

Satar Habib Hamdani

Vs

K.S. Dilipsinhji and Others

Jasab Hazi Ismail and Others

Vs

K.S. Dalip Singh, Secretary to Government of India and Others

Criminal Appeals Nos. 371 and 651-55 of 1985

(O. Chinnappa Reddy, V. Khalid JJ)

20.12.1985

JUDGMENT

CHINNAPPA REDDY, J. –

These several criminal appeals raise a common question and may be disposed of by a single judgment. It is sufficient if we state the facts in one case : Criminal Appeal No. 371 of 1985. On June 29, 1984 an order of detention under the COFEPOSA was made by the Additional Secretary to the Government of India, Finance Department against Satar Habib Hamdani. The grounds of detention were served on him on July 1, 1984. On July 13, 1984 the COFEPOSA was amended by an Ordinance which was replaced by an Amending Act. We will presently refer to the provisions of the Act. Purporting to act under Section 9(1) of the COFEPOSA as amended, the Additional Secretary to the Government of India made a declaration that he was satisfied that 'Shri Satar Habib Hamdani abets and is likely to abet the smuggling of goods into and through Porbandar which is an area highly vulnerable to smuggling, as defined in Explanation 1 to Section 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974'. Thereafter the usual reference to the Advisory Board was made and after obtaining the opinion of the Advisory Board, the Government of India, by an order dated December 22, 1984 confirmed the detention of Satar Habib Hamdani for a period of two years. The order was as follows :

Whereas an order F. No. 673/75/84-Cus. VIII dated June 28/29, 1984 has been passed by the Additional Secretary to the Government of India under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 for the detention of Shri Satar Habib Hamdani;

Whereas a declaration under Section 9(1) ibid has been made against him by the Additional Secretary to the Government of India;

And whereas the case of Shri Satar Habib Hamdani was placed before the Advisory Board who are of the opinion that there is sufficient cause for his detention;

Now, therefore, in exercise of the powers conferred by Section 8(f) read with Section 9(2) of the

aforesaid Act, the Central Government hereby confirms the aforesaid detention order and Satar Habib Hamdani under Section 10 of the said Act, the said Shri Satar Habib Hamdani be detained for a period July 1, 1984 (sic) two years from the date of his detention i.e. from 22nd December, 1984.

Sd/- (A.N. Agnihotri) Under-Secretary to the Government of India##

Shri Satar Habib Hamdani, Central COFEPOSA Detenu, C/o Supdt. District Prison, Rajkot.

2. The submission of Shri Karmali learned counsel for the appellants who presented the case neatly and with precision, was that in every case where it was proposed to have recourse to Section 10 read with Section 9 it was necessary for the Advisory Board to state its opinion that 'the continued detention' of the detenu was necessary and that in a case where the Advisory Board merely opined that 'the detention' of the detenu was necessary, recourse could not be had to Section 10 read with Section 9 so as to enable the detenu to be detained for two years. The answer to the claim of the appellant was stated in the counter-affidavit as follows :

With reference to para 10(xv) I submit that it is not incumbent upon the Advisory Board to send its report to the effect that there is sufficient cause for continued detention once having observed and reported that there was sufficient cause for detention. Once the Advisory Board gives an opinion affirming the detention it must be regarded as an opinion in regard to both the aspects viz. the original detention and the continued detention i.e. right from the date of arrest till the date of giving opinion deny that the continued detention of the appellant is violative of Section 8(c) of the Act.

3. In order to appreciate the submission of Shri Karmali we may refer to the relevant provisions of the COFEPOSA as amended by the Amending Act of 1984. Section 3(1) empowers the authority specified therein

if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from -

(i) smuggling goods, or

(ii) abetting the smuggling of goods, or

(iii) engaging in transporting or concealing or keeping smuggled goods, or

(iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or

(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,

it is necessary so to do, make an order directing that such person be detained.

4. Section 8 provides for the constitution of Advisory Boards, prescribes their function and specifies their procedure. For the purposes of the present case we are concerned with clauses (b), (c) and (f) which are as follows :

8. Advisory Board. - For the purposes of sub-clause (a) of clause (4), and sub-clause

(c) of clause (7), of Article 22 of the Constitution, -

(b) save as otherwise provided in Section 9, the appropriate Government shall, within five weeks from the date of detention of a person under a detention order make a reference in respect thereof to the Advisory Board constituted under clause (a) to enable the Advisory Board to make the report under sub-clause (a) of clause (4) of Article 22 of the Constitution;

(c) the Advisory Board to which a reference is made under clause (b) shall after considering the reference and 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 in person, after hearing him in person, prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned;

(f) in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention, of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith.

