Shri Lallubhai Jogibhai Patel

Vs

Union of India and Others

Writ Petition (Criminal) No. 4349 of 1980

(R. S. Sarkaria, O. Chinnappa Reddy JJ)

15.12.1980

JUDGMENT

SARKARIA, J. -

1. By our order dated October 3, 1980, we had allowed this writ petition for the issue of a writ of habeas corpus and directed the release of the detenu. We are now giving the reasons in support of the at order.

2. On January 30, 1980 the petitioner, Lallubhai Jogibhai Patel was served with an order of detention, dated January 30, 1980 passed by Shri P. M. Shah, Deputy Secretary to the Government of Gujarat (Home Department) under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (For short, the COFEPOSA).

3. The grounds of detention were also served on him on the same day. The petitioners challenged the order of this detention by Writ Petition 449 of 1980 in this Court. That petition was dismissed by this Court by an order dated May 9, 1980, but the reason for that order were announced later on August 4 1980. After the dismissal of his petition, he on July 21, 1980, filed additional grounds. He was only July 30, 1980, informed that he may, if so advised, file a fresh petition on those additional grounds. That is how this subsequent petition came to be filed on additional grounds which were not urged in the previous Writ Petition 449 of 1980.

4. A preliminary objection was raised on behalf of the respondent State that this subsequent petition is barred as constructive res judicata. In this connection, reference has been made to the decision of this Court in Ghulam Sarwar v. Union of India and SEERVAI's CONSTITUTIONAL LAW.

5. In reply, Shri Ram Jethmalani, counsel for the petition, contended that this Court cannot refuse to entertain a second petition for habeas corpus on a fresh ground which could not, for good reasons, be taken in the earlier writ petition, on the ground that it is barred by any doctrine of estoppel or constructive res judicata. It is stressed that a preventive detention illegally continued is a continuous wrong and furnishes a continuous cause of action to the detenu to challenge the same on fresh grounds. In this connection, reference has been made to a Full Bench Decision of the Punjab High Court in Ram Kumar Pearay Lal v. District Magistrate, Delhi. On facts, counsel has tried to distinguish the decisions of this Court in Daryao v. State of U. P. and Niranjan Singh v. State of M. P.

6. The preliminary question, therefore, to be considered is, whether the doctrine of constructive res judicata applies to a subsequent petition for a writ of habeas corpus on a grounds which he "might

and ought" to have taken in his earlier petition for the same relief. In England, before the Judicature Act, 1873, an applicant for habeas corpus had a right to go from court to court, but not from one Bench of a court to another bench of the same court. After the Judicature Act, 1873, this right was lost, and no second application for habeas corpus can be brought in the same court, except on fresh evidence, In re Hastings (No. 2), Lord Parker, C. J., after surveying the history of the right of habeas corpus, arrived at the conclusion that it was never the law that in term time, successive writs of habeas corpus lay from judge to judge. In re Hasting(No. 3), Harman J. pointed out that since the Judicature Act had abolished the three independent courts, namely, the Court of Exchequer, the King's Bench Division, and the Common pleas, and had constituted one High court, when an application for writ of habeas corpus has been disposed of by one Divisional Court, no second application on the same ground lies to another Divisional Court of the High court. This position was given statutory recognition in the Administration of Justice Act, 1960.

7. In a Full Bench decision of the Punjab High Court. Which purports to follow these English decisions and two decisions of this Court in Daryao v. State of U. P. and Calcutta Gas C. (Proprietary) Ltd. v. State of W. B., it was held as follows : (AIR p. 58, col. 1)

No second petition for writ of habeas corpus lies to the High Court on a ground on which a similar petition had already been dismissed by the court. However, a second such petition will lie when a fresh and a new ground of attack against the legality of detention or custody has arisen after the decision on the first petition, and (also) where for some exceptional reason a ground has been omitted in an earlier petition, in appropriate circumstances, the High Court will hear the second petition on such a ground for ends of justice. In the last case, it is only a ground that will be considered. Second petition will not be competent no the same ground merely because an additional argument is available to urge with regard to the same.

