

Badre Alam Vs. State of U.P. and anr.

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Court : Allahabad

Decided On : Sep-17-1981

Reported in : 1982CriLJ132

Judge : H.N. Seth and; M. Wahajuddin, JJ.

Appellant : Badre Alam

Respondent : State of U.P. and anr.

Judgement :

H.N. Seth, J.

1. By this petition under Article 226 of the Constitution petitioner Badre Alam. whose brother Nishat Alam is being detained under the provisions of Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA ACT) in pursuance of the order dated 29th of April 1981 passed by the State Government, questions the validity of Nishat Alam's detention and prays that the respondents be directed to set him at liberty forthwith.

2. The facts which are no more in dispute between the parties are that Nishat Alam was arrested and the order dated 29-4-1981 passed by the State Government authorising his detention along with the grounds therefore, was served upon him on 8th of July, 1981. A representation dated 9th of July, 1981 addressed to the Joint Secretary. U. P. Government in regard to the aforesaid,

detention order passed by the State Government was sent by Nishat Alam by registered post from the District Jail, Bareilly where he was being detained, on 15th July, 1981 and the same was received by the State Government on 17th of July, 1981. The state Govt. eventually rejected the said representation on 27th of July, 1981. As in the meantime the matter had already been referred to the Advisory Board, the State Government forwarded the said representation as well to the Board on 27th of July, 1981.

3. Nishat Alam handed over his second representation with regard to his detention, addressed to the Home Secretary, State of Uttar Pradesh, to the Superintendent of District Jail, Bareilly on 23rd of July, 1981 and the same was considered and rejected by the State Government only on 17th August 1981, that is, after a lapse of 25 days.

4. Principal ground put forward by the petitioner for impugning the validity of Nishat Alam's continued detention' is that there had been unexplained delay on the part of the State Government in dealing with the two representations made by him. However, during the course of hearing of the petition it transpired that although the detention of Nishat Alam in this case had, on behalf of the State Government been authorised by the Chief Minister, the first representation made by Nishat Alam was rejected by the State Minister for Home. Thereupon the petitioner impugned the validity of rejection of his first representation also on the ground that the same had not been dealt with on behalf of the State Government, competent authority and that it remains undisposed of till today rendering his continued detention illegal.

5. So far as Nishat Alam's second representation namely, that dated 22nd of July, 1981 is concerned, learned Government Advocate appearing for the respondents also contended that the provisions contained in Article 22 of the Constitution and the COFEPOSA Act merely contemplate one opportunity being given to a detenu to make a representation against his detention. There is nothing in these provisions which obliges the State Government (the detaining authority) to consider the representation made by a detenu again and again. Accordingly any shortcoming on the part of the State Government, if there be one, in dealing with the second representation made by the petitioner, will not affect the validity of his

continued detention under the provisions of the Act.

6. Section 3(3) of the COFEPOSA Act lays down that for purposes of Clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but certainly not later than five days, and in exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of detention, it is obvious that this provision has been made with a view to enable a detenu to make a representation against the detention and to oblige the detaining authority to consider and dispose of the same. Section 11 of the Act enables the State Government or the Central Government as the case may be to at any time, revoke or modify a detention order made under the Act. The power so conferred upon the State Government or the Central Government can be exercised at any time either *suo motu* or at the instance of the detenu. The section, therefore, recognises a right in the detenu to move the State Government at any time and to request it to recall the order for his detention. It also obliges the State Government to consider such request. There is nothing in this section to indicate that once request of a detenu for the recall of the order has been rejected, he is debarred from making such a request again or if such request is made the State Government may not consider it. In the case of *Raziya Umar Bakshi v. Union of India* : [1980]3SCR1398 the detenu impugned the validity of his continued detention under the provisions of COFEPOSA Act on a number of grounds. One such ground was that although the detenu had made a specific prayer in his representation to the State Government that the representation should be forwarded to the Central Government for consideration Under Section 11 of the Act yet the detaining authority did not choose to forward the representation to the Central Government at all. This position was admitted and the defence taken was that as the detenu had himself sent a copy to the Central Government, the detaining authority did not think it necessary to forward the representation to the Central Government. The Supreme Court held that the defence was wholly unacceptable and observed that Section 11 of the Act conferred a constitutional right on the detenu to have his representation considered by the Central Government and that it should have been considered by the Central Government for whatever it was worth. Eventually it held that

continued detention of the detenu was vitiated amongst other reasons for the aforementioned reason as well.

