

Sushil Kumar Vs. Adhikchhak, Kendriya Karagar and ors.

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Court : Allahabad

Decided On : Sep-28-1982

Reported in : 1983CriLJ744

Judge : P.N. Goel and ;M. Wahajuddin, JJ.

Appellant : Sushil Kumar

Respondent : Adhikchhak, Kendriya Karagar and ors.

Judgement :

M. Wahajuddin, J.

1. Sushil Kumar, the petitioner, has been detained under Section 3(2) of the National Security Act by an order of the District Magistrate, Allahabad, dated 3-11-81. He preferred an earlier Habeas Corpus Petition No. 15165 of 1981 assailing such detention. It was dismissed by the judgment and order dated 12-4-1982 and his detention was upheld. Thereafter this second habeas corpus petition has been preferred on 26-7-1982. While admitting this petition, the Court vide its order dated 30-7-1982 expressly observed that this second petition will be considered strictly on the ground which have been raised for the first time and are not covered by the petition already decided and rejected by the Court-

2. One of the new points raised in this petition is that the representation for revocation of the detention order made by the petitioner to the State Government

and the Union of India on 2-7-1982 have not been decided so far and that vitiates the continued detention of the detenu. During arguments we have been addressed only on the point of non-consideration of detenu's representation by the Central Government.

3. On behalf of the State Government a counter-affidavit of Sri Harish Chandra Gupta, District Magistrate, Allahabad, has been filed. In para 10 of that counter-affidavit, it has been stated that as the record of the case concerning Sushil Kumar was summoned by the Government Advocate during the pendency of the first habeas corpus petition and got misplaced there and could be searched out only on 30th July, 1982, the District Magistrate after making relevant entries in that file forwarded the representation for revocation (hereinafter referred to as the 'representation') to the State Government on 30th July, 1982, and thereafter the representation was again received by the District Magistrate from the State Government on 6-8-1982 with a covering letter of 2-8-1982 calling for his comments. It was sent to the Senior Superintendent of Police, Allahabad, for his comments, and the District Magistrate received it back on 17-8-1982 and together with the comments sent the representation to the State Government again on 18-8-1982 and the State Government by teleprinter message dated 20-8-1982 has intimated that the representation was rejected. Another counter-affidavit of Sri O. P. Tewari, an Upper Division Assistant in the Confidential Section 6 of the U. P. Secretariat, Lucknow, has also been filed on behalf of the State Government. In para 6 of this counter-affidavit he has stated that the aforesaid representation dated 2-7-1982 was received by the State Government on 30-7-1982 with a covering letter of the District Magistrate. The copy of the representation addressed to the Prime Minister was forwarded to the Government of India on 2-8-1982. The State Government considered it necessary to obtain the comments of the District Magistrate, Allahabad, and, consequently, the District Magistrate was addressed on 2-8-1982 to give his comments which were sent by the District Magistrate on 18-8-1982 and received by the State Government on 19-8-1982, and after scrutiny at various channels it was rejected on 25-8-1982, which was communicated to the District Magistrate, Allahabad, by means of a radiogram dated 26-8-1982 for intimation to the detenu as well.

4. It has also been stated in para 5 of the counter-affidavit of Sri Tewari that as by its judgment in the previous habeas corpus petition the Court held the detention of the detenu to be operative from 7-11-81. accepting such date the State Government has modified its earlier order as to lay down that instead of 20-11-82 the detention order shall remain in force up to 6-11-82, i.e. the period of one year.

