

NIRMAL KUMAR KHANDELWAL

v.

UNION OF INDIA AND ORS.

May 1, 1978

[R. S. SARKARIA AND P. S. KAILASAM, JJ.]

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, Section 8, clause (f)—No order confirming the detention passed by the appropriate Government within three months of the commencement of the detention—Whether violates Art. 22(4) of the Constitution.

The petitioner was detained with effect from October 24, 1977 by an order passed by the Secretary to the Government of Maharashtra under Section 3(1) of COFEPOSA. The Advisory Board reported on 23-12-77 that there was sufficient cause for the detention but the Government did not pass any order confirming the detention within three months from the date of detention. The petitioner assailed it as violative of Art. 22(4) of the Constitution.

Allowing the petition the Court.

HELD : 1. Since no order of confirmation of the detention was made under clause (f) of Section 8 within three months of the date of detention by the appropriate Government, further detention of the petitioner after the expiry of that period is without the authority of law. [822 C]

2. The law does not lend its authority to the continuance of the detention even for a day more than the initial period of three months if the Government does not take a decision for that purpose on the report of the Advisory Board within three months of the commencement of the detention. [822 A-B]

3. The expression "may confirm" in clause (f) of Section 8 of COFEPOSA, is significant. It imports a discretion. Even where the Advisory Board makes a report that in its opinion, there is sufficient cause for the detention of the detenu concerned, the Government may not confirm the detention order. Read in the light of Article 22(4) of the Constitution and the context of the words "continue the detention", the expression definitely leads to the conclusion that the *sine qua non* for continuing the detention made beyond the period of three months, is the confirmation of the detention order by the appropriate Government. Conversely, non-confirmation of the initial order by the appropriate Government before the expiry of the period of three months detention, shall automatically result in revocation and termination of the legal authority for its continuance. This position is further clear from the language of Section 10, which provides : "The maximum period for which any person may be detained in pursuance of any detention order. . . . which has been confirmed under clause (f) of Section 8, shall be one year from the date of detention." The crucial words in the Section are : "which has been confirmed under clause (f) of Section 8." They underscore the same policy which underlies the constitutional mandate in Article 22(4). These words put it beyond doubt that if the initial order of detention is not confirmed by the appropriate Government within three months of the date of the detention, the detention after the expiry of that period *ipso facto* becomes unauthorised and illegal. [821 C-F]

Ujjal Mandal v. State of West Bengal, AIR 1972 SC 1446 reiterated; *Shibapada Mukherjee v. State of West Bengal*, AIR 1972 SC 1356, *Deb Sadhan Roy v. State of West Bengal*, [1972] 2 SCR 787; *Micki Khan etc. etc. v. The State of West Bengal*, AIR 1972 SC 2262; and *Satyadeo Parshad Gupta v. State of Bihar*, [1975] 2 SCR 854 referred to.

A CRIMINAL ORIGINAL JURISDICTION: Criminal Writ Petition No. 1238 of 1978.

Under Article 32 of the Constitution for grant of a Writ of *habeas corpus*.

B *A. K. Sen*, and *Herginder Singh* for the Petitioner.

E. C. Agarwal and (*Miss*) *A. Subhashini* for Respondent No. 1

M. N. Phadke and *M. N. Shroff* for Respondent No. 2

The Judgment of the Court was delivered by

C SARKARIA, J.—This is a petition under Article 32 of the Constitution for the grant of a writ of *habeas corpus*. The petitioner has been detained with effect from October 24, 1977 by an order passed by the Secretary to the Government of Maharashtra under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short called COFEPOSA). Reference was made to the Advisory Board on 24-11-1977. At its sitting held on 23-12-1977, the Board rejected the representation of the detenu and opined that there was sufficient cause for the detention.

D The detention has been challenged mainly on the ground that no order under clause (f) of Section 8 of the Act confirming the detention was passed by the appropriate Government within three months of the commencement of the detention and, as such, the continuance of the detention beyond the initial period of three months was violative of the mandate of Article 22(4) of the Constitution. In support of this contention, Mr. Asoke Sen, appearing for the petitioner, has cited five decisions of this Court—*Shibapada Mukherjee v. State of West Bengal*⁽¹⁾; *Ujjal Mondal v. State of West Bengal*⁽²⁾; *Deb Sadhan Roy v. State of West Bengal*⁽³⁾; *Micki Khan etc. etc. v. The State of West Bengal*⁽⁴⁾; and *Satyadeo Parshad Gupta v. State of Bihar*⁽⁵⁾.

