State of Andhra Pradesh and Another

Vs

Balajangam Subbarajamma

Petition for Special Leave to Appeal (Criminal) No. 1783 of 1988

(G. L. Oza, K. Jagannatha Shetty JJ)

27.10.1988

JUDGMENT

JAGANNATHA SHETTY, J. –

1. This appeal by special leave is directed against the judgment dated April 14, 1988 of the High Court of Andhra Pradesh in Writ Petition No. 4454 of 1988 whereby the order of detention passed against the respondent under the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 ("the Act") was quashed.

2. Briefly stated the facts are these : The respondent was said to have smuggled paddy from Andhra Pradesh to Tamil Nadu. During the watch kept by the Inspector, Vigilance Cell, Civil Supplies Department, Nellore on the night of November 4, 1987 a lorry bearing No. MDN 8505 carrying 125 bags of paddy was spotted when it was trying to go to Tamil Nadu avoiding check post. The lorry was chased by the Inspector of Police and his staff. The driver suddenly stopped the lorry, but the persons in the vehicle took to heels jumping out therefrom and disappeared in the bushes. The respondent was identified by the Inspector of Police and his staff in the headlights of the jeep in which they were chasing. The driver of the vehicle was apprehended after a hot chase, but not the respondent. From the interrogation of the driver, it was established that on November 4, 1987, the respondent along with two others were in the cabin of the lorry and they were responsible for transporting paddy to Tamil Nadu. The paddy and the lorry were seized by the Inspector. A criminal case was registered against the driver under the Essential Commodities Act and the Andhra Pradesh Rice Procurement (Levy) Order, 1984. When the investigation of that case was proceeding, Additional Superintendent of Police, Nellore sent proposals to the District Magistrate for detaining the respondent under the Act. The District Magistrate passed an order dated December 24, 1987 directing the detention of the respondent. On January 4, 1988, the State Government approved the detention. On January 11, 1988 the State Government acting under Section 10 of the Act referred the matter to the Advisory Board.

3. On January 27, 1988, the detenu submitted a representation through the Superintendent, Central Prison where he was detained to the Chairman of the Advisory Board and to the Chief Secretary, Government of Andhra Pradesh and also to the detaining authority. The government forwarded the representation to the Advisory Board. On January 29, 1988, the Advisory Board met and heard the detenu and the officers on behalf of the government. There were high ranking police officials representing the government. The Advisory Board after hearing those officers and the detenu made an order :

> We have heard the detenu, who has been produced before us and considered his

> written representation. We have also heard Sri V. Appa Rao, IGP (Spl.), Vigilance, Sri C. R. Naidu, Addl. SP (Vigilance), Hyderabad, Sri N. Chandramouli, DSP (Vigilance), Nellore and Sri Nageswara Rao, Incharge Joint Collector, Nellore District. We have perused the grounds of detention and other connected papers.
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> #OpinionWe are of the opinion that there is sufficient cause forthe detention of Balajangam Subbaramaiah @ Bommu Subbaramaiah @Subbarami Reddy, s/o Changaiah. Chairman Member Member.##

The government agreed with the opinion and confirmed the detention for a period of six months. The detenu challenged the validity of the order of detention before the High Court. The High Court allowed the writ petition and quashed the order of detention. The High Court found that there was unequal treatment by the Advisory Board in considering the representation of the detenu. The Advisory Board having decided to hear the top ranking police officer like the Inspector General of Police, Vigilance, Additional Superintendent of Police, Vigilance, Deputy Superintendent of Police, Vigilance and Joint Collector of Nellore District ought to have given an equal chance of representation to the detenu by permitting him to be represented by a lawyer or at least by an official (friend) of an equal rank. The High Court tersely observed :

> In such circumstances, the Advisory Board ought to have provided the prisoner an opportunity for representation though not by a lawyer at least by someone equally competent like those who appeared for the State. The government cannot deny the fact that the might of the official representation before the Advisory Board outweighed by several times the value of the detenu's represention.