5. On 30-7-1982, when this petition was admitted, Sri Anshuman Singh, standing counsel for the Union of India accepted the notice on behalf of the Union of India. He prayed for and was granted four weeks' time for filing a counter-affidavit. Further, one week's time was allowed to the petitioner for filing his rejoinder-affidavit and it was expressly laid down under the order that the petition will be listed for hearing immediately after the expiry of five weeks from the date of the order. After the expiry of five weeks, the case was put up for hearing on 6-9-1982. On 6-9-1982 the Bench before which this petition was listed observed that the petition be listed before another Bench. The petition was then listed before us on 9-9-1982 and was heard in part and hearing even continued on 10-9-1982. It was at that stage that a counter-affidavit of the District Magistrate, Allahabad, was filed, and a prayer was made for time up to 13-9-1982 for filing another counter-affidavit on behalf of the State Government, which was allowed. Up to that stage no counter-affidavit was filed on behalf of the Union of India. A prayer was made by the brief holder of Sri Anshuman Singh, Senior Standing Counsel for the Central Government, for further time; stating our reasons vide order dated 10-9-82, we directed that the Union Government may also file its counter-affidavit by 13-9-1982 and no further time will be granted. The case was again taken up on 13-9-1982 and as the argument did not conclude, the hearing continued on 15-9-1982. We may mention here that on 13-9-1982 Sri Anshuman Singh, Advocate, submitted that he may move an application for producing the relevant record of the Union Government within three days, but actually did not move any such application. It was on 15-9-1982 that Sri Anshuman Singh informed the Court that he has sent a radiogram to the Central Government for records. The hearing of this petition continued and concluded on 16-9-1982 and by that time neither any counter-affidavit has been filed on behalf of the Union of India, nor even the record has been produced. We may also mention that on 13-9-1982 Sri Anshuman Singh had conveyed that by moving an application he would seek three days' time and even

that period expired.

6. After stating these facts, we may now consider the present habeas corpus petition. The first point that has been raised on behalf of the State Government is that the petition itself being a second petition is not maintainable. The case *Kirit Kumar v. Union of India* : [1981]2SCR718 is an authority on the point, in which this point arose for consideration. The following observations made in that case are important:

Thus, if the principles of *res judicata* could not apply to successive writ petitions in this Court much less could they be attracted in cases where points were not agitated before the High Court but were raised for the first time in this Court in a writ petition under Article 32.

In the case of *Kirit Kumar* (supra) one of the cases that was referred to and followed is the case of *Lallubhai Jogi-bhai v. Union of India* : 1981 CriLJ288 . In that case a distinction was made between petitions in civil matters and petition for issue of a writ of habeas corpus. The Supreme Court in the case of *Lallubhai* (supra) after considering various pronouncements on the point summed up the legal position in para 13 of that judgment. Para 13 is quoted below:

The position that emerges from a survey of the above decisions is that the application of the doctrine of constructive *res judicata* is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Art, 32 of the Constitution on fresh grounds, which were not taken in the earlier petition for the same relief.

It is noteworthy that this particular para of the judgment was also quoted in the case of *Kirit Kumar* 1981 Cri LJ 1267 (supra).

7. The principles which emerge from these cases are that the application of the doctrine of constructive *res judicata* is confined only to civil action and is entirely inapplicable to any illegal detention and do not bar a subsequent petition for a writ of habeas corpus. The Additional Government Advocate stressed that there is a

distinction between the powers of the Supreme Court contained in Article 32 of the Constitution from the powers of the High Court under Article 226 of the Constitution; and while successive writ petitions under Article 32 may lie before the Supreme Court on the strength of these authorities, it would not be so in the case of habeas corpus petition before this Court. We do not find such distinction. It is the rationale and the principle of law laid down which is the crux. It has been laid down in these two rulings that the doctrine of *res judicata* may apply to civil actions, but not to habeas corpus petitions against detention order. It is also noteworthy that in the case of *Kirit Kumar* 1981 Cri LJ 1267 (SC) (*supra*) it has been expressly laid down that the principles of *res judicata* would not apply to successive writ petitions in the Supreme Court. When successive writ petitions can be made in the Supreme Court, on the very analogy such writ petitions would also lie on new grounds before the High Court under Article 226 of the Constitution.

8. The new ground which has been raised in present petition could not have been possibly raised in the earlier petition here. The earlier petition was decided on 12-4-1982, while the new ground has arisen much later after the representation for revocation of the detention order was preferred on 2-7-1982. The cause of action for this ground has arisen only thereafter and not earlier, When any obligation and corresponding right is created, it will be futile to say that the law will give no remedy to redress the grievance.

