SUPREME COURT OF INDIA

Avtar Singh

Vs.

State of J. and K.

Writ Petns. Nos. 68 70, 79, 89 and 92 of 1967

(V. Bhargava, J. (Vacation Judge)

09.06.1967

JUDGEMENT

BHARGAVA, J.:

1. These five writ petitions raise identical question and, having been heard together, are decided by this single judgment. For the sake of convenience, the facts of one case, in which the arguments were first advanced, may be stated. That case is of Ghulam Ahmad, petitioner in Writ Petition No. 79 of 1967. This petitioner was arrested on the 10th March 1966 and an order for his detention under R. 30 (1) (b) of the Defence of India Rules 1962 was made on the 11th March 1966. Thereafter, on two subsequent occasions, the detention order was reviewed under R. 30-A (9) of the said Rules and on the basis of these reviews, orders were passed continuing the detention. The present petition challenging this detention was moved in this Court on 18th April 1967. The main ground for challenge was that the orders of review under R. 30-A (9) were not valid, as those orders were made without giving an opportunity to the petitioner of rendering an explanation or other materials and the orders passed did not indicate the reasons for the Government arriving at the decision that it was necessary to continue the detention of this petitioner. Clearly, in accordance with the decision given by this Court in P. L. Lakhanpal v. Union of India, Writ Petn. No. 258 of 1966, D/- 7-3-1966; (AIR 1967 SC 1507) the detention of the petitioner became illegal when the

Government failed to pass a proper review order before the expiry of the first period of six months computed from 11th March, 1966, the date of the first order of detention. In Lakhanpal's case, W. P. No. 258 of 1966 D/- 7-3-1966 = (AIR 1967 SC 1507), this Court held that "whereas the function under R. 30 (1) (b) is executive, the one under R. 30-A (9) is quasi judicial and, therefore in exercising it, the rules of natural justice have to be complied with." in the judgment, the Court explained these principles of natural justice as follows :-

"It is equally obvious that the manner in which the question of continuation of detention enjoined upon by R. 30-A (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 weighing evidence brought before or collected by such authority relevant to the purposes under R. 30 (1) (b) and Rule 30-A (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 either by explanation or through other materials which he can place before the authority?"

2. In the present case, a counter-affidavit has been, filed on behalf of the State Government, but there is no assertion in that counter-affidavit that, at the time when orders for continuing the detention under R. 30-A (9)were passed, any opportunity was given to the petitioner to correct or contradict the evidence either by explanation or through other materials which be could place before the Government and that the Government arrived at the decision after considering such explanation or materials. Therefore, after the expiry of six months from 11th March 1966, the detention of the petitioner became illegal. Consequently, in April 1967, when this writ petition was moved, the petitioner was under illegal detention and he was clearly entitled to an order of release.

3. However, it appears from the counter-affidavit filed on behalf of the State Government that, subsequently, on 12th May 1967, the Government proceeded to pass two orders; one was an order cancelling the original order of detention dated 11th March 1966, and that was followed by a second order on the same date directing detention of the petitioner by a fresh order under R. 30 (1) (b). It has been urged on behalf of the State Government that the Government was competent to make a fresh order on that date under R 30 (1) (b) itself and that order need not be a quasi judicial order, so that the procedure envisaged in Lakhanpal's case, W. P. No. 258 of 1966, D/-7-3-1967 (AIR 1967 SC 1507) (supra) by this Court was not required to be followed by the Government The Government having made a fresh order under R. 30 (1) (b) and that order being in discharge of execution function, the petitioner's subsequent detention under that order must be held to be valid, so that at this time when this petition has come up for hearing the petitioner's detention is no longer illegal and he is not entitled to be released.

4. In Support of this proposition that such an order conic be validly made by the State Government reference has been made by learned counsel for the Government to the decision of this Court in

Naranjan Singh Nathawan v. State of Punjab (1) 1952 SCR 395 = (AIR 1952 SC 106), were it was held :

'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."

