Smt. Pushpa

Vs

Union of India and Others

Writ Petition No. 329 of 1979

(D. A. Desai JJ)

31.05.1979

JUDGMENT

DESAI, J. –

1. This petition under Article 32 of the Constitution for a writ of habeas corpus is filed by Smt. Pushpa describing herself as the wife of Shri Pala Singh, son of Shri Sarwan who has been detained by an order made by the third respondent, Chief Secretary, Delhi Administration, on January 27, 1979 under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ('COFEPOSA' for short).

2. Validity of the detention of the detenu has been questioned inter alia on the following grounds :

> 1. Two representations dated February 23 and March 27, 1979 made by the detenu have been dealt with and rejected by Chief Secretary who was not competent to reject the same as the representations, if any, by the detenu have to be dealt with and decided by the appropriate Government which in the instant case would imply the Administrator of the Union Territory of Delhi, viz. Lt. Governor.
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> 2. The order confirming the detention of the detenu after obtaining the opinion of the Advisory Board is invalid as the same has been confirmed beyond the prescribed period of three months, the delay being of three days.
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> 3. The constitutional right of the detenu to make a representation was seriously undermined because of the inordinate delay in complying with the request of the detenu for copies of the documents from February 9 to March 9, 1979.
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> 4. Rejection of the representation dated February 23, 1979 after an unreasonable delay is violative of Article 22 of the Constitution and, therefore, the order of detention is vitiated.
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> 5. Presumably the second representation dated March 27, 1979 made by the detenu was not placed before the Advisory Board with the comments of the State Government and any action taken pursuant to the opinion of the Advisory Board would, therefore, be bad in law.
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> 6. An incorrect belief entertained by the detaining authority that the detenu was Pakistani national, unwarranted in the facts and circumstances of the case, has

resulted in the detaining authority's decision being influenced by an extraneous, irrelevant and incorrect consideration which would vitiate the order of detention.

3. Before dealing with the contentions seriatim a few relevant dates may be noticed.

4. The detenu was arrested on December 31, 1978 and was produced before the Magistrate on January 2, 1979 when he was remanded to custody. While he was in Jain custody, a detention order dated January 27, 1979 made by the third respondent, Chief Secretary to Delhi Administration was served upon him. The grounds of detention signed by the detaining authority were also served upon him on January 30, 1979. Learned Advocate Shri Harjinder Singh, who also appeared as an instructing advocate at the hearing of this petition, addressed a letter dated February 9, 1979 on behalf of the detenu to the detaining authority requesting the detaining authority to furnish copies of documents set out in the letter. This request for copies appears not to have been complied with till February 23, 1979 when learned Advocate Shri Harjinder Singh submitted a representation as contemplated by clause (5) of Article 22 of the Constitution on behalf of the detenu. In the last paragraph of this representation it has been stated that what is stated in the communication be treated as representation on behalf of detenu. In this representation a grievance has been supplied made that as the copies of the relevant documents have till then not been supplied to the detenu, an incomplete representation is being made. The detaining authority supplied the copies on March 7, 1979. On March 17, 1979 the detenu made an application complaining that the copies were illegible and copies of some documents were still not supplied though a long time had elapsed whereupon a further set of copies was supplied to the detenu on March 22, 1979. On a request from the detenu copies of some more documents were supplied to him on March 26, 1979. The detenu thereupon made a second representation dated March 27, 1979. The Advisory Board met on March 30, 1979 and after hearing the detenu and taking into consideration the relevant papers and documents, reported that there was sufficient cause for the detention of the detenu whereupon the order of detention was confirmed. There is some controversy whether the detention order was confirmed by the Lt. Governor on April 27, 1979 or April 30, 1979.

