

Gracy

Vs

State of Kerala and another

Writ Petition (Criminal) No. 1218 of 1990

(B.C. Ray, L.M. Sharma, J.S. Verma JJ)

15.02.1991

JUDGEMENT

VERMA, J.:-

1. This writ petition under Art. 32 of the Constitution of India is by the mother of the detenu Noor alias Babu to quash the detention order F. No. 801/ 1/ 90-PITNDPS dated 25-1-1990 passed under S. 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (in short 'PITNDPS Act') and the order of confirmation in F. No.801/1/90-PITNDPS dated 24-4-1990 passed under S. 9(f) read with S. 10(2) of the PITNDPS Act, by the Central Government directing detention of the detenu for a period of two years w.e.f. 30-1-1990. The only argument advanced in support of this writ petition is infraction of Art. 22(5) of the Constitution of India. The facts material for the point raised are stated hereafter.

2. The detenu was arrested from his family estate at Kochuveetil House, Kuthugal, Udumpanchola Taluk, Idikki District, Kerala on 19-10-1989 on the accusation that he and his brothers were involved in extensive illicit cultivation of ganja plants (Cannabis Sativa) in violation of the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act'). He was produced before the Judicial Magistrate who rejected his bail application. The Sessions Judge also rejected the bail application once but later granted conditional bail. Thereafter, the detention order dated 25-1-1990 was served on -the detenu on 30-1-1990. It was stated therein that even though prosecution of the detenu was likely to be initiated under the NDPS Act, there was likelihood of the detenu indulging in cultivation and production of narcotic drugs (ganga) on the detenu being released on bail on account of which there was compelling necessity to detain him under the, PITNDPS Act. The detenu was informed that he had a right to make representation to the detaining authority, Central Government and the Central Advisory Board against the detention order. The mode of address of the representation to the Central Government and the Central Advisory Board was also indicated in the detention order along with the grounds of detention in accordance with Art. 22(5) of the Constitution of India. The detenu's case was referred by the Central Government to the Central Advisory Board on 2-3-1990. During pendency of the reference before the Advisory Board, the detenu made his representation on 24-3-1990 and addressed it to the Advisory Board. The Advisory Board considered the reference relating to the detenu made by the Central Government and also the detenu's representation submitted to it. The Advisory Board gave the opinion that there was sufficient cause to justify his preventive detention. The Central Government then made the order dated 24-4-1990 confirming his detention and directed that the detenu Noor alias Babu be detained for a period of two years w.e.f. 30-1-1990.

3. It is admitted that the Advisory Board considered the detenu's representation before sending its

opinion to the Central Government along with the entire record including the representation submitted by the detenu. It is also admitted that the Central Government made the order of confirmation dated 24-4-1990 on receipt of the opinion of the Advisory Board, but there was no independent consideration of the detenu's representation by the Central Government at any time. In the counter-affidavit filed initially by Shri A. K. Roy, Under Secretary to the Government of India, this fact was not clearly stated and, therefore, we directed an additional affidavit to be filed. In the additional affidavit filed by Shri A. K. Roy, it has not been disputed that the Central Government did not at any time consider independently the detenu's representation addressed to and given to the Advisory Board. In the additional affidavit, the stand of the Central Government in this behalf has been stated thus:-

"..... Since the detenu in the present case has not made any representation to the Central Government, the assertion in para 2 of the grounds of petition that no opportunity was afforded by the Central Government to the said detenu is vehemently denied. The question of consideration of a representation and providing of an opportunity would only arise when a representation is duly made to the Central Government."

4. On the above facts, the question is: Whether there has been any infraction of the guarantee under Art. 22(5) of the Constitution as a result of Central Government's omission to consider the detenu's representation independent of its consideration by the Advisory Board? The Central Government's stand is that the detenu's representation being addressed to the Advisory Board to which it was submitted during pendency of the reference before the Advisory Board, there was no obligation on the Central Government also to consider the same independently since the representation was not addressed to the Central Government.

5. The constitutional mandate in Article 22(5) was considered recently by a Constitution Bench in *K. M. Abdulla Kunhi and B. L. Abdul Khader v. Union of India, State of Karnataka* (JT 1991 (1) SC 216: 1991 AIR SCW 362), in view of some conflict in earlier decisions of this Court regarding the detaining authority's obligation to consider the detenu's representation independently of the Advisory Board's duty in this behalf. The Constitution Bench held as follows (at page 367 SCW of AIR 1991):-

"It is now beyond the pale of controversy that the constitutional right to make representation under Cl. (5) of Art. 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. Secondly, the obligation of the Government to afford to the detenu an opportunity to make representation is distinct from the Government's obligation to refer the case of detenu along with the representation to the Advisory Board to enable it to form its opinion and send a report to the Government. It is implicit in Cls. (4) and (5) of Art. 22 that the Government while discharging its duty to consider the representation cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. The obligation of the Government to consider the representation is different from the obligation of the Board to consider the representation at the time of hearing the references. The Government considers the representation to ascertain essentially whether the order is in conformity with the power under the law. The Board, on the other hand, considers the representation and the case of the detenu to examine whether there is sufficient cause for detention. The consideration by the Board is an

