State of Rajasthan and Another

Vs

Shamsher Singh

Criminal Appeal Nos. 107-108 of 1985.

(Ranganath Misra, Syed M. Fazal Ali JJ)

01.05.1985

JUDGMENT

RANGANATH MISRA, J. -

1. The respondent, an Advocate, was ordered to be detained by the Government of Rajasthan under Section 3(2) of the National Security Act, 1980 (hereinafter referred to as the Act), on August 14, 1984, and he was actually taken into custody and detained on the following day. The grounds of detention were supplied to him when he was detained. Respondent challenged his detention before the Rajasthan High Court by filing two applications under Article 226 of the Constitution on several grounds. Both the writ applications were clubbed and heard together and disposed of by a common judgment. The High Court found that the representation of the detenu-respondent had not been placed before the Advisory Board within three weeks as required by Section 10 of the Act and such violation vitiated the continued detention of the respondent. It also found that he Advisory Board had not considered the documentary evidence produced by the detenu and the opinion formed by the Board that the respondent should be detained was, therefore, not an appropriate one. The Court took the view that the materials in the record which had been considered by the Advisory Board in formulating its recommendation to the State Government had not been transmitted to the Government and the same was not available before the State Government when it made the order of confirmation. The Court was also of the further view that the contents of the intelligence reports referred to in the grounds of detention had not been supplied to the detenu and he had, therefore, been deprived of the opportunity of making an effective representation against his detention. On these findings the High Court held that the detention of the respondent cannot be upheld and the order of detention dated August 14, 1984, and the subsequent order dated October 22, 1984, directing him to be detained for one year be quashed. The Court further directed :

In the interest of justice and in the interest of national security, without curtailing seriously individual liberty, we give the following directions :

> (1) that the detenu Shamsher Singh being entitled to liberty on account of the above order of ours will be released from the Central Jail, Ajmer;
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> (2) that the detenu Shamsher Singh would be nonetheless kept either under house arrest or in a place like Dak Bungalow or Circuit House at Ajmer or a nearby place within the radius of 50 kms. with the members of his family, which would consist of his wife and three minor sons;
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> (3) that if the detenu is kept under house arrest, the expenses will be borne by the

> detenu, but if he is kept in some Dak Bungalow or other Circuit House, then his expenses will be borne by the State;
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> (4) that the authorities would permit interview with other relatives also, if the detenu is kept outside his house.

In case an stay order is received staying the operation of the judgment of this Court, the detenu shall be released on expiry of three weeks, i.e. on January 11, 1985.

2. This Court granted special leave to appeal against the judgment of the High Court by its order dated January 18, 1985. In the meantime, the High 'court had suspended the operation of its order till January 21, 1985, and while granting special leave, this Court stayed operation of the judgment.

3. Learned Advocate-General of the appellant State appearing in support of the appeal maintained that each of the four grounds accepted by the High Court in quashing the detention is wrong and not sustainable as a ground for such quashing while Mr. Jethmalani appearing for the respondent supported the reasonings and the ultimate conclusion of the High Court. We have already stated that the High Court formulated the reasons for its order in the shape of four conclusions and we propose to deal with them seriatim for convenience.

4. The first ground of attack advances by the respondent against the order which impressed the High Court is that there has been violation in complying with the provisions of Section 10 of the Act. Indisputably the respondent was taken into custody on August 15, 1984. On August 22, 1984, the State Government placed before the Advisory, Board the grounds on which the order of detention had been made. By then no representation had been made by the detenu and, therefore, there was no occasion for causing that also to be placed before the Board. The respondent made a representation on August 28, 1984, which was received by the Superintendent of the Central Jail where the detenu had been lodged and the same was received by the State Government on August 30, 1984. There is no dispute that the representation was placed before the Advisory Board on September 6, 1984 as far as relevant, Section 10 of the Act provides :

> ". . . in every case where a detention order has been made under this Act, the appropriate Government shall, within three weeks from the date of detention of a person under the order, place before the Advisory Board constituted by it under Section 9, the grounds on which the order had been made and the representation, if any, made by the person affected by the order. . . .

