

A CHOITH NANIKRAM HARCHANDANI

v.

STATE OF MAHARASHTRA & ORS.

(Writ Petition (Crl.) No.134 of 2015)

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NOVEMBER 20, 2015

**[J. CHELAMESWAR AND
ABHAY MANOHAR SAPRE, JJ.]**

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Preventive Detention – Detention under COFEPOSA Act – Challenged in a Habeas Corpus writ petition u/Art 32 of Constitution – Held: The detention order is liable to be quashed on the ground that that the detenu was denied an opportunity of fair hearing inasmuch he was denied hearing before Advisory Board – Since the Detaining Authority was represented by the officers, denial of opportunity to the detenu to take aid of legal practitioner also amounted to violation of Art 14 of the Constitution – Therefore, the detention order is passed by issuance of writ of certiorari – Constitution of India, 1950 – Arts. 14 and 32 – Natural Justice – Fair hearing – Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 – s.3(1).

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Allowing the petition, the Court

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HELD: 1. The detenu has a right to appear through a legal practitioner in the proceedings before the Advisory Board. The petitioner in the present case, vide his representation/application dated 13/14.05.2015 (Annexure P-5) had prayed that he be permitted to be represented by any legal practitioner/counsel of his choice before the Board. The Board did not grant any time to the petitioner and secondly, at the time of hearing of the case, officers of the sponsoring and detaining authority were present and heard in the course of proceedings. [Paras 7, 8, 9] [84-G; 86-D-E, H; 87-A]

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2. If the Detaining Authority or Government takes the aid of a legal practitioner or legal advisor before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. If it is denied to him then a clear case of breach of Article 14 of the Constitution of India, 1950, is made out in favour of detenu. The expression "legal practitioner" includes even the officers of the Government when they appear before the Board to assist the proceedings against the detenu, the detenu too has to be provided with equal facility of appearing before the Board through legal practitioner. Since no such opportunity was afforded to the petitioner though claimed by him, he was denied an opportunity of a fair hearing before the Advisory Board, which eventually resulted in passing an adverse order. This ground alone is enough to quash the impugned order of detention. [Paras 10 - 13] [87-E-F, H; 88-A-D]

A.K. Roy vs. Union of India & Ors. 1982 (2)
SCR 272: (1982) 1 SCC 271 – followed.

Case Law Reference

1982 (2) SCR 272

followed

Para 4

CRIMINAL ORIGINAL JURISDICTION : Writ Petition
(Criminal) Appeal No. 134 of 2015

Under Article 32 of the Constitution of India

WITH

SLP (Crl.) No. 7010 of 2015

Saurabh Kirpal, Sanjay Agarwal, Wattan Sharma, Nikhil Jain, Amit K. Nain for the Petitioner.

Mahaling Pandarge, Nishant Ramakantrao Katneshwarkar for the Respondents.

A The Judgment of the Court was delivered by

ABHAY MANOHAR SAPRE, J. 1. By way of Habeas Corpus writ petition under Article 32 of the Constitution of India, the petitioner is challenging the order of preventive detention bearing F.No. PSA-1215/CR-23/SPL-3(A) dated 16.04.2015 issued by respondent No.2 - the Principal Secretary (Appeals & Security), Government of Maharashtra, Home Department & Detaining Authority against him under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA Act").

2. Challenging the same detention order dated 16.04.2015 issued by respondent No.2 herein, the petitioner's son filed a petition bearing Writ Petition No. 2076 of 2015 before the High Court of Judicature at Bombay. By impugned judgment dated 03.07.2015, the High Court dismissed the petition. Against the said order, the petitioner's son has filed S.L.P. (Crl.) No. 7010 of 2015 under Article 136 of the Constitution of India before this Court.

3. Brief facts :

(a) On 16.04.2015, a detention order was issued by respondent No.2 herein under Section 3(1) of COFEPOSA Act for detaining the petitioner herein to prevent him from smuggling of goods in future.

(b) On 20.4.2015, the detention order along with Grounds of Detention and the list of relied upon documents was served on the petitioner and he was thereafter lodged in custody in Nashik Road Central Prison at Nashik, Maharashtra.

(c) On 14.05.2015, the petitioner made a representation to the Detaining Authority as well as the Advisory Board, *inter*

alia, praying therein to allow him to be represented through any legal practitioner/counsel of his choice before the Board. The representation dated 14.05.2015 was rejected by the Detaining Authority on 28.05.2015 and the same was communicated to the petitioner on 03.06.2015.

