Nand Lal Bajaj

Vs

State of Punjab and Another

Writ Petition (Criminal) No. 4975 of 1981

(A.P. Sen, Baharul Islam JJ)

15.09.1981

JUDGMENT

A.P. SEN, J. –

1. This is a petition under Article 32 of the Constitution by one Nand Lal Bajaj for the issuance of a writ of habeas corpus for the release of his son, Inderjit alias Billa, who has been detained by an order of detention passed by the District Magistrate, Ropar, under Section 3 of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 (hereinafter called 'the Act'), on being satisfied that his detention was necessary with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies of commodities essential to the life of the community.

2, Various grounds have been taken challenging the validity of the order of detention, but it is not necessary for us to deal with them all as the view that we take on one of them is sufficient to dispose of the petition. The main contention is that the procedure adopted by the Advisory Board is allowing legal assistance to the State and denying such assistance to the detenu was both arbitrary and unreasonable and thus violative of Article 21 read with Article 14 of the Constitution.

3. First as to the facts. On June 1, 1981, the District Magistrate passed an order of detention under sub-section (2) of Section 3 of the Act on being satisfied that detention of Inderjit was necessary with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community, and as required by sub-section (3) thereof, made a report forthwith to the State Government together with the grounds on which the order of detention had been made and the State Government approved of the same. The detenu was apprehended on June 11, 1981 and served with the order of detention together with the grounds and, in due course, the detenu submitted his representation challenging the order of detention to the State Government. He made a request in writing that he be allowed the assistance of counsel during the hearing before the Advisory Board, but the Government did not accede to his request. However, it appears that the detaining authority was represented by the State counsel at the hearing. The detenu thereupon asked the Advisory Board that the he may also be afforded an opportunity for legal assistance. What transpired before the Advisory Board can best be stated in the words of the petitioner. The relevant averment in Para 17 of the petition is as follows :

> Before the commencement of these proceedings the detenu requested the State Government in writing that he be allowed assistance of counsel during the course of the proceedings before the Advisory Board. The said request was denied. The detenu to his utter surprise found that whereas he had to place his case before the Advisory

> Board without assistance of counsel, the order of detention was defended by State counsel. The lawyers representing the State, during the course of the proceedings before the Advisory Board included the District Attorney and the Additional District Attorney who were assisted by the District Legal Adviser and one legal assistant. The detenu had also requested the Advisory Board verbally that he be allowed the assistance of counsel during the course of the proceedings.....

In answer to the rule nisi, the District Magistrate, Ropar who is the detaining authority, has filed a counter-affidavit by which he explained the circumstances which led to the issue of the detention order. In reply to Para 17 of the petition, it is averred :

> In reply to Para 17 of the petition it is stated that Section 11(4) of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 prohibited the assistance of a lawyer to the detenu before the proceedings of Advisory Board, which are confidential. However the Advisory Board is competent to call any information from the appropriate Government or from any person for the purpose through the appropriate Government as laid in Section 11(1) of the Act.

It is thus manifest that there was no traverse of the specific allegation made by the petitioner that while the Advisory Board allowed legal assistance to the detaining authority, there was denial of such an opportunity to the detenu. In substance, the District Magistrate does not deal with the facts but states the law.

4. Despite the Order of this Court for the production of the file containing the proceedings of the Advisory Board, all that was shown to us was the report of the Advisory Board. We were informed that the record was not with the State Government but with the Board. It was represented that the Advisory Board does not forward its records because they are confidential. In the absence of the record, there is no other alternative but to proceed on the allegations made by the petitioner. The report of the Board does indicate that the Public Prosecutor who was present was questioned on one of the aspects of the matter. It also records the presence of two Additional District Attorneys.

5. It is argued on behalf of the State that under sub-section (4) of Section 11 of the Act the detenu was not entitled to any legal assistance before the Advisory Board. The submission is that the proceedings of the Board and its report except that part of the report in which the opinion of the Board is expressed, are confidential. Therefore, lawyers have no place in the proceedings before the Advisory Board.

6. It is further argued that the Advisory Board is entitled to devise its own procedure. Our attention was drawn to sub-section (1) of Section 11 of the Act, and it is urged that the Advisory Board is entitled not only to look into the record and see whether there was any material on which the order of detention could be passed under Section 3 of the Act, but may also call for any such further information as it may deem necessary. Sub-sections (1) and (4) of Section 11 of the Act on which reliance has been placed by the State are as follows :

> 11. (1) The Advisory Board shall, after considering the materials placed before it and, after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if, in any particular case, it considers it essential so to do or if the person concerned desires to be heard, after

hearing him in person, submit its report to the appropriate Government within seven weeks from the date of detention of the person concerned.