additional safeguard and not a substitute for consideration of the representation by the Government. The right to have the representation considered by the Government is safeguarded by Cl.(5) of Art. 22 and it is independent of the consideration of the detenus case and his representation by the Advisory Board under Cl. (4) of Art. 22 read with S.-8(c) of the Act. (See:Sk. Abdul Karim v. State of West Bengal, 1969 (1) SCC 433 : (AIR 1969 SC 1028); Pankaj Kumar Chakrabarty v. State of West Bengal, 1970(1) SCR 543 : (AIR 1970 SC 97); Shayamal Chakraborty v. Commissioner of Police, Calcutta, 1969 (2) SCC 426: (AIR 1970 SC 269); B. Sundar Rao v. State of Orissa, 1972(3) SCC 11 : (AIR 1972 SC 739); John Martin v. State of West Bengal, 1975(3) SCR 211 : (AIR 1975 SC 775); S. K. Sekawat v. State of West Bengal, 1975(2) SCR 161 : (AIR 1975 SC 64) and Haradhan Saha v. State of West Bengal, 1975(1) SCR 778) (AIR 1974 SC 2154)."

(Emphasis supplied)

6. It is thus clear that the obligation of the Government to consider the representation is different and in addition to the obligation of the Board to consider it at the time of hearing the reference before giving its opinion to the Government. Consideration of the representation by the Government has to be uninfluenced by the view of the Advisory Board. In short, the detenu's right to have the representation considered by the Government under Art. 22(5) is independent of the consideration of the detenus case and his representation by the Advisory Board. This position in law is also not disputed before us.

7. The learned Solicitor General, however, contended that in the present case there being no representation addressed 'to the Central Government, the only representation made by the detenu being addressed to the Advisory Board during pendency of the reference, there was in fact no representation of the detenu giving rise to the Central Government's obligation to consider the same. The question is: Whether this contention can be accepted in the face of the clear mandate in Art. 22(5) of the Constitution?

8. It is undisputed that if there be only one representation by the detenu addressed to the detaining authority, the obligation arises under Art. 22(5) of its consideration by the detaining authority independent of the opinion of the Advisory Board in addition to its consideration by the Advisory Board while giving its opinion. In other words, one representation of the detenu addressed only to the Central Government and not also to the Advisory Board does not dispense with the requirement of its consideration also by the Advisory Board. The question, therefore, is: Whether one of the requirements of consideration by Government is dispensed with when the detenu's representation instead of being addressed to the Government or also to the Government is addressed only to the Advisory Board and submitted to the Advisory Board instead of the Government? On principle, we find it difficult to uphold the learned Solicitor General's contention which would reduce the duty of the detaining authority from one of substance to mere form. The nature of duty imposed on the detaining authority under Art. 22(5) in the context of the extraordinary power of preventive detention is sufficient to indicate that strict compliance is necessary to justify interference with personal liberty. It is more so since the liberty involved is of a person in detention and not of a free agent. Art. 22(5) casts an important duty on the detaining authority to communicate the grounds of detention to the detenu at the earliest to afford him the earliest opportunity of making a representation against the detention order which implied the duty to consider and decide the representation when made, as soon as possible. Art.22(5) speaks of the detenu's representation against the order, and imposes the obligation on the detaining authority. Thus, any representation of

the detenu against the order of his detention has to be considered and decided by the detaining authority, the requirement of its separate consideration by the Advisory Board being an additional requirement implied by reading together Cls. (4) and (5) of Art. 22, even though express mention in Art. 22(5) is only of the detaining authority. Moreover, the order of detention is by the detaining authority and so also the order of its revocation if the representation is accepted, the Advisory Board's role being merely advisory in nature without the power to make any order itself. It is not as if there are two separate and distinct provisions for representation to two different authority viz. the detaining authority and the Advisory Board, both having independent power to act on its own.

9. It being settled that the aforesaid dual obligation of consideration of the detenu's representation by the Advisory Board and independently by the detaining authority flows from Art. 22(5) when only one representation is made addressed to the detaining authority, there is no reason to hold that the detaining authority is relieved of his obligation merely because the representation is addressed to the Advisory Board instead of the detaining authority and submitted to the Advisory Board during pendency of the reference before it. It is difficult to spell out such an inference from the contents of Art. 22(5) in support of the contention of the learned Solicitor General. The contents of Art. 22(5) as well as the nature of duty imposed thereby on the detaining authority support the view that so long as there is a representation made by the detenu against the order of detention, the aforesaid dual obligation under Art. 22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the Advisory Board or to both. The mode of address is only a matter of form which cannot whittle down the requirement of the constitutional mandate in Art. 22(5) enacted as one of the safeguards provided to the detenu in case of preventive detention.

10. We are, therefore, unable to accept the only argument advanced by the learned Solicitor General to support the detention. On this conclusion, it is not disputed that there has been a breach of the Central Government of its duty under Art. 22(5) of the Constitution of India to consider and decide the representation independently of the Advisory Board's opinion. The order of detention dated 25-1-1990 as well as the order dated 24-4-1990 of its confirmation passed by the Central Government are, therefore, quashed. This shall not, however, affect the detenu's prosecution for the alleged offence and it shall also not be construed as a direction to release him in case he is in custody as a result of refusal of bail. The writ petition is allowed accordingly.

Petition allowed.

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