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(d) On 05.06.2015, a letter was issued by the Advisory Board through its Secretary informing the petitioner that the date of hearing before it was scheduled on 12.06.2015. The said letter was received by the petitioner on 06.06.2015 in prison.

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(e) On 12.06.2015, the petitioner submitted a written request to the Advisory Board for a short adjournment so that he can make arrangement for the counsel.

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(f) On 03.07.2015, the petitioner got an order dated 29.06.2015 written by the Section Officer to the Government of Maharashtra, Home Department communicating him that after considering the report of the Advisory Board, he is directed to be detained for a period of one year from the date of detention, i.e., 20.04.2015.

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(g) Against the said order, the petitioner has filed this writ petition and his son has filed special leave petition against the impugned judgment dated 03.07.2015 passed by the High Court of Judicature at Bombay.

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4. Mr. Saurabh Kirpal, learned counsel for the petitioner, while assailing the legality and correctness of the impugned order of detention dated 16.04.2015, mainly urged one submission. It was his submission that despite the petitioner repeatedly praying in writing for an opportunity to allow him to have proper representation before the Advisory board so as to enable him to place his case effectively before the Board through legal practitioner/counsel, the same was denied to him.

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- A Learned counsel pointed out from the affidavit dated 23.09.2015 filed by respondent No. 3 - Shri Deepak Kharat, Secretary, Advisory Board, COFEPOSA Act, 1974 that the Board had allowed participation and the assistance of the officials at the time of hearing of the case against the petitioner.
- B Learned counsel submitted that it was, therefore, all the more necessary rather obligatory on the part of the Board to grant time to the petitioner for enabling him to engage any legal practitioner for representing his case as was prayed by him in his application dated 14.05.2015. Learned counsel thus
- C contended that since the petitioner was denied an opportunity to represent his case effectively before the Board though timely prayed by him, the impugned order is not legally sustainable and deserves to be quashed on this ground alone leaving aside other grounds which are also equally made out on merits.
- D In support of his submission, learned counsel placed reliance on the decision of this Court in **A.K. Roy vs. Union of India & Ors.**, (1982) 1 SCC 271.

E 5. In reply, learned counsel for the respondents supported the impugned order and prayed for its upholding contending that since the petitioner is a habitual offender, he is not entitled to claim any indulgence.

F 6. Having heard the learned counsel for the parties and on perusal of the record of the case, we find force in the submission of learned counsel for the petitioner.

G 7. As rightly argued by the learned counsel for the petitioner, the question as to whether the detenu has a right to appear through a legal practitioner in the proceedings before the Advisory Board remains no more *res integra* and stands settled by the decision of the Constitution Bench of this Court in the case of **A.K.Roy's case (supra)**. Y.V. Chandrachud, C.J., speaking for the Bench succinctly dealt with this issue

H and held in paragraph 93 as under :

“93. We must therefore hold, regretfully though, that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. It is, however, necessary to add an important caveat. The reason behind the provisions contained in Article 22(3)(b) of the Constitution clearly is that a legal practitioner should not be permitted to appear before the Advisory Board for any party. The Constitution does not contemplate that the detaining authority or the government should have the facility of appearing before the Advisory Board with the aid of a legal practitioner but that the said facility should be denied to the detenu. In any case, that is not what the Constitution says and it would be wholly inappropriate to read any such meaning into the provisions of Article 22. Permitting the detaining authority or the government to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be in breach of Article 14, if a similar facility is denied to the detenu. We must therefore make it clear that if the detaining authority or the government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. We are informed that officers of the government in the concerned departments often appear before the Board and assist it with a view to justifying the detention orders. If that be so, we must clarify that the Boards should not permit the authorities to do indirectly what they cannot do directly; and no one should be enabled to take shelter behind the excuse that such officers are not “legal practitioners” or legal advisers. Regard must

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A **be had to the substance and not the form since,**
 especially, in matters like the proceedings of
 Advisory Boards, whosoever assists or advises on
 facts or law must be deemed to be in the position
B **of a legal adviser. We do hope that Advisory Boards**
 will take care to ensure that the provisions of Article
 14 are not violated in any manner in the
 proceedings before them. Serving or retired Judges
 of the High Court will have no difficulty in
 understanding this position. Those who are merely
C **“qualified to be appointed” as High Court Judges**
 may have to do a little homework in order to
 appreciate it.”