Re Ground 1

5. The first contention is that the representation made by or on behalf of detenu on February 23, 1979 and March 27, 1979 were rejected by the Chief Secretary who had passed the detention order though he was not competent to reject the representations, that power having been vested in the appropriate Government. Clause (5) of Article 22 of the Constitution makes it obligatory for the authority making an order of preventive detention to communicate to the detenu, as soon as may be, the grounds on which the order has been made and should afford him the earliest opportunity of making a representation against the order. This right to make a representation imposes a corresponding duty on the detaining authority to consider the representation because the representation may furnish such information as may necessitate revocation of the detention order as contemplated by Section 11 of the COFEPOSA. Section 11 confers power for revocation of detention orders. The obligation to furnish grounds for preventive detention and the constitutional right conferred on the detenu to make a representation on receipt of the grounds of detention when read in the context of Section 11 would spell out a scheme that the representation, if and when made, may furnish such information to the detaining authority which may necessitate revocation of the detention order. Therefore, the importance of the constitutional right to make a representation and the corresponding duty to consider the representation cannot be underestimated and should not be whittled down. This Court in Jayanarayan Sukul v. State of West Bengal ((1970) 1 SCC 219, 224 : 1970 SCC (Cri) 92, 98 : (1970) 3 SCR 225), enunciated the following four principles to be

followed in regard to the representation of a detenu : (SCC p. 224 : SCC (Cri) p. 98, para 20).

First the appropriate authority is bound to give an opportunity to the detenu to make a representation and to consider the representation of the detenu 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. It is true that no hard and fast rule can be laid down as to the measure of time taken by the appropriate authority for consideration but it has to be remembered that the Government has to be vigilant in the governance of the citizens. A citizen's right raises a correlative duty of the State. Fourthly, 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.

6. This view was reaffirmed in Sk. Sekawat v. State of W. B. ((1975) 3 SCC 249 : 1974 SCC (Cri) 867 : (1975) 2 SCR 161). It is too late in the day to minimise the importance of a representation that a detenu is entitled to make and the obligation of the appropriate Government to examine the same, applying mind to the points raised therein before a further action is taken in the process of deprivation of liberty of a citizen.

7. In this case two representations have been made. The first was made on February 23, 1979 by learned Advocate Shri Harjinder Singh on behalf of the detenu and the second dated March 27, 1979 was made by the detenu himself. The grievance is that the representations have been rejected by third respondent who made the detention order though he was not competent to do so because the representation has to be considered by the appropriate Government and not by an officer who is especially authorised to make detention order under Section 3 of COFEPOSA. There is a two-fold reply on behalf of the respondents to this contention of the detenu : (1) In fact the representation were addressed to the third respondent and, therefore, he was competent to deal with the same; and (2) no representation was made by the detenu to the appropriate Government. This approach was countered on behalf of the detenu by saying that the detenu was misled by the detaining authority when in the last paragraph of the grounds of detention it was stated that if the detenu wished to make a representation against the order of detention, he may make the representation addressed to him and, therefore, the detenu was denied an opportunity to make a representation to the appropriate Government and its consideration by the appropriate Government.

8. Section 2(a) of COFEPOSA defines appropriate Government to mean as under :

> 2. In this Act, unless the context otherwise requires, -
>
> (a) "appropriate Government" means, as respects a detention order made by the Central Government or by an officer of the Central Government or a person detained under such order, the Central Government, and as respects a detention order made by a State Government or by an officer of a State Government or a person detained under such order, the State Government.

9. Section 2(f) defines State Government in relation to a Union Territory, to mean he Administrator thereof. Section 3 confers power to make an order of detention. The power to detain is conferred not only upon the State Government but any officer of the State Government not below the rank of a Secretary to the Government specially empowered for the purpose of Section 3 by that Government. It is not in dispute that Chief Secretary to the Delhi Administration, third respondent herein, was