8. In Daryao case, Gajendragadkar, J. (as he then was), speaking for the Constitution Bench, held that where the High court dismisses a writ petition under Article 226 of the Constitution after bearing the matter on the merits on the ground that no fundamental right was proved or contravened or that its contravention was constitutionally justified, a subsequent petition to the Supreme Court under Article 32 of the Constitution on the same facts and for the same reliefs filed by the same party would be barred by the general principle of res judicata. It was further clarified that the rule of re judicata, as indicated in Section 11 of the Code of Civil Procedure, has no doubt some technical aspects, for instance, the rule of constructive res judicata may be considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata, they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32. It was also noted that the Liberty of the individual and the protection of his fundamental rights are the very essence of the democratic way of life adopted by the constitution, and it is the privilege and the citizen to move this court by a petition under Article 32 and to claim an appropriate writ against the unconstitutional infringement of his fundamental rights yet, in dealing with an objection based on the principle of res judicata may even apply to a successive petition The court was careful enough to add : "We propose to express on opinion on the question as to whether repeated applications for habeas corpus would be competent under our Constitution. That is a matter with which we are not concerned in the present proceedings".

9. It may be noted that the petitions which were before the court in Daryao case were civil matters

and not petitions for issue of a writ of habeas corpus. Even so, it was clarified in that case that the principle of constructive res judicata, as embodied in Section 11 of the Code of Civil Procedure, was of a technical character and this principle was not one of universal application.

10. In Ghulam Sarwar case the constitution Bench of this Court was dealing with a petition under Article 32 of the Constitution which had raised the question of the validity of the detention of the petitioner under Section 3 of the Foreigners Act, 1946. The petitioner was a Pakistani National, Who entered India without any travel documents. On May 8, 1964, he was arrested in New Delhi by the customs authorities under Section 135 of the Indian Customs Act, 1962. When he was about to be enlarged on bail, the was detained by an order under Section 3(2) (g) of the Foreigners Act. It was said that he had to be detained, as police investigation was in progress in respect of a case of conspiracy to smuggle gold, of which he was a member. On May 29, 1965, he was convicted by the magistrate, of an offence under the Customs Act and sentenced to imprisonment. His appeal was dismissed by the Sessions Judge. Before his terms of Imprisonment expired, the Petitioner filed a writ of habeas corpus in the Circuit Bench of the Punjab High Court challenging his detention. The petition was dismissed by Khanna, J., on Merits. Before the learned Judge, the constitutional validity of Section 3(2) (g) of the Act was not canvassed. The learned Judge held that the section authorised the government to make the said order of detention on the section authorised the government to make the said order of detention on its subjective satisfaction and that the court could not question its validity in the absence of any mala fides. In short, he dismissed the petition on merits. Thereafter, Ghulam Sarwar filed a petition under Article 32 of the Constitution for issue of a writ of habeas corpus against the respondents on the ground that the provisions of the Act were invalid. On behalf of the respondents, a preliminary objection was raised that the decision of Khanna, J. of the Punjab High Court operated as res judicata and barred the maintainability of the subsequent petition under Article 32. reliance was placed on the decision of this Court in Daryao case. After observing that Daryao case was no authority in regard to the repeated applications for habeas corpus, and examining English and American decisions, the learned Chief Justice (Mr. Justice Subba Rao) summed up the position, thus :

> But unlike in England, in India the person detained can file original petition for enforcement of his fundamental right to liberty before a court other than the High court, namely this court. The order of the High Court in the said writ is not re judicata as held by the English and the American courts either because it is not a judgment or because the principle of res judicata is not applicable to a fundamentally lawless order. If the doctrine of res judicata is attracted to an application for a writ of habeas corpus, there is no reason why the principle of constructive res judicata cannot also govern the said application, for the rule of constructive res judicata and if that be applied, the scope of the liberty of an individual will be considerably narrowed. The present case illustrates the position. Before the High Court, the petitioner did not question the constitutional validity of the Presidents order made under Article 359 of the Constitution. If the doctrine of constructive res judicata be applied, this Court, though it is enjoined by the Constitution to protect the right of a person illegally detained, will become powerless to do so. That would be whittling down the wide sweep of the constitutional protection.

On these premises, it was held "that the order of Khanna, J., made in the petition for habeas corpus filed by the petitioner does not operate as res judicata and this court will have to decide the petition on merits".

11. In his concurring judgment, Bachawat, J., while holding that the order of dismissal by the High court does not operate as res judicata and does not bar the petition under Article 32 of the Constitution asking for the issue of a writ of habeas corpus on the same facts, clarified that the petitioner would not have the right to move this Court under Article 32 more than once on the same facts.