7. In the case of *Tara Chand v. State of Rajasthan* : 1980 CriLJ1015 learned Judges of the Supreme Court observed thus (at p. 1015 of Cri LJ):-

Section 11(l) of the COFEPOSA Act clearly enjoins that the Central Government may revoke or modify an order passed by the State Government. Mr. Abdul Khadar fairly conceded that the Central Government had a discretion Under Section 11 of the COFEPOSA Act to revoke the order of retention. Thus when once a representation is made to the Central Government, it is duty bound to consider the same in order to exercise its discretion either in rejecting or accepting it. If there is inordinate delay in considering the representation that would clearly amount to violation of Article 22(5) so as to render the detention unconstitutional and void.

These observations of the Supreme Court clearly indicate that in its opinion consideration of a request Under Section 11 of the COFEPOSA Act made by a detenu to the detaining authority or its superior authority for revocation of a detention order is a constitutional imperative flowing from Art 22(5) of the Constitution and that such representation has to be dealt with exactly in the same manner in which the representation contemplated by the Article are expected to be dealt with. The effect of delay in consideration of such a representation would be just the same as the effect of delay in disposal of a representation contemplated by Section 3 of the Act.

8. Under Section 11 of the Act the nature of obligation of the State Government, in a case where the detention order has been passed by itself, is exactly the same as that of the Central Government. Accordingly, in view of the law laid down by the Supreme Court in aforementioned two cases, defect or infirmity in considering the second representation made by the petitioner would also have its repercussion on the validity of his detention.

9. While dealing with the question with regard to the effect of time consumed in dealing with a representation by a detenu the Supreme Court in the cases of

Pritam Nath Hoon v. Union of India. : 1980 CriLJ1340 and Shanker Raiu Shetty v. Union of India (Writ Petn. No. 640 of 1980 decided on 26th of June. 1980) held that the detaining authority was under an obligation to adequately explain each day's delay in considering a representation made by a detenu and if the same was not adequately explained, the detention would be rendered invalid.

10. In the case of Frances Coralie Mullin v. W. C Khambra : 1980 CriLJ548 the Supreme Court emphasised that the role of the Court in cases of preventive detention had to be one of eternal vigilance. No freedom was higher than personal freedom and no duty higher than to maintain it unimpaired. Court's writ was the ultimate insurance against illegal detention. The Constitution en-joins conformance with the provisions of Article 22 and the Court exacts such compliance. Article 22(5) vests in the detenu the right to be provided with an opportunity to make a representation. The principal enemy of the detenu and his right to make a representation is neither high handedness nor mean-mindedness but the casual indifference, the mindless insensibility, the routine and red tape of bureaucratic machine. The procedure prescribed for making a representation is aimed at shielding personal freedom against indifference, insensibility, routine and red tape and to secure to the detenu to make an effective representation. In dealing with representation expedition is essential at every stage. However, the time-imperative can never be absolute or obsessive. There has to be leeway, depending on the necessities of the case but no allowance can be made for lethargic indifference. No allowance can be made for needless procrastination. But allowance must surely be made for necessary consultation where legal intricacies and factual ramifications are involved. The burden of explaining the necessity for the slightest departure from the time imperative is on the detaining authority.

11. Again in the case of Mst. L. M. S. Umrnu Saleema v- B. B. Gujral : [1981]3SCR647 the Supreme Court interpreted its decision in Pritam Nath Hoon v. Union of India : 1980 CriLJ1340 and Shanker Raiu Shetty v. Union of India (Writ Petn. No. 640 of 1980 decided on 26th of June. 1980) as laying down that the detaining authority has to consider a petition made by the detenu with utmost expedition. It approved its observations made in the case of Frances Coralie Mullin v. W- C. Khambra : [1980]3SCR281 and held that occasional observations made

by the Supreme Court that each day's delay in dealing with the representation must adequately be explained were merely meant to emphasise the expedition with which the representations had to be considered and not that it was a magical formula, the slightest breach of which resulted in the release of the detenu. It pointed out that law deals with the facts of life. In law, as in life, there are no invariable absolutes/Neither life nor law can be reduced mere to despotic formulae.