specially empowered for the purpose of Section 3, to make a detention order. In exercise of this power the Chief Secretary made the impugned detention order. Clause (5) of Article 22 casts a duty on the authority making an order of detention to communicate to the detenu the grounds on which the detention is ordered and also afford him the opportunity of making a representation against the order. There is nothing in the scheme of Article 22 or the provisions of the COFEPOSA which requires that the representation ought always to be considered by the appropriate Government notwithstanding the fact that the order of detention has been made by an officer specially empowered in that behalf. Undoubtedly the power to revoke the detention order under Section 11 is conferred on the State Government and the Central Government whenever an order of detention is made by an officer of the State Government but that does not imply that the representation which a detenu has a right to make after the grounds of detention are furnished to him, must of necessity be made and considered by the State Government. In fact, the representation can ought to be made to the detaining authority because it is he who has to apply his mind to the facts of the case and it is he who has furnished the grounds of detention on which he has acted and it is he who has to be convinced that the action taken by him is unjustified and requires reconsideration. After all the purpose of a representation is to convince the authority to reconsider its decision which has resulted in the detention of the detenu. The representation is not in the from of an appeal to the higher authority and, therefore, ipso facto it must go to the State Government. Undoubtedly it would be open to the detenu to make a representation under Section 11 requesting either the State Government or the Central Government, as the case may be, to revoke the order of detention. But the initial representation that a detenu has a right to make on receipt of the grounds of detention would ordinarily be addressed to the detaining authority because it is that authority which has taken a decision adverse to the detenu and which has to be persuaded to reconsider the same. Therefore, if the detenu made the representation to the third respondent who had passed the detention order it was open to him to consider the same and after applying his mind to accept or reject the same. The failure to submit the representation addressed to the detaining authority and considered by him, to the State Government, would not vitiate the detention order.

10. In the facts of this case the first representation was made on behalf of the detenu by no less a person than his learned Advocate Shri Harjinder Singh. It was addressed to the third respondent. It was signed by learned Advocate Shri Harjinder Singh on behalf of the detenu. Earlier an application for copies was also made by the same learned Advocate on behalf of the detenu addressed to the third respondent. Therefore, the third respondent was perfectly justified in considering the representation made on behalf of the detenu by his learned Advocate.

11. There is some controversy whether the second representation made by the detenu on March 27, 1979 was addressed to Delhi Administration or to the third respondent. At the top of the representation following is to be found :

> Delhi Administration, Home (Police II) Department.
>
> # The Chief Secretary, Delhi Administration, 5, Shamnath Marg, Delhi-110 006.##

12. The contention is that in fact the representation was addressed to the Delhi Administration to be considered in its Home Department, Police Section. The respondents countered by saying that it was in fact addressed to the Chief Secretary, the third respondent, because the address shows that it was sent to 5, Shamnath Marg, where the office of the Chief Secretary is located while the principal office of the Delhi Administration is located in Raj Nivas. It appears that the description on top of the representation, viz., Delhi Administration (Police II) Department, has been bodily copied from

the description at the top of the detention order dated January 27, 1979. Substantially and in fact the second representation was also addressed to the third respondent. There is both external and internal evidence as hereinabove indicated to support this conclusion. Therefore, if the second representation was also addressed to the third respondent and if he considered and rejected the same there is no substance in the contention that the representation of the detenu having not been considered by the State Government, i.e. by the Administrator in the case of Union Territory of Delhi, the detenu has been denied the opportunity to persuade the appropriate authority to consider his representation and to take appropriate action thereon.

13. There is equally no substance in the contention that the detenu was misled by the statement in the last paragraph of grounds of detention that the representation be made to the detaining authority. First representation was made by the learned Advocate of the detenu under his own signature. There was no question of advising him in the matter of law. In any case, as held above, the representation has to be made to the detaining authority and that have been done, there is no merit in the contention that the detenu was misled by the gratuitous advice preferred by the detaining authority.

Re Ground 2

14. The second contention is that there was delay of three days in confirming the order of detention and, therefore, the order is vitiated. Reliance was placed on Nirmal Kumar Khandelwal v. Union of India ((1978) 2 SCC 508 : 1978 SCC (Cri) 303 : (1978) 3 SCR 817), wherein it was held that if the order of detention is not confirmed within three months from the date of detention, further detention of the detenu would be without the authority of law. The impugned order of detention was made on January 27, 1979. An order dated April 30, 1979 signed by the Under-Secretary (Home), Delhi Administration, Delhi and in the appropriate form, viz. by order and in the name of the Administrator, reciting therein the confirmation of the order of detention of the detenu after the receipt of opinion of the Advisory Board is placed on record. There order reads :

The Administrator hereby confirms the aforesaid detention order.

