

Abdul Zabbar

Vs

State of Rajasthan and Others

Writ Petition No. 1191 of 1982 and Special Leave Petition No. 2380 of 1982

(V. D. Tulzapurkar, Baharul Islam JJ)

11.11.1982

ORDER

1. By this writ petition filed under Article 32 of the Constitution the petitioner (detenu) is challenging his continued detention under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (for short 'COFEPOSA'). The Short ground on which the continued detention is challenged before us is that the proceedings before us is that the proceedings before the Advisory Board were vitiated by denial of a right to the detenu to be represented by a friend which right is now recognised and well-settled as a result of the decisions of this Court in A. K. Roy v. Union of India (AIR 1982 SC 710 : (1982) 1 SCC 271 : 1982 SCC (Cri) 152 : (1982) 2 SCR 272).

2. The short facts giving rise to the aforesaid ground are these : As a result of the detention order passed on March 1, 1982 the petitioner was detained on March 3, 1982. Grounds of detention were served upon him on March 4, 1982. It appears that the detenu made his representation and before his case was to be considered by the Advisory Board he had made an application to the Advisory Board for being represented on the date of hearing either through a counsel or by a non-lawyer educated friend and he requested that the necessary permission may be communicated to him so that he may make necessary arrangement on the date of hearing before the Board. No reply was received. On April 5, 1982 when his case was taken up by the Advisory Board he reiterated his request. But the request was turned down in both respects and after hearing the petitioners in person the Advisory Board gave its opinion justifying the detention order. The petitioner has contended before us that though under Section 8(c) of the COFEPOSA he has not entitled to be represented by a legal practitioner his right to be represented through a friend before the Advisory Board was wrongly denied to him for no reason whatever, and in that behalf reliance has been placed by the counsel for the petitioner on this courts' observations in para 95 (SCC para 94) of its judgment in A. K. Roy case (AIR 1982 SC 710 : (1982) 1 SCC 271 : 1982 SCC (Cri) 152 : (1982) 2 SCR 272) at page 747 (SCC p. 335) of the Report which runs thus :

Another aspect of this matter which needs to be mentioned is that the embargo on the appearance of legal practitioners should not be extended so as to prevent the detenu from being aided or assisted by a friend who, in truth and substance, is not a legal practitioner. Every person whose interests are adversely affected as a result of the proceedings which have a serious import, is entitled to be heard in those proceedings and be assisted by a friend. A detenu, taken straight from his cell to the Board's room, may lack the ease and composure to present his point of view. He may be 'tongue-tied, nervous, confused or wanting in intelligence' (see *Pett v. Greyhound Racing Association Ltd.* ((1969) 1 QB 125)) and if justice is to be done he must at

least have the help of a friend who can assist him to give coherence to his stray and wandering ideas. Incarceration makes a man and his thoughts dishevelled. Just as a person who is dumb is entitled as he must, to be represented by a person who has speech, even so, a person who finds himself unable to present his own case is entitled to take the aid and advice of a person who is better situated to appreciate the facts of the case and the language of the law. It may be that denial of legal representation is not denial of natural justice per se, and therefore, if a statute excludes that facility expressly it would not be open to the Tribunal to allow it. Fairness, as said by Lord Denning, M. R., in *Maynard v. Osmond* ((1977) 1 QB 240, 253 : (1977) 1 All ER 64) can be obtained without legal representation. But it is not fair, and the statute does not exclude that right, that the detenu should even be allowed to take the aid of a friend. Whenever demanded, the Advisory Boards must grant that facility.

3. We may refer to another decision of this Court in *Devji Tandel* case (*Devji Vallabhbbhai Tandel v. Administrator of Goa, Daman & Diu*, (1982) 2 SCC 222 : 1982 SCC (Cri) 403) where the aforesaid right has been reiterated by this Court. Counsel for the petitioner invited our attention to certain observations made by this Court in that case in paragraph 38 and has taken exception to their validity but it is unnecessary for us to deal with that aspect of the matter. The right of the detenu to be represented by a friend, who in truth and substance is not a legal practitioner, cannot be disputed and no reasons were given by the Board why it was denied to the petitioner. There is nothing to suggest that the petitioner wanted to be represented by any so-called friends who in reality was a legal practitioner. Counsel for the respondent urged that the petitioner had not furnished the name of the friend so as to enable the Board to ascertain whether the friend was a lawyer or not. But the Board could have asked the petitioner to do so either earlier or on April 5, 1982 before commencing the proceedings if it was minded to grant his request in that behalf. Counsel for the respondent further urged before us that even if this Court finds that the petitioner's request was wrongly rejected the matter could go back to the Advisory Board and a proper hearing could be directed to be given to the petitioner. It is not possible to accept this contention for the simple reason that the procedure followed by the Advisory Board which involved a denial of a valuable right to the petitioner, unquestionably vitiated the entire proceedings before it and therefore the continued detention of the petitioner as from April 5, 1982 would be illegal and the same will have to be quashed.

4. In the result the writ petition is allowed and the continued detention of the petitioner is declared to be illegal as from April 5, 1982 and the petitioner is directed to be released forthwith.

5. We have not dealt with other grounds mentioned in the writ petition challenging the detention.

6. In view of the above judgment Writ Petition No. 1182 of 1982 does not survive and is disposed of accordingly.

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