Vimalchand Jawantraj Jain

Vs

Shri Pradhan and Others

Writ Petition No. 146 of 1979 (Under Article 32 of the Constitution)

(P. N. Bhagwati, V. D. Tulzapurkar, R. S. Pathak JJ)

04.05.1979

JUDGMENT

BHAGWATI, J. –

1. This petition is directed against the validity of an order of detention dated November 31, 1978 made by the first respondent who is the Secretary to the Government of Maharashtra, Home Department in exercise of power conferred under sub-section (4) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the Act). The petitioner has urged several grounds before us but it is not necessary to refer to them since there is one ground which is in our opinion sufficient to dispose of the petition in favour of the petitioner. To appreciate this ground, it is necessary to state a few facts.

2. On November 13, 1978, an order was made by respondent 1 in exercise of the power conferred on him under Sub-section (1) of Section 3 of the Act directing the detention of the petitioner. Pursuant to the order of detention, the petitioner was arrested and he was immediately served with the grounds of detention which were embodied in a communication dated November 13, 1978 addressed by respondent 1 to the petitioner. The grounds of detention were quite elaborate and they alleged various smuggling activities against the petitioner and several statements and documents were referred to and relied upon in support of those allegations. The petitioner, by his advocate's letter dated November 25, 1978, requested respondent 1 to furnish copies of the statements and documents referred to and relied upon in the grounds of detention and stating that he required the same for the purpose of enabling him to make a representation against the order of detention. It seems that a copy of this letter was also sent by the petitioner to the Collector of Customs. The Assistant Secretary to the Government of Maharashtra, Home Department, informed the petitioner's advocate by his letter dated November 27, 1978 that copies of the relevant documents and statements required by the petitioner for the purpose of making a representation against the order of detention many be obtained from the Collector of Customs. The petitioner thereupon addressed his advocate's letter dated December 2, 1978 to the Collector of Customs requesting him to furnish copies of the relevant documents and statements. The Assistant Collector of Customs, however, replied by his letter dated December 6, 1978 stating that copies of the relevant documents and statements would be supplied after a show cause notice under the Customs Act, 1962 was issued to the petitioner. The petitioner was thus unable to get copies of the relevant documents and statements from the Collector of Customs. The petitioner obviously could not wait for making a representation since the period of thirty days within which a representation must be made was expiring and he, therefore, sent a representation dated December 4/9, 1978 to the Home Secretary and it was received by the Home Department on December 12, 1978. The Assistant Secretary, Home Department by his letter dated December 22, 1978 acknowledged that the representation of the

petitioner was received on December 12, 1978 and intimated that the issue regarding the supply of copies of relevant documents and statements to the petitioner was under consideration of the Government and after this issue was decided, the representation of the petitioner would be considered and a suitable reply would be given. Now it appears from the affidavit in reply filed by respondent 1 that the case of the petitioner was in the meanwhile referred to the Advisory Board and since the meeting of the Advisory Board was fixed on December 20, 1978, the representation of the petitioner was forwarded to the Advisory Board for its consideration. The Advisory Board reported to respondent 1 that in its opinion there was sufficient cause for the detention of the petitioner and this report was received by respondent 1 on January 6, 1979. Respondent 1,after considering the report of the Advisory Board, made an order dated January 15, 1979 confirming the detention of the petitioner.

3. The petitioner on these facts contended that the order confirming the detention of the petitioner was passed by respondent 1 without considering the representation of the petitioner and the detention of the petitioner was, therefore, unlawful as being in contravention of Article 22(5) of the Constitution. This contention has in our opinion great force and it must result in invalidation of the detention of the petitioner. It is now settled law that the power to preventively detain a person cannot be exercised except in accordance with the constitutional safeguards provided in clauses (4) and (5) of Article 22 and if any order of detention is made in violation of such safeguards, it would be liable to be struck down as invalid. It is immaterial whether these constitutional safeguards are incorporated in the law authorising preventive detention, because even if they are not, they would be deemed to be part of the law as a superimposition of the Constitution which is the supreme law of the land and they must be obeyed on pain of incalidation of the order of detention. Respondent 1 was, therefore, bound to observe the constitutional safeguards provided inter alia in clauses (4) and (5) of Article 22 in detaining the petitioner. We are concerned in this case only with a complaint of violation of the provisions of clause (5) of Article 22 and that clause reads as follows :

> 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.

This Court explained the true meaning and import of this clause in Khudiram Das v. State of W. B. ((1975) 2 SCC 81 : 1975 SCC (Cri) 435 : AIR 1975 SC 550) (SCC p. 87, para 5) :

> The constitutional imperatives enacted in this article are two-fold : (1) the detaining authority must, as soon as may be, that is, as soon as practicable after the detention, communicate to the detenu the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detenu the earliest opportunity of making a representation against the order of detention. These are the barest minimum safeguards which must be observed before an executive authority can be permitted to preventively detain a person and thereby drown his right of personal liberty in the name of public good and social security.

