

KAMLA KANAHIYALAL KHUSHALANI

A

v.

STATE OF MAHARASHTRA AND ANR.

January 6, 1981

[S. MURTAZA FAZAL ALI AND A. VARADARAJAN, JJ.]

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Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974—Section 3(3)—Failure to supply documents and materials to the detenu—Effect of—“effective representation”—Meaning of.

In a petition under Art. 32 of the Constitution the petitioner detenu complained that though the grounds of detention were served on the detenu on the date of arrest (October 20, 1980) the materials and documents on which the order of detention was based were not supplied to him till November 5, 1980 and that his representation dated November 18, 1980 was disposed of nearly a month later (December 15, 1980) and that the failure on the part of the detaining authority to supply the requisite documents and materials and the unexplained delay in the disposal of the representation constituted violation of the safeguards contained in Art. 22(5) of the Constitution which vitiated the order of detention.

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Allowing the petition,

HELD: It is well settled that the law of preventive detention has to satisfy a two-fold test: (1) that the protection and the guarantee afforded under Art. 22(5) of the Constitution are complied with, and (2) that the procedure is just and reasonable. [463G]

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Before an “effective representation” could be made by the detenu he must be supplied with the documents and materials which form the basis of the grounds of detention and unless this is done there could be no question of making any representation, much less an “effective representation” against the order of detention. The documents and materials relied upon in the order of detention form an integral part of the grounds and must be supplied to the detenu *pari passu* the grounds of detention. [461B]

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Smt. Icchu Devi Choraria v. Union of India & Ors. [1980] 4 SCC 531 and *Smt. Shalini Soni & Ors. v. Union of India & Ors.* [1980] 4 SCC 544 referred to.

If procedure under Art. 21 has to be reasonable, fair and just, then the words ‘effective representation’ appearing in Art. 22(5) must be construed so as to provide a real and meaningful opportunity to the detenu to explain his case to the detaining authority in his representation. If the words ‘effective representation’ are interpreted in an artificial or fanciful manner, then it would defeat the very object not only of Art. 22(5) but also of Art. 21 of the Constitution. It is settled law that it is of the utmost importance that all the necessary safeguards laid down by the Constitution under Art. 21 or Art. 22(5) should be complied with fully and strictly and any departure from any of the safeguards would vitiate the order of detention. [463E-F]

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Maneka Gandhi v. Union of India [1978] 2 SCR 621 referred to.

A In the instant case not only were the documents and materials not supplied to the detenu alongwith the order of detention but there had been an unexplained delay of about 25 days in disposing of the representation of the detenu. [465B]

B [Despite repeated warnings by this Court the detaining authorities do not care to comply with the spirit and tenor of the safeguards contained in Art. 22(5) of the Constitution. There should be no difficulty in keeping copies of the documents and materials referred to in the order of detention and supplying them to the detenu along with the order of detention. This dereliction on the part of the detaining authorities results in the release of persons indulging in such anti-national activities as smuggling though on merits the detentions in suitable cases may be justified.]

C ORIGINAL JURISDICTION : Writ Petition No. 5873 of 1980.
(Under Article 32 of the Constitution.)

Ram Jethmalani and *Mkss Rani Jethmalani* for the Petitioner.

O. P. Rana and *M. N. Shroff* for the Respondents.

D The Judgment of the Court was delivered by

E FAZAL ALI, J.—This petition has been filed by the sister of the detenu praying that the detenu be released because the safeguards provided by the constitution have not been complied with. The detenu was arrested on 20-10-1980 when only the grounds of detention were served on him. On 5-11-1980 the documents and materials on the basis of which the order of detention was passed were supplied to the detenu. On the 18th November 1980, the detenu made a representation to the Government which was disposed of as late as the 15th December 1980. In support of the petition, Mr. Jethmalani has submitted two points on which alone, in our opinion, the petition must succeed.

