P. L. Lakhanpal

Vs

The Union of India and Another

Petition under Art. 32

(G. K. Mitter, J. M. Shelat, M. Hidayatullah JJ)

07.03.1967

JUDGMENT

SHELAT, J. –

The petitioner was arrested by an order dated December 10, 1965 under Rule 30(1) (b) of the Defence of India Rules, 1962 and was detained in Central Jail, Tehar, New Delhi. ON the 24th December, 1965, he filed writ petition No. 47 of 1966 in this Court challenging his detention, inter alia, on the grounds that (1) Rule 30(1) (b) was ultra vires s. 3(2) (15) (i) of the Defence of India Act, (2) that rule 23 of the Defence of India (Delhi Detenues) Rules, 1964 gave him a right to make a representation by providing review of the said detention order and that his said right was disregarded by his having been prevented from making such representation, (3) that the said order was in breach of s. 44 of the Act, and (4) that it was made in mala fide exercise of power. That petition was dismissed on April 19, 1966. The petitioner was thereafter served with an order dated June 11, 1966 passed by the Central Government under Rule 30A(9) of the said Rules. The said order, inter alia, stated that "the said detention order has been reviewed by the Central Government-and upon such review the Central Government hereby decides that Shri P. L. Lakhanpal-should continue to be detained with a view to preventing him from acting in any manner pre-judicial to the Defence of India and Civil Defence". The petitioner filed Writ Petition No. 137 of 1966 challenging the validity of the said original order of detention and the order dated June 11, 1966. Rule 30A(9) provides as follows :-

> "Every detention order made by the Central Government or the State Government shall be reviewed at of not more than six months by the Government who made the order and upon such review that Government shall decide whether the order should be continued or cancelled."

That petition also was dismissed by judgment dated September 1966. It appears that the petitioner thereafter addressed certain letters and sent representations to the Home Ministry stating therein that he was now clearly of the opinion that the demand in Kashmir by Pakistan had become untenable as a result of certain events having taken place, that the Tashkent had altered relations between Pakistan and India, that said declaration and other events which had since taken place completely changed the complexion of Pakistan's stand on and that he was also now of the opinion that the application of some of the provisions of the Indian Constitution to was correct. He also represented that there were more problems in the country requiring his attention than Kashmir and the relations between the two countries that question. By an order dated 2nd December, 1966, Government of India directed the further detention order has been reviewed by the Central Government and upon such the Central Government hereby decides that the order of detention of the said Shri. P. L.

Lakhanpal should be contented. The present petition challenges the validity of this order.

The petitioner contended :-

> (i) that the said order is a mechanical and casual order passed without taking into consideration all the facts and circumstances relevant under Rule 30(1) (b) and Rule 30A(9).
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> (ii) That it is passed in utter disregard of the duty of the Government to act judicially, implicit in the power conferred on it under Rule 30A(9) to continue detention, both the function to review and the decision thereon being judicial or quasi-judicial.
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> (iii) That the said order is ultra vires s. 44 of the Act whereunder the Government is required to decide whether detention is the minimum action necessary on the facts and circumstances of the case.
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> (iv) That the said order is mala fide and illegal to the policy statements made on behalf of the Parliament from time to time to of the Act and the Rules :
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> (a) for purposes of defence only, and
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> (b) in border States; and
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> (v) That the said order is mala fide as it is motivated by punitive rather than preventive considerations.

In reply to these contentions the counter-affidavit filed by the Deputy Secretary in the Ministry of Home Affairs states that between the 10th of December, 1965 and the 2nd of December, 1966, the petitioner had made representations either directly or through certain persons and had addressed letters explaining his position, that on the basis of those representations and letters and after considering those materials the Central Government felt satisfied that if the petitioner were to be released, he was likely to resume his prejudicial activities and, therefore, his detention should be continued. The affidavit further alleged that at the time of the review of his case on December 2, 1966 "the said letters, papers, representations and the report from the police were placed before the Minister who had considered the same and he was satisfied that it was necessary to continue the detention of the petitioner". It also stated that it was not possible to disclose to the detenue the material on the basis of which the Central Government came to the said conclusion, that the order of detention was to prevent the petitioner from indulging in prejudicial activities mentioned in Rule 30(1) (b) and that the apprehension of his indulging in such activities would have to be judged and was judged from representations made by him. It is thus clear from the counter-affidavit that the detaining authority considered (1) the representation and letters made and written by the petitioner, (2) the report of the police authorities in regard to the past activities as he was in jail since the 2nd of December, 1965) and (3) the events which had since his detention taken place. According to the Central Government, it came to the decision that continuation of his detention was necessary as it was satisfied that if he were to be released he would continue the same anti-national activities for which he was detained and that his professions that there was a change in his view was only a ruse to get himself released from detention.

