SUPREME COURT OF INDIA

Mukesh Tikaji Bora

Vs.

Union of India

Crl.A.No.533 of 2007

(Dr. Arijit Pasayat and S.H. Kapadia JJ.)

11.04.2007

JUDGMENT

Dr. ARIJIT PASAYAT, J.

Leave granted.

Challenge in this appeal is to the judgment rendered by a Division Bench of the Bombay High Court dismissing the Habeas Corpus Petition filed by the appellant. In the writ petition challenge was to the order of detention dated 27th August, 1998 passed under Section 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (in short the 'COFEPOSA') in respect of one Bherchand Tikaji Bora alias Bharat alias Bhermal alias Dimple alias Dhayabhai (hereinafter referred to as the 'detenu').

The appellant had filed the writ petition challenging the detention of his brother-Bherchand Tikaji Bora the 'detenu.

Though several grounds were urged in support of the writ petition at the time of hearing only two grounds were urged. Firstly (a) with reference to the facts given in grounds of challenge 1(a) to 1(f) it was argued that when the detenu was exonerated fully in the adjudicating proceeding, then there was no necessity of passing any detention order and (b) this aspect of exoneration of the detenu in the adjudicating proceedings should have been taken note of by the detaining authority.

The aforesaid two statements were made on the basis of following position.

The Enforcement Directorate, Mumbai carried out certain search of the residential premises of one Pravin Popatlal Shah under Section 37 of the Foreign Exchange and Regulation Act, 1973 (in short the 'FERA'). On 16.1.1997 residence of detenu was searched by some officers of the same Directorate. Then detention order dated 27.8.1998 was passed. The show cause notice was given to the detenu on 18.1.1999 for contravention of the provisions of Section 9(1)(a) of the FERA. The Detenu submitted his written explanation on 30.3.1999 and adjudication order dated 29.11.1999 was passed by the Special Director of Enforcement.

The High Court analysed the position of law laid down by this Court in several cases and held that it was not a case of unexplained delay in execution of the order of detention.

Further the exoneration in the adjudication proceedings cannot be a ground to nullify the order of

detention.

Accordingly the writ petition was dismissed.

In support of the appeal learned counsel for the appellant in addition to what was urged before the High Court submitted that certain documents which had relevance were not supplied to the detenu and he was, therefore, not in a position to make an effective representation. The detention order had also been challenged on the ground that the confessional statement of the detenu was retracted subsequently on 15.7.1994 and hence original confession allegedly made on 13.7.1994 could not have been used.

Learned counsel for the respondent on the other hand submitted that not only the original statement but the so called retraction was duly taken note of by the detaining authority. The said Authority referred to the retraction and after its consideration felt that order of detention was necessary.

At this juncture it would be appropriate to take note of what was stated by this Court in Sadhu Roy v. The State of West Bengal [1975(1) SCC 660]. In that case final police report terminated the criminal proceedings. The question was whether in such an event order of detention can be passed.

This Court inter alia observed as follows:

xxx xxx xxx "What is the impact of a discharge of the accused by the criminal court based on police reports on the validity of the detention order against the same person based on the same charge in the context of a contention of a non- application of the authority's mind? xxx xxx xxx The discharge or acquittal by a criminal court is not necessarily a bar to preventive detention on the same facts for "security"

purposes. But if such discharge or acquittal proceeds on the footing that the charge if false or baseless, preventive detention on the same condemned facts may be vulnerable on the ground that the power under the MISA has been exercised in a malafide or colourable manner."

In Bhawarlal Ganeshmalji v. The State of Tamil Nadu and Anr. [AIR 1979 SC 541] it was observed that where the delay is not only adequately explained but is found to be the result of recalcitrant and refractory conduct of the detenu in evading arrest, there is warrant to consider the 'link' not snapped but strengthened.

In the instant case the materials placed by the respondents on record clearly show that all possible efforts were made to take the detenu to custody but he successfully managed to evade. Ultimately proclamation was issued under Section 7 (1) (b) of the COFEPOSA.

Another point which was emphatically urged was that new ground which exists should be taken into consideration.

It is stated that though period of detention may be over in order to avoid civil liability that may be permitted to be urged.

Specific reference in this regards is made to Annexures P-10 to P-14 which are stated to be vital and material documents.

Two of them are the original statement of confession and the subsequent retraction and the show

cause notice dated 3.7.1995 issued to the detenu by dispensing authority and replies dated 18.12.1995 and 17.1.1996 filed by the detenu stating that he was not 'Dimple'.

Though there can be no quarrel with the preposition that in some cases new grounds can be permitted to be urged but the factual background here is different. In Adishwar Jain v.

Union of India & Anr. (2006(10)SCALE 553) it was observed inter alia as follows:

"Although learned Additional Solicitor General may be correct in his submissions but ordinarily we should not exercise our discretionary jurisdiction under Article 136 of the Constitution of India by allowing Appellant to raise new grounds but, in our opinion, we may have to do so as an order of detention may have to be considered from a different angle. It may be true that the period of detention is over. It may further be true that Appellant had remained in detention for the entire period but it is one thing to say that the writ of Habeas Corpus in this circumstances cannot issue but it is another thing to say that an order of detention is required to be quashed so as to enable the detainee to avoid his civil liabilities under SAFEMA as also protect his own reputation.

It is a trite law that all documents which are not material are not necessary to be supplied.

What is necessary to be supplied is the relevant and the material documents, but, thus, all relevant documents must be supplied so as to enable the detenue to make an effective representation which is his fundamental right under Article 22(5) of the Constitution of India. Right to make an effective representation is also a statutory right. (See: Sunila Jain v. Union of India and Anr. [2006 (3) SCC 321])"

Though in that case it was noted that some relevant documents were not supplied, in the instant case the position is not so. No arguments were advanced before the High Court relating to these documents though they were a part of the record before the High Court. The first order of detention and the grounds of detention were served on 23.11.2005. The writ petition was filed on 2.12.2005 under Article 226 of the Constitution of India, 1950 (in short the 'Constitution') for setting aside the order of detention. In March, 2006, Writ Petition (Criminal) No. 146 of 2006 was filed under Article 32 of the Constitution for quashing and setting aside the order of detention during the pendency of Writ Petition (Criminal) No.

2930 of 2005 before the Bombay High Court. On 26.6.2006, this Court disposed of the petition under Article 32 of the Constitution directing the High Court to dispose of the matter within a period of one month and that is how the impugned order dated 6.7.2006 was passed. Looked at from any angle the order of the High Court does not suffer from any infirmity and the appeal deserves dismissal which we direct.