Jagdev Singh

Vs

State of Jammu and Kashmir

Writ Petitions Nos. 69 and 71 of 1967

(CJI K. N. Wanchoo, R. S. Bachawat, V. Ramaswami- I , G. K. Mitter,K. S. Hegde JJ)

14. 08.1967

JUDGMENT

WANCHOO, C.J. -

These two petitions under Art 32 of the Constitution raise common questions of law and will be dealt with together. The petitioners were detained under r. 30(1)(b) of the Defence of India Rules, 1962 (hereinafter referred to as the Rules), under orders of the Government of Jammu & Kashmir in March, 1965. Their detention was continued from time to time after review under r. 30A. One of such reviews was made in February, 1967. At the time the scope of review was governed by judgment dated June 1, 1965 of Shah J. (Vacation Judge) in Sadhu Singh v. Delhi Administration ([1966] 1 S.C.R. 243). In that case it was held that r. 30A relating to review did not require a judicial approach to the question of continuance of detention. No opportunity therefore was given to the petitioners to represent their cases when the review was made in February, 1967 and their detention was continued for a further period of six months. Then came the judgment of this Court in P. L. Lakhanpal v. The Union of India. ([1967] 3 S.C.R. 114) That judgment overruled the decision of Shah J. and held that the function of review under r. 30A was quasi judicial and therefore in exercising it, rules of natural justice had to be complied with. In view of this judgment what the respondent did was to hold another review in the April, 1967. At that time notice was given to the petitioners and they were given a hearing. Thereafter order was passed in each case on April 27, 1967 by which the State Government directed the continuance of the detention orders for a further period. In the meantime the present petitions had been filed on March 30, 1967 and were based on the judgment of this Court in Lakhanpal's case ([1967] 3 S.C.R. 114).

It is not disputed on behalf of the respondent that Lakhanpal's case ([1967] 3 S.C.R. 114) will apply to the present petitions and the petitioners will be entitled to release because the procedure of a quasi judicial tribunal was not followed when earlier reviews were made from August, 1965 to February, 1967. Reliance is however placed on behalf of the respondent on the review made in April, 1967 and it is urged that that review was in accordance with the view taken by this Court in Lakhanpal's ([1967] 3 S.C.R. 114) case and therefore continuance of detention thereafter is justified. Further it is urged that even if this contention is not correct the State Government has power to pass a fresh order of detention on the same facts, and even if we allow the present petitions, we should make it clear that the State Government has such power. It is urged in this connection that the judgment of Bhargava J. in Avtar Singh v. The State of Jammu and Kashmir (W.Ps. 68, 70, 79, 89, 92, of 1967 (decided on June 9, 1967) is not correct.

The first question therefore is whether the orders of review dated April 27, 1967 are sufficient for the continuance of detention, even though the earlier orders of review passed from August, 1965 to

February, 1967 were not properly made in view of the judgment of this Court in Lakhanpal's case ([1967] 3 S.C.R. 114) Reliance in this connection is placed on the judgment of this Court in A. K. Gopalan v. The Government of India. ([1966 2. S.C.R. 427) In that case it was held that "it is well settled that in dealing with a petition for habeas corpus the court has to see whether the detention on the date on which the application is made is legal if nothing more has intervened between the date of the application and the date of hearing." So it is urged for the respondent that as the order passed on review under r. 30A continuing detention on April 27, 1967 was in accordance with the judgment of Lakhanpal's case ([1967] 3 S.C.R. 114) the earlier orders of review made between August, 1965 and February, 1967 which were improper made no difference.