Now, there is no doubt that under the Act as also under the said Rules the Government is the special forum on whose subjective satisfaction an order of detention for the considerations set out in Rule

30(1) (b) can be made and on whose decision arrived at on the considerations and in the manner prescribed by Rule 30A(9) such detention can be continued. However, as held in P. L. Lakhanpal v. The Union of India Anr., (1) there is a difference in the power to detain and the power to continue such detention beyond a period of six months in that whereas the former depends upon the subjective satisfaction of the detaining authority, the latter has in express terms been made dependent on the existence of facts and circumstances necessitating such continuance. This Court held in that petition :

> "It follows that where the exercise of power is not conditioned on a mere opinion or satisfaction but on the existence of a set of facts or circumstances that power can be exercised where they exist. The authority in such a case is required to exercise the power in the manner and within the limits authorised by the Legislature. The existence of such facts which is the determinant for the exercise of the power is demonstrable".

The Court further observed :-

> "Unlike Rule 30(1) (b) the power to continue the detention after a review is not dependent on the satisfaction of the Government. Rule 30A postulates that ordinarily detention should not be for more than six months unless found necessary. It is for that reason that under the Rules when the period of six months whether it should be continued or cancelled. Though the legislature has made the Government the exclusive forum for such a decision, its decision has to be founded on facts and circumstances which make the continuation necessary in order to prevent the detenue acting in a manner prejudicial to the matters set out therein. The substitution of decision instead of satisfaction is a clear indication that the criterion for continuing the detention is the existence of those facts and circumstances which necessitate it. It is not unreasonable to think that the legislature decided to confer power the exercise of which was made dependent upon the subjective satisfaction at the initial stage but where continuation of detention was concerned, it thought that there would be ample time and opportunity for the Government to scrutinise the case fully and ascertain whether facts and circumstances exist demanding continuation and therefore deliberately used the word 'decide' instead of the words 'is satisfied'. Therefore, where such circumstances do not exist there would be no necessity for continuation and yet if the Government decides to continue the detention, such a decision would be beyond the scope of Rule 30A and would not be a decision within the meaning of or under that Rule. Cases may arise where circumstances exist leading to the authority's satisfaction that a particular person should be detained but those circumstances may not exist at the time when the review is made. In the latter case it is impossible to say that the Government can still decide to continue the detention nor is it possible to say that it is the Government's opinion or satisfaction that such facts and circumstances exist which is the criterion. The decision on a review has to be arrived at from the facts and circumstances which actually in the light of subsequent development and not merely those existing at the time when the order was made. In such a case the decision can be challenged as one not within the scope of or under the Rule and therefore unauthorised or as one based on considerations irrelevant to the power".

The position resulting from this decision is that the decision to continue detention has to be arrived

at not subjectively but on an objective standard, i.e. on a decision on materials relevant to the purposes under Rule 30(1) (b) and Rule 30A(9) gathered by or placed before the detaining authority which, according to that authority, necessitates continuation. Though it is the detaining authority which has to decide and its order is not subject to appeal or revision by a court of law such an order is liable to a challenge where either such facts and circumstances do not exist or where it is made on the basis of facts or circumstances not relevant or extraneous to the said purposes.

On the contentions raised by the petitioner, the question that falls for determination is whether the function entrusted by Rule 30A(9) to the Government and its decision thereunder are judicial or quasi-judicial. This question was left open in the earlier judgment in P. L. Lakhanpal v. The Union of India and Another(1) as the petitioner had then not raised it.