It is the contention of the respondent that his representation against the detention had been placed before the Advisory Board a day to late inasmuch as while Section 10 requires the placing to be done within three weeks from the date of detention, the representation had been placed before the Advisory Board on the 22nd day. There was no dispute before the High Court nor is there any challenge before us that there has been a day's delay in placing the representation of he respondent before the Board.

5. The High Court has accepted the respondent's submission that the requirement under Section 10 of the Act was mandatory and failure to place before the Advisory Board the representation of the respondent had vitiated the detention. While Mr. Jethmalani appearing for the respondent reiterates that stand, learned Advocate-General in support of the appeal has contended that as a fact there has been compliance of Section 10 of the act within a week of commencement of the detention and as

by then no representation from the respondent had been received, the same could not be paled before the Board along with the grounds of detention. The State Government received the representation on August 30, 1984, and after looking into the contents caused it to be placed before the Board with due haste and that was done on September 6, 1984. On the basis of the reference made on August 22, 1984, the Advisory Board had already fixed the consideration of the respondent's detention at the meeting on September 10, 1984, and as a fact, four days before the date of hearing fixed by the Board the representation was before it. As a fact, no adjournment had to be given in the matter of consideration of the representation of the respondent on account of a day's delay in the placing of the representation before the Board. Learned Advocate-General further submitted that when a representation from the detenu is received against his detention by the detaining authority (here the State Government), the contents of the representation are intended to be perused so that the detaining authority may consider whether continuing the detention is proper and expedient. At that stage it is open to the detaining authority to rescind the order of detention and in that event no further reference to the Advisory Board is warranted. Since the detaining authority is not a mere post office - being required to receive the representation and have it placed before the Advisory Board - a little time is bound to be taken in dealing with the representation. Taking a practical view of the situation some time is bound to lapse between the receipt of the representation and the forwarding of the same for being placed before the Board. A day's delay in such process cannot indeed be taken to be fatal so as to warrant the quashing of the detention.

6. A Constitution Bench in A. K. Roy v. Union of India, has upheld the vires of the Act. It was pointed out in Ichhu Devi Choraria v. Union of India that (SCC p. 538, para 5)

The burden of showing that the detention is in accordance with the procedure established by law had always been placed by this Court on the detaining authority because Article 21 of the Constitution provides in clear and explicit terms that no one shall be deprived of his life or personal liberty except in accordance with procedure established by law. This constitutional right of life and personal liberty is placed on such a high pedestal by this Court that it has always insisted that whenever there is any deprivation of life or personal liberty, the authority responsible for such deprivation must satisfy the court that it has acted in accordance with the law. This is an area where the court has been most strict and scrupulous in ensuring observance with the requirements of the law, and even where a requirement of the law is breached in the slightest measure, the court had not hesitated to strike done the order of detention or to direct the release of the detenu even though the detention may have been valid till the breach occurred.

This Court in Khudiram Das v. State of W. B., said : (SCC p. 87, para 5)

The constitutional imperatives enacted in this article [22] are two-fold : (1) the detaining authority must, as soon as may be, that is, as soon as practicable after the detention, communicate to the detenu the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detenu the earliest opportunity of making a representation against the order of detention. These are the barest minimum safeguards which must be observed before an executive authority can be permitted to preventively detain a person and thereby drown his right of personal liberty in the name of public good and social security.

The view indicated in these decisions is well accepted and the same is not open to doubt or dispute.

