Smt. Kavita W/O Sunder Shankardas Devidasani

Vs

State of Maharashtra and Others

M. Mohideen Abdul Kadar

Vs

B. B. Gujral and Another

Writ Petitions (Criminal) Nos. 2690 and 3241 of 1981

(O. Chinnappa Reddy, A.P. Sen, Baharul Islam JJ)

28.07.1981

JUDGMENT

CHINNAPPA REDDY, J. –

1. These two writ petition (criminal) may be disposed of by a single judgment as some of the questions raised are common to both. To begin with, we may refer to the facts in Writ Petition (Criminal) No. 2690 of 1981. The Government of Maharashtra, in exercise of the powers under Section 3(1) of the COFEPOSA, directed the detention of Sunder Shankardas Devidasani by an order dated March 9, 1981, with a view to prevent him from smuggling goods and abetting the smuggling of goods. The grounds of detention, also of the same date, were duly served on the detenu. The detenu made a representation on April 14, 1981 and this was rejected by the Government on April 25, 1981. A further representation made by the detenu on April 25, 1981 was also rejected on May 2, 1981. In the meantime the Advisory Board met on April 29, 1981 and considered the case of the detenu. By a letter dated May 6, 1981 the detenu was informed by the Advisory Board that the Board had reported to the Government of Maharashtra advising them that there was sufficient material to justify his detention.

2. In this application for the issue of a writ of habeas corpus, the first submission of Shri Jethmalani, learned counsel for the detenu, was that although it was the Government that was required by Section 8(b) of the COFEPOSA to make the reference to the Advisory Board, in the instant case, it was not the Government but one of its subordinate officers that had made the reference. There was thus, according to Shri Jethmalani, a departure from the prescribed procedural requirement and for that reason the continued detention of the detenu for any period longer than the five weeks mentioned in Section 8(b) was illegal. Shri Jethmalani's contention was that Section 8(b) required the Government to make a reference to the Advisory Board within five weeks from the date of detention and this meant that the Government had first to decide that it was necessary to detain the person for more than five weeks and then to forward the reference to the Advisory Board. The learned counsel would have it that the making of a reference to the Advisory Board necessitated a decision to detain the detenu for more than five weeks and this decision could be taken by the Government only and none else.

3. We are unable to agree with the submission of Shri Jethmalani. Article 22(4)(a) of the Constitution prescribes that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention. Article 22(7)(c) empowers Parliament, by law, to prescribe the procedure to be followed by an Advisory Board in an enquiry under Article 22(4)(a). Section 3(1) of the COFEPOSA authorises the Central Government, the State Government, an officer of the Central Government, now below the rank of a Joint Secretary specially empowered in that behalf, or an officer of a State Government not below the rank of a Secretary specially empowered in that behalf to make an order directing that a person be detained, if satisfied, with respect to that person, that it is necessary to detain him with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from smuggling goods, etc. etc. Section 3(3) provides for the communication of the grounds of detention to the detenu to enable him to make a representation. The communication has to be ordinarily not later than five days of the date of detention though in exception circumstances. For reasons to be recorded in writing, it may be fifteen days. Section 8 provides for the constitution of Advisory Boards and to procedure to be followed by them. Section 8(b) obliges the appropriate Government, within five weeks from the date of detention of a person under a detention order, to make a reference in respect of the detention to the Advisory Board to enable the Advisory Board to make the report under Article 22(4)(e) of the Constitution. Section 8(c) prescribes the procedure to be followed by the Advisory Board and required the Advisory Board to submit its report within eleven weeks from the date of detention of the person concerned. Section 8(f) stipulates that the appropriate Government shall revoke the detention order and cause the person to be released forthwith if the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned. If the Advisory Board reports that there is in its opinion sufficient cause for the detention of the person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit. Section 11 empowers the State Government to revoke an order of detention made by an officer of the State Government, and the Central Government to revoke and an order of detention made by a State Government, an officer of a State Government, or an officer of the Central Government. The power of the State Government and the Central Government, under Section 11 of the COFEPOSA, to revoke orders of detention is in addition to the power under Section 21 of the General Clauses Act to revoke their own orders.