The High Court also found that the detenu did write to the government on January 27, 1988 asking for representation by a lawyer and that request ought to have been acceded to by the Advisory Board when the matter came up before it. The High Court then said :

> We are of the opinion that the dormant right of the detenu for equal representation had become active upon the mode of conducting the proceedings by the Advisory Board. The prisoner in this case could not have envisaged that the high State Officials would appear against his case and for the detaining authority. For these reasons, we cannot agree with the contention that the prisoner himself was to blame for not asking the Advisory Board for a lawyer's representation or for equal level of representation before the Advisory Board. As we are of the opinion that Article 22(5) requires the Advisory Board to afford the prisoner an equal opportunity for representing his case compared with the quality and quantity of official representation allowed for the detaining authority and as we are also of the opinion that the official representation in this case far outweighed in importance the detenu's representation we hold that Article 22(5) is violated in this case.

4. These are the findings of the High Court. The question is whether the view taken by the High Court in the premises is justified. In view of the fact that top ranking officials representing the government were personally heard by the Advisory Board whether the detenu was prejudiced ? Whether there was any breach of equality in denying him representation by a lawyer or friend ?

5. The Act by Section 10 provides for constitution of an Advisory Board. Sub-section (2) thereof provides that every such Board shall consist of three persons who are, or have been, or are qualified

to be appointed as, judges of a High Court, and such persons shall be appointed by the appropriate government. Sub-section (3) provides that the government shall appoint one of the members of the Advisory Board who is, or has been, a judge of a High Court to be its Chairman, etc. Section 10 provides for reference to Advisory Board. In every case where a detention order has been made under the Act, the government, shall within three weeks from the date of detention of a person, place before the Advisory Board constituted by it, the grounds on which the order has been made the representation, if any, made by the person affected by the order. Section 11 provides procedure to be followed by Advisory Board. It reads :

> (1) The Advisory Board shall, after considering 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, after hearing him in person, submit its report to the appropriate government within seven weeks from the date of detention of the person concerned.
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> (2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.
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> (3) When there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.
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> (4) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board, and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

Section 12 provides that where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit. But in case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the government shall revoke the detention order and cause the person to be released forthwith.

6. The Act thus by Section 11(4) expressly denies representation through a legal practitioner. The Board may hear any person if necessary. If the detenu desires to be heard, the Board may hear him also. But no person has a right to be represented by a lawyer much less the detenu. This provision is in conformity with Article 22(3)(b) of the Constitution, the scope of which has been explained by a Constitution Bench of this Court. In A. K. Roy v. Union of India ((1982) 1 SCC 271 : 1982 SCC (Cri) 152 : (1982) 2 SCR 272, 339), this Court speaking through Chandrachud, C.J., had this to say : [SCC p. 330 : SCC (Cri) pp. 204-5, para 86]

> On a combined reading of clauses (1) and (3)(b) of Article 22, it is clear that the right to consult and to be defended by a legal practitioner of one's choice, which is conferred by clause (1), is denied by clause (3)(b) to a person who is detained under any law providing for preventive detention. 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 considerations that the detenu has the right of being represented by a legal practitioner in the proceedings before the Advisory Board. Since the Constitution, as originally enacted, itself contemplates that such a right should be made available to a detenu, it cannot be said that the denial of the said right is unfair, unjust or unreasonable. It is indeed true to say, after the decision in the Bank Nationalisation case (R. C. Cooper v. Union of India, (1970) 1 SCC 248), that though the subject of preventive detention is specially dealt with in Article 22, the requirements of Article 21 have nevertheless to be satisfied. It is therefore necessary that the procedure prescribed by law for the proceedings before the Advisory Boards must be fair, just and reasonable.

Learned Chief Justice continued : [SCC p. 331 : SCC (Cri) p. 205, para 86]

But then, the Constitution itself has provided a yardstick for the application of that standard, through the medium of the provisions contained in Article 22(3)(b). Howsoever much we would have liked to hold otherwise, we experience serious difficulty in taking the view that the procedure of the Advisory Boards in which the detenu is denied the right of legal representation is unfair, unjust and unreasonable. If Article 22 were silent on the question of the right of legal representation, it would have been possible, indeed right and proper, to hold that the detenu cannot be denied the right of legal representation in the proceedings before the Advisory Boards. It is unfortunate that courts have been deprived of that choice by the express language of Article 22(3)(b) read with Article 22(1).