G In the first place, it was pointed out that, as already held by this Court the grounds served on the petitioner were not accompanied by the documents and materials which formed the basis of the order of detention, hence the safeguards contained in Art. 22(5) of the Constitution not having been complied with, the continued detention of the detenu became void. Secondly, it was argued that even though the detenu had made a representation on 18-11-1980, the same was disposed of a month thereafter and no explanation for this delay has been furnished by the respondents. This Court has held in numerous cases **H** that the representations of the detenu should be disposed of as soon as possible and even an unexplained delay of 12 to 14 days has been held to be fatal to the order of detention. Reliance has been placed

by Mr. Jethmalani on two decisions of this Court in *Smt. Icchu Devi Choraria v. Union of India & Ors.*⁽¹⁾ which was later followed in *Smt. Shalini Soni & Ors. v. Union of India & Ors.*⁽²⁾. As regards the first case, which is a decision of two Judges of this Court, it has clearly held that before an effective representation can be made by the detenu, he must be supplied with the documents and materials which formed the basis of the grounds of detention. Unless this is done, there could be no question of making any representation, much less an effective representation, against the order of detention. In this connection, Bhagwati J., speaking for the Court observed as follows :—

“Now it is obvious that when clause (5) of Article 22 and sub-section (3) of section 3 of the COFEPOSA Act provide that the grounds of detention should be communicated to the detenu within five or fifteen days, as the case may be, what is meant is that the grounds of detention in their entirety must be furnished to the detenu. If there are any documents, statements or other materials relied upon in the grounds of detention, they must also be communicated to the detenu, because being incorporated in the grounds of detention, they form part of the grounds and the grounds furnished to the detenu cannot be said to be complete without them. It would not therefore be sufficient to communicate to the detenu a bare recital of the grounds of detention, but copies of the documents, statements and other materials relied upon in the grounds of detention must also be furnished to the detenu within the prescribed time subject of course to clause (6) of Article 22 in order to constitute compliance with clause (5) of Article 22 and Section 3, sub-section (3) of the COFEPOSA Act. One of the primary objects of communicating the grounds of detention to the detenu is to enable the detenu, at the earliest opportunity, to make a representation against his detention and it is difficult to see how the detenu can possibly make an effective representation unless he is also furnished copies of the documents, statements and other materials relied upon in the grounds of detention. There can therefore be no doubt that on a proper construction of clause (5) of Article 22 read with Section 3, sub-section (3) of the COFEPOSA Act, it is necessary for the valid continuance of detention that subject to clause (6) of Article 22 copies of the

(1) [1980] 4 SCC 531 [1981] 1 SCR 640

(2) [1980] 4 SCC 544

A documents, statements and other materials relied upon in the grounds of detention should be furnished to the detenu along with the grounds of detention or in any event 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. If this requirement of clause (5) of Article B 22 read with Section 3, sub-section (3) is not satisfied, the continued detention of the detenu would be illegal and void."

C Mr. Rana for the State has submitted that the observations extracted above do not form the ratio of the decision because in a subsequent para of the decision, Bhagwati, J. had observed that at the most grounds could be given within a period of five to fifteen days of the order of detention. These observations, no doubt, are contained in paragraphs D 7 and 8 of the judgment but they do not, in our opinion, form the *ratio decidendi* of this case but were made merely to rebut the extreme arguments that could be put forward. This Court made it very clear that even apart from the interpretation placed by the Court on Art. 22(5) of the Constitution, the conclusion is inescapable that the documents and statements which formed the basis of the grounds of detention must be supplied to the detenu without least possible delay. It is in this context that these observations were made in paragraphs 7 and 8. E Moreover, this position has been made absolutely clear by a later decision of this Court in *Smt. Shalini Soni's* case (supra) where a Division Bench of this Court while endorsing *Smt. Icchu Devi's* case observed as follows :—

F "The matter may also be looked at from the point of view of the second facet of Article 22(5). An opportunity to make a representation against the order of detention necessarily implies that the detenu is informed of all that has been taken into account against him in arriving at the decision to detain him. It means that the detenu is to be informed not merely, as we said, of the inferences of fact but of all the factual material which have led to the inferences of fact. G If the detenu is not to be so informed the opportunity so solemnly guaranteed by the Constitution becomes reduced to an exercise in futility. Whatever angle from which the question is looked at, it is clear that 'grounds' in Article 22(5) do not mean mere factual inferences but mean factual H inferences plus factual material which led to such factual inferences. The grounds must be self-sufficient and self-explanatory. In our view copies of documents to which

reference is made in the 'grounds' must be supplied to the detenu as part of the 'grounds'." A

The Court, therefore, clearly held that the documents and materials relied upon in the order of detention formed an integral part of the grounds and must be supplied to the detenu *pari passu* the grounds of detention. If the documents and materials are supplied later, then the detenu is deprived of an opportunity of making an effective representation against the order of detention. In this case, the court relied upon the ratio in *Ichhu Devi Choraria's* case (*supra*) extracted above. We find ourselves in complete agreement with the view expressed by the two decisions of this Court and we are unable to accede to the prayer of Mr. Rana for sending the case for reconsideration to a larger Bench. This Court has invariably laid down that before an order of detention can be supported, the constitutional safeguards must be strictly observed. B C

