas corpus proceeding. We are unable to agree with the proposition submitted by the learned counsel. This Court, observed in Naranjan Singh Nathawan v. State of Punjab, 1952 SCR 395: (AIR 1952 SC 106), as follows:

"Once it is conceded that in habeas corpus proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of the proceeding, it is difficult to hold, in the absence of proof of bad faith, that the detaining authority cannot supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from defects and duly complies with the requirements of

the law in that behalf."

This Court observed further at p. 400 (of SCR): (at p. 108 of AIR), as follows:

"If at any time before the Court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later order the Court can direct the release of the petitioners."

The mere fact that the detention order is passed during the pendency of habeas corpus proceedings cannot by itself lead to the conclusion that the order is vitiated by malice in law. It depends on the circumstances of the case. The detenu would have to prove not only that the detention order has been passed during the pendency of habeas corpus proceedings but also that there are other facts showing malice. Mr. Garg has not been able to point out any other facts in this case. If the Government considers an order of detention, which is the subject-matter of challenge, to be invalid, there is no reason why it should not pass a valid order. Mr. Garg says that there was no fresh consideration of the facts and the Ministers acted on pre-conceived notions and passed the new order, dated February 3, 1964, without any fresh consideration. We are unable to accept this argument because it is quite clear from the affidavits filed by the Under Secretary to the Government of Maharashtra. Home Department and General Administration Department, that before the order was passed the Minister of Home and the Chief Minister were satisfied in accordance with the rules of business made under Art. 166 of the Constitution.

9. We may at this stage deal with the question whether the High Court should have insisted on the Ministers filing the affidavit. It is for the High Court to consider in each case whether it is satisfied with the affidavit filed in the case. In this case it does not appear from the judgment of the High Court that this point was raised before the High Court.

10. The only point that remains is whether there was any material for detaining the appellant for the maintenance of public order. It has been consistently held by this Court that it is for the detaining authority to be satisfied whether on the material before it, it is necessary to detain a person under R. 30, and that this question is not justiciable. There is no force in this point.

11. Accordingly we hold that there is no infirmity in the order of detention dated February 3, 1964.

12. In Criminal Appeal No. 144 of 1964, the appellant P. P. Sanzgiri, adopted the arguments of Mr. Garg and further urged that he had been validly detained by order of the District Magistrate dated November 11, 1962, and there had been no proper cancellation of this order. But he says that this order was bad because there was no confirmation of it. As pointed out above, we are not concerned with the previous orders of detention because the appellant is detained now under the order dated February 3, 1964, and we need not go into the point.

13. We may mention that in three appeals, Criminal Appeal No. 225/64, Criminal Appeal No. 226/64 and Criminal Appeal No. 227/64, the order of detention are dated February 14, 1964, but nothing turns on this difference in the dates of detention.

14. In the result the appeals fail and are dismissed.

Appeals dismissed.