Relying on the date mentioned in the order, namely, April 30, 1979, and the afore-quoted expression, it was contended that if the detenu was detined on January 27,1979 and if the order of detention was confirmed on April 30, 1979 it was beyond the period of three months as contemplated by Section 8 of COFEPOSA and, therefore, the order is vitiated. Learned counsel for the respondents produced before the court the original file which, before the court looked into it, was shown to the learned counsel for the petitioner who was invited to satisfy himself that the Lt. Governor who is the competent authority in this behalf to confirm the order of detention, had confirmed the same on April 27, 1979. It was thereafter drawn up and communicated on April 30, 1979. With this fact situation brought to the notice of the learned counsel for the detenu adn the court the contention on behalf of the detenu that there was delay of three days in confirming the order of dention must be negative.

Re Grounds 3 and 4

15. The next two contentions may be examined together. It was next contended that there was inordinate delay in complying with the request for copies of documents which would enable the detenu to make a representation and there was futher delay in applying mind to the representation made on February 23, 1979 and consequently the order of the detention is vitiated. Shri Harjinder Singh learned counsel on behalf of the detenu applied for copies on February 9, 1979. It appears

from the representation made by Shri Harjinder Singh on behalf of the detenu on February 23, 1979 that till that date the request for copies was not complied with. It is said that copies were supplied on March 9, 1979. In the meantime the detenu had made a representation through his advocate on February 23, 1979. While rejecting this representation the third representation keeping in view that it was an incomplete representation for want of copies, had specifically stated that any further representation, as and when made, by the detenu would be taken into consideration. It is not in dispute that the detenu received copies on March 7, 1979. One W. C. Khambra in his affidavit on behalf of Delhi Administration has stated that the copies were supplied to the detenu on March 7, 1979. This date was not controverted in the affidavit in rejoinder. It appears that on March 15, 1979 the detenu complained that the copies were not legible and a fresh set of copies was supplied to him on March 22, 1979. There was a further request for copies of some more documents which was complied with on March 26, 1979. Thereafter the detenu made the second representation on March 27, 1979. It may be noticed here that the first representation made on February 23, 1979 was rejected by the third representation on March 21, 1979. It was said that there was delay of nearly one month in applying mind to the representation of the detenu and that delay on two occasions would vitiate the order. A portion from the observation extracted hereinabove from Sukul case ((1970) 1 SCC 219, 224 : 1970 SCC (Cri) 92, 98 : (1970) 3 SCR 225) was relied upon to show that when the detenu makes a representation it must be considered as early as possible. Where there are specified time-limits which could not be transgressed, an action beyond the prescribed time may be either incompetent or without jurisdiction or without the authority of law. Where a citizen is deprived of his liberty and grounds of detention are furnished to him, his representation must be examined as expeditiously as possible, but as has been said in Sukul case ((1970) 1 SCC 219, 224 : 1970 SCC (Cri) 92, 98 : (1970) 3 SCR 225), there is no hard and fast rule as to the measure of time taken by the authority for consideration of the representation. However, a caution was administered that the Government should be vigilant in the governance of the citizens. Can it be said on the facts of this case that there was such delay in complying with the request for copies of the documents and in examining the representation as would manifest a deliberate inaction on the part of the concerned authority which would vitiate the order ? One has merely to look at the request for copies of the documents made on behalf of the detenu by his learned Advocate Shri Harjinder Singh in the letter dated February 9, 1979. There is a long list of documents and preparation of copies of a number of documents is bound to be time-consuming. But Shri Jethmalani urged that is now a matter of day-to-day experience of the detaining authority that the detenu is bound to ask for copies and, therefore, presumably a time has come to administer a warning that the copies of documents should be kept ready along with the grounds of detention so that as soon as the request is made the same may be furnished. It would be quite in consonance with the zealous anxiety for the liberty of a citizen that the detaining authority should keep the copies of the relevant documents referred to in the grounds of detention ready so that the same can be supplied as soon as the request is received. It must, however, not be overlooked that the request sometimes may be for copies of such documents as are not within the easy contemplation of the detaining authority or as may not be directly relatable to the grounds of detention and some time is bound to be spent in finding out the documents and preparing the copies of the same. Undoubtedly when the court is dealing with the question of deprivation of liberty of a citizen it would like to remind the detaining authority that as grounds of detention have to be served within 5 days from the date of detention it would be an additional safeguard and make the constitutional right of making the representation effective and purposive to keep at least copies of those documents ready which have been taken into account while preparing the grounds of detention so that the copies can be furnished as expeditiously as possible. But having said this, on the facts of this case looking to the long list of documents copies of which were demanded by the learned Advocate on behalf of the detenu, the time taken does not appear to be