(4) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board, and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

Under Article 23(3)(b) of the Constitution, the right to consult and be defended by a legal practitioner of his choice is denied to any person who is arrested or detained under any law providing for preventive detention. Sub-section (4) of Section 11 of the Act is undoubtedly in conformity with Article 22(3)(b) of the Constitution. Normally, lawyers have no place in the proceedings before the Advisory Board. The functions of the Advisory Board are purely consultative. It is an independent body constituted under Section 9 of the Act consisting of a sitting judge as the Chairman and not less than two other members, who may be sitting or retired judges of the High Court. It is expected that the Advisory Board would act in a fair and impartial manner in making a report whether or not there is, in its opinion, sufficient cause for the detention of a person. In coming to that conclusion, the Board has to make an objective determination on the question as to whether there was sufficient material on which the subjective satisfaction of the detaining authority could be based. Under sub-section (1) of Section 11 of the Act, the Board is not only entitled to look into the record and see whether there was any material on which the order of detention could be passed under Section 3 of the Act, but may also call for such further information as it may deem necessary from the appropriate Government or from the person concerned and if, in any particular case, it considers essential to do so or if the person concerned desires to be heard, shall hear him in person. The Board is entitled to devise its own procedure.

7. It is the arbitrariness of the procedure adopted by the Advisory Board that vitiates the impugned order of detention. There is no denying the fact that while the Advisory Board disallowed the detenu's request for legal assistance, it allowed the detaining authority to be represented by counsel. It appears that the Advisory Board blindly applied the provisions of sub-section (4) of Section 11 of the Act to the case of the detenu failing to appreciate that it could not allow legal assistance to the detaining authority and deny the same to the detenu. The Advisory Board is expected to act in a manner which is just and fair to both the parties. The report of the Board placed before us shows that the detenu exercised his right to recall some of the witnesses for the purpose of cross-examination. We are informed that the hearing before the Advisory Board went on for 4 to 5 days and there were as many as 11 witnesses cross-examined by the detenu. It cannot be, as is suggested by the counsel for the State, that the lawyers representing the State Government did not participate in the proceedings. On the contrary, the report itself shows that the Public Prosecutor was called upon to explain some aspects of the case. If the manner was so intricate, the Advisory Board should have ensured that both the parties had equal opportunities to place their respective cases. It appears that the dice was loaded against the detenu in that whereas he had to go without legal assistance, the State Government had the benefit of an array of lawyers.

8. The expression "procedure established by law" in the context of deprivation of life and liberty under Article 21 was interpreted in Maneka Gandhi v. Union of India [(1978) 2 SCR 621 : (1978) 1 SCC 248] and the interpretation so put has been treated as involving an enlargement of the right conferred by Article 21 of the Constitution. As limited to the procedure, the judges were agreed that the procedure must be reasonable and fair and not arbitrary or capricious. For, if the procedure was

arbitrary, it would violate Article 14 since Article 14 is not consistent with any arbitrary power [H.M. Seervai : CONSTITUTIONAL LAW of INDIA, 2nd Edn., Vol. 3, pp. 1940-41]. In interpreting the expression "procedure established by law" in Article 21 with reference to Article 14 of the Constitution, Bhagwati, J., observed : [(1978) 2 SCR 621, 674 : (1978) 1 SCC 248, 283] (SCC p. 283, para 7)

> We must reiterate here what was pointed out by the majority in E.P. Royappa v. State of T.N. [(1974) 2 SCR 348 : (1974) 4 SCC 3 : 1974 SCC (L&S) 165] namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

Arbitrariness is the very antithesis of Article 14. The principle of reasonableness is an essential element of equality and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14.

9. Among the concurring opinions, Krishna Iyer, J., although he generally agreed with Bhagwati, J., goes a step forward by observing : [(1978) 2 SCR 621, 723 : (1978) 1 SCC 248, 338] (SCC p. 338, para 84)

> Procedural safeguards are the indispensable essence of liberty. In fact, the history of procedural safeguards and the right to a hearing has a human-right ring. In India, because of poverty and illiteracy, the people are unable to protect and defend their rights : observance of fundamental rights is not regarded as good politics and their transgression as bad politics.

In short, the history of personal liberty is largely the history of procedural safeguards. The need for observance of procedural safeguards, particularly in cases of deprivation of life and liberty is, therefore, of prime importance to the body politic. In Francis Coralie Mullin v. Administrator, Union Territory of Delhi [(1981) 2 SCR 516, 531 : (1981) 1 SCC 608 620-21 : 1981 SCC (Cri) 212] the interrelation between Articles 21 and 14 of the Constitution was brought out by Bhagwati, J. in these words : (SCC pp. 620-21, para 11)

> The right of detenu to consult a legal adviser of his choice for any purpose not necessarily limited to defence in a criminal proceeding but also for securing release from preventive detention or filing a writ petition or prosecuting any claim or proceeding, civil or criminal, is obviously included in the right to live with human dignity and is also part of personal liberty and the detenu cannot be deprived of this right nor can this right of the detenu be interfered with except in accordance with reasonable, fair and just procedure established by a valid law.