E As against the above, Mr. Phadke, appearing for the State of Maharashtra, contends that the view taken in the aforesaid decisions of this Court, is not in conformity with the plain language of Article 22(4). In the counsel's view, what Article 22(4) requires is that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months, unless an Advisory Board consisting of persons having the qualifications specified therein, reports before the expiration of the said period of three months that there is, in its opinion, sufficient cause for such detention. This requirement—proceeds the argument—was fully complied with in

(1) A. I. R. 1972 S. C. 1356

(2) A. I. R. 1972 S. C. 1446

(3) [1972] 2 S.C.R. 787

(4) A. I. R. 1972 S. C. 2262

(5) [1975] 2 S. C. R. 854

the instant case because the Advisory Board had made such a report within three months of the date of detention and within 11 weeks of the receipt of the Reference from the Government. It is stressed that there is nothing in the language of Article 22(4) or in COFEPOSA which requires that the confirmation of the detention on the basis of the report of the Advisory Board, should also be within three months from the commencement of the detention.

According to Mr. Phadke, COFEPOSA on the other hand clearly indicates that an order of confirmation of the detention can be passed by the appropriate Government within a reasonable time even after the expiry of the initial period of three months' detention. In this connection, counsel has adverted us to Clause (c) of Section 8, which requires that the Advisory Board shall, on receiving the Reference from the appropriate Government, submit its report as to whether or not there is sufficient cause for the detention, within 11 weeks from the date of the detention; while under the corresponding provisions of the Maintenance of Internal Security Act, 1971, the period prescribed for the report of the Advisory Board is ten weeks only. The point sought to be made out is that if the Advisory Board makes a report that there is sufficient cause for the detention, to the appropriate Government just before the expiry of the aforesaid period of 11 weeks, then hardly about 13 or 14 days would be left to the Government to consider whether or not the detention should be confirmed. This period, it is contended, left to the Government for taking a decision on the report of the Advisory Board is too short from a practical point of view.

On the above premises, Mr. Phadke urges that the aforesaid decisions of this Court—none of which was a case of detention under COFEPOSA—need reconsideration.

Before dealing with these arguments, it may be noted that the aforesaid ground of challenge has been specifically adumbrated as Ground No. 12 in the petition. In the counter filed on behalf of the respondent-State, the fact that the order of confirmation of the detention was not passed by the appropriate Government within three months of the date of detention, appears to have been impliedly admitted in these terms :

“.....No confirmation is needed on the part of the State Government. After the advice of the Advisory Board, the detention of the detenu was continued and the order of the State continuing the detention on the basis of the advice of the Advisory Report was served upon the detenu of 27-2-78.”

Nothing has been placed before us to show that the order of detention was, in fact, passed by the appropriate Government within the requisite period of three months. We therefore, take it that the order, if any, for confirmation of the detention of the petitioner by the Government, was made beyond three months of the date of the detention.

A The ground is now clear for considering the legal question raised by Mr. Asoke Sen. The decisions cited by Mr. Sen, primarily proceed on an interpretation of Article 22(4) of the Constitution, though they also in the context examine the relevant provisions of the detention law, under which the detention in question in those cases was purportedly made. We can do no better than reiterate what Mathew, J. speaking for this Court, said in *Ujjal Mondal's* case (supra) :