7. We have already pointed out that within a week of detention of the respondent a reference to the Advisory Board had actually been made in this case but without the respondent's representation as

the same had not been made by then. Section 10 stipulates that the grounds on which the order has been made and also the representation of the detenu, if any, have to be placed before the Board when the reference is made. The legislative scheme contained in this section envisages the situation that there may be a case where no representation at all is made or within the time contemplated under section 10, the representation has not been forthcoming. We agree with the submission of Mr. Jethmalani that the obligation cast under Section 10 of the Act is paramount and the strictness with which such a mandate has to be complied with is absolute. While making of the reference under Section 10 with the grounds of detention is a must, furnishing of the representation is conditional upon it having been made and receipt thereof by the appropriate Government. Though under the general scheme of the Act definite and different periods have been prescribed for compliance with the step to step treatment of the matter, there is no obligation cast on the detenu to make a representation within any definite time. We are, therefore, prepared to accept the submission of the learned Advocate-General that while considering the compliance with Section 10 of the Act emphasis has to be laid on making of the reference and forwarding of the grounds of detention, and the placing of the representation has to be judged on different basis. We may not be understood to be of the view that it is open to the appropriate Government to withhold the placement of the representation unduly or indefinitely. When the reference is received and the grounds of detention are available, the Board proceeds to fix a date of hearing for consideration of the justification of detention. The procedure of the Advisory Board contained in Section 11 of the Act indicates that the Board is to consider the materials placed before it and is entitled to call for such information as it may deem necessary from the appropriate Government or from any other person concerned and after hearing the detenu, if he wants to be heard in person, has to report to the appropriate Government within seven weeks from the date of detention in the manner indicted in the remaining sub-sections of that section. While dealing with this aspect of the matter it is to be borne in mind that Section 10 requires the reference to be placed before the Board within three weeks and Section 11 requires the report to be submitted to the appropriate Government within seven weeks. The legislative scheme in fixing the limit of three weeks in Section 10 and the further limit of seven weeks in Section 11 allows at least four weeks' time to the Board to deal with the matter.

8. The Board on receipt of the reference on August 22, 1984, directed its sitting to be convened for September 10, 1984, for considering the justifiability of the respondent's detention. This had apparently been done on the basis of the reference form the appropriate Government but without the representation but the representation was received by the Board in the meantime on September 6, 1984. The first meeting of the Advisory Board was thus fixed within four weeks from the date of detention and the consideration of the matter by the Board was not required to be adjourned on account of any delay in receiving the copy of the representation of the detenu.

9. We agree with the submission of Mr. Jethmalani that it is obligatory for the appropriate Government to Forward the representation, when received, to the Board without delay because unless on the basis of the representation the appropriate Government rescinds the order of detention, the representation is a document intended for the Board. Where the representation has been received the same should, as expeditiously as possible, reach the Board. In this case the State Government received the representation on August 30, 1984, and placed the same before the Board on September 6, 1984. Six clear days have intervened between the receipt of the representation by Government and the placing thereof before the Board. Admittedly, if the representation had reached the Board by September 5, 1984, respondent would not be entitled to raise any objection. Can it, on the facts of the case and in the circumstances indicted, be said to be non-compliance with Section 10 of the Act?

10. Mr. Jethmalani placed before us a passage from Broom's Legal Maxims (p. 162), 10th Edn.,

where the doctrine of impossibility of performance (lex non cogit ad impossibilia) has been discussed. It has been indicated therein that however mandatory the provision may be, where it is impossible of compliance that would be a sufficient excuse for non-compliance, particularly when it is a question of the time factor. Keeping the attendant circumstances of this case in view, we find it difficult to hold that the time taken by the State Government can amount to withholding of the representation which resulted in non-compliance of Section 10 of the Act so as to vitiate the detention. It is useful to refer to paragraph from a judgment of his Court in Frances Coralie Mullin v. W. C. Khambra, while we are on this point. A Division Bench was dealing with a COFEPOSA detention. Section 8 of the COFEPOSA requires the appropriate Government to make a reference to the Board within five weeks from the date of detention. While dealing with an argument referring to this aspect of the matter, the Court observed : (SCC p. 279, para 5)

