Amir Shad Khan

Vs

L. Hmingliana and Others

Criminal Appeal No. 485 Of 1991

with

Aziz Ahmedkhan Alias Aziz Mohd. Khan

Vs

L. Hmingliana and Others

Criminal Appeal No. 486 of 1991

Criminal Appeal Nos. 485 and 486 of 1991

(A. M. Ahmadi, V. Ramaswami-II, M. M. Punchhi JJ)

09.08.1991

JUDGMENT

AHMADI, J. (for himself and V. Ramaswami, J.) –

1. Special leave granted.

2. The events leading to the filing of these two appeals, briefly stated, are that on the afternoon of March 25, 1990, the officers of the Directorate of Revenue Intelligence being in possession of information intercepted a motor car at about 3.45 p.m., driven by the appellant Amir Shad Khan with the appellant Aziz Ahmad Khan as his companion. On search of the vehicle 1400 gold bars were recovered. The statements of the two appellants were recorded and thereafter they were formally arrested on March 28, 1990 and produced before the Chief Metropolitan Magistrate, Bombay. The Chief Metropolitan Magistrate granted remand. While the matter was under investigation a proposal was made to respondent 1 - Secretary (Preventive Detention), Government of Maharashtra for invoking the powers conferred on him be Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter called 'the Act'). On the very next day after the receipt of the proposal respondent 1 passed the impugned order of detention against the two appellants. These order were passed under sub-section (1) of Section 3 of the Act with a view to preventing the appellants from smuggling goods and engaging in transporting, keeping and concealing the same. After these detention orders were passed on April 24, 1990 they served on the appellants along with the grounds of detention and basic documents on which realigns was placed. By clauses (iii), (iv) and (v) of paragraph 43 of the grounds of detention the appellants were informed that they had a right to make representation to (i) the State Government; (ii) the Central Government; and (iii) the Advisory Board against the detention order, if they desired. It was further stated that the representation to the State Government should be

addressed to the Minister of State for Home, Mantralaya, Bombay. They were informed that to facilitate expeditious consideration thereof the Superintendent of Jails may be requested to forward the same to the detaining authority so that the Home Department can put up the case to the Minister for consideration. It was further stated that the representation to the Central Government may be addressed to the Secretary, Government of India, Ministry of Finance (Department of Revenue), New Delhi through the Superintendent of Jail. In the case of the Advisory Board the appellants were informed that the representation may be addressed to the Chairman, Advisory Board constituted under the Act and may be forwarded through the Superintendent of Jail. On the basis of this advice contained in the grounds of detention the appellants preferred a representation addressed to the Detaining Authority and forwarded it though the Superintendent of Jail, Arthur Road Central Prison, Bombay. It is not necessary to state the various grounds made out in the representation for the revocation of the detention orders but it would suffice to reproduce the last paragraph of the representation. That paragraph reads as under :

> "I would also like to request you that the copies if these representations be sent to the state and Central Government for their kind consideration in view of the above facts so as to revoke and/or set aside my order of detention and order my release forthwith."

It is not disputed that the representation was considered and rejected by the State Government. It was, however, not forwarded to the Central Government and hence the Central Government had no occasion to consider the representation of the appellants for the revocation of the detention orders. As the detention order were not revoked the appellants preferred separate habeas corpus writ petitions which were numbered Criminal Writ Petition Nos. 530-31 of 1991 in the High Court of Bombay under Article 226 of the Constitution. The High Court on a detailed consideration of the various contentions raised by the appellants dismissed both the writ petitions. On the question whether the detention orders were vitiated as the Detaining Authority as well as the State Government had failed to forward their representations to the Central Government, the High Court answered in the negative for reason that the detenus who had failed to follow the clear and specific instructions given in the grounds of detention regarding the manner and mode of address to various authorities not be allowed to reap the benefit of their own default. On the question whether the fundamental right guarantee by Article 22(5) of the Constitution was violated, the High Court observed as under :

> "So far we have not come across authority of this Court or of the Supreme Court wherein it has been ruled that despite this express communication to the detenu, if the detenu makes any representation, the Detaining Authority is under obligation under Article 22(5) of the Constitution to take out xerox copies of the same and forward to the State Government or the Central Government. We are afraid, we cannot infer such obligation on the Detaining Authority or the State Government under Article 22(5) of the Constitution. But however, it is advisable that upon receipt of such representation from the detenu, the Detaining Authority may immediately inform the detenu about the procedure that he has to follow in forwarding representations to the State Government, the Central Government or the Advisory Board against the order of detention."