9. Section 14 of the National Security Act provides that a detention order may at any time be revoked or modified by the State Government or by the Central Government. When that is the position, it cannot be urged that if such right of the detenu is defeated for any non-consideration of his representation, the detenu will be devoid of any remedy by moving the court simply because his earlier writ petition, much before the representation in question made on other grounds has been rejected. We may also observe that Section 14 of the Act providing for revocation or modification has a very wide scope, which is not the position in the matter of habeas corpus petition before the Court. When a detention is challenged before a Court, the Court considers whether legal imperatives have been observed and the right procedure has been followed and the proper opportunity, as envisaged in Article 22(5) of the Constitution as well as under the provisions of the

Act in question, has been afforded. The Court does not examine the desirability of the detention, of the detenu, which depends on so many other factors including conditions prevailing in any particular region and the need of the detention, the matter comes within the ambit of subjective satisfaction of the detaining authority. Besides, while the Court cannot modify the order as to reduce the period of detention etc. even that scope is open to the appropriate authority under Section 14 of the Act and rather in the present case within that scope the State Government has modified the period of detention of the detenu, as per its order disposing of the representation of the detenu. Thus, it cannot be urged that once any writ petition is decided, before any remedy is sought under Section 14 of the Act, upholding the detention, the detenu cannot avail of that additional remedy provided under Section 14 of the Act. It was also rightly conceded by the learned Additional Government Advocate that the remedy under Section 14 of the Act is an independent remedy, which is available to the detenu. We, therefore, hold that the present petition is not barred on account of any judgment in earlier petition and the present petition on new grounds, which arose subsequent to the disposal of the earlier writ petition, is maintainable.

10. Sri Girdhar Malviya, appearing for the State, stressed much that the law relating to expeditious disposal of representation applies to the representations under Section 8 only and not to the representations for revocation of the detention order under Section 14 of the Act and the right of the detenu to seek revocation is not a constitutional right as such.

11. We may now refer to the various pronouncements on the point. In the case of *Shyam Ambalal v. Union of India* : 1980 CriLJ555 , which was a case under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act; Amba Lal, who was detained by an order dated 31-8-1979, made a representation dated 5-10-1979 under Section 11 of COFEPOSA Act, which is identical to Section 14 of the National Security Act, for revocation of the detention order. The representation was properly addressed to the Central Government. The representation was not forwarded to the Central Government and, consequently, no order on it could be passed. The following observations made in that case are important (para 6).-

The power conferred on the Central Government by Section 11 is wide enough to enable the Central Government to revoke the detention order at any stage for the words used are a detention order may at any time be revoked or modified. The power of the Central Government to revoke the order of detention implies that the detenu can make a representation for exercise of that power. Any petition for revocation of an order of detention should be dealt with reasonable expedition.

It was further observed that as the representation was not forwarded to the Central Government, and as such, was left unattended for a period of nearly four months. We feel that in such circumstances the detention cannot be justified as being according to the procedure and in the circumstances there will be no justification in sending the representation to the Central Government.

12. In the case of Sabir Ahmad v. Union of India : [1980]3SCR738 the detenu who was detained under an order of detention passed under Section 3(1), COFEPOSA by an order dated Oct. 2, 1979, addressed an application on Nov. 18, 1979, under Section 11 of COFEPOSA to the Central Government for revocation of his order of detention. The argument on behalf of the Central Government, that as the power under Section 11 of the Act is simply a supervisory power, the detenu is not vested with a right to move the Central Government, was repelled and it was held that the discretion of the Central Government is coupled with a duty and if the statutory safeguard is to retain its meaning and efficacy, the Central Government must discharge its supervisory responsibility with constant vigilance and watchful care. It was further held as follows:

The report received under Section 3 or any communication or petition received from the detenu must be considered with reasonable expedition. What is 'reasonable expedition' is a question depending on the circumstances of the particular case. No hard and fast rule as to the measure of reasonable time can be laid down. But it certainly does not cover the delay due to negligence, callous inaction, avoidable redtapism and unduly protracted procrastination.

In para 13 of this ruling observation was made that the petitioner's plea that the representation was sent to the Central Government, Department of Revenue, COFEPOSA Branch, is unrepelled and the conclusion is, therefore, inescapable

that the Central Government has not at all considered the petition made by the detenu requesting for revocation of his detention under Section 11. In that case four months had passed since the dispatch of the representation and it was held relying upon the ratio in the case of *Tara Chand v. State of Rajasthan* : 1980 CriLJ1015 and *Shyam Ambalal* 1980 Cri LJ 555 (SC) (supra), that as the representation of the detenu to the Central Government , has been ignored and left unattended for a period of about four months, the detention is vitiated and any further directions in view of such delay would also not be given to the Central Government to then dispose of the representation.