12. The matter was once again considered by the Supreme Court in the case of Smt. Khatoon Begum v. Union of India : 1981 CriLJ606 wherein the Supreme Court observed thus (at p. 608 of Cri LJ):-

The right of detenu to have his representation considered at the earliest opportunity', and the obligation of the detaining authority to consider the representation 'at the earliest opportunity' are not a right and an obligation flowing from either the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, or the National Security Act or, for that matter any other Parliamentary or State Law providing for preventive detention. They are a right and an obligation created by the very Constitution which breathes life into the parliamentary or State Law. Article 22(5) enjoins a duty on the authority making the order of detention to afford the detenu 'the earliest opportunity of making a representation against the order.' The right and obligation to make and to consider the representation at the earliest opportunity is a constitutional imperative which cannot be curtailed or abridged. If the Parliament or the State Legislature making the law providing for preventive detention devises a circumlocutory procedure for considering the representation or if the interdepartmental consultative procedures are such that the delay becomes inevitable, the law and the procedure will contravene the Constitutional mandate. It is essential that any law providing for preventive detention and any authority obliged to make orders for preventive detention should adopt procedures calculated towards expeditious considerations of representations made by detenu. It will be no answer to a demand for liberty to say that administrative red tape makes delay inevitable....The Constitution mandate brooks no unreasonable delay in the consideration of a representation.

13. Again in another case of *Tara Chand v. State of Rajasthan* AIR 1981 SC 2133 : 1980 Cri LJ 1482 the Supreme Court held that a delay on the part of the authority to whom a representation had been handed over for being forwarded to the detaining authority, if unexplained and improper renders the detention invalid. The upshot of the aforementioned decisions of the Supreme Court is that whenever a detenu questions the validity of his detention on the ground that there has been delay in consideration of his representation the detaining authority has to explain that the time consumed between the handing over of the representation by the detenu and its disposal by the detaining or the superior authority was such which was absolutely necessary in the circumstances of the case and that there had been no slackness or element of red tapeism in dealing with the same. The question whether the time so consumed; was absolutely necessary and that there has been no slackness on the part of the authorities concerned in forwarding and considering the representation of the de- tenu have to be judged and decided in the circumstances of the case.

14. Coming now to the manner in which the second representation made by Nishat Alam had been dealt with the facts which are no more in dispute are that the petitioner handed over his representation addressed to the Home Secretary, State of Uttar Pradesh to the Superintendent, District Jail, Bareilly on 23rd of July, 1981. The Superintendent, District Jail. Bareilly forwarded the same to the District Magistrate Azamgarh by registered post and the same was received in the office of the District Magistrate Azamgarh on 10th of August, 1981. The Additional District Magistrate, Azamgarh thereupon forwarded the representation to the Collector, Customs, Gorakh-pur on 12th of Aug., 1981 and the same was eventually received by the Government on 14th of Aug., 1981. The Government after considering the same, rejected it on 17th of Aug., 1981.

15. The representation in question when handed over to the Superintendent, District Jail, Bareilly, on 23rd of July, 1981 was meant to be conveyed to the Home Secretary, State of Uttar Pradesh. According to the respondent the proceedings for passing the detention order against the petitioner under the COFEPOSA Act were initiated at the instance of Collector, Central Excise, Gorakhpur and the order for petitioner's detention had been passed by the State Government, it does not

appear that District Magistrate Azamgarh had any thing whatsoever to do with the case. There is absolutely no explanation on the part of the respondents as to why the Superintendent District Jail, Bareilly forwarded the representation of Nishat Alam to District Magistrate, Azamgarh. Clearly the time taken by the Superintendent, District Jail Bareilly in forwarding the said representation to the District Magistrate, Azamgarh and that taken by the District Central Excise, Gorakhpur was spent unnecessarily and has caused de-lay in the representation reaching the office of the State Government for being considered expeditiously. This unnecessary and unexplained delay on the part of respondent's agency would in view of the principles laid down in? various Supreme Court cases mentioned above, render petitioner's continued detention invalid.

16. Coming now to the first representation made by Niishat Alam and its consideration, the main submission of learned Counsel for petitioner in this regard is that the order for Nishat Alam's detention on behalf of the State Government was made by the Chief Minister. His representation dated 9th of July, 1981 which was got posted by Nishat Alam on 15th of July. 1981 had been dealt with and rejected by the S'tate Minister for Home but no order of the State Government duly authenticated under the provisions of Article 166 of the Constitution has been brought to our notice.