unreasonable. So also the time taken in considering the representation does not appear to be unreasonable. Therefore, the contention that on this account the order of detention is vitiated cannot be entertained.

Re Ground 5

16. The next contention is that the second representation dated March 27, 1979 was not placed before the Advisory board and, therefore, the Advisory Board had not the benefit of the point of view of the detenu and personal appearance of the detenu before the Advisory Board is not an adequate substitute for a written detailed representation. This contention was based on the assumption that the second representation was not placed before the Advisory Board. The learned counsel for the respondents brought the original file, a perusal of which shows that the second representation was forwarded to the Advisory Board on the very day it was received and it was in the file which was submitted to the Advisory Board. Indisputably, therefore, the second representation was before the Advisory Board when it met on March 30, 1979. In this fact situation it is not necessary to examine the second limb of the contention that personal appearance of the detenu to explain his case before the Advisory Board is not an adequate substitute for a detailed written representation.

Re Ground 6

17. The last contention is that an incorrect belief entertained by the detain authority that the detenu was a Pakistani national, unwarranted in the facts and circumstances of the case, misguided the detaining authority in making the detention order, the decision being influenced by an extraneous, irrelevant and incorrect consideration which would vitiate the order of detention. There is a serious dispute between the parties about the nationality of detenu. The detenu claims that he is an Indian national while the respondents treat him as a foreigner. It also transpires from the record that the detenu applied for conferment of India citizenship which request has been negative more than once. That apart, the record does not show that the detaining authority was influenced by the fact that the detenu is a foreigner. If there was material to show that the mind of the detaining authority was influenced by the fact that the detenu is a foreigner a question would have arisen whether this fact is relevant in coming to the conclusion whether it is necessary to detain the detenu for preventing certain activities alleged against him. But there is nothing to show that the question of status of the detenu whether he is an Indian citizen or a foreigner has at all influenced the mind of the detaining authority in passing the impugned order of detention. The learned counsel for the respondents made in abundantly clear that this aspect has not entered the assessment and evaluation of facts leading to the passing of the detention order. In paragraph 11 of the petition it has been averred that, "by the enquiries made it transpired that the detenu was not a foreign national and, therefore, the order directing him to report to the Foreigners' Registration Office was withdrawn". In reply to this averment Shri K. L. Verma, Deputy Director in the Directorate of Revenue Intelligence has stated in his counter-affidavit that the allegation is vague, irrelevant, wrong and is denied insofar as it is alleged that the detenu was found not to be a foreign national. It was further asserted that as a number of fact various representations of the petitioner seeking Indian citizenship have been considered and rejected by the authorities. As the petitioner made some assertion about his status it was countered on behalf of the respondents but there is nothing to show that apart from the relevant considerations, the allegation that the petitioner is a foreign national according to the belief of the custom authorities or the detaining authority has at all influenced the mind of the detaining authority or that this aspect has stealthily crept into the decision of the detaining authority directing detention of the detenu. Therefore, the contention must be negatived.

18. As there is no merit in any of the contentions advanced on behalf of the detenu this petition fails and is dismissed but this being a petition for habeas corpus there will be no order as to costs.

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