

Anwar

Vs

The State of Jammu and Kashmir

Writ Petition No. 131 of 1970

(I. D. Dua JJ)

07.07.1970

JUDGMENT

DUA, J. -

1. The petitioner, Anwar alias Raldu Son of Basawa Batwal, resident of Nathu Pora, District Sialkot (West Pakistan), forwarded to this Court his application date March 11, 1970, from Central Jail, Jammu, where he was being detained, praying for a writ in the nature of habeas corpus for his production in this Court to enable him to challenge his detention. In the application it was asserted inter alia that the petitioner had been brought from Pakistan to the State of Jammu and Kashmir by his uncle Shri Dosa, son of Jumma, who was working for Indian Intelligence. The petitioner had crossed the cease-fire line and come to India for the purpose of taking to Pakistan the necessities of life. His uncle who was inimical towards him got him arrested after he had crossed the cease-fire line on the basis of the allegation that the petitioner was a smuggler and had opium on his person. The petitioner was thereafter convicted and sentenced. His sentence expired in January, 1970. After his release he was again arrested. His sentence after his re-arrest was challenged in his application.

2. In the return it was sworn by Shri A. K. Hamdani, Under Secretary, Home Department, Jammu and Kashmir State, that the petitioner had been detained on January 30, 1970, pursuant to an order dated January 27, 1970. The petitioner was duly informed of the grounds of his declaration and also of his right to make a representation. He, however, made no representation. His case was referred to the Advisory Board and the opinion of the Board was being awaited. The petitioner, according to the return, had been detained earlier and on the expiry of two years of detention he was re-arrested with the object of making arrangements for his expulsion from the State of Jammu and Kashmir.

3. On June 9, 1970, this case was heard by the Vacation Judge (Ray, J.) and time was granted to the petitioner up to June 23, 1970, for filing a rejoinder to the return. On June 15, 1970, the State filed an application stating that the order of the petitioner's detention had since been revoked and that the petitioner had been ordered on June 9, 1970, to leave India within ten days. This application came up for hearing on June 16, 1970, when the State took time for producing the orders or revocation of the detention order and, of the petitioner's deportation. The case was accordingly adjourned to June 18, 1970, when by means of a short order the writ petition was dismissed and the petitioner was permitted to be sent out of India. I now proceed to give reasons for the order.

4. The petitioner is not a citizen of India. He is, therefore, a foreigner as defined in the Foreigners Act. Not being a citizen, he is clearly not entitled to any fundamental right guaranteed by Article 19 of the Constitution. He has thus no right to remain within the territories of India. His entry into this country was also within any right and indeed he himself does not claim to have entered into India in

accordance with the provisions of the Foreigners Act and the Orders made thereunder. The only rights which he can claim in the present proceedings are those contained in Articles 20 to 22. The order dated January 27, 1970, reads as under :

"Whereas Anwar alias Raldu s/o Basawa Batwal r/o Nathuropa District Sialkot presently in the State is a foreigner within the meaning of the Foreigners Act, 1946, and

Whereas the Government is satisfied that with a view to making arrangements for his expulsion from the State, it is necessary to do so;

Now, therefore, in exercise of the powers conferred by Section 3(1)(b) read with Section 5 of the Jammu and Kashmir Preventive Detention Act, 1964, the Government hereby direct that the said Anwar alias Raldu be detained in the Central Jail, Jammu, subject to such conditions as to maintenance, discipline and punishment for breaches of discipline as have been specified in the Jammu and Kashmir Detenus (General) Order, 1968."

