Union of India and Others

Vs

Manoharlal Narang

Criminal Appeal No. 662 of 1986

(G. L. Oza, V. Khalid JJ)

02.03.1987

JUDGMENT

V. KHALID, J. -

1. The Union of India has brought this appeal by special leave against the judgment of a Full Bench of the Bombay High Court quashing the notice under Section 6(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, hereinafter referred to as SAFEMA. It is necessary to set out the brief facts to appreciate the questions involved in this appeal.

2. Manoharlal Narang, the respondent in this appeal and Ramlal Narang are brothers. An order of detention was passed on December 19, 1974, under Section 3(1) of the COFEPOSA Act against Ramlal Narang. This order was challenged before the Delhi High Court, in Writ Petition No. 10/75 and the High Court quashed the order of detention by its order dated April 30, 1975. An appeal was filed against that order before this Court by the Union of India. Though an application for stay was moved, this Court declined to grant stay but passed an order on May 1, 1975 imposing certain conditions on the movement of Ramlal Narang. On June 25, 1975, emergency was declared. On July 1, 1975, a fresh order of detention was passed against Ramlal on the same facts and grounds. In the meantime the appeal filed by the Union of India against the order of the Delhi High Court relating to the earlier order of detention, was dismissed by this Court in 1977, for want of prosecution. Ramlal was detained under the second order. A relative of his, filed Writ Petition No. 115 of 1975, in the Delhi High Court, challenging this detention. That petition was dismissed on November 25, 1975.

3. An appeal was filed by certificate, against that order before this Court as Appeal No. 399 of 1977. In the meanwhile, notices under Sections 6 and 7 of the SAFEMA were issued against Ramlal. These notices were challenged by him by filing Writ Petition No. 720 of 1975, in the Delhi High Court. Subsequently, this Court took up Appeal No. 399/75 and disposed it of saying that it would be open to the petitioner to raise all contentions available to him in Writ Petition No. 720 of 1975 notwithstanding what is contained in the judgment in Writ Petition No. 115/75. The Delhi High Court heard Writ Petition No. 720 of 1975 and dismissed it. Against that dismissal order Ramlal filed Special Leave Petition No. 9361/82 before this Court. In this special leave petition, notice was issued limited only to the question of the compentency of the authorities to issue the second detention order on the same facts and grounds. That petition was thereafter admitted and the civil appeal arising therefrom is Civil Appeal No. 2790 of 1985, which has been referred to a Constitution Bench and is pending disposal at present.

4. The learned counsel for the appellants made a fervent plea before us that since the question of

competency of the authorities to issue the second detention order is pending consideration before a Constitution Bench of this Court, this appeal also should be directed to be posted along with that appeal. The respondent's counsel met this plea stating that for the purpose of this appeal, this question is covered by a three Judge Bench decision of this Court in Ibrahim Bachu Bafan v. State of Gujarat ((1985) 2 SCC 24 : 1985 SCC (Cri) 149) and that it was not necessary to direct this appeal to be tagged with Civil Appeal No. 2790/85. After hearing the counsel for some time, we indicated to the learned counsel for the respondent, that we were inclined to direct this appeal to be posted along with the appeal pending before the Constitution Bench but were still willing to hear the matter if he could sustain the judgment under appeal, on grounds other than the one referred to the Constitution Bench. He was willing to do so and he argued the case on the other grounds raised by him. We will now proceed to consider those other grounds and see whether the judgment could be sustained or whether it has to be reversed.

5. The facts and the relevant dates have been stated above. 'A' few more facts are necessary. An order of detention under COFEPOSA was issued against the present respondent on January 31, 1975. At that time he was in England. He was brought to India on some express understanding given to the Government of the United Kingdom. His order of detention was challenged before the Bombay High Court being Writ Petition No. 2752/75, and the High Court quashed that order of detention as per order dated July 8, 1980. The appeal filed against that order before this Court was dismissed on November 4, 1980.

