Smt. Masuma

Vs

State of Maharashtra and Another

Criminal Writ Petition No. 1892 of 1981

(P.N. Bhagwati, V.B. Eradi JJ)

12.08.1981

JUDGMENT

BHAGWATI, J. –

1. This is petition for a writ of habeas corpus for securing the release of one Hasnain Mukhtar Hussain Lakdawala (hereinafter referred to as the detenu) who has been detained by the Government of Maharashtra under an order of detention dated December 31, 1980 made in exercise of the powers conferred under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the COFEPOSA Act). This order of detention though dated December 31, 1980 was served on the detenu on January 17, 1981 and along with the order of detention, a communication also dated December 31, 1980, was served on the detenu containing the grounds of detention. The Government of Maharashtra also served on the detenu at the same time a letter dated January 7, 1981 enclosing copies of the documents relied upon in the grounds of detention. It appears that on February 6, 1981 the advocate of the detenu addressed a letter to the Superintendent, Bombay Central Prison where the detenu was then confined and along with this letter he forwarded nine copies of the representation which was to be submitted by the detenu to the Government of Maharashtra against the order of detention. This letter was delivered by the authorities in charge of the Bombay Central Prison to the detenu on February 6, 1981, but on the same day the detenu was shifted from the Bombay Central Prison to Nasik Road Central Prison and the nine copies of the representation were therefore carried by the detenu with him to the Nasik Road Central Prison and from there, the requisite number of copies of the representation duly signed by the detenu were forwarded to the Government of Maharashtra and the Chairman of the Advisory Board on February 10, 1981. This representation was however rejected by the Government of Maharashtra by its letter dated February 25, 1981. It appears that a copy of the representation was also sent by the detenu to the Central Government and by its letter dated February 26, 1981 the Central Government too rejected the representation. In the meantime, the case of the detenu was referred to the Advisory Board and on March 11, 1981, the detenu was called for an oral hearing by the Advisory Board and at this meeting the detenu handed over to the Chairman and Members of the Advisory Board four copies of a further representation dated March 11, 1981 addressed by him jointly to the Chairman and the Members of the Advisory Board and the Government of Maharashtra praying that the Government of Maharashtra may be pleased to revoke the order of detention and set the detenu at liberty. The Advisory Board considered the case of the detenu and by a letter dated March 16, 1981, the Secretary of the Advisory Board intimated to the advocate of the detenu that Advisory Board had by its report dated March 12, 1981 advised the Government of Maharashtra that there was sufficient cause for the detention of the detenu. The State Government thereafter in exercise of the powers conferred under clause (f) of Section 8 passed an order dated March 23, 1981 reciting the opinion given by the Advisory Board and confirming the

order of the detention. The petitioner who is the wife of the detenu thereupon preferred the present writ petition challenging the order of detention made by the Government of Maharashtra as also the continuance of the detention under the subsequent order dated March 23, 1981.

2. There were several grounds urged on behalf of the petitioner in support of the petition and each one of them was seriously pressed before us by Mr. Jethmalani on behalf of the petitioner. The first ground was that the order of detention was made by one P.V. Nayak, Secretary to Government, Revenue and Forest Department and Ex-Office Secretary to Government, Home Department while the representation made by the detenu against the order of detention was considered and disposed of by the Minister of State for Home affairs and not by P.V. Nayak and hence there was no effective consideration of the representation of the detenu as required by law. The argument on behalf of the detenu was that the representation of a detenu must be considered by the same person who has passed the order of detention and since in the present case, the representation was considered by a different person, it was not a valid and proper consideration of the representation and continuance of the detention of the detenu was therefore invalid. There was also another related ground urged on behalf of the petitioner and it was that the Minister of State for Home Affairs who considered the representation of the detenu was not competent to do so, both by reason of lack of authority as also in view of the fact that the case had already been dealt with by P.V. Nayak. We do not think there is any substance in either of these two grounds. If we look at the order of the detention, it is clear that it was not made by P.V. Nayak in his individual capacity as an officer of the State Government but it was made by him as representing the State Government. It was the State Government which made the order of detention acting through the instrumentality of P.V. Nayak, Secretary to Government who was authorised so to act for and on behalf of and in the name of the State Government under the Rules of Business. Rule 15 of the Rules of Business of the Government of Maharashtra provided that those Rules may "to such extent as necessary be supplemented by instructions to be issued by the Governor on the advice of the Chief Minister" and in exercise of the powers conferred under this Rule, the Governor of Maharashtra issued Instructions for the more convenient transaction of the business of the Government. Clauses (4), (5) and (6) of these Instructions as they stood at the material time provided inter alia as under :