It is this view of the High Court which was vehemently challenged before us by learned counsel for the appellants. In support of his contention counsel placed strong reliance on four decisions of this Court reported in (i) Razia Umar Bakshi (Smt.) v. Union of India (1981 Supp SCC 195 : 1980 SCC

(Cri) 846 : (1980) 3 SCR 1398), (ii) Rattan Singh v. State of Punjab ((1981) 4 SCC 481 : 1981 SCC (Cri) 853), (iii) Sat Pal v. State of Punjab ((1982) 1 SCC 12 : 1982 SCC (Cri) 46) and (iv) Gracy (Smt.) v. State of Kerala ((1991) 2 SCC 1 : 1991 SCC (Cri) 467 : JT (1991) 1 SC 371). On the other hand counsel for the State Government as well as the Central Government supported the view taken by the High Court and contended that the appellants cannot make a grievance if they have despite a clear direction in the grounds of detention chosen to deviate therefrom. Once the procedure established by law is followed by the respondents the failure on the part of the Detaining Authority or the State Government to accede to the request made by the appellants in the last paragraph of their representation to take out copies thereof and forward the same to the Central Government cannot vitiate the detention order. It was further pointed out that a subsequent representation dated June 5, 1990 made to the Central Government was considered with despatch and was rejected on June 12, 1990. We may at this sage state that we are not concerned with the subsequent representation. The point which we have been called upon to consider is whether failure on the part of the Detaining Authority as well as the State Government to accede to the request of the appellants to take out copies of the representations and forward the same to the Central Government for consideration has resulted in violation of their constitutional/statutory right to have their representation considered by the Central Government, and if yes, whether the detention order are liable to be quashed on that ground.

3. The law of preventive detention is harsh to the person detained and, therefore, there can be no doubt that it must be strictly construed. Article 22(3)(b) denies to a person who is arrested or detained under any law providing for preventive detention the protection of clauses (1) and (2) of the said article. Clause (4) thereof enjoins that the preventive detention law must conform to the limitation set out thereunder. Clause (5) of Article 22 reads as under :

> "22. (5) 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."

This clause casts a dual obligation on the Detaining Authority, namely, (i) to communication to the detenu the grounds on which the detention order has been made; and (ii) to afford to the detenu the earliest opportunity of making a representation against the detention order. Consequently the failure to communicate the grounds promptly or to afford the detenu an opportunity of making a representation against the order would clearly violate the constitutional guarantee afforded to the detenu by clause (5) of Article 22 of the Constitution. It is by virtue of this right conferred on the detenu that the Detaining Authority considers it a duty to inform the appellant-detenu of his right to make a representation to the State Government, the Central Government and the Advisory Board. The right to make a representation against the detention order thus flows from the constitutional guarantee enshrined in Article 22(5) which casts an obligation on the authority to ensure that the detenu is afforded an earliest opportunity to exercise that right, if he so desires. The necessity of costing a dual obligation on the authority making the detention order is obviously to acquaint the detenu of what had weighed with the Detaining Authority for exercising the extraordinary powers of detention without trial conferred by Section 3(1) of the Act and to give the detenu an opportunity to point out any error in the exercise of the power so the said authority gets an opportunity to undo the harm done by it, if at all, correcting the error at the earliest point of time. Once it is realised that Article 22(5) confers a right of representation, the next question is to whom must the representation be made. The grounds of detention clearly inform the detenu that he can make a representation to