6. The notice challenges in this appeal was issued to the respondent under Section 6 of the SAFEMA with the aid of Section 2 of the Act. Section 2 reads as follows :

> 2. Application. - (1) The provisions of this Act shall apply only to the persons specified in sub-section (2).

Sub-section (2), relevant for our purpose, reads as follows :

> (2) The persons referred to in sub-section (1) are the following, namely :
>
> # * * *##
>
> (c) every person who is a relative of a person referred to in clause (a) or clause (b);
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> # * * *##

Explanation 2 states :

> For the purposes of clause (c), "relative", in relation to a person, means -
>
> # * * *##
>
> (ii) brother or sister of the person;
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> # * * *##

7. The learned counsel for the respondent contended that the respondent could challenge the order of detention against his brother, to get the notice issued against him under SAFEMA quashed on all the grounds available to him, though they were raised by his brother or not. He was not seeking to

get the order of detention against his brother quashed for his brother's benefit nor was he doing it on his behalf, but he was invoking the jurisdiction of the court only for his own benefit. While doing so he is not fettered by what happened to his brother's petition or to the grounds raised by him. Nothing held against his brother would, according to the learned counsel, operate as res judicata against the respondent. The provisions of SAFEMA were being pressed into service because a relative answering the description given in Explanation 2 to sub-section (2) of Section 2 of the Act was available. He cannot be prevented from urging all the grounds available to him to get out of the mischief of the notice issued to him under Section 6 of the SAFEMA. We find that this submission is well founded. We hold that in such cases, the person against whom action is taken by invoking the Explanation to sub-section (2) referred to above, is at liberty to raise all grounds available to him though such grounds were raised and found against in a proceedings initiated by the relative.

8. The ground that found favour with the Bombay High Court in this case is that the detaining authority did not apply its mind to the order passed by this Court on May 1, 1975, in the special leave petition against the decision of the Delhi High Court which quashed the detention of Ramlal. The appellants before us sought a stay of the order passed by the Delhi High Court. This Court declined the request but passed the following order :

> We grant special leave on usual terms. The petitioner-appellant should have gone to the High Court first for a certificate. In view of the arguments heard, we give special leave in this matter as a very special case, and this is not to be treated as precedent in future. We are unable to grant any stay. We impose a condition on Ramlal Narang, detenu pending the disposal of the appeal in this Court that he will report to the police station in whose jurisdiction he resides either at Bombay or at Delhi, once every day at 10 a.m. or at 5 p.m. and whenever he will leave for Delhi, he will inform the police as to when he is leaving and when he will arrive at Delhi, similarly when he will leave for Bombay, he will inform the police as to when he is leaving for Bombay and when he will arrive at Bombay. Certified copy of the judgment impugned shall be filed as soon as possible.

It is not disputed that the detenu Ramlal was reporting to the officer-in-charge of the Bandra Police Station, Bombay regularly, in due compliance with the above order passed by the Supreme Court.

9. We have already adverted to the fact that proceedings against the respondent taken under SAFEMA were abandoned after the order of this Court on November 4, 1980. It was nearly 3 years later, on October 29, 1983, that the proceedings, from which this appeal arises, were initiated under Section 6 of SAFEMA on the basis of the detention order dated July 1, 1975, issued against Ramlal. It is necessary to bear in mind that on July 1, 1975, when the order of detention against Ramlal was passed, the authorities had before them the order of this Court, extracted above, dated May 1, 1975. By this order Ramlal was permitted to be at large on condition that he will report to the police station as mentioned therein. In cannot be disputed that this order of the Supreme Court is a relevant material for the detaining authority to consider when the detention order was passed. From the records it is not seen that the Union of India had specifically put forward a case at any time that this order was not a relevant material or that this order was considered by the detaining authority. The first respondent had specifically raised this contention in paragraph 'Q' of the grounds of the writ petition, by an amendment which was allowed by the order of the Division Bench of the Bombay High Court on April 29, 1986. The specific contention raised in grounds 'Q' was "that vital and material facts which would have weighed in the mind of the detaining authority one way or the other, have been suppressed from him, thus vitiating the order of detention dated July 1, 1975, and

consequent declaration made under Section 12(a) of the COFEPOSA". After that, reference was made to the order of this Court extracted above, accompanied by an assertion that Ramlal was complying meticulously with the orders of the Supreme Court. This specific assertion is met by the appellants in paragraph 53 of the counter-affidavit filed by Under Secretary, Ministry of Finance, which reads as follows :

With reference to para 24-Q, additional ground - it is not admitted that any detaining authority as alleged or otherwise.