12. In Niranjan Singh case, the District Magistrate of Gwalior by his order dated May 26, 1971, passed under Section 2-A of the Madhya Pradesh Public Security Act (Amendment Act) of 1970, detained the petitioner. The petitioner filed a writ petition under Article 226 of the Constitution, challenging his detention and praying for a writ of habeas corpus. The petition was rejected by the High Court. Thereupon, the detenu moved this Court by a petition under Article 32 of the Constitution, for the same relief. A preliminary objection was taken on behalf of the respondent that the petition was barred by res judicata. Following the earlier decision of this Court in Ghulam Sarwar case, Jaganmohan Reddy, J., speaking for a Bench of two learned Judges, overruled this objection.

13. The position that emerges from a survey of the above decisions is that the application of the doctrine of constructive res judicata is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Article 32 of the Constitution on fresh grounds, which were to taken in the earlier petition for the same relief.

14. In the present petition fresh additional grounds have been taken to challenge the legality of the continued detention of the detenu. We would therefore hold that the subsequent writ petition is not bared as res judicata and overrule the preliminary objection raised by the respondents.

15. The additional grounds which have been pressed into arguments by Shri Ram Jethmalani, are :

> (1) The respondents failed to supply despite the request of the detenu, all the documents which were relied upon by the detaining authority while passing the order of his detention, that the detaining authority purported to give him 460 documents, but later on, the detenu discovered that their number was less and many of them were either incomplete or had been wholly withheld; that in particular, 236 documents covering 236 pages were not supplied.
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> This is alleged in ground 13 of the present petition. In reply to this, in para 17 of the counter-affidavit field on behalf of the respondents it is admitted that all the documents had not been given to the detenu, and he had been supplied enough documents which were though to be sufficient to enable him to make an effective representation.
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> The petitioner came to know about the non-supply of these documents from the copy of the judgment, date May 13, 1980, of the Gujarat High Court passed in the allied writ petitions filed on behalf of other detenu who were alleged to be the associates of the present petitioner.
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> (2) On July 17, 1980, a representation was made on behalf of the detenu with a request that the same be forwarded to the Central Government for exercise of its power of revocation of the detention under Section 11 of the Act. The jailor

forwarded that representation to the Central Government on July 18, 1980, but the same has to yet been disposed of. This plea is the subject of Grounds 16, 17 and 26 of the Writ Petition.

A reply to these allegations is to be found in paragraphs 20 and 21 of the counter filed on behalf of the respondents, wherein it is admitted that the jailor had sent the representation at the detenu's request to the Central Government.

(3) The grounds served on the detenu were in English. The detenu does to know English. It is stated in the affidavit of the person who served the "grounds" that they were explained to the detenu in Gujarati which is the mother tongue of the detenu. Admittedly, to translation into Gujarati of the grounds of detention was a given to the detenu on March 11, 1980. This being the case, there was a breach of the constitutional imperative which requires that the grounds should be communicated to the detenu. It can be spelled out therefrom that the grounds must be communicated in a language which the detenu understands. In support of this contention, reference has been made to Hadibandhu Das v. District Magistrate, Cuttack and the judgment dated June 23, 1980 in Bakshi case.

Contention (1)

16. In the previous petition, though it was alleged that there was delay in supply of copies of the documents relief on by the detaining authority in passing the impugned order of detention, no specific grounds was taken that documents covering about 236 pages which were relied upon by the detaining authority in passing the order of detention were suppressed and not supplied to the petitioner. Indeed, this is not denied in the counter affidavit. The petitioner has affirmed in his affidavit that he came to know about the non-supply of these documents from the judgment of the Gujarat High Court subsequent to the dismissal of his earlier petition. This affirmation remains unchallenged.

17. A catena of decisions of this Court has firmly established the rule that one of the constitutional imperatives embodied in Article 22(5) of the constitution is that all the documents and materials relied upon by the detaining authority in passing the order of detention must be supplied to the detenu, as soon as practicable, to enable him to make an effective representation. Recently, in Icchu Devi Choraria v. union of India, this Court reiterated the principle as follows : (SCC pp. 539-40 : SCC (Cri) 33-4 Para 6)