5. Reliance was also placed on the decision of this Court in Smt. Godavari Shamrao Parulekar v. State of Maharashtra. 1964 6 SCR 446=(AIR 1964 SC 1128), were the question arose whether the order of detention was illegal inasmuch as it was served on the detenus while they were in jail. This Court took notice of the fact that the detenus in that case were detained under the Preventive Detention, Act originally by an order of. November 7, 1962. which had been reported, to Government for approval and which order could only remain in force for twelve days under S. 3 (3) of the Preventive Detention Act, unless, in the meantime it had been approved by the State Government. The State Government, however, decided on November 10, 1962 to revoke that order of the Commissioner of Police under the Preventive Detention Act and to pass an order itself under the Defence of India Rules. After referring to the cases of Rameshwar Shaw v. District Magistrate Burdwan. AIR 1964 SC 334 and Makhan Singh Tarsikka v. State of Punjab, AIR 1964 SC 1120). this Court held that:

"in these circumstances, the principle of the two cases referred to above would not apply, for the detention of the appellants depended upon the approval of the State Government. The State Government, however, decided to revoke the order of November 7, 1962 and instead, decided to pass an order under the Rules on the same day, namely, November 10, 1962. In these circumstances, it would be in our opinion, an empty formality to allow the appellants to go out of jail or, the revocation of the order of November 7, and to serve them with the order, dated November 10, 1962 as soon as they were out of jail."

It was further held that :

"where the detention is either under the Preventive Detention Act or under the Rules, and its duration is dependent upon the will of the State Government, we cannot see any reason for holding that if the State Government decides to revoke an earlier order of detention it cannot pass a fresh order of detention the same day and serve it on the detenu in jail, for the two orders are really of the same nature and are directed towards the same purpose."

It was urged on the basis of these two decisions of this Court that, in the present case the State Government was competent to cancel the earlier order of detention, dated 11th March 1966, to pass a fresh order of detention under R. 30 (1) (b) on 12th May 1967, and to serve it on the petitioner, even though he was in jail on that date.

6. It, however, appears that the principle laid down in those two cases is not applicable to the present case, because, in the present case, the original order of detention, dated 11th March l966 was a valid order and it had completely exhausted itself when the petitioner was kept under detention for the first six months in pursuance of that order. Thereafter, any order cancelling that order, dated 11th March 1966, would be ineffective and meaningless. Further, under the scheme of the Defence of India Rules, if, without any additional grounds coming into existence, the State Government considered it necessary that the detention of the petitioner should be continued, the proper course open to the State Government was to make an order of continuation under R. 30-A (9), after reviewing the original order within the period prescribed in that Rule. The manner in which the order had to be reviewed had to be that explained in Lakhanpal's case, W. P. No. 258 of 1966, D/-7-3-1967=(AIR 1967 SC 1507) (supra). The State Government failed to review the order in that manner and the detention consequently became illegal on the expiry of six months from 11th March 1966. On 12th May 1967, a fresh order of detention on identical grounds, on which the earlier order, dated 11th March 1966 had been made, could not be passed justifiably because that earlier order, dated 11th March 1966 was a valid order and had already taken ful1 effect. A fresh order could have been made only if additional grounds had come into existence, though after taking into consideration the earlier grounds also which were the basis of the original order of detention. If there were no fresh or additional grounds which came into existence after 11th March 1966, the making of another fresh order under Rule 30 (1) (b) would really amount to a subterfuge adopted for the purpose of getting round the provisions of R. 30-A (9) under which an order of continuation of detention had to be made and that order had to be a quasi judicial order and not merely an executive order. By purporting to act under R. 30 (1) (b) and passing a fresh order under it, the State Government obviously deprived the petitioner of the right of tendering an explanation or supplying materials to show that there was no justification for continuing his detention. In fact, if it were to be held that the State Government could validly make a fresh order under R. 30 (1) (b) on the same materials, on which the order, dated 11th March 1966 was made, after that order had already taken full effect, the result would be that in every case it would be open to the Government to keep on making repeated orders under R. 30 (1) (b) on the expiry of six months from each order in the case of the same detenu and, thus, avoid the requirement of making a quasi judicial order under R. 30-A (9) As a consequence, the detenu would never get an opportunity of either submitting an explanation or supplying materials to satisfy the Government that there was no justification for further continuing his detention. In these circumstances, it has to be held that the present case is distinguishable from the two cases cited above.