> (4) Except as otherwise provided in these instructions, cases shall ordinarily be disposed of by, or under the authority, of the Minister-in-charge who may by means of standing orders give such directions as he thinks fit for the disposal of cases in the Department. Copies of such standing orders shall be sent to the Governor and the Chief Minister.
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> (5) Each Minister shall arrange with the Secretary of the Department what matters or classes of matters are to be brought to his personal notice.
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> (6) Except as otherwise provided in these instructions, cases shall be submitted by the Secretary in the Department to which the case belongs to the Minister-in-charge.

Pursuant to the instructions contained in these clauses, Shri A.R. Antulay, Chief Minister of Maharashtra and Minister-in-charge of the Home Department, issued a Standing Order dated July 18, 1981 directing that cases under sub-section (1) of Section 3 of the COEFPOSA Act need not be submitted to him or to the Minister of State for the Home Department and that such cases may be allotted to and disposed of by any of the six officers mentioned there one of them being P.V. Nayak. On the same day, another standing order was issued by Shri A.R. Antulay, Chief Minister of Maharashtra and Minister-in-charge of Home Department in pursuance of the Provisions contained

in Rule 6 of the Rules of Business, directing inter alia that all cases appertaining to the COFEPOSA Act and all other matters arising under the provision of that Act may be allotted to the Minister of State for Home Affairs. This latter standing order provided that nothing contained in it shall affect the directions contained in the earlier standing order issued on the same day. It will therefore be seen that P.V. Nayak was authorised under the earlier standing Order dated July 18, 1980 to deal with and dispose of cases under sub-section (1) of Section 3 of the COFEPOSA Act and it was in exercise of the authority thus conferred upon him that P.V. Nayak acting for the State Government made the order of detention against the detenu under sub-section (1) of Section 3. It was the State Government which made the order of detention and not P.V. Nayak in his individual capacity. The representation made by the detenu against the order of detention was also therefore required to be considered by the State Government and either it could be disposed of by P.V. Nayak acting for the State Government under the earlier Standing Order dated July 18, 1980 or the Minister of State for Home could dispose it of under the later Standing Order dated July 18, 1980. Whether P.V. Nayak considered the representation and disposed it of or the Minister of State for Home did so would be immaterial, since both had authority to act for the State Government and whatever be the instrumentality, whether P.V. Nayak or the Minister of State for Home, it would be the State Government which would be considering and dealing with the representation. The only requirement of Article 22(5) is that the representation of the detenu must be considered by the detaining authority which in the present case is the State Government and this requirement was clearly satisfied because when the Minister of State for Home considered the representation and rejected it, he was acting for the State Government and the consideration and rejection of the representation was by the State Government. There is no requirement or implied in any provision of the COFEPOSA Act that the same person who acts for the State Government in making the order of detention must also consider the representation of the detenu. In fact, as pointed out by Chinnappa Reddy, J. in Smt. Kavita v. State of Maharashtra ((1981) 3 SCC 558) : (SCC p. 564, para 5)

> Government business can never get through if the same individual has to act for the Government in every case or proceeding or transaction, however advantageous it may be to do so.

Moreover it would really be to the advantage of the detenu if his representation is not considered by the same individual but fresh mind is brought to bear upon it. We do not therefore see any constitutional or legal infirmity in the representation having been considered by the Minister of State for Home.

