

Kamla Kanyalal Khushalani

Vs

State of Maharashtra and Another

Writ Petition No. 5873 of 1980

(R. S. Sarkaria, R.S. Pathak JJ)

06.01.1981

JUDGMENT

S. MURTAZA FAZAL ALI, J. –

1. This petition has been filed by the sister of the detenu praying that the detenu be released because the safeguards provided by the Constitution have not been complied with. The detenu was arrested on October 20, 1980 when only the grounds of detention were served on him. On November 5, 1980 the document and materials on the basis of which the order of detention was passed were supplied to the detenu. On November 18, 1980, the detenu made a representation to the government which was disposed of as late as December 15, 1980. In support of the petition, Mr. Jethmalani has submitted two points on which alone, in our opinion, the petition must succeed.

2. In the first place, it was pointed out that as already held by this Court the grounds served on the petitioner were not accompanied by the documents and materials which formed the basis of the order of detention, hence the safeguards contained in Article 22(5) of the Constitution not having been complied with, the continued detention of the detenu became void. Secondly, it was argued that even though the detenu had made a representation on November 18, 1980, the same was disposed of a month thereafter and no explanation for this delay has been furnished by the respondents. This Court has held in numerous cases that the representations of the detenus should be disposed of as soon as possible and even an unexplained delay of 12 to 14 days has been held to be fatal to the order of detention. Reliance has been placed by Mr. Jethmalani on two decisions of this Court in *Ichhu Devi Choraria v. Union of India* ((1980) 4 SCC 531 : 1981 SCC (Cri) 25) which was later followed in *Shalini Soni v. Union of India* ((1980) 4 SCC 544 : 1981 SCC (Cri) 38). As regards the first case, which is a decision of two Judges of this Court, it has clearly held that before an effective representation can be made by the detenu, he must be supplied with the documents and materials which formed the basis of the grounds of detention. Unless this is done, there could be no question of making any representation, much less an effective representation, against the order of detention. In this connection, Bhagwati, J., speaking for the court observed as follows : [SCC pp. 539-40 : SCC (Cri) pp. 33-41, para 6]

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 of fifteen days, as the case may be, what is meant is that the grounds of detention in 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

ground 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 copies of the documents, statements and other materials relied upon in the grounds of detention must also be furnished to the detenu within the prescribed time subject 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. One of the primary objects of communicating the grounds of detention to the detenu is to enable the detenu, at the earliest opportunity, to make a representation against his detention and it is difficult to see how the detenu can possibly make an effective representation unless he is also furnished copies of the documents, statements and other materials relied upon in the grounds of detention. There can therefore be no doubt that on a proper construction of clause (5) of Article 22 read with Section 3, sub-section (3), of the COFEPOSA Act, it is necessary for the valid continuance of detention that subject to clause (6) of Article 22 copies of the documents, statements and other materials relied upon in the grounds of detention should be furnished to the detenu along with the grounds of detention or in any event not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days from the date of detention. If this requirement of clause (5) of Article 22 read with Section 3, sub-section (3) is not satisfied, the continued detention of the detenu would be illegal and void.

3. Mr. Rana for the State has submitted that the observations extracted above do not form the ratio of the decision because in a subsequent para of the decision, Bhagwati, J. has observed that at the most grounds could be given within a period of five to fifteen days of the order of detention. These observations, no doubt, are contained in paragraphs 7 and 8 of the judgment but they do not, in our opinion from the ratio decidendi of this case but were made merely to rebut the extreme arguments that could be put forward. This Court made it very clear that even apart from the interpretation placed by the court on Article 22(5) of the Constitution, the conclusion is inescapable that the documents and statements which formed the basis of the grounds of detention must be supplied to the detenu without least possible delay. It is in this context that these observations were made in paragraphs 7 and 8. Moreover, this position has been made absolutely clear by a later decision of this Court in Shalini Soni case ((1980) 4 SCC 544 : 1981 SCC (Cri) 38) where a Division Bench of this Court while endorsing Ichu Devi case ((1980) 4 SCC 531 : 1981 SCC (Cri) 25) observed as follows : [SCC p. 549 : SCC (Cri) p. 43, para 7]

The matter may also be looked at from the point of view of the second facet of Article 22(5). An opportunity to make a representation against the order of detention necessarily implies that the detenu is informed of all that has been taken into account against him in arriving at the decision to detain him. It means that the detenu is to be informed not merely, as we said, of the inferences of fact but of all the factual material which have led to the inferences of fact. If the detenu is not to be so informed the opportunity so solemnly guaranteed by the Constitution becomes reduced to an exercise in futility. Whatever angle from which the question is looked at, it is clear that 'grounds' in Article 22(5) do not mean mere factual inferences but mean factual inferences plus factual materials which led to such factual inferences. The 'grounds' must be self-sufficient and self-explanatory. In our view copies of documents to which reference is made in the 'grounds' must be supplied to the detenu as part of the 'grounds'.

