

MOHD. SHAKEEL WAHID AHMED

v.

STATE OF MAHARASHTRA & ORS.

March 31, 1983

[Y.V. CHANDRACHUD, C.J., V.D. TULZAPURKAR, O. CHINNAPPA
REDDY, A. VARADARAJAN AND RANGANATH MISRA, JJ.]

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974—Two persons detained in respect of some transaction—Advisory Board was of view no sufficient cause for detention of one of them—Failure to place view of the Board before detaining authority while passing order of detention of the other—Whether vitiated order of detention.

The Customs officials intercepted a ship off Bombay and seized from it various articles worth several lakhs of rupees. None of the seven persons on board the ship possessed any documents authorising them to import the goods. On August 19, 1981, S. one of the seven persons on board the ship, was detained under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ; but the Advisory Board reported that there was in its opinion no sufficient cause for his detention. He was therefore released.

By an order dated November 7, 1981 the petitioner, who was also one of the persons on board the same ship, was detained under the COFEPOSA in respect of the same transaction. While dismissing the habeas corpus petition filed by the petitioner's wife, the High Court was of opinion that three out of the four grounds on which the petitioner was detained were bad for one reason or the other but that the first ground was enough to sustain the order of detention in that important material relevant to that ground was neither placed before nor considered by the detaining authority while passing the order of detention.

In the petition under Article 32 of the Constitution it was contended on behalf of the petitioner that had the detaining authority in the instant case been apprised that the Advisory Board, on examining an identical ground in the case of S had reported that there was no sufficient cause for detention of S who was involved in the same transaction, it might not have passed the order of detention against the petitioner which is based on similar facts and that its failure to place such highly relevant and important material before the detaining authority has vitiated the order of detention.

Allowing the petition,

HELD: The failure of the State Government to place before the detaining authority the opinion which the Advisory Board had recorded in favour of another detenu who was detained partly on a ground relating to

the same incident deprived the detaining authority of an opportunity to apply its mind to a piece of evidence which was relevant, if not binding. In other words, the detaining authority did not, because it could not, apply its mind to a circumstance which reasonably could have affected its decision whether or not to pass an order of detention against the petitioner. [618 B-H]

The opinion of the Board may not have been binding on the detaining authority but it cannot be gain said that the fact that the Board had recorded such an opinion on identical facts involving a common ground was at least a relevant circumstance which ought to have been placed before the detaining authority in this case. The ground on which the High Court upheld the order of detention was similar to one of the grounds on which S. was detained, the transaction being one and the same as also the incident on which the two orders of detention were based. This is why the opinion of the Board in the earlier case became relevant in the present case. [618 D-F]

It may be that there were other grounds on which S. was detained, and that the Advisory Board might have come to the conclusion that since these grounds were not enough to justify his detention there was no sufficient cause for detaining him. But it is not as if the opinion of the Board was binding on the detaining authority. The substance of the matter is that the detaining authority in this case failed to apply its mind to a highly relevant circumstance that an order of detention passed on the ground on which the detention of the petitioner rested, in addition to something more, was not sustained by the Advisory Board in the case of S. The reasonable probability that, since the Advisory Board had not sustained S's detention on a ground which was common to him and the petitioner, the detaining authority would have, if at all, passed the order of detention against the petitioner on the remaining three grounds only cannot be excluded. Those three grounds had been held to be bad by the High Cour. [619 E-H]

The explanation of the detaining authority that the Board's opinion dated October 19, 1981 came into existence after he had passed the order of detention on October 8, 1981 is not correct. When the order of detention was passed on November 7, 1981 the Board's opinion in Ss' case was available to the State Government nearly three weeks before that date and it was the duty of the State Government to place that opinion before the detaining authority. [620 E-F]

ORIGINAL JURISDICTION : Writ Petition (Crl.) No. 1369 of 1982.

(Under Article 32 of the Constitution.)

Ram Jethmalani and Miss Rani Jethmalani for the Petitioner.

O.P. Rana and Mr. M.N. Shroff for Respondents Nos. 1 & 2,

K.G. Bhagat, Addl. Sol. General, N.C. Talukadar, Miss A. Subhashini and Girish Chandra for Respondent No. 3.

The Judgment of the Court was delivered by

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CHANDRACHUD, C.J. By this Writ Petition under Article 32 of the Constitution, the petitioner Mohd. Shakeel Wahid Ahmed challenges the validity of an order of detention dated November 7, 1981 passed against him by the first respondent, the State of Maharashtra, under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, herein referred to as 'the Act'. Earlier, the petitioner's wife had filed a *habeas corpus* petition in the Bombay High Court for the release of the petitioner, but that petition (Writ Petition No. 579 of 1982) was dismissed by the High Court on October 28, 1982. The High Court held that three out of the four grounds on which the petitioner was detained were bad for one reason or another but that the remaining ground, namely, ground No. 1 did not suffer from any defect and was enough to sustain the order of detention. While upholding the detention on one of the four grounds only, the High Court relied upon the provisions of section 5-A of the Act by which an order of detention made on two or more grounds is to be deemed to have been made separately on each of such grounds and consequently, such an order cannot be deemed to be invalid merely because some of the grounds are : (i) vague, (ii) non-existent, (iii) not relevant, (iv) not connected or not proximately connected with such person or (v) invalid for and other reason whatsoever.