It will, therefore, be seen that one of the basic requirements of clause (5) of Article 22 is that the authority making the order of detention must afford the detenu the earliest opportunity of making a representation against the order of detention. Now this requirement would become illusory unless there is a corresponding obligation on the detaining authority to consider the representation of the detenu as early as possible. It could never have been the intention of the constitution-makers that the

detenu should be given the earliest opportunity of making a representation against the order of detention but the detaining authority should be free not to consider the representation before confirming the order of detention. That would render the safeguard enacted by the constitution-makers meaningless and futile. There can, therefore, be no doubt that the constitutional imperative enacted in clause (5) of Article 22 requiring the earliest opportunity to be afforded to the detenu to make a representation carries with it by necessary implication a constitutional obligation on the detaining authority to consider the representation as early as possible before making an order confirming the detention. The detaining authority must consider the representation of the detenu and come to its own conclusion whether it is necessary to detain him. If the detaining authority takes the view, on considering the representation of the detenu, that it is not necessary to detain him, it would be wholly unnecessary for it to place the case of the detenu before the Advisory Board. The requirement of obtaining opinion of the Advisory Board is an additional safeguard over and above the safeguard afforded to the detenu of making a representation against the order of detention. The opinion of the Advisory Board even if given after consideration of the representation is no substitute for the consideration of the representation by the detaining authority. This Court pointed out in Khairul Haque v. State of W. B. (W.P. 246 of 1969, dec. on Sep. 10, 1969) :

> It is implicit in the language of Article 22 that the appropriate Government, while discharging its duty to consider the representation, cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. There was, therefore, no reason for the Government to wait for considering the petitioner's representation until it had received the report of the Advisory Board, as laid down in Sk. Abdul Karim v. State of W. B. ((1969) 1 SCC 433 : AIR 1969 SC 1028), the obligation of the appropriate Government under Article 22 (5) is to consider the representation made by the detenu as expeditiously as possible. The consideration by the Government of such representation has to be, as aforesaid, independent of any opinion which may be expressed by the Advisory Board.

The fact that Article 22(5) enjoins upon the detaining authority to afford to the detenu the earliest opportunity to make a representation must implicitly mean that such representation, must, when made, be considered and disposed of as expeditiously as possible, otherwise, it is obvious that the obligation to furnish the earliest opportunity to make a representation loses both its purpose and meaning.

4. There are thus two distinct safeguards provided to a detenu; one is that his case must be referred to an Advisory Board for its opinion if it is sought to detain him for a longer period than three months and the other is the should be afforded the earliest opportunity of making a representation against the order of detention and such representation should be considered by the detaining authority as early as possible before any order is made confirming the detention. Neither safeguard is dependent on the other and both have to be observed by the detaining authority. It is no answer for the detaining authority to say that the representation of the detenu was sent by it to the Advisory Board and the Advisory Board has considered the representation and then made a report expressing itself in favour of detention. Even if the Advisory board has made a report stating that in its opinion there is sufficient cause for the detention, the State Government is not bound by such opinion and it may still, on considering the representation of the detenu or otherwise, decline to confirm the order of detention and release the detenu. The detaining authority is, therefore, bound to consider the representation of the detenu on its own and keeping in view all the facts and circumstances relating to the case, come to its own decision whether to confirm the order of detention or to release the

detenu.

5. Here in the present case, the representation of the petitioner was received by the Home Department on December 12, 1978 and it was immediately forwarded to the Advisory Board because the meeting of the Advisory Board was fixed on December 20, 1978. The report of the Advisory Board stating that in its opinion there was sufficient cause for the detention of the petitioner was received by respondent 1 on January 6, 1979 and on the basis of this report, respondent 1 confirmed the order of detention on January 15, 1979. There is nothing on the record to show that respondent 1 considered the representation of the petitioner before making the order confirming the detention of the petitioner. We do not find anywhere in the affidavit of respondent 1 in reply to the petition any statement that he considered the representation of the petitioner before making the order of confirmation dated January 15, 1979. On the contrary, there is a positive statement in paragraph 16 of this affidavit that the detention order was confirmed after consideration of the report of the Advisory Board which was of the opinion that the detention should be continued. We called upon the learned advocate appearing on behalf of respondent 1 to place before us the file relating to the detention of the petitioner and when this file was shown, we found that there was an endorsement made on March 12, 1979 which showed that it was only on that date that the representation of the petitioner was considered by respondent 1 and rejected. This is also borne out by the letter dated March 12, 1979 addressed by the Deputy Secretary, Home Department to the petitioner stating that the representation was considered by the "Advisory Board/Government" and his request for release from detention could not be granted. It is, therefore, amply clear from the record that the representation of the petitioner was not considered by respondent 1 before he confirmed the order of detention. Respondent 1 thus failed to comply with the constitutional obligation imposed upon him under clause (5) of Article 22. The subsequent consideration and rejection of the representation could not cure the invalidity of the order of confirmation. The detention of the petitioner must, therefore, be held to be illegal and void.

6. These were the persons for which we made our order dated April 11, 1979 quashing and setting aside the detention of the petitioner and directing that the petitioner be set at liberty forthwith.

</html