

Smt. Kavita Wife of Shri Sunder Shankardas Devidasani

Vs

State of Maharashtra and Others

Writ Petition (Criminal) No. 4957 of 1981

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

26.08.1981

ORDER

This is an application under Article 32 of the Constitution for the issue of a writ of habeas corpus to release the detenu, Sunder Shankardas Devidasani, detained under the provisions of the COFEPOSA. An identical writ petition on almost the same grounds was rejected by us on July 28, 1981 [Kavita v. State of Maharashtra, (1981) 3 SCC 558 : 1981 SCC (Cri) 743] after a full dressed debate. At that hearing the detenu was represented by Shri Ram Jethmalani. He is now represented by Shri R.K. Garg. The grounds now taken in the petition are generally the same as the grounds taken then, except that the present petition contains a trenchant criticism of the judgment pronounced by us on July 28, 1981 [Kavita v. State of Maharashtra, (1981) 3 SCC 558 : 1981 SCC (Cri) 743] and asks for a virtual review of the earlier judgment. Advantage has been taken of our ruling in *Lallubhai Jogibhai Patel v. Union of India* [AIR 1981 SC 728 : (1981) 2 SCC 427 : 1981 SCC (Cri) 463] that the principle of *res judicata* is not applicable in all its vigour in applications for that issue of writs of habeas corpus, and, instead of filing a petition for review, the present independent writ petition has been filed. We have heard the learned counsel at great length and we are unable to find any ground justifying the admission of this writ petition. One ground is that some of the grounds, particularly the one relating to representation by a counsel before the Advisory Board, is awaiting decision by the Constitution Bench in other cases and therefore the present writ petition may also be heard by a Constitution Bench. We do not see any reason to adopt such a course. We have expressed our view on the question raised before us and if our view is later found to be wrong in the light of what may be said by the Constitution Bench it will be open to the petitioner to seek a review of our judgment or file another writ petition, as he may be advised. Another ground now taken is about the vires of the COFEPOSA, the argument being that its inclusion in the Ninth Schedule of the Constitution offends the basic structure of the Constitution. This ground was hinted at but not argued on the earlier occasion. It was not raised in the writ petition at that time. It could not be that the petitioner was not properly advised. According to Shri Garg the question of legality of the inclusion of the COFEPOSA in the Ninth Schedule of the Constitution is pending decision in other writ petitions. Those writ petitions are said to have been pending even when we heard the earlier writ petition. I do not think the applicants and their advisers were unaware of the pendency of the writ petitions in which the question was being canvassed. On the other hand we were told by the counsel that no constitutional question was proposed to be argued. The petitioner having deliberately and advisedly not chosen to raise the question in the earlier petition, we do not think we will be justified in admitting this writ petition. We may add that we are also not satisfied even *prima facie* how the basic structure of the Constitution is affected. We, however, leave it open to the petitioner to file an application for review or file an independent writ petition, as he may be advised, after this Court decides in other cases, the question now posed before

us. The application is dismissed.

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