This Court in *Maneka Gandhi v. Union of India* (1) has widened the horizon of Art. 21 and added new dimensions to various features of and concept of liberty enshrined in Art. 21. In view of the decision in the aforesaid case, Art. 22(5) of the Constitution assumes a new complexion and has to be construed liberally and meaningfully so as to permit the legislature to impose the minimum possible curbs on the precious rights of a citizen, by virtue of preventive detention. If a procedure under Art. 21 has to be reasonable, fair and just, then the words 'effective representation' appearing in Art. 22(5) must be construed so as to provide a real and meaningful opportunity to detenu to explain his case to the detaining authority in his representation. If the words 'effective representation' are interpreted in an artificial or fanciful manner, then it would defeat the very object not only of Art. 22(5) but also of Art. 21 of the Constitution. D E F

Thus, we are of the opinion that in view of what has been laid down in *Maneka Gandhi's* case (*supra*) and in a number of other cases following the aforesaid decision, the law of preventive detention has now to satisfy a twofold test : (1) that the protection and the guarantee afforded under Art. 22(5) is complied with, and (2) that the procedure is just and reasonable. In this view of the matter unless the materials and documents relied on in the order of detention are supplied to the detenu alongwith the grounds, the supply of grounds simpliciter would give him not a real but merely an illusory opportunity to make a representation to the detaining authority. G H

A It is well settled that the Court frowns on preventive detention without trial because the detenu is deprived of the right of proving his innocence in a trial by a court of law. It is, therefore, of the utmost importance that all the necessary safeguards laid down by the Constitution under Art. 21 or Art. 22(5) should be complied with fully and strictly and any departure from any of the safeguards would void the order of detention. This is so because in a civilised society, like ours, liberty of a citizen is a highly precious right and a prized possession and has to be protected unless it becomes absolutely essential to detain a person in order to prevent him from indulging in anti-national activities like smuggling, etc. We are fortified in our view by a decision of this Court in *Sampat Prakash v. State of Jammu & Kashmir*⁽¹⁾ where

C the following observations were made :

“that the restrictions placed on a person preventively detained must, consistently with the effectiveness of detention, be minimal.”

D It is a matter of great concern and deep dismay that despite repeated warnings by this Court, the detaining authorities do not care to comply with the spirit and tenor of the constitutional safeguards contained in Art. 22(5) of the Constitution. It is manifest that when the detaining authority applies its mind to the documents and materials which form the basis of the detention, the same are indeed placed

E before it and there could be no difficulty in getting photostat copies of the documents and materials, referred to in the order of detention, prepared and attaching the same alongwith the grounds of detention, if the detaining authority is really serious in passing a valid order of detention. Unfortunately, the constitutional safeguards are not

F complied with, resulting in the orders of detention being set aside by the Court, even though on merits they might have been justified in suitable cases. We feel that it is high time that the Government should impress on the detaining authority the desirability of complying with the constitutional safeguards as adumbrated by the principles laid down in this regard. We would like to suggest that whenever a detention is

G struck down by the High Court or the Supreme Court, the detaining authority or the officers concerned who are associated with the preparation of the grounds of detention, must be held personally responsible and action should be taken against them for not complying with the constitutional requirements and safeguards (viz. delay in disposing of the representation, not supplying the documents and materials

H relied upon in the order of detention *pari passu* the order of detention, etc. etc.) or, at any rate, an explanation from the authorities concern-

(1) [1969] 3 SCR 574

ed must be called for by the Central Government so that in future persons against whom serious acts of smuggling are alleged, do not go scot free. In the instant case, not only were the documents and materials not supplied along with the order of detention, but there has been a delay of about 25 days in disposing of the representation of the detenu and no explanation for the same has been given. These are matters which must be closely examined by the Government.

For the reasons given above, we hold that the continued detention of the detenu is void. We allow the petition and direct the detenu to be released forthwith. A copy of this judgment be sent to the Home Ministers of all the State Governments, Hon'ble the Home Minister of the Government of India and also the Hon'ble Finance Minister, Government of India for necessary action.

P.B.R.

Petition allowed.