13. In the case of *Tara Chand v. State of Rajasthan* (supra), which was also under COFEPOSA, a representation for revocation of the detention order was addressed on behalf of the detenu on 6th Dec., 1979, to the President of India, besides some other authorities of the Union of India. The President's Secretariate received the representation before 9-12-1979 and it was forwarded to the Finance Ministry of the Union Government for necessary action on 9-12-1979 (the date '9-10-79' in the journal is misprint). Neither the representation was considered by the Union of India, nor any order was passed on it. The Supreme Court made the following observations (para 1):

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 the provisions of Article 22(5) so as to render the detention unconstitutional and void. We, therefore, allow the petition and direct that the detenu be released forthwith.

The detention in this case was held vitiated. This pronouncement also repels the submission made before us that the provisions for revocation is not a constitutional right. In the case of *Tara Chand* 1980 Cri LJ 1015 (SC) (supra) it has been held that if there is inordinate delay in considering the representation that would clearly amount to violation of the provisions of Article 22(5) of the Constitution.

14. In the case of *Rattan Singh v. State of Punjab* AIR 1982 SC 1 : 1982 Cri LJ 146, which is a Constitutional Bench ruling of three Hon'ble Judges and which is

also a case under COFEPOSA, it has been held that 'the power under Section 11(2) of that Act in order to be real and effective must imply the right in a detenu to make a representation to the Central Government'. In that case the counsel for the detenu wrote a letter to the Superintendent of Central Jail concerned on April 19, 1981, enclosing two representations, one of which was addressed to the Secretary, Union Ministry of Finance Department, besides the other addressed to the Joint Secretary, Home Department, Government of Punjab, requesting that the signature of the detenu be obtained on both of them and they be forwarded to the appropriate authorities. While the Government of Punjab rejected the representation on April 28, 1981, the other representation made to the Central Government was completely overlooked and was not forwarded to the Central Government. The Supreme Court made the following observation in that case (para 4).-

The failure in this case on the part either of the Jail Superintendent or the State Government to forward the detenu's representation to the Central Government has deprived the detenu of the valuable right to have his detention revoked by that Government. The continued detention of the detenu must therefore be held illegal and the detenu set free.

It relied upon the cases of Tara Chand 1980 Cri LJ 1015 (SC) (supra) and Shyam Ambalal 1980 Cri LJ 555 (SC) (supra). It also quoted the observation made in the case of Shyam Ambalal that 'a petition for revocation of the detention order should be disposed of with reasonable expedition.'

15. The learned Additional Government Advocate has relied upon the case of Sat Pal v. State of Punjab : 1981 CriLJ1867 of a Division Bench, In that case the detention order was served along with the relevant papers when the detenu was apprehended on June 28, 1981. The detenu addressed two representations, one addressed to the State Government and other addressed to the Central Government, which was received by the Superintendent, Central Jail, Amritsar, on July 6, 1981. The representations were for revocation of the detention order. The Superintendent. Jail forwarded both the representations to the Home Department of the State Government and they were received at that end on July 8, 1981. The

State Government rejected the representation addressed to it on July 24, 1981, and forwarded the same to the Advisory Board and the Advisory Board also rejected that representation on July 31, 1981. The State Government confirmed the order of detention on Aug. 6, 1981, but the representation addressed to the Central Government was not forwarded by the State Government till Sept. 23, 1981. The question that was formulated was whether the failure of the State Government to forward the representation addressed to the Central Government for revocation with reasonable despatch renders his continued detention invalid. It has been held that 'the constitutional imperatives of Article 22(5) enjoin that where the detenu makes simultaneous representations to the detaining authority as well as an application for revocation under Section 11 of the Act, they must both be dealt with by the appropriate Governments at the same time and there is no question of any conflict of jurisdiction.' It has been further held that 'the making of an application for revocation to the Central Government under Section 11 of the Act (which corresponds to Section 14 of the National Security Act) is, therefore, part of the constitutional right a citizen has against his detention under a law relating to preventive detention. There was a lapse of 2 1/2 months in forwarding the representation by the State Government, but the Central Government, which received the representation on 24th Sept. 1981, considered it and rejected it on Sept. 28, 1981. Referring to these facts the Supreme Court further observed as follows (para 4).-

It is, therefore, quite clear that there was no delay on the part of the Central Government in dealing with the representation. The question is whether the unexplained delay on the part of the State Government in not forwarding the representation till Sept. 23, 1981, i.e., for a period of 2 months and 15 days, renders the continued detention invalid.