the State Government, the Central Government as well as the Advisory Board. There can be no doubt that the representation must be made to the authority which has the power to rescind or revoke the decision, if need be. Our search for the authority must, therefore, take us to the statute since the answer cannot be found from Article 22(5) of the Constitution read in isolation. As pointed out earlier that clause casts an obligation on the authority making the detention order to afford to the detenu an earliest opportunity to make a representation against the detention order. If we are to go by the statement in the grounds of detention our search for that authority would end since the grounds of detention themselves state the authorities to which the representation must be made. The question must be answered in the context of the relevant provisions of the law. Now as stated earlier by clause (5) of Article 22 a dual obligation is cast on the authority making the detention order one of which is to afford to the detenu an earliest opportunity of making a representation against the order which obligation has been met by informing the detenu in the grounds of detention to whom his representation should be addressed. But the authority to which the representation is addressed must have statutory backing. In order to trace the source for the statutory backing it would be advantageous to notice the scheme of the Act providing for preventive detention. Section 2(b) defines a detention order to mean an order made under Section 3. Sub-section (1) of Section 3 empowers the Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to the government, special empowered for the proposes of this section by that government, or any officer of a State Government, not below the rank of a Secretary to that government, specially empowered for the purposes of this section by that government, to make an order of detention with respect to any person with a view to prevention him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from doing any one of the five prejudicial acts enumerated thereunder. Sub-section (2) of that section provides that when any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order. It is evident from this provision that whenever a detention order is made by the State Government or its officer specially empowered for that purpose an obligation is cast on the State Government to forward a report to the Central Government in respect of that order within ten days. The purpose of this provision is clearly to enable the Central Government to keep an eye on the exercise of power under Section 3(1) by the State Government or its officer. Then comes sub-section (3) which reads as under :

3. (3) For the purposes of clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention."

This provision is clearly intended to meet the obligation cast by Article 22(5) that the ground of detention shall be communicated 'as soon as may be'. The legislation has, therefore, fixed the outer limit within which the grounds of detention must be communicated to the detenu. Thus the first part of the obligation cast by Article 22(5) is met by Section 3(3) of the Act. Section 8 provides for the Constitution of Advisory Boards. This section is clearly to meet the obligation of sub-section (a) of clause (4) and sub-clause (c) of clause (7) of Article 22 of the Constitution. Section 8(f) which has some relevance provides that 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 continue that 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 in sufficient cause for

the detention of the person concerned, the appropriate government shall revoke detention order and cause the person to be released forthwith. This provision clearly obliges the appropriate government to order revocation of the detention order if the Advisory Board reports want of sufficient cause for detention of that person. Than comes Section 11 which reads as under :

> "11. Revocation of detention orders. - (1) Without prejudice to the provisions of Section 21 of the General Clauses Act, 1897, a detention order may, at any time, be revoked or modified -
>
> (a) notwithstanding that the order has been made by an officer of a State Government, by that State Government or by the Central Government;
>
> (b) notwithstanding that the order has been made by an officer of the Central Government or by a State Government, by the Central Government."