7. Learned counsel drew my attention to the views expressed by this Court in Ujagar Singh v. State of Punjab, 1952 SCR 756 = (AIR 1952 SC 350), to the following effect :-

Let us now turn our attention to the main contentions. There is nothing strange or surprising in the

fact that the same grounds have been repeated after the lapse of several months In both the cases, when it is remembered that the petitioners were under detention and in jail during the whole of the intervening period. No fresh activities could be attributed to them. There could only be a repetition of the original ground or grounds, whether good or bad. It does not follow from this that the satisfaction of the detaining authority was purely mechanical and that the mind did not go with the pen. The past conduct or antecedent history of a person can be taken into account when making a detention order, and, as a matter of fact, it is largely from prior events showing the tendencies or indications of the man that an inference could be drawn whether he is likely even in the future to act in a manner prejudicial to the maintenance of public order. If the authority satisfied himself that the original ground was still available and that there was need for detention on its basis, no male fides can be attributed to the authority from this fact alone."

Relying on this principle laid down by this Court, it was urged by learned counsel that, in the present case also, no inference could be made that the fresh order under R. 30 (1) (b) for detention of the petitioner was mala fide and, consequently, it should not be held that it is liable to be vacated. The question of applying these views to the present case does not arise, because there is no allegation that the fresh order made against the petitioner under R. 30 (1) (b) amounted to exercise of power mala fide. The ground on which that order has to be held to be invalid is entirely different. That ground is that, even though the Government may not have acted deliberately with the purpose of depriving the petitioner of his rights, the effect of that order at least is that he, in fact, is prejudiced inasmuch as he does not get an opportunity at all to submit an explanation or place other materials to correct or contradict the evidence on the basis of which the Government would have been required to make an order of continuation under R. 30-A (9). By proceeding under R. 30 (1) (b) instead of R. 30-A (9), which is the Rule under which, according to the scheme of the Rules, the Government should have proceeded, the Government has rendered R. 30-A (9) ineffective. This procedure necessarily results in substantial prejudice to the petitioner. It is not a question of a mere formality or technical defect. The right envisaged by this Court in Lakhanpal's case, W. P. No. 258 of l966, D/- 7-3-1967 = (AIR 1967 SC 1507) (supra) accruing to a detenu, when his case is reviewed and an order of continuation of detention is made, is a valuable right and its deprivation will amount to material prejudice. In these circumstances, if the Government had, in fact, adopted the course of giving an opportunity to the petitioner to correct or contradict the evidence existing against him either by explanation or through other materials which he could place before the Government, and had then proceeded to make an order under R. 30 (1) (b), no such objection could have been taken, because it would have been a question of mere technicality that the order being made by the Government was one of a fresh detention under R. 30 (1) (b) instead of an order of continuation under R. 30-A(9). The question whether, after affording such an opportunity, the Government could have validly made an order of continuation under R. 30-A (9) is already under consideration of this Court in two petitions which are to come up for hearing after the vacation, and, consequently, I refrain from expressing any opinion on it. It does, however, appear to me that, if the Government had given the requisite opportunity to the petitioner and had then proceeded to make the order under R. 30 (1) (b), no objection of substantial prejudice could have been taken on the ground of not proceeding under R. 30-A (9). Further, there might not have been any technical defect also, because the order under R. 30 (1) (b) could then be made on the basis of the material which already existed before the Government and which could lead the Government to form the opinion that the detention of the petitioner was necessary even after taking into account the explanation or the materials supplied by him. The order made under R. 30 (1) (b) completely ignoring the purpose and object of R. 30-A(9) must, in these circumstances, be held to be in contravention of the scheme

of the Defence of India Rules and, consequently, must be struck down as invalid, so that the detention of the petitioner is not legalised by this fresh order under R. 30 (1) (b).

8. The cases of the remaining four petitioners only differ from the case of Ghulam Ahmad with regard to the dates of the original orders of detention under R. 30 (1) (b), the dates of invalid orders of continuation under R. 30-A (9) made in their cases without complying with the requirements indicated in Lakhanpal's case, W. P. No. 258 of 1966, D/- 7-3-1967 - (AIR 1967 SC 1507) (supra), and in some cases the dates on which fresh orders under R. 30(1)(b) were made. These differences are, however, not at all material to the question of validity of the fresh detention orders made in their cases; and the principle which I have laid down in the case of Ghulam Ahmad, consequently, fully applies to their cases also. As a result, all these petitions are allowed, the fresh orders of detention made against the five petitioners under R. 30 (1) (b) are held to be invalid and it is ordered that they be released forthwith, as they are being detained without authority of law. Learned counsel for the petitioners made a prayer that copies of this judgment may be sent individually to the various detenus. Let copies be sent as early as possible through the Superintendents of the jails where the petitioners are being detained, as prayed by learned counsel.

Petitions allowed.