5. This order was made in exercise of the powers conferred by Section 3(1)(b) read with Section 5 of the Jammu and Kashmir Preventive Detention Act, 1964. The Government felt satisfied that the petitioner who was a foreigner within the meaning of the Foreigners Act (Act 31 of 1946), should be expelled from the State of Jammu and Kashmir and it was with a view to making arrangements of his expulsion that it was considered necessary to detain him. It appears that in the opinion of the authorities making the order it was necessary to give to the petitioner an opportunity of making a representation to the Government against the order of detention. In order to give this opportunity, on February 4, 1970, the grounds of detention were disclosed to the petitioner and he was further informed that if he so desired he could make a representation to the Government. It may be recalled that according to the return he was actually detained on January 30, 1970, though the order of detention had been made on the 27th of that month. The petitioner, without making any representation, apparently sent the present application to this Court through the jail authorities at Jammu. On April 9, 1970, this Court directed a rule nisi to issue in his case along with some other cases. Apparently, the State authorities did not consider it proper to take any further steps for implementing the orders of the petitioner's expulsion because this Court had been seized of the habeas corpus proceedings. According to the application dated June 15, 1970, the order of detention was revoked on June 9, 1970, with the result that the habeas corpus petition assailing that order must be considered to have become infructuous. The question naturally arose if this Court should order the petitioner's release forthwith on account of the revocation of the impugned order of detention or it should dismiss the writ petition as infructuous and send the petitioner back to Jammu to be released from the detention under the order dated January 27, 1970 and leave it to the Government to deal with the petitioner in accordance with law. The petitioner not being a citizen of India obviously had no right to leave India by June 19, 1970. The order of deportation may at this stage be reproduced :

"In exercise of the powers conferred by clause (c) of sub-section (2) of Section 3 of the Foreigners Act, 1946 (Act No. XXXI of 1946), read with Ministry of Home Affairs Notification issued under S.O. 590, dated April 19, 1958, the Government of Jammu and Kashmir hereby direct that the persons named below who are foreigners shall not remain in India and shall leave India within ten days from the date of this order :

"1. Anwar alias Raldu son of Basawa Batwal, resident of Nathpora District Sialkot.
.....".

This order has to be read with the Ministry of Home Affairs Notification issued under S.O. 590, dated April 19, 1958. That notification is in the following terms :

"In exercise of the powers conferred by clause (1) of Article 258 of the Constitution and all other powers enabling him in this behalf and in supersession of all previous notifications on the subject in so far as they relate to the Act, rules and orders hereinafter mentioned, the President with the consent of the State Government concerned hereby entrusts to the Government of each of the States of A.P., Assam, Bihar, Bombay, J. and K., Kerala, M.P., Madras, Mysore, Orissa, Punjab, Rajasthan, U.P. and West Bengal the functions of the Central Government,

(1) under Section 5 of the Indian Passports Act, 1920 (34 of 1920),

(2) under Rules 2 and 4 of the Indian Passports Rules, 1950,

(3) under Rule 3 of the Registration of Foreigners Rules, 1939,

(4) in making orders of the nature specified in clauses (c), (cc), (d), (e) and (f) of sub-section (2) of Section 3 of the Foreigners Act, 1946 (31 of 1946), and

(5) under the Foreigners Order, 1948 subject to the following conditions, namely,

(a) that in the exercise of that function the said State Government shall comply with such general or special directions as the Central Government may from time to time issue, and

(b) that notwithstanding this entrustment the Central Government may itself exercise any of the said functions should it deem fit to do so in any case."

I have reproduced this notification because Shri H. K. Puri, the learned counsel appearing *amicus curiae* in support of the petitioner's application for habeas corpus, had raised the point that it was the Central Government alone which could make a lawful order of deportation under Section 3(2)(c) of the Foreigners Act. This notification is a complete answer to this objection because the President has under Article 258 lawfully entrusted *inter alia* to the Government of Jammu and Kashmir the function of the Central Government under Section 3(2)(c), (d), (e) and (f) of the Foreigners Act.