In paragraph 54, this ground is met more elaborately with the following observations :

> At any rate it is submitted that the contents pertain to the proceedings in the High Court and the Supreme Court and the detention law does not contemplate that the detaining authority is required to take into account the different court proceedings whether independent proceedings, under the law not initiated, conducted, managed or looked after by the detaining authority. [It is well known that the different Ministries of the government carry out different types of work in different ways and the detaining authority is not required under the law to take notice of work of the Ministries or court proceedings. The court proceedings and adjudication proceedings are initiated and conducted by different authorities which are not require under the law to submit their reports or communicate their actions to the detraining authority. The detaining authority, in turn, is not required under the law to carry out the process of collection of any material about any court proceeding or proceedings before other authorities for the purpose of issuance of a detention order. The contents of the paragraph refers to such proceedings which are not required to be collected by the detaining authority from such authorities or courts.]

10. We are not very happy with the manner in which this important contention has been met in the counter-affidavit. An order of this Court is not an inconsequential matter. It cannot be assumed for a moment that the detaining authority or the sponsoring authority did not know, at the time the detention order was passed, that this Court had refused stay of the judgment of the Delhi High Court and that Ramlal was allowed freedom of movement subject to certain conditions. It is to be regretted that the portion extracted above from the counter-affidavit (shown in brackets) betrays an attitude, to put it mildly, that lacks grace. Be it understood that the bracketted portion was made to meet a case that there existed an order of this Court which was a relevant and vital material. We can use stronger language to express our displeasure at the manner in which reference was made indirectly to this Court's order but we desist from doing so. If the sponsoring authority and the detaining authority are to adopt such cavalier attitude towards orders of courts and of this Court in particular, their orders will meet with the same fate as the one under review.

11. If the detaining authority had considered the order of this Court, one cannot state with definiteness which way his subjective satisfaction would have reacted. This order could have persuaded the detaining authority to desist from passing the order of detention since this Court had allowed freedom of movement. Detention is only a preventive act. This Court did not find it necessary to restrict the liberty of Ramlal when the order on the stay application was passed. It may also be that the detaining authority after considering the order of this Court carefully could still feel that an order of detention is necessary with reference to other materials which out-weigh the effect of this Court's order. In all these cases, non-application of mind on a vital and relevant material need not necessarily lead to the conclusion that application of mind on such materials would always be in

favour of the detenu. Application of mind in such cases is insisted upon to enable the detaining authority to consider one way or the other, as to what effect a relevant material could have, on the authority that decides the detention. In our view the absence of consideration of this important document amounts to non-application of mind on the part of the detaining authority rendering the detention order invalid.

12. In Ashadevi v. K. Shivraj ((1979) 1 SCC 222 : 1979 SCC (Cri) 262), this Court had occasion to consider the plea whether an order of detention would be vitiated if relevant or vital facts, essential to the formation of subjective satisfaction, were kept away from the consideration of the detaining authority. This is how this Court dealt with this aspect : [SCC pp. 226-27, SCC (Cri) pp. 266-67, para 6]