4. The first important factor to be noticed here is that the period for which a person is to be detained under the COFEPOSA is not to be determined and specified at the time of making the original order of detention under Section 3(1). It has to be determined and specified at the time of confirming the order of detention under Section 8(f), after receiving the report of the Advisory Board. The second factor of importance which calls for attention is that while an order of detention may be made by the State Government, the Central Government or an officer of either Government specially empowered in that behalf, an order of detention may only be confirmed by the appropriate Government. Keeping in mind these two factors, we may now examine the time-scheme under the COFEPOSA. First the detaining authority, who may be the Central Government, the State Government or an officer of either Government, specially empowered in that behalf, must be satisfied that it is necessary to detain a person with a view to preventing him from acting in a certain manner or doing certain things, and if so, satisfied, an order of detention may be made (Section 3(1), COFEPOSA). The order of detention has not to specify the proposed period of detention at that stage. Within five

days of the detention, the detenu is required to be furnished with the grounds of detention so as to enable him to make a representation to the detaining authority (Article 22(5) of the Constitution and Section 3(3), COFEPOSA). Thereafter, within three months from the date of detention, the Advisory Board has to report on the sufficiency of cause for such detention. This is constitutional mandate (Article 22(4) of the Constitution). In order to enable the Advisory Board to discharge its constitutional obligation, the Government is required to make a reference to the Advisory Board within five weeks from the date of detention (Section 8(b) of COFEPOSA). The Advisory Board in its turn is charged with the task of submitting a report within eleven weeks from the date of detention, specifying its opinion as to whether or not there is sufficient cause for the detention of the person concerned (Section 8(c), COFEPOSA). Quite obviously the period of eleven weeks from the date of detention prescribed for the submission of the report of the Advisory Board is to enable compliance with the Constitutional time-limit of three months. On receipt of the report of the Government has to revoke the detention, if the Board has reported that there is no sufficient cause for the detention or, to confirm the order of detention and specify the period of detention if the Board has reported that there is sufficient cause for the detention (Section 8(f), COFEPOSA). In the meanwhile, at any time, the Central Government in any case, and the State Government if the order of detention was made by the State Government or by an officer of the State Government, are entitled to revoke the order of detention. Thus there is no constitutional or statutory obligation on anyone, until after the report of the Advisory Board it received to decide finally or tentatively upon the period of detention. The initial compulsion on the detaining authority before making an order of detention is to arrive at the satisfaction that it is necessary to detain the person concerned with a view to preventing him from acting in a certain manner or with a view to preventing him from committing certain acts. The obligation to specify the period of detention is upon the appropriate Government and that has to be done at the final stage, after consideration of the report of the Advisory Board. There is no intermediate stage at which any tentative conclusion is to be arrived at by the Government regarding the period of detention though, at any and every stage, the Government has the full liberty to revoke the order of detention. We are, therefore, of the view that the act of making a reference to the Advisory Board is a mechanical or ministerial act involving no exercise of discretion, though of course the Government is at that stage, as at all other stages, at liberty to revoke the order of detention. The prescription of five weeks in Section 8(b) of the COFEPOSA for the making of a reference to the Advisory Board is with a view to enable the fulfilment of the constitutional requirements of Article 22(4) and not with a view to imposing an obligaion upon the Government to consider the question of the length of detention and arrive at a tentative conclusion even at that stage. We, therefore, reject the first submission of Shri Jethmalani.

5. The second submission of the learned counsel for the detenu was that the representation was disposed of by the Minister of State, Home Affairs, Government of Maharashtra without any authority to do so. It is somewhat strange that this contention should have been raised before us. We understand that this very contention was previously raised in another writ petition and that the relevant standing order was produced before the Court at the hearing of the writ petition and that it was also shown to the learned counsel. The standing order is made by Shri A.R. Antulay, Chief Minister of Maharashtra and Minister for Home and it directs allotment of the business appertaining to "all cases of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Maharashtra Detention Order, 1974 and all other matters arising under the provisions of the said Act and the said Order... and any other orders issued under this Act, except..." (we are not concerned with the exceptions) to the Minister of State of Home, Shri Abhey Singh Maharaj Raje Bhosale. Rule 6 of the Maharashtra Government Rules of Business made by the Governor of Maharashtra in

exercise of the powers conferred by Article 166(2) and (3) of the Constitution provides that the Chief Minister and a Minister in consulation with the Chief Minister may allot to a Minister of State or a Deputy Minister any business appertaining to a Department or a part of a Department. It is, therefore, clear that the Minister of State, Home Affairs, Government of Maharashtra was entitled to deal with the representation of the detenu. It was suggested that it would have been more appropriate if the representation had been considered by the very individual who had exercised his mind at the initial state of making the order of detention, namely the Secretary to the Government, Shri Samant. There is no substance in this suggestion. The order of detention was not made by Shri Samant as an officer of the State Government specially empowered in that behalf but by the State Government itself acting through the instrumentality of Shri Samant, a Secretary to Government authorised to so act for the Government under the Rules of Business. Governmental business can never get through if the same individual has to act for the Government at every stage of a proceeding or transaction, however, advantageous it may be to do so. Nor can it be said that it would be to the advantage of the detenu to have the matter dealt with by the same individual at all stages. It may perhaps be to the advantage of the detenu if fresh minds are brought to bear upon the question at different stages. It is unnecessary to pursue the matter any further as we find no constitutional or legal infermity in the representation having been considered by the Minister of State, Home Affairs, Government of Maharashtra.