6. Reverting to the fundamental right claimable by the petitioner who is not a citizen of India it is clear that Article 20 of the Constitution is not attracted to this case. Article 21 merely lays down that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 22 deals with detention of persons in certain cases. In the case in hand in January, 1970, an order of detention was made under Section 3(1)(b) of the J. and K. Preventive Detention Act, which clearly empowers the Government to detain a foreigner within the meaning of the Foreigners Act with a view to *inter alia* making arrangements for his expulsion from the State. The petitioner not being a citizen of India is, as already stated, a foreigner and therefore liable to be so detained. The Government, it appears, considered it incumbent to comply with the provisions of Sections 8 to 11 of the Jammu and Kashmir Preventive Detention Act even when the petitioner was

being detained for the purpose of expelling him from India. The period fixed for the Advisory Board to submit its report had not yet expired when the petitioner, without making any representation, applied to this Court on March 11, 1970 and initiated the present proceedings. After the present application for a writ of habeas corpus was entertained by this Court, the orders in respect of his custody were subject to the control and permission of this Court and the State authorities were naturally reluctant in taking any step towards implementation of the order of expulsion, without this Court's permission. As soon as the order of detention was revoked the State Government made an order under Section 3(2)(c) of the Foreigners Act, read with the Ministry of Home Affairs Notification issued under S.O. 590, dated April 19, 1958, directing the petitioner not to remain in India and to leave India within ten days from June 9, 1970, the date of the order. Soon thereafter the State Government filed an application in this Court stating all the relevant facts. The petitioner was informed of this order and Shri Puri the learned Counsel appearing as amicus curiae actually addressed this Court on its legality after consulting the petitioner. This order appears to be consistent with the order of detention, dated January 27, 1970, which was also made with the object of expelling the petitioner from India. Since the order, dated June 9, 1970, had to be complied with by June 19, one day earlier, as already noticed, on June 18 this Court permitted the State authorities to take suitable steps for deporting the petitioner from India.

7. The question arises if in these circumstances it can be said that after the revocation of the detention order the petitioner was deprived of his personal liberty illegally or without procedure established by law so as to require this Court to order his immediate release. In *State of Punjab v. Ajaib Singh*, 1953 SCR 254 = (AIR 1953 SC 10), this Court held that physical restraint put upon an abducted woman (abducted during the partition of the undivided Punjab in 1947) in the process of recovering and taking her into custody without any allegation or accusation of any actual or suspected or apprehended commission by her of any offence of a criminal or quasi-criminal nature or of any act prejudicial to the State or the public interest and handing her over to the custody of the officer-in-charge of the nearest camp under Section 4 of the Abducted Persons (Recovery and Restoration) Act, 55 of 1949, could not be regarded as arrest and detention within the meaning of Article 22(1) and (2). In the *State of U.P. v. Abdul Samad*, AIR 1962 SC 1506, two persons (Mr and Mrs. Abdul Samad) were in Pakistan in March, 1955. In September, 1955, they obtained a Pakistani passport and came to India after securing a visa for temporary stay till December 16, 1955. They secured repeated extensions of the period of stay. In 1957 they unsuccessfully applied for their registration as Indian citizens. Against refusal to register them as Indian citizens their application under Article 226 of the Constitution also failed in 1959. The State Government then directed them to leave India. They secured several extensions of time for complying with this order. Finally on July 7, 1960 they were required to leave India within 24 hours. On their failure to do so they were taken into custody on July 21, 1960 and sent by train to Amritsar for being deported to Pakistan. They were produced before a Magistrate at Amritsar who ordered that they be kept in the Civil Lines Thana till further orders. Meanwhile an application was filed before the Lucknow Bench of the Allahabad High Court under Section 491, I.P.C., on July 25, 1960. On being informed that the two persons concerned having been sent to Amritsar were no longer within its territorial jurisdiction, the High Court recorded an order that it has no jurisdiction in the matter and that the proceedings be consigned to records. In the meantime a spurious telegram and a spurious telephone message purporting to emanate from Saxena, Under Secretary, Home Department, U.P., were received by the police at Amritsar stating that the High Court had issued orders for Mr and Mrs. Abdul Samad to be brought back to Lucknow to attend the case on July 25, 1960. Pursuant to this message Mr and Mrs. Abdul Samad were taken to Lucknow and produced before the Deputy Registrar of the High Court, but after the Court had disposed of the habeas corpus petition. They