We cannot accept this contention. In Gopalan's case ([1966] 2 S.C.R. 427) what had happened was that a fresh order was made on March 4, 1965 and the detention was under that order. The principle laid down in that case is unexceptionable; but the question is whether that principle applies to the facts of the present case. In Gopalan's case the question that arose was whether the fresh order of March 4, 1965 under which detention was made was legal, and the Court did not look at the earlier order which had been cancelled by the fresh order of March 4, 1965. In the present cases however no fresh order was made on April 27, 1967 and this distinguishes the present cases from Gopalan's case ([1966] 2 S.C.R. 427). Rule 30A of the Rules was originally not in the Rules and was introduced some time later. Before the introduction of r. 30A the position was that a detention made under r. 30 would be of indefinite duration. But r. 30A provided for review of detention orders passed under r. 30, and such review was to be made at an interval of not more than six months. On such review the Government had to decided whether detention orders should continue or be cancelled. The effect of r. 30 along with r. 30A(9) would therefore be that the detention order passed under r. 30 would be good only for six months and unless there was a review and the detention order was continued the detenu would have to be released. We cannot accept the contention on behalf of the respondent that the detention order would continue even after six months and the detenu may be detained under that order even thereafter without an order under r. 30A(9), continuing the order of detention. It is true that r. 30A(9) only says that the Government shall decide whether the detention order should be continued or cancelled. That however does not mean that if the government omits to make a review under r. 30A within six months the detention order will still continue and the detenu continue to be detained thereunder. The provisions in r. 30A are designed to protect the personal liberty of the citizens of this country and that is why that rule provides that every detention order shall be reviewed at an interval of not more than six months. This is a mandatory provision and if it is not complied with and the Government omits to review the detention order within six months the order must fall and the detenu must be released. Of course when the Government actually reviews the order it will either continue that order or cancel that order. That is why r. 30A(9) says that on review the Government shall decide whether the order should be continued or cancelled. But that does not mean that if for any reason (say, by oversight) the Government omits to review an order within the time provided in the first part of r. 30A(9), the detention can continue even though there has been no review. What applies to an omission to review an order under r. 30A(9) applies equally to a case where a review is not in accordance with law as held by this Court in Lakhanpal's case ([1967] 3 S.C.R. 114). Where therefore there has been no review under r. 30A(9) or a review is not in compliance with the provisions thereof, as explained in Lakhanpal's case ([1967] 3 S.C.R. 114), the result is that the original detention order though it may have been good when it was passed, falls and the detention after the first period of six months becomes illegal. Further if there is no review of the detention order in the manner provided by law, as explained in Lakhanpal's case ([1967] 3 S.C.R. 114) the original order falls after six months and there is nothing to continue thereafter. In the present cases the orders were passed in March, 1965 and should have been reviewed after every

six months in the manner explained in Lakhanpal's case ([1967] 3 S.C.R. 114). That admittedly was not done upto February. 1967, though a number of reviews were made in between. Consequently orders of detention passed in March, 1965 fell after six months and there were no orders to continue thereafter. When therefore the State Government ordered the continuance of detention orders on review on April 27, 1967 in accordance with the procedure indicated in Lakhanpal's case ([1967] 3 S.C.R. 114), there was no order to be continued because in-between the reviews were not proper and the detention had become illegal. In these circumstances, the principle laid down in Gopalan's case ([1966] 2 S.C.R. 427) cannot apply to the facts of the present cases, for we cannot ignore that between September, 1965 and April, 1967 there was no proper review as required by r. 30A(9) and the detention for all that period was illegal and could not be saved by the original order of March, 1965 which must be deemed to have come to an end after six months, in the absence of a proper review under r. 30A(9). So there was no order which could be continued on April, 1967, and therefore the petitioners would be entitled to release on that ground.

This brings us to the next question, namely, whether it is open to the State Government to pass a fresh order in the circumstances of the present cases. In this connection reliance is placed on behalf of the respondent on two cases of this Court Ujagar Singh v. The State of Punjab ([1952] S.C.R. 756) and Godavari Shamrao Parulekar v. State of Maharashtra and others ([1964] 6 S.C.R. 446). The first case was under the Preventive Detention Act (IV of 1950). In that case it was held that "if authority making an order is satisfied that the ground on which a detenu was detained on a former occasion is still available and that there was need for detention on its basis on mala fides can be attributed to the authority from the fact that the ground alleged for the second detention is the same as that of the first detention." In the latter case what had happened was that detenues were first detained under the Preventive Detention Act. Later that order was revoked and they were detained under r. 30 of the Rules and the order was served in jail. The second order of detention was apparently based on the same facts on which the first order of detention was passed. This Court held that the second order of detention was perfectly valid and its service in jail did not make the detention illegal.

These cases certainly show that a fresh order of detention can be passed on the same facts. If for any reason the earlier order of detention has to be revoked by the Government. Further we do not find anything in the Defence of India Act (hereinafter referred to as the Act) and the Rules which forbids the State Government to cancel one order of detention and pass another in its place. Equally we do not find anything in the Act or the Rules which will bar the Government from passing a fresh order of detention on the same facts, in case the earlier of detention or its continuance is held to be defective for any reason. This is of course subject to the fact that the fresh order of detention is not vitiated by mala fides. So normally a fresh order of detention can be passed on the same facts provided it is not mala fide, if for any reason the previous order of detention or its continuance is not legal on account of some technical defect as in the present cases.