D 8. Applying this principle to the facts of the case in hand,
 we find that the petitioner vide his representation/application
 dated 13/14.05.2015 (Annexure P-5) had prayed that he be
 permitted to be represented by any legal practitioner/counsel
 of his choice before the Board. It is clear from prayer (e), which
 reads as under :

E **“I may also be permitted to be represented by any**
 legal practitioner/counsel of my choice before the
 Hon’ble Advisory Board. An advance permission for
 the same may please be communicated to me,
 along with the response of the Sponsoring
F **Authority and of the Detaining Authority on the**
 issues raised in this representation, so that I can
 timely and effectively instruct my Counsel
 regarding the same.”

G 9. We also find from Paras 2 and 3 (wrongly typed as 4)
 of the counter affidavit filed by respondent No.3 - Mr. Deepak
 Kharat that the Board did not grant any time to the petitioner
 and secondly, at the time of hearing of the case, officers of the
 sponsoring and detaining authority were present and heard in
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the course of proceedings. Paras 2 and 3 of the affidavit read as under:

"2. At the outset I state that I am filing the present affidavit to the extent that the Petitioner has referred to the proceedings before the Advisory Board. It is true that the Petitioner had addressed a representation dated 14.05.2015 through Superintendent, Nashik Road Central Prison, Nashik. It is also true that on the date of hearing before the Advisory Board on 12.06.2015, Petitioner made a request for adjourning proceedings for two weeks to enable him to engage a Legal Advisor. The Advisory Board decided not to grant any time for that purpose and after hearing the detenu as well as his son concluded the proceedings.

3. I say that it is true that in the course of hearing Officers of the Sponsoring Authority and Detaining Authority were present and were heard in the course of the proceedings."

10. In our considered opinion, since the Detaining Authority was represented by the officers at the time of hearing of the petitioner's case before the Advisory Board, the petitioner too was entitled to be represented through legal practitioner. Since no such opportunity was afforded to the petitioner though claimed by him, he was denied an opportunity of a fair hearing before the Advisory Board, which eventually resulted in passing an adverse order.

11. As held in **A.K.Roy's case (supra)**, if the Detaining Authority or Government takes the aid of a legal practitioner or legal advisor before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. If it is denied to him then a clear case of breach of Article 14 is made out in favour of detenu. Since the

A expression “legal practitioner” was interpreted in **A.K.Roy’s case** to include even the officers of the Government when they appear before the Board to assist the proceedings against the detenu, the detenu too has to be provided with equal facility of appearing before the Board through legal practitioner.

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12. It is not in dispute, as would be clear from Para 3 of the counter affidavit, that the officers had appeared in the case before the Advisory Board and participated in the proceedings against the petitioner whereas the petitioner was denied such facility. This infirmity, being fatal, renders the impugned order legally unsustainable.

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13. In the light of what is held above, it is not necessary for this Court to examine other grounds though taken by the petitioner in these proceedings because one ground once held made out is enough to quash the impugned order of detention. We, therefore, express no opinion on any other ground taken in the petition and raised in the arguments.

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14. So far as the submission of the learned counsel for the respondents that the petitioner being a habitual offender and, therefore, he should not be shown any indulgence in this case is concerned, in our considered view, firstly, this Court can not uphold the detention order on such submission and secondly, once the legal infirmity pointed out by the petitioner in the proceedings before the Advisory Board is held made out then the impugned detention order is rendered bad in law and can not be sustained.

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15. In our considered view, if the petitioner is a habitual offender and has past criminal record, as alleged by the respondents, it was all the more necessary for the respondents to have followed in letter and spirit the procedure laid down in **A.K. Roy’s case (supra)** before passing the impugned order of detention. It was, however, not done.

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16. In view of forgoing discussion, the petition succeeds and is allowed. The impugned order of detention dated 16.04.2015 (Annexure P-2) is quashed by issuance of writ of certiorari.

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17. As a consequence of this order, allowing the writ petition filed by the petitioner and quashing the detention order dated 16.04.2015, it is not necessary to pass any order in Special Leave Petition (Crl.) No. 7010 of 2015, which has rendered infructuous.

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Kalpana K. Tripathy

Petition allowed.

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