.... One of the basic requirements of clause (5) of Article 22 is that the authority making the order of detention must, as soon as may be, communicate to the detenu the grounds on which the order of of detention has been made and under sub-section (3) of Section 3 of the COFEPOSA Act, the words "as soon as may be" have been translated to mean "ordinarily not later than five days and in exceptional circumstances and for reason to be recorded in writing not later than fifteen days, from the date of detention". The grounds of detention must therefore, be furnished to the detenu ordinarily within five days from the date of detention, but in exceptional circumstances and for reasons to be recorded in writing, the time for furnishing the grounds of detention may stand extended but in any event it, cannot be later than fifteen days from the date of detention. There are the two outside time limits provided by Section 3, sub-section (3) of the COFEPOSA Act because unless the grounds of detention are furnished to the detenu, it would not be possible for him to make a representation against the order of detention and it is a basic requirement of clause (5) of Article 2 that the detenu must be afforded the earliest opportunity of making a representation against his detention. If the grounds of detention are not furnished to the detenu within five or fifteen days, as

the case may be, the continued detention of the detenu would be rendered illegal both on the ground of violation of clause(5) of Article 22 as also on the ground of breach of requirement of Section 3, sub-section (3) of the COFEPOSA Act. Now it is obvious that when clause (5) of Article 22 and sub-section (3) of Section 3 of the COFEPOSA Act provide that the grounds of detention should be communicated to the detenu within five or fifteen days, as the case may be what is meant is that the grounds of detention in their their entirety must be furnished to the detenu. If there are any documents, statements or other materials relied upon in the grounds of detention, they must also be communicated to the detenu, because being incorporated in the grounds of detention, they form part of the grounds and the grounds furnished to the detenu cannot be said to be complete without them. It would not therefore be sufficient to communicate to the detenu a bare recital of the grounds of detention, but of the documents, statements and there materials relied upon in the ground so detention must also be furnished to the detenu within the prescribed time subject of course to clause(6) of Article 22 in order to constitute compliance with clause (5) of Article 22 and Section 3, sub-section (3) of the COFEPOSA Act.

18. In the instant case, the materials and documents which were not supplied to the detenu were evidently a part of those materials which had influenced the mind of the detaining authority in passing the order of detention. In other words, they were a part of the basic facts and materials, and therefore, according to the ratio of Icchu Devi case should have been supplied to the detenu ordinarily within five days of the order of detention, and, for exceptional reasons to be recorded, within fifteen days of the commencement of detention. In the counter affidavit, it has not been asserted that these documents, which were not supplied, were to relevant to the case of the detenu.

19. The respondents have, in their counter-affidavit, stated that this representation was not addressed to the central Government. It is, however, admitted that the jailor had, on the request of the detenu, forwarded the same to the Central Government on July 18, 1980. No counter-affidavit has been filed on behalf of the Central Government, showing that this representation was considered and disposed of by it. In matters touching the personal liberty of a person preventively detained, the constitutional imperative embodies in Article 22(5) is that any presentation made by him should be dealt with utmost expedition. This constitutional mandate has been honoured in breach regarding the representation sent by the detenu to the Central Government.

Contention (3)

20. It is an admitted position that the detenu does not know English. The grounds of detention, which were served on the detenu, have been drawn up in English. It is true that Shri C. l. Antali, Police Inspector, who served the grounds of detention on the detenu, has filed an affidavit stating that he had fully explained the grounds of detention in Gujarati to the detenu. But that is not a sufficient compliance with the mandate of Article 22(5) of the constitution, which requires that the grounds of detention must be "communicated" to the detenu. "Communicate" is a strong word. It means that sufficient knowledge of the basic facts constituting the "grounds" should be imparted effectively and fully to the detenu in writing in a language which he understands. The whole purpose of communication the "grounds" to the detenu is to enable him to make a purposeful and effective representation. If the "grounds" are only verbally explained to the detenu and nothing in writing is left with him, in a language which he understands, then that purpose is not served, and the constitutional mandate in Article 22(5) is infringed. If any authority is needed on this point, which is so obvious from Article 22(5), reference may be made to the decision of this Court in Harikisan v. State of Maharashtra and Hadibandhu Das v. District Magistrate.

21. Thus all the three contentions canvassed by the counsel for the petitioner, on merits were sound. The conclusion was therefore, inescapable that due to the aforesaid contraventions of constitutional imperatives, the continued detention of the detenu was illegal.

22. It was for these reasons that we had allowed Writ Petition (Criminal) 4349 of 1980 by our order dated October 3, 1980, and directed the release of the detenu.

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