Sub-Section (2) is not relevant for our purpose. It is obvious from a plain reading of the two clauses of sub-section (1) of Section 11 that where an order is made by an officer of the State Government, the State Government, the State Government as well as the Central Government are empowered to revoke the detention order. Where, however, the detention order is passed by an officer of the Central Government or a State Government, the Central Government is empowered to revoke the detention order. Now this provision is clearly without prejudice to Section 21 of the General Clauses Act which lays down that where by any Central Act a power to issue orders is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions, if any, to rescind any order so issued. Plainly the authority which has passed the order under any Central Act is empowered by this provision to rescind the order in like manner. This provision when read in the context of Section 11 of the Act makes it clear that the power to rescind conferred on the authority making the detention order by Section 21 of the General Clauses Act is saved and is not taken away. Under Section 11 an officer of the State Government or that of the Central Government specially empowered under Section 3(1) of the Act to make a detention order is not conferred the power to revoke it; that power for those officers has to be traced to Section 21 of the General Clauses Act. Therefore, where an officer of the State Government or the Central Government has passed any detention order and on receipt of representation he is convinced that the detention order needs to be revoked he can do so by virtue of Section 21 of the General Clauses Act since Section 11 of the Act does not entitle him to do so. If the State Government passes an order of detention and later desires to revoke it, whether upon receipt of a representation from the detenu or otherwise, it would be entitled to do so under Section 21 of the General Clauses Act but if the Central Government desires to revoke any order passed by the State Government or its officer it can do so only under clause (b) of Section 11(1) of the Act and not under Section 21 of the General Clauses Act. This clarifies why the power under Section 11 is conferred without prejudice to the provision of Section 21 of the General Clauses Act. Thus on a conjoint reading of Section 21 of the General Clauses Act and Section 11 of the Act it becomes clear that the power of revocation can be exercised by three authorities, namely the officer of the State Government or the Central Government, the State Government as Well as the Central Government. The power of revocation conferred by Section 8(f) on the appropriate Government is clearly independent of this power. It is thus clear that Section 8(f) of the Act satisfies the requirement of Article 22(4) whereas Section 11 of the Act satisfies the requirement of the latter part of Article 22(5) of the Constitution. The statutory provisions, therefore, when read in the context of the relevant clauses of Article 22, make it clear that they are intended to satisfy the constitutional requirements and provide for enforcement of the right conferred on the detenu to represent against his detention order. Viewed in this

perspective it cannot be said that the power conferred by Section 11 of the Act has no relation whatsoever with the constitutional obligation cast by Article 22(5).

4. We may now turn to the case law on which reliance was placed. In Razia Umar case (1981 Supp SCC 195 : 1980 SCC (Cri) 846 : (1980) 3 SCR 1398), S. Murtaza Fazal Ali, sitting singly during vacation was concerned with a more or less similar situation. In that case a detention order was passed by the State Government against which the detenu had made a representation to the said government. By that representation he also preyed that his representation may be forwarded to the Central Government for considered. That representation was disposed of by the State Government but it was not forwarded to the Central Government, notwithstanding the specific prayer of the detenu. The defence taken was that the detenu had himself sent a copy of his representation to the Central Government and, therefore, the Detaining Authority did not consider it necessary to forward the representation to the Central Governement. The defence of the State Government was held to be wholly unacceptable on the following line of reasoning : (SCC p. 197, para 6)

> "Section 11 of the Act confers a constitutional right on the detenu to have his representation considered by the Central Government. It is true that the Central Government has a discretion to revoke or confirm the detention but the detenu has undoubtedly a right that his representation should be considered by the Central Government for whatever worth it is. The mere fact that the detenu had sent a copy to the Central Government does not absolve the detaining authority from the statutory duty of forwarding the representation to the Central Government."

This observation would show that the power of revocation conferred by Section 11 of the Act has a nexus with the right of representation conferred on the detenu by Article 22(5) and, therefore, the State Government when requested to forward a copy of the representation to the Central Government is under an obligation to do so. The learned counsel for the appellant further pointed out that our case stands on a stronger footing because, admittedly, the appellants had not forwarded a copy of their representation to the Central Government as in Razia Umar case (1981 Supp SCC 195 : 1980 SCC (Cri) 846 : (1980) 3 SCR 1398).

5. The High Court distinguished this decision on the ground that the facts of Razia Umar case (1981 Supp SCC 195 : 1980 SCC (Cri) 846 : (1980) 3 SCR 1398) reveal that the detenu had sent a separate representation to the Detaining Authority with a request to forward the same to the State Government and the Central government whereas in our case only one representation was sent to the Detaining Authority with a request that copies thereof be taken out and sent to the State Government as well as the Central Government for their consideration. With respect, this distinction has nothing to do with the ratio of the decision; if at all, as rightly pointed out by counsel for the appellants, the facts of this case are stronger than those of Razia Umar case (1981 Supp SCC 195 : 1980 SCC (Cri) 846 : (1980) 3 SCR 1398).