This brings us to the consideration of the judgment of our brother Bhargava J. in Avtar Singh's case (W.Ps. 6S. 70, 79, 89, 92, of 1967 (decided on June 9, 1967)), to which we have already referred. Our learned brother held that where the original order of detention, as in these cases, was a good order for the first period of six months, it would not be open to the State Government to pass a fresh order of detention on the same facts after cancelling the order on the expiry of six months, for that would be going round the provisions of r. 30-A, and that the only way in which detention could be continued after the first period of six months, where a good order was originally passed, was to make a review in a proper manner as indicated in the case of Lakhanpal. ([1967] 3 S.C.R. 114) Our learned brother also seems to have held that if a review was not made in a proper manner as

indicated in Lakhanpal's case ([1967] 3 S.C.R. 114), the Government would be completely powerless and could not detain the persons concerned by a fresh order. In effect therefore our learned brother held that if a mistake is made by Government in the matter of review it could not correct it and the detenu must go free.

Now there is no doubt that if the Government resorts to the device of a series of fresh orders after every six months and thus continues the detention of a detenu, circumventing the provisions of r. 30-A for review, which, was interpreted by this Court in Lakhanpal's case ([1967] 3 S.C.R. 114), gives some protection to the citizens of this country, it would certainly be acting mala fide. Such a fresh order would be liable to be struck down, not on the ground that the Government has no power to pass but on ground that it is mala fide exercise of the power. But if the Government has power to pass a fresh order of detention on the same facts in case where the earlier order or its continuance fails for any defect, we cannot see why the Government cannot pass such fresh order curing that defect. In such a case it cannot be said that the fresh order is a mala fide order passed to circumvent r. 30-A. Take the present case itself. The Government passed the original order of detention in March, 1965. That order was good for six months and thereafter it could only continue under r. 30-A on orders passed under r. 30-A(9). The Government did pass orders under r. 30-A(9) and we cannot say in view of the judgment in Sadhu Singh's case ([1966] 1 S.C.R. 243) that the Government went wrong in the procedure for review. It was only after the judgment of this court in Lakhanpal's case ([1967] 3 S.C.R. 114) that the manner of review became open to objection, with the result that the continuance of the order in these two cases failed and the detention became illegal. If in these circumstances the Government passes a fresh order under r. 30, it cannot be said that it is doing so mala fide in order to circumvent r. 30-A(9). In actual fact the Government had complied with the provisions of r. 30-A(9) and what it did was in accordance with the judgment of this Court in Sadhu Singh's case ([1966] 1 S.C.R. 243). It is true that after Lakhanpal's case ([1967] 3 S.C.R. 114) the manner in which the review was made became defective and therefore the continuation of detention became illegal. Even so, if the Government decides to pass a fresh order in order to cure the defect which has now appeared in view of the judgment of this Court in Lakhanpal's case ([1967] 3 S.C.R. 114), it would in our view be not right to say that the Government cannot do so because that would be circumventing r. 30-A. We do not think that we should deprive the Government of this power of correcting a defect particularly in the context of emergency legislation like the Act and the Rules. The Courts have always the power to strike down an order passed in mala fide exercise of power, and we agree with Bhargava, J. to this extent that if the Government, instead of following the procedure under r. 30-A as now laid down in Lakhanpal's case ([1967] 3 S.C.R. 114) wants to circumvent that provision by passing fresh orders of detention on the same facts every six months, it will be acting mala fide and the court will have the power to strike down such mala fide exercise of power. But in cases, like the present, where the continuance became defective after the judgment of this Court in Lakhanpal's case, ([1967] 3 S.C.R. 114) we can see no reason to deny power to Government to rectify the defect by passing a fresh order of detention. Such an order in such circumstances cannot be called mala fide, and if the Government has the power to pass it - which it undoubtedly has, for there is no bar to a fresh order under the Act or the Rules - there is no reason why such a power should be denied to Government so that it can never correct a mistake or defect in the order once passed or in the continuation order once made. We are therefore of opinion that the view taken in Avtar Singh's case (W.Ps. 68, 70, 79, 89, 92 of 1967 (decided on June 9, 1967) insofar as it says that no fresh order can be passed even to correct any defect in an order continuing detention under r. 30-A(9) is not correct.

We therefore allow the writ petitions and order the release of the petitioners. But it will be open to the State Government to pass a fresh order of detention if it considers such a course necessary.

Petitions allowed.

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