Niranjansingh

Vs

State of Madhya Pradesh

Writ Petition No. 450 of 1971

(P. Jagmohan Reddy, K. K. Mathew JJ)

18.07.1972

JUDGMENT

JAGANMOHAN REDDY, J. -

1. By this application under Article 32 of the Constitution, the petitioner challenges his detention under Section 2-A of the Madhya Pradesh Public Security Act (Amendment Act) of 1970 (hereinafter called the 'Act'). The District Magistrate of Gwalior by his order, dated May 26, 1971 under the said Act thought it necessary to detain the petitioner with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. The grounds on which the detention was sought to be justified were dated the same day and appear to have been served on the detenu, though it is not apparent on what date those grounds were served on him. As he was informed by the Government that he has a right to make a representation within a period of 30 days, the petitioner says that he submitted his representation to the State Government on June 19, 1971 but here again there is nothing to show from the counter-affidavit of the respondent as to when that representation was received or on what date it was considered and rejected. The petitioner, however, alleges that his representation was dismissed on August 17, 1971 by the Governor of Madhya Pradesh relying on the recommendation of the Advisory Board. In other words, it is his contention that his representation was not considered till after the Advisory Board had given its opinion to the State Government and only then it was rejected. Whether this is so or not, we are in no position to ascertain. It was true that the Advisory Board, as appears from the order of the Governor, was of the opinion that there exist sufficient grounds for the detention of the petitioner and consequently the Government acting on that opinion confirmed the order of detention passed against the petitioner and directed that the order of detention shall remain in force till May 26, 1972. The detenu filed a Writ Petition in the High Court of Madhya Pradesh under Article 226 of the Constitution challenging the detention order on the ground that his previous conviction in 1964 could not form the basis for detention and that the other ground mentioned in the ground served on him were all vague and non-existent as on the date the detention order was passed, Jagmohan was no more. Even the ground that in May-June, 1969, four rifles of 303 bore were given to Sobran Singh for Rs. 4,000/- was also vague. This petition was, however, rejected by a Division Bench of the High Court by its judgment, dated September 18, 1971.

2. The learned advocate on behalf of the State of Madhya Pradesh, at the outset, raised a preliminary objection to the maintainability of this petition because according to him the dismissal of he petition of the detenu by the High Court under Article 226 operates as res judicata. This contention is opposed to the view taken by the this Court. In Ghulam Sarvar v. Union of India and Other ((1967) 2 SCR 271 : AIR 1967 SC 1335 : 1967 Cri LJ 1204 : (1969) 2 SCJ 531.) a Constitution Bench held that the order of the High Court does not operate as res judicata. We are not here concerned with the

different reasons given, one by Subbarao, C.J., Hidayatullah, Sikri and Shelat, JJ. and the other by Bachawat, J. for arriving at this conclusion except to state that the majority was of the view that it does not operate as res judicata as it is not a judgment and also because the principle is inapplicable to a fundamentally lawless order which this Court has to decide on merits. Bachawat, J. while substantially agreeing with this view thought that the order of the High Court is not a judgment and the previous dismissal of such a petition by the High Court is only one of the matters taken into consideration under Order 35, Rules 3 and 4 of the Supreme Court Rules before issuing a rule nisi. The petitioner, however, would not have a right to move this Court under Article 32 more than once on the same facts. In Writ Petitions Nos. 227 and 228 of 1969, decided on September 16, 1969 (Nazul Ali Molla v. State of W.B., (1969) 3 SCC 698.), a similar view as that expressed by the majority was expressed, viz., that there is no bar of res judicata to a petition under Article 32 in a case where earlier the High Court had dismissed the petition under Article 226. In view of this legal position, we reject the preliminary objection.

3. The learned advocate for the petitioner contends inter alia that since the State has not in its counter-affidavit denied the allegation made in the petition nor has it stated when it is that the representation of the petitioned was considered and dismissed, the detention is illegal inasmuch as the right to make a representation as well as to have it considered and determined is a valuable right implicit in clause (5) of Article 22. As the law relating to preventive detention, which has to conform to the limits imposed in Article 22, is a restriction on the fundamental right of the freedom of a citizen, it has necessarily to be construed in a manner which will not restrict that right to any extent greater than is necessary to effectuate the object of that provision. Clause (5) of Article 22 prescribes that :

> "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."

4. The words "afford him the earliest opportunity" in this clause have been interpreted by this Court in Abdul Karim and Other v. State of West Bengal ((1969) 3 SCR 479 : (1969) 1 SCC 433.), to imply that the State Government to whom the representation is made should properly consider it as expeditiously as possible. Nor is the constitution of an Advisory Board under Section 8 of the Act relieves the State Government from the legal obligation to consider the representation of the detenu as soon as it is received by it, and take appropriate action thereon including the revocation of the Order which it is empowered to make under Section 13 of the Act. It was further emphasised that the right under Article 22(5) to make a representation has been guaranteed and is independent of the duration of the period of detention irrespective of the existence or non existence of the Advisory Board. Even if a reference has to be made to the Advisory Board under Section 9 of the Act, the appropriate Government is under a legal obligation to consider the representation of the detenu before such a reference is made. This matter was again considered by a Constitution Bench of this Court in Jayanarayan Sukul v. State of West Bengal ((1970) 3 SCR 225 : (1970) 1 SCC 219.), which held that broadly stated, four principles are to be followed in regard to the representation of detenu.

