

Sk. Abdul Karim and Others

Vs

State of West Bengal

Writ Petition No. 327 of 1968

(J.C. Shah, V. Ramaswami - I, A.N. Grover JJ)

31.01.1969

JUDGMENT

RAMASWAMI, J. -

1. In this case the petitioners have obtained a rule calling upon the respondent, viz., the State of West Bengal, to show cause why a writ of habeas corpus should not be issued under Article 32 of the Constitution directing their release from detention under orders passed under Section 3(2) of the Preventive Detention Act, 1950 (Act IV of 1950), (hereinafter called the Act). Cause has been shown by Mr. Debabrata Mukherjee and other counsel on behalf of the respondent to whom notice of the rule was ordered to be given.

2. At the conclusion of the hearing of this petition on 15th January, 1969, we directed the release of these petitioners and said that the reasons would be furnished later. We shall now proceed to state those reasons.

3. As regards petitioner No. 2, Sk. Abdul Karim, the order of detention was made on 17th February, 1968, by the District Magistrate of Hooghly and read as follows :

##No. 230-C Dated 17-2-1968##

Whereas I am satisfied with respect to the person known as Sk. Abdul Karim, son of late Sk. Nasiruddin of Mathurdangi, Police-station Chanditala, District Hooghly, that with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies and services essential to the community, it is necessary so to do. I therefore in exercise of the powers conferred by Section 3(2) of the Preventive Detention Act, 1950, make this order directing that the said Sk. Abdul Karim be detained.

Given under my hand and seal of office.

(Sd.) Illegible 17-2-68 District Magistrate, Hooghly.##

On the same date the following grounds of detention were communicated to the detenu :

"1. You are being detained in pursuance of a detention order made under sub-section (2) of Section 3 of the Preventive Detention Act, 1950 (Act IV of 1950), on the following grounds :

2. That on 2-2-68 at 19.05 hours you were arrested while carrying 60 kgs. of rice without authority from Dankuni Bazar towards Dankuni Rly. Station with a view to despatch the same by train into the statutory rationing areas of Calcutta and Howrah.

(a) That on 9-2-68 at 14.00 hrs. you were found to detain at Dankuni Rly. Station with a bag containing one maund of rice from Burdwan-Howrah local train.

(b) That on 10-2-68 to 13.55 hrs. you with 2/3 other smugglers were found to carry rice 20 kgs. each, by train from Dankuni Rly. Station towards Sealdah and you all detained at Baranagore off side platform with unauthorised stocks of rice.

(c) That on 11-2-68 at 08.45 hrs. you with other smugglers were found carrying 15 kgs. of rice each by train towards Howrah from Dankuni Rly. Station.

3. You are hereby informed that you may make a representation to the State Government, as early as possible, on receipt of the detention order and that such representation should be addressed to the Asst. Secy. to the Government of West Bengal, Home Deptt., Special Section, Writers' Buildings, Calcutta, and forwarded through the Superintendent of the Jail in which you are detained.

4. You are also informed that under Section 10 of the Preventive Detention Act, 1950 (Act IV of 1950), the Advisory Board shall hear you in person and if you desire to be so heard by the Advisory Board, you should intimate such desire in your representation to the State Government.

(Sd.) Illegible 17-2-68 District Magistrate, Hooghly.###

On 21st February, 1968, Sk. Abdul Karim made a representation to the State Government against the order of detention.

4. On 22nd April, 1968, the Advisory Board made a report under Section 10 of the Act stating that there was sufficient cause for detention of Sk. Abdul Karim. On 24th July, 1968, the Governor of West Bengal confirmed the detention order under Section 11(1) of the Act.

5. Section 3 of the Act provides :

"3. (1) The Central Government or the State Government may -

(a) If satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to -

(i) the defence of India, the relations of India with foreign powers or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community, or

(b) if satisfied with respect to any person who is a foreigner within the meaning of

the Foreigners Act, 1946 (XXXI of 1946), that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary so to do, make an order directing that such person be detained.

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4. When any order is made or approved by the State Government under this section, the State Government shall, as soon as may be, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as in the opinion of the State Government having bearing on the necessity for the order."

Sub-sections (2) and (3) of this section empower the District Magistrate, Sub-Divisional Magistrate or the Commissioner of Police in a Presidency Town to exercise the power conferred by and make the order contemplated in sub-section (1), but with the qualification that any order made thereunder must be reported forthwith to the Government of the State to which the officer in question is subordinate with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the necessity for the order. Sub-section (3) further provides that no such order made after the commencement of the Preventive Detention (Second Amendment) Act, 1952, shall remain in force for more than twelve days after the making thereof unless in the meantime it has been approved by the State Government. Section 7 of Act reads :

"7. (1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but not later than five days from the date of detention, communicate to him the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government.

(2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose."