The four principles enunciated by the Court in Jayanarayan Sukul v. State of West Bengal as well as other principles enunciated in other cases, an analysis will show, are aimed at shielding personal freedom against indifference, insensibility, routine and red tape and thus to secure to the detenu the right to make an effective representation. We agree : (1) the detaining authority must provide the detenu a very early opportunity to make a representation, (2) the detaining authority must consider the representation as soon as possible, and this, preferably, must be before the representation is forwarded to the Advisory Board, (3) the representation must be forwarded to the Advisory Board before the Board makes its report, and (4) the consideration by the detaining authority of the representation must be entirely independent of the hearing by the Board or its report, expedition being essential at every stage. We, however, hasten to add that the time-imperative can never be absolute or obsessive. The Court's observations are not to be so understood. There has to be lee-way, depending on the necessities (we refrain from using the word 'circumstances') of the case. One may well imagine a case where a detenu does not make a representation before the Board makes its report making it impossible for the detaining authority either to consider it or to forward it to the Board in time or a case where a detenu makes a representation to the detaining authority so shortly before the Advisory Board takes up the reference that the detaining authority, cannot consider the representation before then but may merely forward it to the Board without himself considering it. Several such situations may arise compelling departure from the time-imperative. But no allowance can be made for lethargic indifference. No allowance can be made for needless procrastination. But, allowance must surely be made for necessary consultation where legal intricacies and factual ramifications are involved.

11. It is useful at this stage also to refer to a later decision of another Division Bench of this Court in Raisuddin alias Babu Tamchi v. State of U. P. That was a case of detention under the act and there was a delay of six days between the receipt by the District Magistrate (the detaining authority) of the comments from the Superintendent of Police on the representation and despatch of the representation to the State Government. While negativing the contention founded on delay and the resultant effect on the order of detention, this Court observed : (SCC pp. 540-41, para 4)

In this context we consider it necessary to emphasise that the question whether the representation submitted by a detenu has been dealt with all reasonable promptness and diligence is to be decided not by the application of any rigid or inflexible rule or set formula nor by a mere arithmetical counting of dates, but by a careful scrutiny of the facts and circumstances of each case; if on such examination, it is found that there was any remissness, indifference or avoidable delay on the part of the detaining authority/State Government in dealing with the representation, the Court will undoubtedly treat it as a factor vitiating the continued detention of the detenu; on the other hand, if the Court is satisfied that the delay was occasioned not by any lack of diligence or promptness of

attention on the part of the part concerned, but due to unavoidable circumstances reasons entirely beyond his control, such delay will not be treated as furnishing a ground for the grant of relief to the detenu against his continued detention. . . .

We agree with the principle indicated above and in our opinion, in the facts of the present case, it cannot be said that there has been any negligence or remissness on the part of the State Government in dealing with the representation of the detenu or in the matter of causing the same to be placed before the Advisory Board. We are impressed by the fact that no prejudice has been caused to the detenu on account of the delay of a day beyond the statutory period in lacing the representation before the Advisory Board inasmuch as the Advisory Board had caused the matter to be heard on September 10, 1984 and before the appointed date the representation was before the Board. The first ground on which the High Court came to hold that the detention was invalid has, therefore, to be negatived.

12. The next contention advanced on behalf of the respondent which has been accepted by the High Court in support of its conclusion against the detention is that the Advisory Board did not consider the documentary evidence produced by the detenu. Under Section 11(2) of the Act the report of the Advisory Board has to specify in a separate part thereof the opinion of the Board as to whether or not there is sufficient cause for the detention of the person concerned and as sub-section (4) provides, the proceedings of the Board and its report, except that part of the report in which the opinion of the advisory Board is specified, shall be confidential. In view of the specific plea raised by the detenu and the argument advanced before the High Court that the Board had not considered the documentary evidence, the State Government placed the report before the High Court and the same has been also placed before us as a part of the record. On a reference to the report we find that the Advisory Board in the instant case was constituted by three Judges of the High Court, one of them being the Chairman. That would justify our assumption that the members of the Board by their professional ability and acumen were capable to assess the matter in a proper way and form an objective opinion on the basis of materials produced. The detailed conclusion with reasons given by the Board has also been disclosed. That shows that the detenu made before the Board very lengthy arguments and cited a number of authorities in support of his submissions. The detenu in the instant case is a practising advocate and we are impressed by the learned Advocate-General's submission that we could assume that such a practising advocate must have very properly placed his points before the Board.