These have been summarised in the head-note thus -

> "Firstly, the appropriate authority is bound to give an opportunity to the detenu to make a representation and to consider the representation as early as possible.

Secondly, the consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the representation of the detenu by the Advisory Board.

Thirdly, there should not be any delay in the matter of consideration. Though no hard and fast rule can be down as to the measure of time taken by the appropriate authority for consideration, it has to be remembered that the Government has to be vigilant in the governance of the citizens. The fundamental right of the detenu to have his representation considered by the appropriate Government would be rendered meaningless if the Government does not deal with the matter expeditiously but at its own sweet will and convenience.

Frothily, the appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detenu's representation to the Advisory Board. If the appropriate Government will release the detenu the Government will not send the matter to the Advisory Board. If however the Government will not release the detenu the Government will send the case along with the detenu's representation to the Advisory Board. If thereafter the Advisory Board will express an opinion in favour of release of the detenu the Government will release the detenu. If the Advisory Board will express any opinion against the release of the detenu the Government may still exercise the power to release the detenu."

These principles are now well established in their application to the detention of a citizen under any law made by a State Legislature or by the Central Parliament.

5. The next question is, whether it is incumbent upon the State in a habeas corpus petition where a rule nisi has been issued to satisfy the Court that the detention of the petitioner was legal and in conformity not only with the mandatory provisions of the Act, but it is also in accord with the requirements implicit in clause (5) of Article 22 of the Constitution. It is contended by the learned advocate for the petitioner that in a habeas corpus petition under Article 32 when a return is made by the State, it should set our the facts relied upon as constituting valid and sufficient ground of detention of persons alleged to be legally detained. The return must set forth clearly and with sufficient particularity, the facts upon which the State relies. He further contends that the consequence of an insufficiency of return would entitle this Court to declare the detention as illegal. In view of this implication, a duty is imposed upon the State to justify the detention where it is challenged before a court empowered to determine the legality or otherwise of that detention. The learned advocate on behalf of the State, however, by a reference to a decision of this Court in Arun Kumar Roy alias Katu v. State of West Bengal (Writ Petition No. 52/1972 (Decided on May 3, 1972.) to which both of us were parties) contends that Mitter, J. speaking for the Court had observed that where a detenu has not alleged that the representation has not been considered or has been considered but not expeditiously dealt with, it is not incumbent upon the Government to explain the reasons for any delay or for not disposing if of at the earliest possible time. True it is that in that case certain observations have been made to the effect that before requiring the State to explain any delay the detenu must allege that his representation was not expeditiously considered and disposed of. In that case, the representation of the detenu was received on a day before the 30 days from the date of detention of the petitioner was due to expire and as such the State had no option but to refer the case to the Advisory Board forthwith and subsequently consider that representation. In view of the delay in making the representation, the Government could not be blamed in not considering it expeditiously and once the matter was before the Board, it had no papers with it to consider that representation and arrive at a decision thereon. It was only subsequently that they were in a position to consider. It is in this context that the observations must be understood. In several cases, the delay

has been explained.....see Prof. Khaidem Ibocha Singh v. The State of Manipur (AIR 1972 SC 438 : (1972) 2 SCC 576.), and Ranjit Dam v. State of West Bengal (W.P. No. 14 of 1972, decided by Shelat and Khanna, JJ., on April 24, 1972) ((1972) 2 SCC 516.). It is contended that as the State Government does not communicate to the detenu its decision on his representation, he cannot be expected to raise any question of delay by the State Government to consider to consider his representation, nor is there anything to show on the face of an order so made, the reason or the basis on which that representation was rejected. Merely to say that it is rejected does not indicate what is it that weighed with the State Government and what materials were taken into consideration in arriving at that conclusion. This objection suggests that the order rejecting the representation should be a speaking order. In our view it is not necessary in this case to refer to or deal with any of these aspects because the petitioner has specifically given the date of his representation and the date on which he said it was considered and rejected, which on the face of it shows that there has been an inordinate delay which makes it incumbent on the State to explain it and satisfy the Court that there was justification for that delay. Since the State has not filed any counter-affidavit explaining why the representation of the detenu has not been expeditiously disposed of nor has it chosen to set out the various steps taken to comply with the mandatory provisions of the Act, the detention must be held to be illegal. We had after the hearing itself, directed the detenu to be set free. We accordingly allow the petition.

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