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As stated above, three out of the four grounds on which the petitioner was detained have been held to be bad by the High Court. Those grounds are mentioned in paragraphs 5.2, 5.3 and 6.1 of the grounds furnished to the petitioner. Grounds 5.2 and 5.3 were held to be bad because they were neither relevant nor did they bear any "nexus, direct or indirect, with the detenu". It would appear from the judgment of the High Court that this position was not controverted by the learned Public Prosecutor. In so far as the fourth ground mentioned in paragraph 6.1 is concerned, the High Court held that it was bad because important material which was relevant to that ground was neither placed before nor considered by the detaining authority while passing the order of detention. In view of the judgment of the High Court, only one out of the four grounds of detention, namely, the ground mentioned in paragraph 1.1 of the grounds furnished to the detenu requires consideration by us.

This petition along with a few other petitions was referred to the Constitution Bench for considering the validity of sections 5-A

and 11 of the Act. We have already set out the purport of section 5-A. Section 11, which authorises the revocation of detention orders, provides by sub-section 2 that the revocation of a detention order shall not bar the making of another order under section 3 against the same person. In view of the conclusion which we have reached in this petition, it is unnecessary to consider the validity of these sections.

The surviving ground of detention contains the allegation that, working on a secret information received on January 13, 1981, the officers of the Marine and Preventive Wing of the Collectorate of Customs (Preventive), Bombay, intercepted a vessel named 'Manek Prasad' in the sea off World' at Bombay on February 2, 1981 at about 2 p.m. and seized therefrom wrist-watches valued at Rs. 18, 89, 935/-, textiles valued at Rs. 18, 20 675, miscellaneous goods valued at Rs. 18, 769/- and Indian currency of Rs. 1,540/- and 188 U.A.E. Dhiraams. It is alleged that none of the seven persons who were on board the ship possessed any documents authorising them to import the aforesaid goods. The various sub-paras of this ground refer to the material which connects the petitioner with the illegal import of the goods seized from the ship.

Shri Jethmalani who appears on behalf of the petitioner contends that the first ground of detention is bad for several reasons, most of which are directed to the question as to whether the detaining authority had applied its mind to the relevant facts and circumstances bearing on the question of the petitioner's detention. Only one of these reasons is valid and has to be accepted. That reason is as follows :

The petitioner was detained under an order dated November 7, 1981. Prior to that, one Shamsi was detained under an order dated August 19, 1981 passed by the same Government of Maharashtra. After considering the reference and the materials placed before it in Shamsi's case, the Advisory Board reported to the State Government on October 19, 1981 that there was in its opinion no sufficient cause for Shamsi's detention. Shamsi was released, as he had to be, in pursuance of the Advisory Board's opinion.

It is urged by Shri Jethmalani that one of the grounds on which Shamsi was detained being the same as ground No. 1 in this case, the fact that the Advisory Board had reported that there was

A no sufficient cause for Shamsi's detention ought to have been placed before the detaining authority which passed the order of detention against the petitioner. According to the learned counsel, the failure of the State Government to place a highly relevant and important piece of material before the detaining authority vitiates the order of detention. If the detaining authority in the instant case were apprised that the Advisory Board had reported on examining, inter alia, an identical ground that there was no sufficient cause for detention of another person involved in the same transaction, it may not have passed the order of detention against the petitioner, which is based on similar facts. This submission is well-founded and must be accepted. It is clear that Shamsi was detained for engaging in a smuggling activity arising out of the same incident and transaction which forms the subject-matter of ground No. 1 in the instant case. The opinion of the Advisory Board that there was no sufficient cause for Shamsi's detention may not have been binding on the detaining authority which ordered the detention of the petitioner but, it cannot be gainsaid that the fact the Advisory Board had recorded such an opinion on identical facts involving a common ground was at least a relevant circumstance which ought to have been placed before the detaining authority in this case. Since three out of the four grounds on which the petitioner was detained have been held to be bad by the High Court, we have to proceed on the basis that the petitioner was detained and could validly be detained on the remaining ground only. That ground is similar to one of the grounds on which Shamsi was detained, the transaction being one and the same, as also the incident on which the two orders of detention are based. That is why the opinion of the Advisory Board in Shamsi's case becomes relevant in the petitioner's case. The failure of the State Government to place before the detaining authority in the instant case, the opinion which the Advisory Board had recorded in favour of a detenu who was detained partly on a ground relating to the same incident deprived the detaining authority of an opportunity to apply its mind to a piece of evidence which was relevant, if not binding. In other words, the detaining authority did not, because it could not, apply its mind to a circumstance which, reasonably, could have affected its decision whether or not to pass an order of detention against the petitioner.