were produced before the Deputy Registrar who directed their production in the High Court on July 26, at 10.15 a.m. An application was thereupon filed on behalf of Mr. and Mrs. Abdul Samad on July 25, 1960, to revive their earlier habeas corpus petition. A fresh habeas corpus petition was also filed on July 26, 1960, praying for their release. On July 27, 1960, the High Court passed an interim order of their release on bail on the fresh habeas corpus petition that application was ultimately allowed and Mr. and Mrs. Abdul Samad were released on the ground that after their arrival in Lucknow at 1 p.m. on July 25, 1960, they had not been produced before a Magistrate within 24 hours and this was in breach of the mandatory provisions contained in Article 22(2) of the Constitution. On appeal by the State, the Supreme Court set aside the order of the High Court and held that there was no violation of Article 22(2). In this connection it was emphasised that Mr. and Mrs. Abdul Samad had actually been produced before the High Court on July 26, 1960, within 24 hours of their arrival at Lucknow on July 25, 1960, and that they were against produced before the High Court on July 27, 1960. On both occasions they had full opportunity of representing their case. The view expressed in this decision would rule out the argument of non-compliance with Article 22(2) on the facts and circumstances of the present case.

8. As observed earlier the petitioner had no right to enter and remain within the territories of India and indeed he was bound, under the order, date June 9, 1970, to leave India by June 19, 1970. According to clause (3) of the Foreigners Order, 1948, no foreigner can enter into India -

"(a) otherwise than at such port or other place of entry on the border of India as a Registration Officer having jurisdiction at that port or place may appoint in this behalf; either for foreigners generally or for any specified class or description of foreigners; or

(b) without the leave of the civil authority having jurisdiction at such port or place."

Under clause (5) of this Order no foreigner can leave India -

"(a) otherwise than at such port or other recognised place of departure on the borders of India as the Registration Officer having jurisdiction at that port or place may appoint in this behalf either for foreigners generally or for any specified class or description of foreigners; or

(b) without the leave of the civil authority having jurisdiction at such port or place."

9. It would thus be seen that the petitioner who had illegally and clandestinely entered into India could not stay in any part of its territory. Indeed, he had to leave Indian by June 19, 1970, and this had to be done in accordance with the statutory regulations. The order of his release by this Court would, therefore, not only have resulted in his presence in a part of India in contravention of the statutory provisions but would in addition have rendered it somewhat difficult for the authorities to enforce compliance with the order of his expulsion. In those circumstances the restraint on his personal liberty for the purpose of taking him to the border in order to expel him from India in accordance with the Statutory provisions could by no means be considered to be an illegal custody justifying an order of release by this Court. While dealing with cases like the present one cannot ignore the historical fact of Pakistan's extremely hostile attitude towards the State of Jammu and Kashmir and also the fact that from the borders of the State of Jammu and Kashmir adjoining those of West Pakistan infiltrators have constantly been surreptitiously entering that part of the Indian territory for unfriendly activities which endanger maintenance of public order and security of the

State. The petitioner had on his own showing crossed the cease-fire line secretly with the object of taking out of India the necessities of life. Regulations governing the entry into and departure from India as also the presence in this country of Pakistani infiltrators from across the cease-fire line on the Jammu and Kashmir border demand strict enforcement and the claim to personal liberty made by unlawful infiltrators from Pakistan cannot be placed above the security of the country and maintenance of law and order. Habeas corpus, though a writ of right, is not a writ of course. Its scope has grown to achieve its purpose of protecting individuals against erosion of the right to be free from wrongful restraint on their rightful liberty. But when, as in the present case, the petitioner has no right to move about freely in this country without a proper legal sanction, the restraint exercised on him for expelling him from India by June 19, 1970, cannot be construed on the facts and circumstances of this case to amount to his custody being illegal so as to require this Court to direct his immediate release. The constitutional protection against illegal deprivation of personal liberty construed in a practical way cannot entitle non-citizens like the petitioner to remain in India contrary to the provisions of the law governing foreigners. It is accordingly difficult to hold that the petitioner is being illegally deprived of his right to personal liberty to stay and move about in India without restraint. The petition accordingly fails and is dismissed.

</html