

Asha Keshavrao Bhosale

Vs

Union of India and Another

Write Petition (Criminal) No. 1107 of 1985

(R. S. Pathak, Ranganath Misra JJ)

04.10.1985

JUDGMENT

RANGANATH MISRA, J. -

1. The petitioner, the wife of a detenu under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ('Act for short), in this application under Article 32 of the Constitution assails the order of detention as also the subsequent declaration under Section 9 of the Act. The order of detention, Annexure 'A' was made by the Government of Maharashtra under Section 3(1) of the Act on November, 20, 1984. The order directed his detention in the Bombay Central Prison at Bombay for one week from the date of detention and in Nasik Road Central Prison thereafter. On the same day the grounds of detention were also served on the detenu. On December 12, 1984, the Additional Secretary to the Government of India in the Ministry of Finance made the requisite declaration under Section 9(1) of the Act, Annexure 'B'.

2. Petitioner, at the instance of the detenu, made a representation to the Chief Minister on November 24, 1984, against the detention and the said representation was received in the office of the Chief Minister on November 28, 1984. This representation was rejected on January 28, 1985, two months after its receipt as alleged by the petitioner. Detenu appeared before the Board on April 17, 1985. When he appeared before the Board he asked for the assistance of a lawyer or alternatively of a non-lawyer friend. The request was not acceded to and the Board made an adverse report to the State Government. The petitioner had challenged the detention of her husband by filing a writ petition before the Bombay High Court being Criminal Writ Petition 50 of 1985. By judgment dated April 29, 1985, the High Court dismissed the said petition. This writ application has thereafter been filed in July 1985 for the reliefs indicated already.

3. Two affidavits in opposition have been filed - one by the Special Secretary to the Government of Maharashtra and the other by the Desk Officer of the Home Department of Maharashtra Government. The Special Secretary in his affidavit explained the basis of his satisfaction regarding the necessity to detain the detenu and the reasons for which the declaration under Section 9(1) was later made. He also explained in answer to specific allegations contained in the writ petition that there was no separate intelligence report which had been placed before him and /or taken into consideration in making of the order of detention. In the other counter-affidavit, apart from indicating the justification for detention, reference was made to the petitioner's representation against the detention made to the Chief Minister. It has been pointed out that the order was dated January 23, 1985, and the reasoning adopted by the Bombay High Court in regard to the delay in disposal of the representation has been adverted to. Reference has also been made in regard to the detenu's request for representation by a lawyer or alternatively a non-lawyer friend. Dealing with

that aspect, the affidavit indicates :

I say that in his representation, which was handed over to the Advisory Board, the detenu asked to be represented by a lawyer or otherwise by his next friend. I say that the Advisory Board, after considering the detailed representation made and after talking to the detenu, came to the conclusion that since the detenu was in good health and also that he has studied upto eighth standard in Khambala Hill Municipal School and there after in Social Hight High School and since he was the owner/part owner, manager of number of business enterprises and he was been active in politics, there was no necessity for permitting the detenu to have his case represented through the lawyer. These facts were mentioned by the Advisory Board to the detenu. I say that whenever a request is made by the detenu to have his case represented through his friend, such a request has invariably been granted and he is always allowed to represent his case by his next friend who is not a lawyer. I say that the Advisory Board had informed this to the detenu and asked the detenu whether he had brought any friend with him since the Board always permits the detenu to be assisted by his next friend. I say that the detenu replied that he had not brought any friend to represent his case. I say that the fact that the detenu had not brought any friend despite the request made in the representation, is noted in the Minutes which are regularly kept by the Chairman, Advisory Board.

4. One more or less similar allegations the Bombay High Court had been moved for quashing of petitioner's husband's detention. The High Court examined the contentions at great length and ultimately concluded that on the facts of the case continued detention of the petitioner's husband was not vitiated.

5. Though raised in the writ application the challenge against the declaration under Section 9(1) of the Act has not been canvassed at the hearing by Mr. Jethmalani appearing for the petitioner. It was stated to us that the challenge to the vires of the section is pending before this court for consideration by a larger Bench and as the petitioner is anxious to have her writ petition disposed of expeditiously, petitioner does not press the relief against the declaration and would remain content by confining the challenge to the order of detention. In view of counsel's statement and in the circumstances stated, we proceed to consider the challenge to the order of detention, Annexure 'A' without entering into controversy over the vires of the section.