4. The court, therefore, clearly held that the documents and materials relied upon in the order of detention formed an integral part of the grounds and must be supplied to the detenu *pari passu* the grounds of detention. If the documents and materials are supplied later, then the detenu is deprived of an opportunity of making an effective representation against the order of detention. In this case, the court relied upon the ratio in *Ichu Devi Choraria case* ((1980) 4 SCC 531 : 1981 SCC (Cri) 25) extracted above. We find ourselves in complete agreement with the view expressed by the two decisions of this Court and we are unable to accede to the prayer of Mr. Rana for sending the case for reconsideration to a larger Bench. This Court has invariably laid down that before an order of detention can be supported, the constitutional safeguards must be strictly observed.

5. This Court in *Maneka Gandhi v. Union of India* ((1978) 2 SCR 621 : (1978) 1 SCC 248), has widened and horizon of Article 21 and added new dimension to various features of and concept of liberty enshrined in Article 21. In view of the decision in the aforesaid case, Article 22(5) of the Constitution assumes a new complexion and has to be construed liberally and meaningfully so as to permit the legislature to impose the minimum possible curbs on the precious rights of a citizen, by virtue of preventive detention. If a procedure under Article 21 has to be reasonable, fair and just, then the words 'effective representation' appearing in Article 22(5) must be construed so as to provide a real and meaningful opportunity to the detenu to explain his case to the detaining authority in his representation. If the words 'effective representation' are interpreted in an artificial or fanciful manner, then it would defeat the very object not only of Article 22(5) but also of Article 21 of the Constitution.

6. Thus, we are of the opinion that in view of what has been laid down in *Maneka Gandhi case* ((1978) 2 SCR 621 : (1978) 1 SCC 248) and in a number of other cases following the aforesaid decision, the law of preventive detention has now to satisfy a two-fold test : (1) that the protection and the guarantee afforded under Article 22(5) is complied with, and (2) that the procedure is just and reasonable. In this view of the matter unless the materials and documents relied on in the order of detention are supplied to the detenu along with the grounds, the supply of grounds *simpliciter* would give him not a real but merely an illusory opportunity to make a representation to the detaining authority.

7. It is well settled that the court frowns on preventive detention without trial because the detenu is deprived of the right of proving his innocence in a trial by a court of law. It is, therefore, of the utmost importance that all the necessary safeguards laid down by the Constitution under Article 21 or Article 22(5) should be complied with fully and strictly and any departure from any of the safeguards would void the order of detention. This is so because in a civilised society, like ours, liberty of a citizen is a highly precious right and a prized possession and has to be protected unless it becomes absolutely essential to detain a person in order to prevent him from indulging in anti-national activities like smuggling, etc. We are fortified in our view by a decision of this Court in *Sampat Prakash v. State of J&K* ((1969) 3 SCR 574 : (1969) 1 SCC 562), where the following observations were made : "that the restrictions placed on a person preventively detained must, consistently with the effectiveness of detention, be minimal". (SCC p. 567)

8. It is a matter of great concern and deep dismay that despite repeated warnings by this Court, the detaining authorities do not care to comply with the spirit and tenor of the constitutional safeguards contained in Article 22(5) of the Constitution. It is manifest that when the detaining authority applies its mind to the documents and materials which form the basis of the detention, the same are indeed placed before it and there could be no difficulty in getting photostat copies of the documents and materials, referred to in the order of detention, prepared and attaching the same along with the

grounds of detention, if the detaining authority is really serious in passing a valid order of detention. Unfortunately, the constitutional safeguards are not complied with, resulting in the orders of detention being set aside by the court, even though on merits they might have been justified in suitable cases. We feel that it is high time that the government should impress on the detaining authority the desirability of complying with the constitutional safeguards as adumbrated by the principles laid down in this regard. We would like to suggest that wherever a detention is struck down by the High Court or the Supreme Court, the detaining authority of the officers concerned who are associated with the preparation of the grounds of detention, must be held personally responsible and action should be taken against them for not complying with the constitutional requirements and safeguards (viz. delay in disposing of the representation, not supplying the documents and materials relied upon in the order of detention pari passu the order of detention, etc.) or, at any rate, an explanation from the authorities concerned must be called for by the Central Government so that in future persons against whom serious acts of smuggling are alleged, do not go scot-free. In the instant case, not only were the documents and materials not supplied along with the order of detention, but there has been a delay of about 25 days in disposing of the representation of the detenu and no explanation for the same has been given. These are matters which must be closely examined by the government.

9. For the reasons given above, we hold that the continued detention of the detenu is void. We allow the petition and direct the detenu to be released forthwith. A copy of this judgment be sent to the Home Ministers of all the State Governments, the Hon'ble Home Minister of the Government of India and also the Hon'ble Finance Minister, Government of India for necessary action.

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