6. In Rattan Singh case ((1981) 4 SCC 481 : 1981 SCC (Cri) 853) the facts reveal that the detenu had written a letter to the Superintendent of Central Jail, Amritsar, enclosing therewith two representations one of which was addressed to the Joint Secretary, Department of Home, Government of Punjab, Chandigarh, and the other to the Secretary, Union Ministry of Finance, Department of Revenue, New Delhi. The Jail Superintendent was requested to forward the representations to the State Government as well as the Central Government. In the counter filed on behalf of the Central Government it was stated that no representation by or on behalf of the detenu had been received by the Central Government. It was contended that failure to forward the

representation to the Central Government and the consequent failure of the Central Government to apply its mind to the representation vitiated the detention order. This Court held that the detenu was unaccountably deprived of a valuable right to defend and assert his fundamental right to personal liberty. Chandrachud, C.J. who spoke for the three Judge bench, observed as under : (SCC p. 483, para 4)

> "But the laws of preventive detention afford only a modicum of safeguards to persons detained under them and if freedom and liberty are to have any meaning in our democratic set up, it is essential that at lease those safeguards are not denied to the detenus. Section 11(1) of COFEPOSA confers upon the Central Government the power to revoke an order of detention even if it is made by the State Government or its officer. That power, in order to be real and effective, must imply the right in a detenu to make a representation to the Central Government against the order of detention. The failure in this case on the part either of the Jail Superintendent or the State Government to forward the detenu's representation to the Central Government has deprived the detenu of the valuable right to have his detention revoked by that government. The continued detention of the detenu must therefore be held illegal and the detenu set free."

In taking this view reliance was placed on an earlier decision of this Court in Tara Chand v. State of Rajasthan ((1980) 2 SCC 321 : 1980 SCC (Cri) 441).

7. In Sat Pal case ((1982) 1 SCC 12 : 1982 SCC (Cri) 46) also counsel for the detenu had forwarded two representations one meant for the Central Government and other for the State Government for exercise of power under Section 11 of the Act. The Jail Superintendent who was requested by a forwarding letter to send the representations to the appropriate governments after obtaining the signatures of the detenu thereon forwarded them to the Joint Secretary in the State Government with an endorsement that one of them may be forwarded to the Central Government. The representation of the detenu to the Central Government was not forwarded to that government by the State Government promptly. It was, therefore, contended that the detention order was rendered illegal and liable to be quashed. Dealing with this contention this Court observed that the making of an application for revocation of the order of detention by the Central Government under Section 11 of the Act is part of the constitutional right a citizen has against his detention under a law relating to preventive detention. It was, therefore, observed : (SCC p. 18, para 11)

> "It is, therefore, idle to contend that the State Government had no duty to forward the representation made by the detenu to the Central Government for revocation of his order of detention under Section 11 of the Act."

In taking this view the Court placed reliance on Rattan Singh case ((1981) 4 SCC 481 : 1981 SCC (Cri) 853)

8. Gracy case ((1991) 2 SCC 1 : 1991 SCC (Cri) 467 : JT (1991) 1 SC 371) may not be entirely apposite because the question which the court was required to consider in that case was that the representation made to the Advisory Board was not taken into consideration by the Central Government after the papers were laid before it with the opinion of the Advisory Board that there was sufficient cause to justify the preventive detention. That was, therefore, a case in which the representation was very much before the Central Government and it failed to consider the same before confirming and fixing the duration of the detention order. In that case, therefore, the question

for consideration was whether it was incumbent on the part of the Central Government to consider a representation addressed to the Advisory Board notwithstanding its rejection by the Advisory Board. Such is not the question before us but counsel for the appellants invited our attention to certain observations made in paragraphs 8 and 9 which indicate that the detenu's right for consideration of his representation by the Central Government flow from Article 22(5), irrespective of the fact whether the representation is addressed to the Detaining Authority or to the Advisory Board or both. These observations though made in a different fact-situation do support the submission made on behalf of the appellants. But counsel for the respondents argued that the observations were to broadly stated. It is not necessary for us to examine this contention as the earlier decisions are sufficient to uphold the appellants' contention.