It is well settled that the subjective satisfaction requisite on the part of the detaining authority, the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order. In Sk. Nizamuddin v. State of West Bengal ((1975) 3 SCC 395 : 1975 SCC (Cri) 21) the order of detention was made on September 10, 1973 under Section 3(2)(a) of MISA based on the subjective satisfaction of the District Magistrate that it was necessary to detain the petitioner with a view to preventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to the community and this subjective satisfaction, according to the grounds of detention furnished to the petitioner, was founded on a solitary incident of theft of aluminium wire alleged to have been committed by the petitioner on April 14, 1973. In respect of this incident of theft a criminal case was filed inter alia against the petitioner in the Court in the Sub-Divisional Magistrate, Asansol, but the criminal case was ultimately dropped as witnesses were not willing to come forward to give evidence for fear of danger to their life and the petitioner was discharged. It appeared clear on record that the history-sheet of the petitioner which was before the District Magistrate when he made the order of detention did not make any reference to the criminal case launched against the petitioner, much less to the fact that the prosecution had been dropped or the date when the petitioner was discharged from that case.

Then this Court referred to a decision reported in Sk. Nizamuddin v. State of West Bengal ((1975) 3 SCC 395 : 1975 SCC (Cri) 21) and extracted the following in support of their view : [SCC p. 397 SCC (Cri) p. 23, Para 3, quoted in (1979) 1 SCC at p. 227, 1979 SCC (Cri) at p. 267, para 6]

We should have thought that the fact that a criminal case is pending against the person who is sought to be proceeded against by way of preventive detention is a very material circumstance which ought to be placed before the District Magistrate. That circumstance might quite possibly have an impact on his decision whether or not to make an order of detention. It is not altogether unlikely that the District Magistrate may in a given case take the view that since a criminal case is pending against the person sought to be detained, no order of detention should be made for the present, but the criminal case should be allowed to run its full course and only if it fails to result in conviction, then preventive detention should be resorted to. It would be most unfair to the person sought to be detained not to disclose the pendency of a criminal case against him to the District Magistrate.

The material not placed before the detaining authority is mentioned in paragraph 7 of the judgment which reads as follows : [SCC p. 228, SCC (Cri) pp. 267-68, para 7]

In the instant case admittedly three facts were not communicated to or placed before the detaining authority before it passed the impugned order against the detenu, namely, (i) that during interrogation of the detenu, in spite of request, neither the presence nor the consultation of the advocate was permitted; (ii) that in spite of intimation to the advocate in that behalf the detenu was not produced before the Magistrate on December 14, 1977, and (iii) that the confessional statements were squarely retracted by the detenu on December 22, 1977 at the first available opportunity while he was in judicial custody; the first two had a bearing on the question whether the confessional statements had been extorted under duress from detenu or not, while the third obviously was in relation to the confessional statements which formed the main foundation of the impugned order and as such were vital facts having a bearing on the main issue before the detaining authority.

13. Ultimately the order of detention was quashed because the retracted confessional statement of the detenu was not placed before the detaining authority who passed the detention order on the detenu's confessional statements. This Court observed : [SCC p. 229, SCC (Cri) pp. 268-69, para 7] it cannot be disputed that the fact of retraction would have its own impact one way or the other on the detaining authority before making up its mind whether or not to issue the impugned order of detention and also to see whether the confessional statements recorded ...... were voluntary statements or were statements which were obtained from the detenu under duress and also whether the retracted confession was in the nature of an afterthought. On the facts of this case, by way of reiteration, we wish to state that the facts that Ramlal was detained, that he had undergone substantive period of detention did not weigh with this Court when the above order was passed, which clearly indicated that this Court felt that there was no need to detain him further pending appeal.

14. In Mohd. Shakeel Wahid Ahmed v. State of Maharashtra ((1983) 2 SCC 392 : 1983 SCC (Cri) 509), a Constitution Bench of this Court has to deal with a somewhat similar situation. There, one of the grounds of detention on which the appellant before this Court was detained was the same as the one on which one Shamsi was detained. The Advisory Board had reported that there was no sufficient cause of Shamsi's detention. A case was pleaded before this Court that the report of the Advisory Board to the above effect ought to have been placed before the detaining authority which passed the order of detention against the petitioner before this Court in that case. It was contended that if this material had been placed before the detaining authority it may not have passed an order of detention on against the petitioner in that case. This Court accepted this plea and observed as follows : [SCC pp. 394-95, SCC (Cri) pp. 511-12, para 7]