13. The Board is not required to writ out a judgment wherein one would expect mention of the respective pleas, materials produced by the parties, specification of contentions advanced and reasons for the conclusion as may have been drawn. What is required is the unbiased and impartial conclusion on the materials available with reference to the grounds of detention as to whether the detention order when made and the continued detention of the person concerned are justified. The High Court, in our view, had no justification to accept the submission of the detenu that the documentary evidence produced by the detenu had not been considered by the Board. The second ground accepted by the High Court has, therefore, to be repelled as not sustainable.

14. We proceed to examine the next ground, viz., that all the records had not been sent to the State Government by the Board and, therefore such records were not available for consideration of the State Government at the time of confirmation of the detention. There is no dispute that the Board had not sent the entire record to the State Government. Under Section 11(2) of the Act, the Board is required to submit its report and there is no obligation cast by the Act that the entire record of the Board should be placed before the State Government. It is, however, not disputed by learned

Advocate-General that the report of the Board is only a recommendation and, the ultimate decision on the basis of the report as to what further action has to be taken is for the State Government to make. Section 12 in its two sub-sections indicates two alternative courses open to the State Government on the basis of the report. If the Board is of the view that there is no sufficient cause for detention of the person, the appropriate Government is obliged to revoke the detention and release the detenu. On the other hand, where the Board is of the view that there is sufficient cause for the detention of the person, the appropriate Government may confirm the detention order and continue the detention. The two provisions have been expressed in different language. Where the report is against the detention no option is left to the State Government and a duty is cast on it to release the detenu. When the Board recommends that there is sufficient cause for detention, the State Government may confirm the detention or even revoke it. Since the final order has to be made by the State Government, we are inclined to accept the submission of Mr. Jethmalani that the entire record or at least all relevant materials should be available to the State Government when it proceeds to apply its mind to decide whether the detention should be continued or revoked. This view is in accord with prudence and is also judicially supported by a decision of this Court. In Nand Lal Bajaj v. State of Punjab, this Court observed : (SCC p. 334, para 11)

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 serious infirmity in the case which makes the continued detention of the detenu illegal.

We have already indicated that the procedure established by law does not require the entire record to be sent by the Board to the State Government : Yet it is certainly proper that the record should be available for being looked into in such manner as the confirming authority considers appropriate before the final decision one way or the other is taken. The grounds of detention were available with the State Government. Materials referred to in the grounds of detention were also available in the file. The only materials which the State Government did not have before it are the documents which the detenu claims to have produced before the Board. With a view to forming a prima facie impression that there was any material document which would have a bearing on the question at issue, we sent for the record and the same has been produced before us. On looking into the documents produced by the detenu before the Board, we have come to the conclusion that this did not contain any material which could persuade the state Government to act in a different way. We are cognizant the position that it is for the State Government and not for this Court to act as the confirming authority and non-compliance with the procedure laid down by law makes the order of detention liable to be quashed. But we have also already said that non-placing of the record of the Board before the appropriate Government is not a failure of compliance with the prescribed procedure. It is, therefore, that we looked at the record to find out if it can be said to be a defect having material baring on the question and a matter of prejudice so far as the detenu is concerned. We reiterate by agreeing with the view of our learned Brother Sen, J. expressed in Nand Lal Bajaj case that the appropriate Government should have the entire material before it along with the report of the Board when it is called upon to consider whether to confirm or not to confirm the detention on the basis of the report of the Board under Section 12(1) of the Act. The Board should, therefore, forward the record containing the papers placed before it at the hearing of the matter along with its report so that the matter can be attended by the State Government with due despatch and on taking a full view of the matter. Our conclusion with reference to the third ground, therefore, is that the High

Court was not right in the facts of the case to hold that the order of confirmation of detention was bad.