3. The next contention of Mr. Jethmalani on behalf of the petitioner was that there was nothing to show that the decision to confirm the order of detention and continue the detention of the detenu was taken by the State Government as required by clause (f) of Section 8 and hence the continuance of the detention was invalid. It is really difficult to appreciate this contention urged on behalf of the petitioner. It is clear from the annexures to the writ petition that after receipt of the opinion of the Advisory Board that there was in its opinion sufficient cause for the detention of the detenu, the State Government, in exercise of the powers conferred under clause (f) of Section 8, made an order dated March 23, 1981 confirming the detention order and continuing the detention of the detenu. This order was expressed to be made "By Order and in the name of the Governor of Maharashtra" and was authenticated by the Under-Secretary to the Government of Maharashtra, Home Department. It recited in so many terms that it was the State Government which was confirming the order of detention and continuing the detention of the detenu and no material has been placed before us on behalf of the detenu to displace the correctness of this recital. There can therefore be no doubt that the order confirming the detention of the detenu was made by the State Government. Moreover,

we have the statement on oath made by C.V. Karnik, Assistant Secretary to the Government of Maharashtra, Home Department that "the Government of Maharashtra thereafter under clause (f) of Section 8 of the said Act confirmed the said detention order by an order dated March 23, 1981".

4. It was then contended by Mr. Jethmalani on behalf of the petitioner that under clause (b) of Section 8 it was the obligation of the State Government to make a reference to the Advisory Board within five weeks from the date of detention of the detenu and there was nothing to show that the State Government had made such a reference to the Advisory Board. This contention is also without substance and totally futile, because it is clear from the statement of C.V. Karnik in his affidavit that it was the State Government which referred the case of the detenu to the Advisory Board under clause (b) of Section 8 and no material has been placed before us on behalf of the detenu controverting the correctness of this statement. Mr. Jethmalani also raised another contention in this connection and it was that, before making a reference to the Advisory Board, the State Government had not applied its mind to the question whether it was necessary to detain the detenu for a period longer than three months and this non-application of mind vitiated the reference to the Advisory Board and the subsequent order of confirmation following upon it. The argument of Mr. Jethmalani was that it was only if the State Government decided to detain a person for a period longer than three months that it was required to refer the case of such person to the Advisory Board and it was therefore necessary for the State Government in every case of detention to apply its mind and consider at least before making a reference to the Advisory Board whether the detention was to be continued for a period longer than three months. We are of the view that this argument is not well founded and must be rejected. It is clear that under clause (4) of Article 22 no law providing for preventive detention can authorise the detention of a person for a period longer than three months unless the Advisory Board has reported before the expiration of the period of three months that there is in its opinion sufficient cause for such detention. This requirements of clause (4) of Article 22 is satisfied by the enactment of Section 8 in the COFEPOSA Act. Section 8, clause (b) provides that in case of every detention, the appropriate Government shall, within five weeks from the date of detention, make a reference to the Advisory Board and the Advisory Board is required to make a report as to whether or not there is sufficient cause for the detention of the detenu and submit the same to the appropriate Government within eleven weeks from the date of detention of the detenu. The period of eleven weeks from the date of detention is prescribed for the submission of the report obviously because under clause (4) of Article 22 no detention can lawfully continue for a period longer than three months unless the Advisory Board has reported before the expiration of such period of three months that there is in its opinion sufficient cause for such detention. But one thing is clear that this provision for reference to the Advisory Board is not confined to cases where the detaining authority has already come to a decision that the detention shall be continued for a period longer than three months. It applies equally where the detaining authority has not yet made up its mind as to how long the detention shall continue or even where the detention is to continue for a period of three months or less. Whenever any order of detention is made, whether the detention is to continue for a period longer than three months or a period of three months or less or the detaining authority has not yet applied its mind and determined how long the detention shall be continued, the appropriate Government is bound within five weeks from the date of detention to make a reference to the Advisory Board and if it fails to do so, the continuance of the detention after the expiration of the period of five weeks would be rendered invalid. The Advisory Board is, in every such case where a reference is made, required to submit its report within eleven weeks from the date of detention and if it reports that there is in its opinion no sufficient cause for detention, the detaining authority is bound to release the detenu forthwith, even though a period of three months may not have expired since the date of detention. This is a safeguard provided by the COFEPOSA Act,