6. Four points have been raised by Mr. Jethmalani in support of his stand that the detenu's detention is bad :

(1) Petitioner made a representation against the detention of her husband on November 24, 1984, and it was admittedly received in the Secretariat of the Chief Minister on November 28, 1984. It, however, was not disposed of till January 28, 1985. The delay vitiates the detention and the detenu became entitled to be set at liberty by quashing of the order;

(2) The order of detention is liable to be set aside inasmuch as it has been made without proper application of mind. The link between the alleged transaction and the detenu is said to have been established by a statement made by one Sabnis to the effect that the detenu had asked him to allow the truck to enter into the Raj Bhavan premises with a view to transporting the contraband materials clandestinely received there;

(3) The grounds of detention disclose that the detaining authority had relied upon

contact between the detenu and one Yusuf Herro and the source of information for ascertaining the existence of relationship was described as intelligence report. The same had not been furnished to the detenu;

(4) The detenu had been prejudiced in the hearing by the Advisory Board as his request for representation by counsel or by a non-lawyer friend had not been entertained by the Board. This, it is alleged, affected the guarantee of limited defence available to a detenu as held by this Court in *A. K. Roy v. Union of India* ((1982) 2 SCR 272 : (1982) 1 SCC 271 : 1982 SCC (Cri) 152).

7. Two of these grounds had been clearly raised before the High Court but the Court was not impressed with these submissions and, therefore, dismissed the petition. The petitioner has not chosen to come in appeal against the decision of the High Court and relying upon some observations of this Court in a case of this type, a writ petition has been filed in this Court under Article 32 of the Constitution. As objection to the maintainability of the writ petition has not been raised at the hearing by counsel for the opposite parties, we are not examining the question of maintainability of this application and propose to deal with the submissions made on behalf of the petitioner.

8. It is a fact that a representation was made by the petitioner on behalf of the detenu which was received in the office of the Chief Minister on November 28, 1984, and Mr. Jethmalani has accepted the position that orders on the representation were passed on January 23, 1985 and the said orders were received on January 28, 1985. In the representation made by the petitioner to the Chief Minister, the order of detention was casually impugned but lot of attention appears to have been bestowed on the necessity of keeping the detenu in a Bombay jail instead of sending him to Nasik Road Prison as directed in the order of detention. A detailed representation was made by Secretary, Khed Taluka Maratha Seva Sangh challenging the detention. It appears that the detenu belonged to the Khed Taluka and his case was espoused by the Sangh. It is not disputed before us that the said representation was received on November 29, 1984, in the Secretariat of the Chief Minister and was forwarded to the Home Department on December 3, 1984, and was finally disposed of on December 12, 1984, and the rejection thereof was communicated on December 13, 1984. This representation was a detailed one and on a due consideration thereof the representation had been expeditiously disposed of. The High Court looked into the two representation - one made by the Sangh and the other by the petitioner and on considering the contents thereof and the manner in which the Sangh's representation had been disposed of, came to hold that the representation made by the petitioner was a second one on the same score and delay in disposing of that representation did not really prejudice the detenu's case. On the facts and circumstances appearing in the record and as found by the High Court, we are inclined to agree with the submission made before us that the petitioner is not entitled to make any tenable submission on the score of delay in disposal of the representation.

9. In paragraph 3(H) of the writ petition petitioner alleged :

That the detention of the detenu is based on the statement of a self-confessed accomplice one Sabnis who claims that it was the detenu who had told him to allow the truck to enter the Raj Bhavan. The detaining authority is aware that on such flimsy material it is impossible to get a conviction in a regular court of law. The detaining authority has failed to apply its mind to this aspect of the matter.

In the return made by the Special Secretary to Government of Maharashtra, it has been averred :

With reference to para 3(H), I say that I was aware that prosecution against the detenu and his co-detenus were under contemplation yet I have come to the conclusion that departmental adjudication and prosecution proceedings under Customs Act, were not sufficient to prevent the detenu from indulging in criminality in future considering the role of the detenu and the attending circumstances. Moreover, the prosecution under Customs Act cannot overlap action under COFEPOSA

10. It is interesting to note that the contraband articles alleged to be worth more than 1/2 crore of rupees had been received on the sea-shore at back of the Raj Bhavan of Bombay. Access to this place was only through the Raj Bhavan. Sabnis was an employee of the Raj Bhavan at the relevant time and the detenu had asked Sabnis to allow the truck to enter into the Raj Bhavan compound for the purpose of transporting the contraband articles. It was up to the detaining authority to accept the statement to Sabnis and to be satisfied that such statement provided the link between the detenu and the receipt of the contraband articles and the bundle of facts relating thereto. This satisfaction under the law is subjective and it is not for the court to test the adequacy of the material on which satisfaction is reached. It is quite possible as suggested in the writ application and reiterated in the submission of learned counsel that at a trial conviction may not have been secured on the basis of the statement of Sabnis. But that argument is not available for challenging an order of detention if the satisfaction of the detaining authority has been reached on bona fide basis. We do not think there is any force in this submission advanced on behalf of the petitioner and, therefore, attack on that ground has to be rejected.