As to what is a quasi-judicial as against an administrative or ministerial function, it is no longer necessary to go in any detailed search for the principles governing the distinction between the two. Lord Loreburn, L. C. in Board of Education v. Rice(2) stated, "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining the questions of various kind. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve a matter of law as well as a matter of fact, or even depend upon the matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I do not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides any thing. But I do not think that they are bound to treat such a question as though it were a trial..... They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their views". Similar sentiments were also expressed by Lord Chancellor there stated. "When the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. " The principles distinguishing a quasi-judicial function from one which is ministeral were more precisely set out by Das, J. (as he then was) in the Province of Bombay v. Kusaldas S. Advani(2). He observed (1) where is a lis, there is prima facie in the absence of anything in the statue to the contrary the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and (2) even if there is no lis inter-parties and the contest between the party proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially. "In other words, while the presence of two parties besides the deciding authority will prima facie and in the absence of any other factor impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is nevertheless required by the statute to act judicially". These principles have since been acted upon by this Court in subsequent decisions such as Nagendra Nath Bora, v. The Commissioner of Hills Division(3) Radheshyam Khare v. The State of Madhya Pradesh(4), Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation(5), and Shivji Nathubhai v. The Union of India(6). In Board of High School and Intermediate Education, U. P. v. Ghanshyam(7) the question again was whether the power entrusted to the Examination Committee under s. 15 of U. P. Intermediate Education Act, 1921 and Chapter VI, r. (1) of the Regulations made thereunder was a quasi- judicial power. Wanchoo, J., who spoke for the court said at page 43 as follows :-

" Now it may be mentioned that the statute is not likely to provide in so many words that the authority passing the order is required to act judicially; that can only be inferred from the express provisions of the statute in the first instance from the express provisions of the statute in the first instance in each case and no one circumstance alone will be determinative of the question whether the authority set up by the statute has the duty to act judicially or not. The inference whether the authority acting under a statute where it is silent has the duty to act judicially will depend on the express provisions of the statute read along with the nature of the rights affected, the manner of the disposal provided, the objectives criterion if any to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute."

The Court there held that it was obvious that the Committee when it proceeded to decide matters covered by r. 1 (1) will have to depend upon materials placed before it and before it decided to award any penalty it had to come to an objective determination on certain facts and this was the only manner in which it could carry out the duties imposed on it. Even though there was no lis in the present case in the sense that there were not two contending parties before it the Committee should hear the examinees whose lives might be seriously affected by its decision even subjecting them in some cases to criminal prosecution on charges of impersonation, fraud and perjury. Though, therefore, there was nothing express one way or other in the act or the Regulation casting a duty on the Committee to act judicially, the manner of the disposal and the serious effects of the decision of the Committee would lead to the conclusion that a duty to act judicially was cast on the Committee and the Committee when it acted under r. 1 (1) was acting quasi - judicially and the principles of natural justice would apply to its proceedings.

Let us now proceed to consider the nature of the function if review and the decision thereon in the light of the principles laid down in these decisions. There can hardly be any doubt that in a case of the kind we have before us there must always occur a dilemma or a conflict between the claims on the one hand of personal liberty of an individual and theses of national interests on the other. Nevertheless, it must be remembered that in such cases, the only remedy that a person detained has lies in the procedural safeguards that the legislature deliberately lays down. Where such procedural safeguards haves been fully and properly complied with, the Court would have no power or would in any event be reluctant, even if it has, to interfere. That is because of the consideration that national interest and security should have a prior claim than even the personal liberty of an individual who has acted or is likely to act in a manner prejudicial to them. In such cases, however, utmost care has to be taken to comply with such few safeguards which the law justifying the loss of liberty provides. That the impugned decision involves the right of personal liberty, a more cherished right than that one cannot conceive in our democratic State is obvious. It is equally obvious that the manner in which the question of continuation of detention enjoined upon by Rule 30A (9) has to be determined is by applying the objective standard as against the subjective opinion or the belief of the detaining authority i.e. by weighting evidence brought before or collected by such authority relevant to the purposes under Rule 30 (1) (b) and Rule 30A (9) and then coming to a decision whether the order of detention needs continuation or not. How can such an authority come to its decision honestly and properly unless it is certain that the materials before it are true and dependable. How is that certainty to be derived unless the person concerned is given an opportunity to correct or contradict such evidence wither by explanation or through other materials which he can place before the authority. Keeping in mind the five factors laid down in the case of The Board of High School and Intermediate Education U. P. (1), the conclusion that we must come to its that the function entrusted to the authority under Rule 30A (9) as distinguished from the power under Rule

30 (1) (b) is quasi - judicial and the decision which it has to arrive at cannot be anything other than a quasi - judicial decision.