Section 8 provides for constitution of one or more Advisory Boards for the purposes of this Act. Section 9 states :

"In every case where a detention order has been made under this Act, the appropriate Government shall, within thirty days from the date of detention under the order, place before the Advisory Board constituted by it under Section 8 the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer, also the report by such officer, under sub-section (3) of Section 3."

Section 11 enacts :

"11. (1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.

(2) In any case where the Advisory Board has reported that there is in its opinion no

sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith."

Section 11-A states :

"11-A. (1) The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under Section 11 shall be twelve months from the date of detention.

(2) Notwithstanding anything contained in sub-section (1) every detention order which has been confirmed under Section 11 before the commencement of the Preventive Detention (Second Amendment) Act, 1952 shall, unless a shorter period is specified in the order, continue to remain in force until the 1st day of April, 1953, or until the expiration of twelve months from the date of detention, whichever period of detention expires later.

(3) The provisions of sub-section (2) shall have effect notwithstanding anything to the contrary contained in Section 3 of the Preventive Detention (Amendment) Act, 1952 (XXXIV of 1952), but nothing contained in this section shall affect the power of the appropriate Government to revoke or modify the detention order at any earlier time."

Section 13 provides for revocation of a detention order and reads as follows :-

"13. (1) Without prejudice to the provisions of Section 21 of the General Clauses Act, 1897 (X of 1897), a detention order may at any time be revoked or modified -

(a) notwithstanding that the order has been made by an officer mentioned in the sub-section (2) of Section 3, by the State Government to which that officer is subordinate or by the Central Government; and

(b) notwithstanding that the order has been made by a State Government or by the Central Government.

(2) The revocation or expiry of a detention order shall not bar the making of a fresh detention order under Section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Central Government or a State Government or an officer as the case may be, is satisfied that such an order should be made."

6. The Preventive Detention Act (Act No. 4 of 1950), was enacted by Parliament by virtue of the power conferred on it by Article 22, clause (7) of the Constitution, read with Entries 9 of List 1 and 3 of List III of the Seventh Schedule. Article 22(4), (5), (6) and (7) provides as follows :

##22. X X X X X X##

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless -

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention :

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe -

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of the Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

7. It was argued by Mr. Garg that the representations of the petitioners were not considered by the respondent Government of West Bengal, but were merely forwarded by the respondent to the Advisory Board without any consideration. It was contended that the detention of the petitioners was bad in law, because there was a failure on the part of the Government to consider the representations submitted by the petitioners before forwarding them to the Advisory Board. In the first counter-affidavit of the respondent it was asserted by Mr. Monoranjan Dey that "there was no requirement of law which compelled the consideration by the State Government of the detenu's representation before being forwarded to the Advisory Board for consideration". In the second counter-affidavit Mr. Monoranjan Dey said that "for securing an unprejudiced and impartial consideration of the representation of the petitioner by an independent Statutory Authority, the State Government refrained at that stage from expressing its views on the representations to the Advisory Board". The counter-affidavits of the respondent are somewhat vague and the allegation of the petitioner has not been categorically denied. Mr. Debabrate Mukherjee, however, said in the course of argument that the case may be decided on the footing that the representations were not considered by the State Government before sending them to the Advisory Board. It was contended on behalf of

the respondent that there was no obligation on the State Government to consider the representations since the Advisory Board had been constituted under Section 8 of the Act to consider the case of the detenu and to report to the State Government whether there was sufficient cause for their detention. The question involved in this case depends upon the construction of Article 22(5) of the Constitution which has already been reproduced.

8. Though the Constitution has recognised the necessity of laws as to preventive detention, it has also provided certain safeguards to mitigate their harshness by placing fetters on the legislative power conferred on this topic. Article 22 lays down the permissible limits of legislation empowering preventive detention. Article 22 prescribes the minimum procedure that must be included in any law permitting preventive detention and if such requirements are not observed the detention infringes the fundamental right of the detenu guaranteed under Article 21 and 22 of the Constitution. The said requirements are : (1) that no law can provide for detention for a period of more than three months unless the sufficiency for the cause of the detention is investigated by an Advisory Board within the said period of three months; (2) that the State law cannot authorise detention beyond the maximum period prescribed by Parliament under the powers given to it in Article 22, clause (7); (3) that Parliament also cannot make a law authorising detention for a period beyond three months without the intervention of an Advisory Board unless the law conforms to the conditions laid down in clause (7) of Article 22; (4) provision has also been made to enable Parliament to prescribe the procedure to be followed by Advisory Boards. Apart from those enabling and disabling provision certain procedural rights have been expressly safeguarded by clause (5) of Article 22. A person detained under a law of preventive detention has a right to obtain information as to the grounds of detention and has also the right to make a representation protesting against an order of preventive detention. Article 22(5) does not expressly say to whom the representation is to be made and how the detaining authority is to deal with the representation. But it is necessarily implicit in the language of Article 22(5) that the State Government to whom the representation is made should properly consider the representation as expeditiously as possible. The constitution of an Advisory Board under Section 8 of the Act does not relieve the State Government from the legal obligation to consider the representation of the detenu as soon as it is received by it. On behalf of the respondent, it was said that there was no express language in Article 22(5) requiring the State Government to consider the representation of the detenu. But it is a necessary implication of the language of Article 22(5) that the State Government should consider the representation made by the detenu as soon as it is made, apply its mind to it and, if necessary, take appropriate action. In our opinion, the constitutional right to make a representation guaranteed by Article 22(5) must be taken to include by necessary implication the constitutional right to a proper consideration of the representation by the authority to whom it is made. The right of representation under Article 22(5) is a valuable constitutional right and is not a mere formality. It is, therefore, not possible to accept the argument of the respondent that the State Government is not under a legal obligation to consider the representation of the detenu or that the representation must be kept in cold storage in the archives of the Secretariat till the time or occasion for sending it to the Advisory Board is reached. If the view point contended for by the respondent is correct, the constitutional right under Article 22(5) would be rendered illusory. Take for instance a case of detention of a person on account of mistaken identity. If the order of detention has been made against A and a different person B is arrested and detained by the police authorities because of similarity of names or some such cause, it cannot be reasonably said that the State Government should wait for the report of the Advisory Board before releasing the wrong person from detention. It is obvious that apart from the procedure of reference to the Advisory Board, the State Government has ample power under Section 13 of the Act to revoke any order of detention at any time. If the right of representation is such a case is to be real and not illusory, there is a legal