11. The third submission advanced by counsel is a reiteration of the allegation in paragraph 3(I) of writ petition. There it was alleged :

.... the grounds of detention that the detaining authority has relied upon some alleged between the detenu and one Yusuf Herro. In para 12 of the grounds of detention, the detaining authority states : "Intelligence gathered reveals that the main person behind the said smuggling racket is one Yusuf Herro. Since he has figured in many big cases detected by the customs Dept. his photograph was available with the Customs Department" The grounds of detention then continue to allege that the detenu was in the company of this Yusuf Herro on October 16, 1984, as stated by Sabnis in his statement of October 22, 1984. It was incumbent under these circumstances on the detaining authority to disclose the role of Yusuf Herro in the smuggling in hand, as well as his involvement in other big cases. No privileges was claimed in respect of this material. Under the circumstances there has been a failure to comply with Article 22 of the constitution and the petitioner's constitutional rights have been violated.

In the return of the Special Secretary it has been stated :

... I say that it was not necessary to supply the copy of the intelligence report. I say that as a matter of fact no independence intelligence report was ever placed before me and I have neither referred to nor relied upon the said report. I say that it is a fact that the detenu was engaged in criminal activity with Yusuf Herro and was in his company. Which fact his co-accused Sahibs has brought to light in his confessional statement dated October 22, 1984 recorded by the Customs under Section 108 of the Customs Act.

12. Before the High Court this submission had been pressed into service and the High Court found no force in the point relying upon a decision of this court in *Wasiuddin Ahmed v. District Magistrate, Aligarh* ((1981) 4 SCC 521 : 1982 SCC (Cri) 4). That was a case as rightly indicated by Mr. Jethmalani where privilege had been claimed against disclosure of the source also the contents of the information. In view of the privileges claimed this Court took the view that supply of intelligence report of select nature cannot be insisted upon and non-disclosure of such information does not provide a basis for challenging the detention. In this case no privileges was claimed. On the facts we are, however, satisfied that adequate material had been disclosed and no prejudice appears to have been caused for want of further disclosure. It may be that the exact information received from the intelligence source had not been made available to the petitioner or placed on record but sufficient material with reference to the intelligence report had been made available. In that view of the matter, we also find no force in this submission.

13. We now proceed to examine the last contention. In paragraph 3(J), petitioner alleged :

That, on April 17, 1985, the detenu appeared before the Advisory Board. He handed over to the Advisory Board his written representation containing a prayer that the detenu be allowed to be represented by a lawyer, and in the alternative, by a non-lawyer friend or a relative. These requests were not considered by the Advisory Board and were not disposed of as are required to be done by judgments of this Hon'ble Court. Under the circumstances, the hearing before the Advisory Board was not in accordance with the law and detenu's continued detention is invalid.

This aspect has been dealt with in the counter-affidavit of Mokal, Desk Officer of Home Department of the Government of Maharashtra and the relevant paragraph has already been extracted by us earlier. Ordinarily, in cases of this type representation by lawyer is not allowed. In *A. K. Roy case* ((1982) 2 SCR 272 : (1982) 1 SCC 271 : 1982 SCC (Cri) 152) this court indicated : (SCC p. 330, para 86)

Thus, according to the express intendment of the Constitution itself, no person who is detained under any law which provides for preventive detention, can claim the right to consult a legal practitioner of his choice or to be defended by him. In view of this, it seems to us difficult to hold, by the application of abstract, general principles or on a priori consideration that the detenu has the right of being represented by a legal practitioner in the proceedings before the Advisory Board.

No grievance, therefore, can be made on the score that the Advisory Board has not permitted the detenu to be represented by counsel. While reiterating the position, the learned Chief Justice stated : (SCC p. 334 para 93)

We must therefore hold, regretfully through, that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board.

The Court further added : (SCC p. 335, para 94)

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 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 case 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 WB 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.

14. It is on these observations of the learned Chief Justice that reliance has been placed by Mr. Jethmalani to contend that denial of representation by a friend has affected due representation of the petitioner's case before the Advisory Board. It is the case of the State that the Advisory Board made inquires from the detenu as to whether he had a friend available on the date of hearing to represent him and It appeared that no such person had been called by the detenu to the place of hearing. The Board was not inclined to adjourn the matter. The Board taken to the detenu and ascertained that the detenu was wordly wise, was sufficiently educated and did not suffer from any deficiency and was in a fit condition to represent his case. The rule to be applied is one of prejudice and in the facts of the case we are inclined to agree with Mr. Rana for the state that the detenu was not prejudiced in making an effective representation of his case at the hearing by the Advisory Board in the absence of a friend. There are cases where the affected persons is in a better position than anyone else to his place his case and in the facts and circumstance available on record, we are inclined to agree with Mr. Rana that the detenu's is one such.

15. Since all the four submissions advanced by Mr. Jethmalani on behalf of the petitioner are rejected, this writ petition has to fail. We accordingly dismiss it.

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