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It is contended by Shri Rana, who appears on behalf of the Government of Maharashtra, that there is distinction between the

petitioner's case and that of Shamsi since, the petitioner is the brother of the consignor, Ashfaq, while Shamsi is not. Counsel contends that by reason of this distinction in the facts of the two cases, the State Government was justified in not placing before the detaining authority in this case the fact that the Advisory Board had reported that there was no sufficient cause for detaining Shamsi. We may assume that the petitioner is the brother of the consignor Ashfaq, since in these proceedings we cannot determine the truth of the various facts alleged by the detaining authority. But the question for consideration is not whether the detaining authority would have been justified in passing the order of detention against the petitioner, even after being apprised of the opinion of the Advisory Board in Shamsi's case. The question is whether the order of detention was passed in this case after applying the mind to the relevant facts which bear upon the detention of the petitioner. It seems to us plain that the opinion of the Advisory Board in Shamsi's case was, at any rate, an important consideration which would and ought to have been taken into account by the detaining authority in the instant case. That opportunity was denied to it.

Shri Rana contends that there were other grounds on which Shamsi was detained and the Advisory Board may have come to the conclusion that since those grounds were not enough to justify Shamsi's detention, there was no sufficient cause for detaining him. This argument also overlooks that it is not as if the opinion of the Advisory Board in Shamsi's case was binding on the detaining authority in this case. The substance of the matter is that the detaining authority in this case failed to apply its mind to the highly relevant circumstance that an order of detention passed on the ground on which the detention of the petitioner now rests, in addition to something more, was not sustained by the Advisory Board in Shamsi's case. We cannot exclude a reasonable probability that since the Advisory Board had not sustained Shamsi's detention on a ground which was common to him and the petitioner, namely, ground No. 1, the detaining authority would have, if at all, passed the order of detention against the petitioner on the remaining three grounds only. Those three grounds have been held to be bad by the High Court and it is only by resorting to the provisions of section 5A of the Act that the High Court upheld the detention of the petitioner.

Shri D.N. Capoor, Secretary to the Government of Maharashtra, Home Department (Law and Order), has filed a

A counter-affidavit in this Court in answer to the Writ Petition. In paragraph 14 of the said affidavit, Shri Kapoor says that he had "ordered to issue detention order on 8.10.1981", after considering the entire material very carefully. Shri Kapoor says that he formulated the grounds of detention "contemporaneously" on 8.10.1981, that thereafter the order of detention and the grounds of detention were got typed and the Customs authorities were directed to supply to the detenu the copies of the statements which were placed before him. According to Shri Kapoor, it was after the receipt of copies of all the documents that the order of detention was issued on November 7, 1981. The explanation offered by Shri Kapoor as to why the opinion of the Advisory Board in Shamsi's case was not placed before him is that the report of the Advisory Board in Shamsi's case which is dated October 19, 1981, was not in existence when he "formulated and ordered to issue the detention order against the petitioner" in this case. We see quite some difficulty in accepting this explanation. In the first place, the fact that it was on October 8, 1981 that Shri Kapoor had directed the detention of the petitioner is a matter of no consequence. The order of detention was issued, that is to say passed, on November 7, 1981 and we must have regard to the state of circumstances which were in existence on that date. Shri Kapoor seems to suggest that the Advisory Board's opinion dated October 19, 1981 came into existence after he had made up his mind to pass an order of detention against the petitioner on October 8, 1981 and therefore he could not take, or need not have taken, that opinion into account. The infirmity of this explanation is that the order of detention was passed against the petitioner on November 7, 1981 and the Advisory Board's opinion in Shamsi's case was available to the State Government nearly three weeks before that date. If that opinion were available before the order of detention was passed in this case, it was the duty of the State Government to place that opinion before the detaining authority in order to enable it to consider whether, an order of detention could be passed against the petitioner despite that opinion especially when, one of the grounds on which the two orders of detention are based is identical and relates to the same incident. We would like to add that having seen the original order of detention which was made available for our inspection by the officers of the State Government, we were baffled to find that though Shri Kapoor's signature bears the date October 8, 1981, the column for date, in the left hand corner at the bottom of the order of detention, has remained or become blank.

For the reasons mentioned above, we set aside the order of detention dated November 7, 1981 passed against the petitioner by the Government of Maharashtra and direct that to the extent that his detention is attributable to the said order of detention, he shall be released forthwith.

P.B.R.

Petition allowed. B