And also said : [SCC pp. 334-35 : SCC (Cri) p. 208, para 93]

We must therefore hold, regretfully though, that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. It is, however, necessary to add an important caveat. The reason behind the provisions contained in Article 22(3)(b) of the Constitution clearly is that a legal practitioner should not be permitted to appear before the Advisory Board for any party. The Constitution does not contemplate that the detaining authority or the government should have the facility of appearing before the Advisory Board with the aid of a legal practitioner but that the said facility should be denied to the detenu. In any case, that is not what the Constitution says and it would be wholly inappropriate to read any such meaning into the provisions of Article 22. Permitting the detaining authority or the government to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be a breach of Article 14, if a similar facility is denied to the detenu. We must therefore make it clear that if the detaining authority or the government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. We are informed that officers of the government in the concerned departments often appear before the Board and assist it with a view to justifying the detention orders. If that be so, we must clarify that the Boards should not permit the authorities to do indirectly what they cannot do directly; and no one should be enabled to take shelter behind the excuse that such officers are not "legal practitioners" or legal advisers. Regard must be had to the substance and not the form since, especially, in matters like the proceedings of Advisory Boards, whosoever assists or advises on facts or law must be deemed to be in the position of a legal adviser. We do hope that Advisory Boards will take care to ensure that the provisions of Article 14 are not violated in any manner in the proceedings before them.

Learned Chief Justice also examined the right of a detenu to be represented by a friend if not by a lawyer and in that context observed : [SCC pp. 335-36 : SCC (Cri) p. 209, 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 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 case and composure to present his point of view. He may be "tongue-tied, nervous, confused or wanting in intelligence", and if justice 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 not even be allowed to take the aid of a friend. Whenever demanded, the Advisory Boards must grant that facility.

7. There are two decisions of this Court earlier to A. K. Roy ((1982) 1 SCC 271 : 1982 SCC (cri) 152 : (1982) 2 SCR 272, 339). In Kavita v. State of Maharashtra ((1981) 3 SCC 558 : 1981 SCC (Cri) 743 : (1982) 1 SCR 138, 147), Chinnappa Reddy, J. speaking for a three Judge Bench, observed : [SCC pp. 564-65 : SCC (Cri) p. 749, para 6]

.... [W]here a detenu makes a request for legal assistance, his request would have to be considered on its own merit in each individual case. In the present case, the government merely informed the detenu that he had no statutory right to be represented by a lawyer before the Advisory Board. Since it was for the Advisory Board and not for the government to afford legal assistance to the detenu the latter, when he was produced before the Advisory Board, could have, if he was so minded, made a request to the Advisory Board for permission to be represented by a lawyer. He preferred not to do so. In the special circumstances of the present case we are not prepared to hold that the detenu was wrongly denied the assistance of counsel so as to lead to the conclusion that procedural fairness, a part of the Fundamental Right guaranteed by Article 21 of the Constitution was denied to him.

In that case, this Court found that there was no denial of procedural fairness which is a part of the Fundamental Rights guaranteed under Article 21 of the Constitution. It was also found that the detenu made no request for representation by a legal practitioner before the Advisory Board.

8. In Nand Lal Bajaj v. State of Punjab ((1981) 4 SCC 327 : 1981 SCC (Cri) 841 : (1982) 1 SCR 718, 723), A. P. Sen, J. said : [SCC p. 331 : SCC (Cri) p. 845, para 7]

It is the arbitrariness of the procedure adopted by the Advisory Board that vitiates the impugned order of detention. There is no denying the fact that while the Advisory Board disallowed the detenu's request for legal assistance, it allowed the detaining authority to be represented by counsel. It appears that the Advisory Board blindly applied the provisions of sub-section (4) of Section 11 of the Act to the case of the detenu failing to appreciate that it could not allow legal assistance to the

detaining authority and deny the same to the detenu. The Advisory Board is expected to act in a manner which is just and fair to both the parties.