9. In the case before us the facts clearly show that the appellants had made a request to the Detaining Authority to take out copies of his representation and forward them to the State Government as well as the Central Government for consideration. Counsel for the Detaining Authority as well as the State Government contended that no such duty was cast on the said respondents to take out copies and forward them to the Central Government for consideration. Counsel for the Union of India contended that since no such representation had reached the Central Government there was no question of the Central Government applying its mind thereto and taking a decision thereon. In support, reliance was placed on Phillippa Anne Duke v. State of Tamil Nadu ((1982) 2 SCC 389 : 1982 SCC (Cri) 444 : (1982) 3 SCR 769) a judgement rendered by O. Chinnappa Reddy, J. sitting singly. In that case the two petitioners who were British nationals were detained for smuggling electric equipments and goods secreted in specially made compartments/cavities of their Mercedez Benz van. Representations were presented on their behalf to the Prime Minister of India during her visit to England. No decision was taken on those representations and hence it was contended that the detention orders deserved to be quashed. This Court held that representation from whatever source addressed to whosoever officer of one or other department of the government cannot be treated as representations under the Act. It was further held that the bout de papier presented to the Prime Minister of India during her visit to Britain and the subsequent reminder addressed to the External Affairs Ministry could not be treated as representations to the Central Government. It is, therefore, obvious that this decision turned on its special facts and is no authority for the proposition that the Detaining Authority or the State Government was under no obligation to forward the representations to the Central Government.

10. It must be realised that when a person is placed under detention he has certain handicaps and if he makes a request that a representation prepared by him may be forwarded to the Central Government as well as the State Government for consideration after taking out copies thereof it would be a denial of his right to represent to the Central Government if the Detaining Authority as well as the State Government refuse to accede to his request and omit to forward his representation to the Central Government for consideration. It is difficult to understand why such a technical and rigid view should be taken by the concerned authorities in matters of personal liberty where a person is kept in preventive detention without trial. Detenus may be literate or illiterate, they may have access to legal advice or otherwise, they may or may not be in a position to prepare more than one copy of the representation and if they make a request to the authorities which have the facilities to take our copies to do so and forward them for consideration to the Central Government, would it be just and fair to refuse to do so ? In such circumstances refusal to accede to their request would be wholly unreasonable and in total disregard of the right conferred on the detenu by Article 22(5) of the Constitution read with Section 11 of the Act. We are, therefore, of the opinion that the Detaining Authority as well as the State Government were not justified in taking a hypertechnical stand that they were under no obligation to take out copies of the representations and forward them to the

Central Government. We think that this approach on the part of the Detaining Authority and the State Government has robbed the appellants of their constitutional right under Article 22(5) read with Section 11 of the Act to have their representation considered by the Central Government. The request of the detenus was not unreasonable. On the contrary of action of the Detaining Authority and the State Government was unreasonable and resulted in a denial of the appellants' constitutional right. The impugned detention orders are, therefore, liable to be quashed.

11. In the result we allow these appeals, set aside the order of the High Court and quash the detention orders on this single ground. We direct that both the appellants who are in detention shall be set free at once unless they are required in any other pending matter.

PUNCHHI, J. (partly dissenting) –

I agree to the release of the detenus, but in the facts and circumstances of the case I have reservation to Section 11 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 being treated part of the constitutional guarantee under Article 22(5) of the Constitution of India. Section 11 of the Act does not confer any constitutional right on the detenu to have his representation thereunder considered as if under Article 22(5), but merely a provision enabling the State Government or the Central Government, as the case may be, to revoke or modify detention orders. Have Section 11 of the Act repealed, it causes no affectation to the constitutional guarantee under Article 22(5) of the Constitution. Correspondingly, Section 11 of the Act derives no sustenance from the said Article. Both operate in mutually exclusive fields, though not as combatants. Both the detenus may be set free as proposed by my learned brother, A.M. Ahmadi, J.

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