5. Section 9(1) empowers the authority specified therein to make a declaration that the person against whom an order of detention has been made

(a) smuggles or is likely to smuggle goods into, out of or through any area highly vulnerable to smuggling; or

(b) abets or is likely to abet the smuggling of goods into, out of or through any area highly vulnerable to smuggling; or

(c) engages or is likely to engage in transporting or concealing or keeping smuggled goods in any area highly vulnerable to smuggling.

Whereupon such person may be detained without obtaining the opinion of an Advisory Board for a period longer than three months but not exceeding six months from the date of his detention.

Explanation 1 to Section 9(1) defines 'area highly vulnerable to smuggling'.

6. Section 9(2) is important and it is as follows :

(2) In the case of any person detained under a detention order to which the provisions of sub-section (1) apply, Section 8 shall have effect subject to the following modifications, namely -

(i) in clause (b), for the words "shall, within five weeks", the words "shall, within four months and two weeks" shall be substituted;

(ii) in clause (c), -

(1) for the words "the detention of the person concerned", the words "the continued detention of the person concerned" shall be substituted;

(2) for the words "eleven weeks", the words "five months and three weeks" shall be substituted;

(iii) in clause (f), for the words "for the detention", at both the places where they occur, the words "for the continued detention" shall be substituted.

7. Section 10 stipulates the maximum period for which any person may be detained pursuant to an order of detention to which the provisions of Section 9 do not apply and which has been confirmed under Section 8(f) as one year from the date of detention or the specified period; and, the maximum period for which any person may be detained pursuant to an order of detention to which the provisions of Section 9 apply and which has been confirmed under Section 8(f) read with Section 9(2) as two years from the date of detention, or the specified period. As we see, the scheme of Sections 3, 8, 9 and 10 appears to be that while generally the period for which a person may be preventively detained under the COFEPOSA in connection with smuggling activities, may not exceed a period of one year, in case of certain kinds of activities of smuggling into, out of or through 'any area highly vulnerable to smuggling', the period may extend up to two years. In the latter event a declaration is required to be made within five weeks of the detention of such person in the matter provided by Section 9(1) of the Act. That is not enough. In a case to which Section 9 applies, Section 8 stands suitably amended, a reference is required to be made within four months and two weeks by the government to the Advisory Board and the Advisory Board is required to state its opinion within five months and three weeks from the order of detention whether there is sufficient cause for the 'continued detention' of the person concerned. In other words, the Advisory Board is to state its opinion not merely whether detention is necessary but whether 'continued detention' is necessary. The Advisory Board will necessarily have to go behind the declaration under Section 9(1) to consider the question whether there is sufficient cause for 'continued detention'. The two safeguards provided to the detenu against 'continued detention', at that stage, are the application of mind by the specified authority before making a declaration under Section 9(1) and the consideration of the question by the Advisory Board. Section 8 is enacted and professedly enacted for the purpose of Article 22, clause (4), sub-clause (a) and Article 22, clause (7), sub-clause (c) and Section 9 expressly refers to Article 22, clause (4), sub-clause (a). That is why in a case to which Section 9 applies it is important that the Advisory Board specifically considers and answers the question whether in its opinion there is sufficient cause for the 'continued detention' of the person concerned. If the Advisory Board merely states that the detention of the person is necessary it is not for anyone else to supplement the Advisory Board's opinion and substitute the word "continued detention" for the word "detention". The matter is of vital importance for that. The omission of the words "continued detention" in the opinion of the Advisory Board cannot be slurred over in the fashion we are invited to do in the counter-affidavit. Nor can we treat the omission as a mere clerical or typographical error when that is not the express case of the respondents. We are of the opinion that in the absence of the Advisory Board's opinion to the effect that there is sufficient cause for the 'continued detention' of the detenus, their detention for a period exceeding one year is without legal sanction. It is already much more than one year since the appellants have been detained. They are directed to be set at liberty forthwith.

</html