9. More recently in Johney D'Couto v. State of Tamil Nadu ((1988) 1 SCC 116 : 1988 SCC (Cri) 70 : AIR 1988 SC 109, 112), Ranganath Misra, J. speaking for a Bench of this Court, said : [SCC p. 121 : SCC (Cri) pp. 75-76, para 6]

The rule in A. K. Roy case ((1982) 1 SCC 271 : 1982 SCC (Cri) 152 : (1982) 2 SCR 272, 339) made it clear that the detenu was entitled to the assistance of a 'friend'. The word 'friend' used there was obviously not intended to carry the meanings of the term in common parlance. One of the meanings of the word 'friend', according to the Collins English Dictionary is "an ally in a fight or cause; supporter". The term 'friend' used in the judgments of this Court was more in this sense than meaning 'a person known well to another and regarded with liking, affection and loyalty'. A person not being a friend in the normal sense could be picked up for rendering assistance within the frame of the law as settled by this Court. The Advisory Board has, of course, to be careful in permitting assistance of a friend in order to ensure due observance of the policy of law that a detenu is not entitled to representation through a lawyer. As has been indicated by this Court, what cannot be permitted directly should not be allowed to be done in an indirect way. Sundararajan, in this view of the matter, was perhaps a friend prepared to assist the detenu before the Advisory Board and the refusal of such assistance to the appellant was not justified.

10. The history of civilised man is the history of incessant conflict between liberty and authority. The concentration of power in one hand and liberty in the other cannot go side by side. Temptation to use the power to curtain or destroy the liberty will be always there. It is found in the history of every country. The power to detain a person without trial is a serious inroad into the liberty of individuals. It is a drastic power capable of being misused or arbitrarily exercised. The Framers of our Constitution were not unaware of it. Some of them perhaps were the worse sufferer being the victims in the exercise of that arbitrary power. They had, therefore, specifically incorporated in the Constitution enough safeguards against the abuse of such power. The power to legislate in regard to preventive detention is located in entry 9 of List I as well as in entry 3 of List III in the Seventh Schedule of the Constitution. The safeguards in regard to preventive detention are incorporated under Article 22 of the Constitution. Article 22(4) provides :

> No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless -
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> (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention :
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> Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any made Parliament under sub-clause (b) of clause (7); or
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> Article 22(5) provides :
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> When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be,

communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

11. These are the two important constitutional safeguards. The Advisory Board is a constitutional imperative. It has an important function to perform. It has to form an opinion whether there is sufficient cause for the detention of the person concerned. There is no particular procedure prescribed for the Advisory Board since there is no lis to be adjudicated. Section 11 of the Act provides only the broad guidelines for observance. The Advisory Board however, may adopt any procedure depending upon varying circumstances. But any procedure that it adopts must satisfy the procedural fairness. We need not deal with this aspect in detail since the Advisory Board consists of persons who are, or have been or are qualified to be appointed as judges of a High Court. They are men of wisdom and learning. Their report as envisaged under Section 11(2) of the Act should provide specifically in a separate part whereof as to "whether or not there is sufficient cause for the detention of the person concerned". That opinion as to sufficient cause is required to be reached with equal opportunity to the State as well as the person concerned, no matter what the procedure. It is important for laws and authorities not only to be just but also appear to be just. Therefore, the action that gives the appearance of unequal treatment or unreasonableness - whether or not there is any substance in it - should be avoided by Advisory Board. We consider that it must be stated and stated clearly and unequivocally that it is the duty of the Advisory Board to see that the case of detenu is not adversely affected by the procedure it adopts. It must be ensured that the detenu is not handicapped by the unequal representation or refusal of access to a friend to represent his case.

12. In the instant case, since the Advisory Board has heard the high ranking officers of the Police Department and others on behalf of the government and detaining authority, it ought to have permitted the detenu to have the assistance of a friend who could have made an equally effective representation on his behalf. Since that has been denied to the detenu, the High Court, in our opinion was justified in quashing the detention order.

13. It was, however, sought to be made out for the State that the police officers were present before the Board only to produce the record and they did not do anything further. But the record shows otherwise. The officers were not there only to produce the records. They were in fact heard by the Advisory Board obviously on the merits of the matter and that makes all the difference in the instant case.

14. In the result, we agree with the conclusion of the High Court and dismiss this appeal.

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