It is increasingly felt that in the context of "deprivation of life and liberty" under Article 21, the "procedure established by law" carried with it the inherent right to legal assistance. Apart from authority it is easy to appreciate that in overwhelming majority of cases a detenu can do nothing to help himself before the Advisory Board. The right to be heard before the Advisory Board would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. It is expected that Parliament while making a law to regulate the procedure before an Advisory Board under Article 22(7)(c) of the Constitution should provide the right to consult and be defended by a legal practitioner of his choice. It is incomprehensible that a person committing a crime should have under Article 22(1) of the Constitution the right to consult and be defended by a legal practitioner of his choice, but a person under preventive detention, more often than not for his political beliefs, should be deprived of this valuable right. It cannot be denied that preventive detention is an anachronism in a democratic society like ours. The detention of individuals without trial for any length of time, however short, is wholly inconsistent with the basic ideals of a parliamentary system of Government. In the nature of things, under the law as it exists, a person under preventive detention is not entitled to legal assistance. However, we think it is futile for us to attempt to project our personal views in a matter which lies in the realm of decision-making of Parliament. The matter is essentially political and as such it is the concern of the statesmen and, therefore, within the domain of the Legislature, and not the Judiciary.

10. In Smt. Kavita v. State of Maharashtra [(1981) 3 SCC 558 : 1981 SCC (Cri) 743] the Court recently had an occasion to deal with Section 8 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, which is in pari materia with sub-section (4) of Section 11 of the Act. The Court speaking through Chinnappa Reddy, J. observed : (SCC p. 564, para 6)

It is true that while Section 8(e) disentitle 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.

The learned Judge emphasised that (SCC p. 564, para 6)

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 Act,

and observed that this valuable right may be jeopardized and reduced to mere nothing without adequate legal assistance, in the light of the intricacies of the problems involved and other relevant factors. He then went on to say whether or not legal assistance should be afforded by the Advisory Board must necessarily depend on the facts and circumstances of each individual case and observed : (SCC pp. 564-65, para 6)

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.

In that case, there was no denial of procedural fairness which is a part of the fundamental right guaranteed under Article 21 of the Constitution, since no such request was made by the detenu

before the Advisory Board. The decision in Kavita case [(1981) 3 SCC 558 : 1981 SCC (Cri) 743] is, however, an authority for the proposition that while there is no right under Section 8(e) of the COFEPOSA Act to legal assistance to a detenu in the proceedings before the Advisory Board, he is entitled to make such a request to the Board and the Board is bound to consider such a request when so made. In the present case, the detenu made such a request, but in the absence of the record of the Advisory Board, it is not possible to infer whether the request was considered. Even if it was denied, as the petitioner himself alleges, there was no rational basis for a differential treatment. There is no denial of the fact that while the detenu was not afforded legal assistance, the detaining authority was allowed to be represented by counsel. It is quite clear upon the terms of sub-section (4) of Section 11 of the Act that the detenu had no right to legal assistance in the proceedings before the Advisory Board, but it did not preclude the Board to allow such assistance to the detenu, when it allowed the State to be represented by an array of lawyers.

11. The matter can be viewed from another angle. We were informed that the Advisory Board did not forward the record of its proceedings to the State Government. If that be so, then the procedure adopted was not in consonance with the procedure established by law. The State Government while confirming the detention order under Section 12 of the Act has not only to peruse the report of the Advisory Board, but also to apply its mind to the material on record. If the record itself was not before the State Government, it follows that the order passed by the State Government under Section 12 of the Act was without due application of mind. This is a serious infirmity in the case which makes the continued detention of the detenu illegal.

12. We refrain from expressing any opinion on the other grounds raised. It appears to us prima facie that the grounds for detention set out the facts with sufficient degree of particularity and that they did furnish sufficient nexus for forming the subjective satisfaction of the detaining authority. It seems to us that the order of detention cannot also be challenged that the grounds furnished were vague or indifferent or lacking in particulars or were not adequate or sufficient for the satisfaction of the detaining authority, or, for that matter, for the making of an effective representation.

13. For the reasons stated above, the order of detention passed by the District Magistrate, Ropar dated June 1, 1981 is quashed and we direct that the detenu Inderjit alias Billa be set at liberty forthwith.

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