Mr. Dhebar, however, relied on the judgment of Shah, J. in Sadhu Singh v. Delhi Administration (2) and especially the observations therein that " if the order of detention is purely executive and not open to review by the court, a review of those very circumstances on which the order was made in the light of circumstances since the date of the order cannot but be regarded as an executive order. " The question is : Does it follow that because the first order is purely executive, the subsequent order is necessarily also executive ? While making the subsequent order, the authority is called upon to decide whether further detention is necessary for the purposes set out in the Rules. That decision has to be arrived at, firstly, on the assessment of the evidence placed before the authority and not on its subjective satisfaction and secondly, in the light of the facts which existed at the date of the original order and the facts and circumstances which have occurred or developed since then. It is well - recognised that a function or power which in its inception is purely ministerial may some times because quasi - judicial at a latter or some intermediate stage during the course of its exercise. At the stage at which it attains the nature of a quasi - judicial function, the authority entrusted with that function has to comply with the rules of natural justice and give an opportunity to the party concerned of representing his case. An illustration can be found in R. Johnson & Co. (Builders) Ltd. v. Minister of Health (1), where Lord Greene, M. R. at p. 401 of the Report points out that the function entrusted to the Minister there was of such a composites character. It started as an administrative function but at the second stage it was quasi - judicial where he had to consider the objections of parties, that is, the objectors and the local authority and then ended as an administrative function when the Minister decided whether to confirm or not to confirm the report of the local authority. Regarding the second stage, he characterised that as a quasi - lis and the parties i.e. objectors and the local authority as quasi - parties and said that while that stage was pending statements made by or obtained through either of the quasi - parties would have to be disclosed to the other quasi-party.

To say therefore that because a function is in its inception executive in character, it retains the executive character throughout would not, with respect, be correct. Besides, the function under Rule 30 (1) (b) and that under Rule 30A (9) is not one and the same. The former is completed as soon as an order of detention is made; the latter is independent of the former and is to be exercised after detention has gone on for a period of six is executive, the one under Rule 30A (9) is quasi - Judicial and therefore in exercising it the rules of natural justice have to be complied with.

It is admitted that the petitioner was not given any opportunity of representing his case or to correct or contradict the evidence on which the Government was going to rely on and which it admittedly relied on. But Mr. Dhebar's contention was that if the power of decision under Rule 30A (9) were held to be quasi - judicial in character a person detained would be entitled to disclosure of the materials in possession of the Government and on the basis of which the order would be made, that such disclosure would not only be prejudicial to the very purposes of the Act and the Rules but also to national interest and, therefore, the legislature could not have intended such disclosure. The answer to this contention is simple. In some cases, though such cases would be few, such disclosure would perhaps be embarrassing and, we will assume, detrimental to the larger interests of the country. But the proper remedy against such a consequence is not to deny by providing a rule whereunder the authority in suitable cases can claim privilege against such disclosure. Such a provision is in fact provided for under Art 22 of the Constitution under the Prevention of Detention Act. There does not appear to be any reason why such a rule cannot be made under the Defence of India Act or the Rules made there under.

It may be that in the present case the Government had materials before it which might justify the petitioner's detention. We do not know whether it had or not for the only thing that was said in the counter - affidavit was that there were materials on the consideration of which the Minister based his decision. If that be so, the proper thing to do was to give a chance to the petitioner to explain them. This not having been done the order of continuation of detention was illegal, it being in breach of the principles of natural justice and has, therefore, to be quashed.

In this view, it is not necessary to deal with the rest of the contentions raised by the petitioner. The petition is allowed. The order dated December 2, 1966 is quashed and the petitioner is directed to be set free forthwith.

R. K. P. S. Petition allowed.

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