15. The respondent contended and the High Court accepted the submission that not providing copies of intelligence reports to the detenu, though the same had been relied upon in the grounds of detention, vitiated the order of detention. The grounds of detention were divided into two grounds, one labelled as criminal activities and the other as extremist activities. Against extremist activities it was further indicated, "on the basis of confidential reports". The facts by way of accusations were detailed but copies of the reports as such were not furnished. It is the settled position in law and learned Advocate-General did not attempt to contend to the contrary that the detenu has to be supplied all materials relied upon in making the order of detention with a view to being provided an adequate opportunity of making an effective representation. Personal freedom is an invaluable treasure and the founding fathers took great care to protect it by making appropriate provisions in the Constitution. Simultaneously taking into consideration the peculiar situations prevailing in the country, the right of the State to order preventive detention was also provided therein. In order the personal freedom may not be curtailed beyond necessity and the executive administration may not make it an empty guarantee, detailed provisions were made in article 22 providing an effective procedure in the matter of making of representation and scrutiny' of the materials in the presence of the detenu and even hearing him, if he so desired, by an independent Board with adequate judicial bias. While that is so, the detenu is not entitled to a disclosure of the confidential source of information used in the grounds or utilised for the making of the order. What is necessary for the making of an effective representation is the disclosure of the material and not the source thereof. By indicating that the facts have been gathered from confidential reports, a suggestive disclosure of the source has also been made. The Constitution Bench in the case of State of Punjab v. Jagdev Singh Talwandi, dealt with this aspect of the matter. The learned Chief Justice, speaking for the Court, observed : (SCC p. 607, para 19)

It was further argued by the learned counsel that the detaining authority should have disclosed the evidence on the basis of which the order of detention was passed because, in the absence of knowledge of such evidence, the respondent could not have made an effective representation against the order of detention. There is no substance in this contention. It is not the law that the evidence gathered by the detaining authority against the detenu must also be furnished to him.

Reference was made to Beni Madhob Shaw v. State of West Bengal; Har Jas Dev Singh v. State of Punjab and Vakil Singh v. State of J & K, and the learned Chief Justice proceeded to state : (SCC p. 608, para 23)

> These cases show that the detenu is not entitled to be informed of the source of information received against him or the evidence which may have been collected against him as, for example, the evidence corroborating that the report of the CID is true and correct. His right is to receive every material particular without which a full and effective representation cannot be made. If the order of detention refers to or relies upon any document, statement or other material, copies thereof have, of course, to be supplied to the detenu as held by this Court in Ichhu Devi Choraria.

In view of what has been said by the Constitution Bench, there was no force in the submission of the respondent that there has been an infraction of the law in not supplying the respondent copies of the reports or disclosing the source thereof. The respondent had actually been given in the grounds all material details necessary for making an effective representation. The fourth ground accepted by

the High Court in support of its order is also not tenable in law. As all the grounds accepted by the High Court for its conclusion are not sustainable for reasons discussed above, the order of the High Court quashing the detention is not supportable. The appeal is allowed and the order of the High Court is set aside.

16. In course of the hearing, Mr. Jethmalani had drawn our attention to the fact that many detenus like the respondent have been and are being released, and the respondent who has already undergone more than two-thirds of the period should be released. That is a matter entirely for the detaining authority to decide and we hope and trust that notwithstanding the reversal of the decision of the High Court, the State Government will proceed to review the matter expeditiously and made such appropriate directions as it considers fit.

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