17. It is apparent from the perusal of Section 11 of. the COFEPOSA Act that the representation made by a detenu either to the State Government or the Central Government has to be dealt with by an authority which is competent to act on its behalf. If the representation has been dealt with by an authority not competent to so act, not only the rejection thereof would be bad but also because of actual delay in the consideration by appropriate authority the continued detention would be rendered illegal. It has been held by the, Supreme Court in the cases of Smt. Santosh Anand v. Union of India : (1981)2SCC420 and Kiru Kumar Chaman Lai Kundaliya v- State of Guj-rat : [1981]2SCR718 that where the representation of a detenu has been rejected by an authority which was not competent to deal with it the detention of a detenu is rendered void. The question with regard to rejection of Nishat Alam's first representation dated 9th July, 1981, that, therefore, arises for consideration is whether the State Minister for Home had been authorised to

consider and deal with a representation made by a detenu Under Section 11 of the COFEPOSA Act.

18. It is not in controversy that the Home Department Of the State Government wherein the representations made by detenus under the provisions of COFEPOSA Act were to be dealt with had been placed in charge of the Chief Minister. Rule 3 of the Uttar Pradesh Rules of Business, 1975 lays down that subject to the provisions of the Rules in regard to consultation with other departments and submission of cases of the Chief Minister, the Cabinet and the Governor; by business allotted to a department under the Business U. P. Allocation Rules, 1958 had to be disposed of by or under the general or special direction of the Minister-in- charge. If at all, under this rule the representation of the petitioner could be dealt with by the State Minister for Home, only if there was some general or special direction by the Chief Minister to whom the Home Department stood allocated to deal with and dispose of the same. In support of his submission that the State Minister for Home had been so authorised by the Chief Minister, learned Government Advocate placed before us an order of the Chief Minister dated 14th of Feb., 1981. A perusal of the order translated into English read thus:-

State Home Minister is authorised to confirm the detention order under National Security Act and COFEPOSA Act.

Confirmation of detention under the provisions of National Security Act is provided in Section 12 of the Act which lays down that in any case where the Advisory Board has reported that there is in its opinion, sufficient cause for the detention of the person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit. Likewise the power of confirmation of a detention order under COFEPOSA Act finds place in S- 8 () which lays down that in every case where the Advisory Board has reported that there, is, in its opinion, sufficient cause for the detention of person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it think fit. It thus becomes clear that under the orders of the Chief Minister dated 14th of Feb., 1981, the State Minister for Home became entitled to deal with the Question with

regard to confirmation of a detention after receipt of the report of the Advisory Board Dealing with the case of confirmation of detention on receipt of report from the Advisory Board is something quite different from dealing with the representation of a detenu made in response to the service of the grounds for his detention on Nishat Alam. In our opinion, the order dated. 14th of Feb., 1981 did not authorise the State Minister for Home to pass orders, on the representation made by a person detained under the provisions of the National Security Act Or the COFEPOSA Act.

19. Learned Government Advocate then relied upon the notings in the Secretariat file which translated into English reads/thus;-

Chief Minister may, under the provisions of Rules of Business, for such occasion when he and State Minister go out or remain so busy that it is not possible for them to deal with the files authorize the Chief Secretary to deal with the approval of matters in connection with N. S- A. and COFEPOSA Act. In this connection a request had already been made to the Chief Minister yesterday.

Proposal was to confer powers on the Chief Secretary to deal with the cases for approval under the provisions of National Security Act and COFEPOSA Act and it was this proposal which was duly approved by the Chief Minister on 4th of Mar., 1981. The effect of such approval would at best be that the Chief Secretary became in the absence of the Chief Minister and the State Minister or when they were so busy that they could not attend to the file, competent to make orders in connection with the approval of matters under National Security Act and COFEPOSA Act. It did not have the effect of conferring acv additional power on State Minister for Home which he did not already possess. Accordingly, the aforementioned noting as approved by the Chief Minister on 4th of March, 1981 can also not be utilised foreshowing that the State Minister for Home had been authorised by, the Chief Minister to deal with the representations made by the detenus detained under the provisions of National Security Act or COFEPOSA Act, The respondents have thus failed to show that the first representation had been dealt with on behalf of the State Government by a competent authority. This defect would also have the effect of vitiating petitioner's continued detention under

the impugned order passed by the State Government.

20. In the result. the petition succeeds and is allowed. The continued detention of Nishat Alam in pursuance of the order dated 29th of Apr., 1981 impugned in this petition is held illegal and void. The respondents are directed to set Nishat Alam at liberty forthwith unless he is being detained also in connection with some other case.

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