which is applicable in all cases of detention, whether the detention is to be continued beyond a period of three months or not and whether or not the detaining authority has applied its mind and determined, before making a reference to the Advisory Board, as to what shall be the period of detention. We are clearly of the view that it is not at all necessary for the detaining authority to apply its mind and consider at the time of passing the order of detention or before making a reference to the Advisory Board, as to what shall be the period of detention and whether the detention is to be continued beyond a period of three months or not. The only inhibition on the detaining authority is that it cannot lawfully continue the detention for a period longer than three months unless the Advisory Board has, before the expiration of the period of three months, reported that there is in its opinion sufficient cause for such detention. We must therefore hold that the State Government did not commit any breach of its constitutional or legal obligation in making a reference to the Advisory Board without first determining the period for which the detenu was to be detained.

5. Mr. Jethmalani on behalf of the petitioner lastly submitted that there was unreasonable delay on the part of the State Government in considering the representation of the detenu and this delay was fatal to the validity of the continuance of the detention. This contention is also without substance and must be rejected. It is no doubt true that the advocate of the detenu sent nine copies of the representation to the detenu on February 6, 1981 and these nine copies came to be forwarded to the various authorities only on February 10, 1981, but the affidavit of B.B. Mulay, Jailor attached to the Bombay Central Prison, shows that these nine copies were handed over by B.B. Mulay to the detenu as soon as they were received by him from the emissary of the detenu's advocate and the detenu got these documents on the same day, namely, February 6, 1981. B.B. Mulay asked the detenu to sign the representation and hand over the same for being forwarded to the State Government but the detenu stated that he would sign the representation only after going through it and he therefore carried the nine copies of the representation with him to the Nasik Central Jail where he was shifted in the evening of February 6, 1981 and it was only on February 10, 1981 that he signed all the nine copies of the representation and handed over the same to C.P. Gaekwad, Jailor, In-charge of the Nasik Central Prison and according to the affidavit of C.P. Gaekwad, these nine copies of the representation duly signed by the detenu were forwarded to the respective authorities on the same day. There was therefore no unreasonable delay on the part of the State authorities at this stage.

6. Proceeding further we find that the representation sent by the detenu was received in the Home Department of the State Government on February 13, 1981 and on the same day, a letter was addressed by the Home Department to the Collector of Customs calling for his remarks in regard to the various allegations contained in the representation and para-wise comments were received from the Customs Department on February 21, 1981. Now, it cannot be said that the Government acted unreasonably in forwarding the representation of the detenu to the Collector of Customs and waiting for the para-wise comments of the Customs Authorities, since there were various allegations made in the representation which called for the comments of the Customs Department and without such comments, the State Government could not fairly and properly consider the representation of the detenu. It may be noted that the communication from the Home Department dated February 13, 1981 could not have reached the Collector of Customs until February 16, 1981 because February 14 and 15 were Saturday and Sunday and therefore closed holidays. The reply of the Customs Authorities which was received on February 21, 1981 must have been despatched on February 20 and therefore the Customs Authorities did not have more than four or five days within which to give their comments in regard to the various allegations contained in the representation of the detenu and this time taken by the Custom Authorities cannot be regarded as unreasonable. We do not think that in these circumstances the State Government could be said to be guilty of any unreasonable delay so

far as the period between February 13 and February 21, 1981 is concerned.

7. There was also no unreasonable delay after February 21, 1981. The affidavit of C.V. Karnik shows that the representation of the detenu was immediately put up before the Minister of State for Home for consideration, in the light of the comments received from the Customs Authorities and the representation was considered and rejected by the Minister of State for Home on February 23, 1981 and necessary intimation to that effect was conveyed to the detenu by a letter dated February 25, 1981. It is impossible to hold in these circumstances that there was any unreasonable delay on the part of the State Government in considering that representation of the detenu and this contention of Mr. Jethmalani must be rejected.

8. These were all the contentions urged on behalf of the petitioner and since there is no substance in them, the petition fails and is dismissed.

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