obligation imposed upon the State Government to consider the representation and to take appropriate action thereon. Otherwise the right of representation conferred by Article 22(5) of the Constitution would be rendered nugatory. The argument of Mr. Debabrata Mukherjee as regards the construction of Article 22(5) cannot also be correct for another reason. Under Article 22, clause (4) of the Constitution, it is open to Parliament to make a law providing for preventive detention for a period of less than three months without the cause of detention being investigated by an Advisory Board. It is clear that the right of representation conferred by clause (5) of Article 22 does not depend upon the duration of period of detention. Even if the period of detention is less than three months, the detenu has a constitutional right of representation. It is also important to notice that under Article 22(7) Parliament may by law prescribe the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board. It cannot possibly be argued that if Parliament makes a law contemplated by Article 22(7) of the Constitution, the detaining authority is under no legal obligation to consider the representation made by the detenu under Article 22(5).

9. Faced with this difficulty counsel on behalf of the respondent conceded that in a case where the detention is for a period of less than three months or in a case contemplated by Article 22(7), the State Government will be legally obliged to consider the representation of the detenu. But it was suggested that in a case where a reference has to be made to the Advisory Board it was not necessary for the State Government to consider the representation. We are unable to accept this argument as correct. There is no such dichotomy in the scheme of Article 22(5) of the Constitution and there is no reason why it must be interpreted in a different manner for the two classes of detenues. It is manifest that the right under Article 22(5) to make a representation has been guaranteed independent of the duration of the period of detention and irrespective of the existence or non-existence of an Advisory Board. The constitution of an Advisory Board for the purpose of reporting whether a person should or should not be detained for a period of more than three months is a very different thing from a right of consideration by the State Government whether a person should be detained even for a single day. The obligation of the detaining authority to consider the representation is different from the obligation of the Advisory Board to consider the representation later on at the time of hearing the reference. It follows, therefore, that even if reference is to be made to the Advisory Board under Section 9 of the Act, the appropriate Government is under legal obligation to consider the representation of the detenu before such a reference is made.

10. In the present case, Sk. Abdul Karim has alleged that his representation was not considered by the State Government before it was forwarded to the Advisory Board. This allegation is not controverted in the counter-affidavit filed on behalf of the respondent. What is at stake in this case is the issue of personal freedom which is one of the basic principles of a democratic State. A predominant position and role is given in our Constitution to human personally and human freedom as the ultimate source of all moral and spiritual values. Preventive detention is a serious invasion of personal liberty, and, therefore, the Constitution has provided procedural safeguards against the improper exercise of the power of preventive detention. All the procedural requirements of Article 22 are in our opinion mandatory in character and even if one of the procedural requirements is not complied with, the order of detention would be rendered illegal. Accordingly, the order of detention, dated 17-2-1968, made against petitioner No. 2, Sk. Abdul Karim and the subsequent order of the Governor of West Bengal, dated 24th April, 1968, confirming the order of detention must be held to be illegal and ultra vires and petitioner No. 2, Sk. Abdul Karim was entitled to be released.

11. In the case of petitioners No. 5, Nimal Chandra Jana, No. 6 Sk. Ibrahim and No. 8 Nur Mohd.

the order of detention suffers from the same legal defect as the order of detention in the case of petitioner No. 2, Sk. Abdul Karim. For the reasons already stated we hold that the order of detention and the order of confirmation under Section 11 of the Act in the case of petitioners Nos. 5, 6 and 8 were also illegal and ultra vires and the petitioners were consequently entitled to be released.

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