6. The learned counsel next submitted that the detenu was not permitted to be represented by a lawyer despite his request that he might be allowed to engage the services of a lawyer before the Advisory Board. In his representation to the Government the detenu did make a request to be permitted to be represented by a lawyer. The Government informed him that under the provisions of section 8(e) of the COFEPOSA he was not entitled to be represented by a lawyer before the Advisory Board and therefore, it was not possible to grant his request. The complaint of the learned counsel for the detenu was that while a detenu may not be entitled, as of right, to be represented by a lawyer before the Advisory Board, there was no bar against a lawyer being permitted to appear before the Advisory Board and therefore, the request of a detenu to be represented by a lawyer had to be considered on the merits of each individual case. This the learned counsel submitted had not been done in the present case and the detenu's request was never placed before the Advisory Board. It is true that while Section 8(e) disentitles a detenu from claiming as of right to be represented by a lawyer, it does not disentitle him from making a request for the services of a lawyer. We agree that the importance of legal assistance can never be over-stated and as often than not adequate legal assistance may be essential for the protection of the Fundamental Right to life and personal liberty guaranteed by Article 21 of the Constitution and the right to be heard given to a detenu by Section 8(e), COFEPOSA. These rights may be jeopardised and reduced to more nothings without adequate legal assistance. That would depend on the facts of each individual case, in the light of the intricacies of the problem involved and other relevant factors. Therefore, where a detenu makes a request for legal assistance, his request would have to be considered on its own merit in each individual case. In the present case, the Government merely informed the detenu that he had no statutory right to be represented by a lawyer before the Advisory Board. Since it was for the Advisory Board and not for the Government to afford legal assistance to the detenu the latter, when he was produced before the Advisory Board, could have, if he was so minded, made a request to the Advisory Board for permission to be represented by a lawyer. He preferred not to do so. In the special circumstances of the present case we are not prepared to hold that the detenu was wrongfully denied the assistance of counsel so as to lead to the conclusion that procedural fairness, a part of the Fundamental Right guaranteed by Article 21 of the Constitution was denied to him.

7. The last submission of the learned counsel was that there was a non-application of the mind of the

detaining authority, first in making the order of detention and later in considering the representation of the detenu. It was contended that the recital in the grounds of detention that the detenu had made a statement that certain documents received at the detenu's residence at the time of search pertained to the order dated November 29, 1980 of Shri Abdullahi Amin, Attache, Sudan consulate was not correct and that the detenu's statement contained no such recital. It was said that the grounds of detention read as if the detenu had admitted the existence of the order dated November 29, 1980 in the statement made by him. We do not find any substance in this submission. A reading of the document leaves no such impression. All that was said was that the documents received by post at the time of search pertained to an order dated November 29, 1980 and not that there was any admission by the detenu that there was ever an order dated November 29, 1980. It was then contended that in the course of communication of the grounds of detention the detenu was informed that it was against the public interest to disclose the source of intelligence and the further facts contained therein. The actual sentence by which privilege was claimed against disclosure was as follows :

> I consider it against public interest to disclose the source of intelligence referred to in the grounds furnished above and further consider it against public interest to disclose further facts contained therein.

The argument was that the grounds did not state that the Government considered it against public interest to disclose the source of intelligence and the further facts contained therein but that it was the Assistant Secretary to the Government of Maharashtra who signed at the bottom of the grounds that though it was against the public interest to disclose the source of intelligence and the facts contained therein. The emphasis was on the use of the first person by the Assistant Secretary. This was explained by the respondents as a clerical mistake and was later rectified by making suitable corrections. It was contended that the discovery of the mistake and its rectification was after the Advisory Board had submitted its report, though the detenu had even earlier raised the question that it was the Government and not the Assistant Secretary that could claim privilege. It was not brought to the notice of the Advisory Board at any time that the mistake was only clerical. We have the least hesitation in rejecting the contention. The mistake is so obviously clerical that we cannot permit the detenu to take advantage of it. In the result Writ Petition No. 2690 of 1981 is dismissed.

8. The first two questions raised in the previous writ petition are common to Writ Petition No. 3241 of 1981 also. An additional point was sought to be raised that the copy of a certain document was not supplied to the detenu but after verification the point was abandoned by the learned counsel. This writ petition is also dismissed.

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