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"Article 22(4) of the Constitution has specified the maximum limit of initial detention, and detention for a longer period than 3 months can only be made on the basis of the report of the Board. The Act authorises a possible detention of more than 3 months. It is because the appropriate Government wants to detain a person for more than 3 months that the matter is referred to the Board and it is only when the Board makes its report that the appropriate Government can fix the period of detention under sub-section (1) of Section 12. So when the Government receives the report of the Board stating that there is sufficient cause for detention of a person, if the Government wants to detain him for a period beyond 3 months, it has to pass an order or make a decision under section 12(1) to confirm the order of detention. The confirmation of the detention order without anything more would result in an automatic continuation of the detention, even if there is no separate decision to continue the detention for any specific period as held by this Court in (1952) SCR 612-(AIR 1952 SC 181). When Section 12(1) of the Act speaks of "and continue the detention of the person concerned for such period as it thinks fit", it can only mean continuance of detention from the point of time at which detention would become illegal if the order of detention is not confirmed, namely, the expiry of 3 months from the date of detention. It would not be necessary to confirm the order of detention even after the receipt of the report of the Board by the Government if the Government only wants to continue the detention for the period of three months from the date of detention, as the initial order of detention would authorise the continuance of detention for that period without any confirmation. Confirmation is necessary only to continue the detention after the expiry of 3 months. If that be so, it stands to reason to hold that the order of detention must be confirmed before the expiry of 3 months."

The observations extracted above, apply *mutatis mutandis* to the language of clause (f) of Section 8, which is similar. This clause runs as follows :

H "8. For the purposes of sub-clause (a) of clause (4), and sub-clause (c) of clause (7), of article 22 of the Constitution—
" (f) 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 and *continue the 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 no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith.”

(emphasis supplied)

The key words in clause (f) are those which have been underlined. These very words were also, employed in Section 12(1) of the West Bengal Prevention of Violent Activities Act, 1970, the interpretation of which had come up for consideration in the context of Article 22(4) of the Constitution in *Ujjal Mondal's* case. These words also occurred in Sections 10 and 11 of the Preventive Detention Act, 1950, which were in *pari materia* with Sections 11 and 12 of the Maintenance of Internal Security Act, 1971. The expression “may confirm” in clause (f) of Section 8 is significant. It imports a discretion. Even where the Advisory Board makes a report that in its opinion there is sufficient cause for the detention of the detenu concerned, the Government may not confirm the detention order. Read in the light of Article 22(4) of the Constitution and the context of the words “continue the detention”, they definitely lead to the conclusion that the *sine qua non* for continuing the detention made beyond the period of three months, is the confirmation of the detention order by the appropriate Government. Conversely, the non-confirmation of the initial order by the appropriate Government before the expiry of the period of three months detention, shall automatically result in revocation and termination of the legal authority for its continuance. This position is further clear from the language of Section 10, which provides : “The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under clause (f) of Section 8, shall be one year from the date of detention.” The crucial words in the Section are : “which has been confirmed under clause (f) of Section 8.” They underscore the same policy which underlies the constitutional mandate in Article 22(4). These words put it beyond doubt that if the initial order of detention is not confirmed by the appropriate Government within three months of the date of the detention, the detention after the expiry of that period *ipso facto* becomes unauthorised and illegal.

We do not find any merit in the contention that since the period prescribed for the Advisory Board to make its report has been increased from 10 weeks (as prescribed under MISA) to 11 weeks in COFEPOSA, leaving only a short period for the Government to take a decision under Section 8(f), the legislative intent was that the order of confirmation of the detention and its continuance could be made after the expiry of three months from the date of the detention. It is true that in certain situation when the Advisory Board makes its report in favour of the detention just before the expiry of 11 weeks from the date of the detention, the time left to the Govern-

- A** ment for taking a decision as to the confirmation of the detention and its continuance would be hardly two weeks. That only shows the anxiety on the part of the legislature to ensure that the Government continues the preventive detention of a person beyond three months after due application of mind and for that purpose acts with utmost promptitude. The law does not lend its authority to the continuance of the detention even for a day more than the initial period of three months if the Government does not take a decision for that purpose on the report of the Advisory Board within three months of the commencement of the detention.
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- C** There is no reason to doubt the law enunciated by this Court in the aforesaid decisions. Respectfully following the ratio of those decisions, we hold that since no order of confirmation of the detention was made under clause (f) of Section 8 within three months of the date of detention by the appropriate Government, further detention of the petitioner after the expiry of that period is without the authority of law.

- D** In the result, we allow this petition, quash the detention of the petitioner and direct that he be set at liberty forthwith. Rule made absolute.

S.R.

Petition allowed.