This submission is well founded and must be accepted. It is clear that Shamsi was detained for engaging in a smuggling activity arising out of the same incident and transaction which forms the subject-matter of ground 1 in the instant case. The opinion of the Advisory Board that there was no sufficient cause for Shamsi's detention may not have been binding on the detaining authority which ordered the detention of the petitioner but, it cannot be gainsaid that the fact that the Advisory Board bad recorded such an opinion on identical facts involving a common ground was at least a relevant circumstance which ought to have been placed before the detaining authority in this case. Since three out of the four grounds on which the petitioner was detained have been held to be bad by the High Court, we have to proceed on the basis that the petitioner was detained and could validly be detained on the remaining ground only. That ground is similar to one of the grounds on which Shamsi was detained, the transaction being one and the same, as also the incident on which the two orders of detention are based. That is why the opinion of the Advisory Board in Shamsi's case becomes relevant in the petitioner's case. The failure of the State Government to place before the detaining authority in the instant case, the opinion which the Advisory Board had recorded in

favour of a detenu who was detained partly on a ground relating to the same incident deprived the detaining authority of an opportunity to apply its mind to a piece of evidence which was relevant, if not binding. In other words, the detaining authority did not, because it could not, apply its mind to a circumstance which, reasonably, could have effected its decision whether or not to an order of detention against the petitioner.

This Court observed further the scope of the consideration of the relevant materials in the following words : [SCC p. 395, SCC (Cri) p. 512, para 8]

But the question for consideration is not whether the detaining authority would have been justified in passing the order of detention against the petitioner, even after being apprised of the opinion of the Advisory Board in Shamsi's case. The question is whether the order of detention was passed in this case after applying the mind to the relevant facts which bear upon the detention of the petitioner. It seems to us plain that the opinion of the Advisory Board in Shamsi's case was, at any rate, an important consideration which would and ought to have been taken into account by the detaining authority in the instant case. That opportunity was denied to it.

15. The Constitution Bench has in unambiguous terms outlined the scope of the doctrine of the application of mind and the purpose behind it, in the above observation.

16. In a recent case, Sita Ram Somani v. State of Rajasthan ((1986) 2 SCC 86 : 1986 SCC (Cri) 104) to which one of us was a party, it was held that non-application of mind about the bail applications of the detenu in pending criminal case and his applications to the Collector of Customs, informing him that he had retracted his earlier confessional statements not having been placed before the detaining authority, the order of detention was held to be vitiated. In another case Criminal Writ Petition No. 397 of 1986, in a judgment given by one of us alongwith Pathak, J. (as he then was), the detention order which was based on three separate incidents, was quashed on the ground that the detaining authority did not apply its mind while passing the detention order, that the detenu had moved an application for bail, in the three pending cases and that he was enlarged on bail on January 13, 1986, January 14, 1986 and January 15, 1986. Since the order of detention did not mention that the detenu in these cases was an undertrial prisoner, that he was arrested in connection with the three cases, that applications for bail were pending and that he was released on three successive days in the three cases, this Court had to observe that there was a total absence of application of mind on the part of the detaining authority while passing the detention order and quashed the order of detention.

17. Appellants' counsel in this case found it difficult to get over this plea made by the respondent, supported by weighty authorities. He could not put forward any persuasive submissions to compel us to disagree with the consistent view taken by this Court in such matters. He acted with propriety in not adopting the argument put forward in the counter-affidavit that it was not the function of the authorities to go after all proceedings that take place in courts of law, relating to a detenu.

18. In view of the above conclusions we do not think it necessary to consider the question whether the authorities acted rightly in not considering the representation made by the respondent. It cannot be disputed that provisions of SAFEMA cannot be invoked in cases where there is no valid order of detention. We agree with the High Court that the order of detention is bad on the ground discussed above. Consequently we hold that the High Court was justified in quashing the notice issued under Section 6 and the proceeding initiated under Section 7 of the SAFEMA. We accordingly dismiss the appeal.

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