The detention in the background of the aforesaid facts was upheld making the following observations (para 12):

There is nothing but the unexplained delay on the part of the State Government and that by itself is not sufficient to invalidate the order of detention.

In the case of Sat Pal 1981 Cri LJ 1867 (SC) (supra) it has been further observed 'the Court must look at the substance of the matter and not act on mere technicality.' In Para 14 of the judgment one more observation was made that 'matters where the liberty of the subject is involved, should not be treated in a cavalier fashion'.

16. The learned Additional Government Advocate, laying stress upon the circumstances that 2 1/2 months' unexplained delay by the State Government in forwarding the , representation was not considered fatal, urged that this ruling is an authority for the proposition that the representation for revocation under Section 14 of the National Security Act does not stand on the same footing as the representation under Section 8 of the National Security Act.

17. We have carefully considered the facts and the observations made in the case of Sat Pal 1981 Cri LJ 1867 (SC) (supra) and we find that neither this matter has been considered in that ruling, nor any proposition of law on that point has been laid down in Sat Pal's case. We cannot import in this judgment any proposition of law which is not laid down therein. In fact, in Sat Pal's case it has been held that the right to seek revocation is a constitutional right and that the Central Government has been empowered to exercise overall supervision and once a representation has been made to it, it has to either reject it or revoke the detention; but it must consider the representation and exercise its mind. As laid down in the concluding para of that case it has also been observed that such representation is not to be handled in a cavalier manner. The case of Sat Pal was decided in the light of its own fact's. The important facts which have a major impact are that the representation was received by the Central Government on 24th Sept., 1981, and not earlier and that the Central Government, which was the proper authority to consider the representation, acted expeditiously and not in a dilatory manner; considered and rejected it within four days, i.e. on 28th Sept., 1981. The ratio of that case is as follows:

(i) The right to make a representation for revocation is also a constitutional right and the Central Government must consider it not in a cavalier manner and must either accept or reject it,

(ii) The Courts are not to be guided by mere technicalities, but it is the substance of the matter which should be examined,

(iii) Representations can be addressed to the Central Government as well as to the State Government both simultaneously and at each end they have to be considered, either to accept or reject it.

(iv) Where the Central Government itself has acted very promptly and there is no lapse on its part in individual cases, mere delay in forwarding the representation by the State Government to the Central Government alone, though unexplained, may not by itself vitiate the detention.

We have quoted the portions of other earlier pronouncements of the Supreme Court. The ratio of those decisions is as follows:

(i) An obligation is cast on the appropriate revoking authority under Section 11 of the COFEPOSA (corresponding to Section 14 of the National Security Act) to consider the matter of revocation of detention as to either accept or reject it; and to make it real the detenu is necessarily vested with a right to make a representation,

(ii) Such right is a constitutional imperative and where the matter of a detenu's liberty, who is detained without trial, is involved the Court will be vigilant to examine that the proper procedure is observed and is not defeated.

(iii) Whenever any representation for revocation is made, it has to be disposed of without inordinate delay and expeditiously and while the Central Government may take a reasonable time depending upon the facts of each case, it has not to be dealt with in a cavalier manner.

(iv) The right contained in the provisions of revocation is a very important right from the angle of the detenu and the Courts are to see that the proper procedure in that connection is observed,

(v) Our Constitution being a federal Constitution, the Central Government has been vested with over all supervisory powers and it must exercise those powers one way or the other and the matter should not be dealt with in a dilatory manner.

18. The learned Additional Government Advocate tried to distinguish those rulings on a submission that in all those cases the representation was not disposed of by the Central Government. In the present case also, we do not know what has been the fate of the detenu's representation addressed to the Central Government, when there is no counter-affidavit by the Central Government disclosing how the representation of the petitioner has been dealt with. Apart from that in every pronouncement independent of the facts of that case some general principles of law is laid down. In the cases of Shyam Ambalal 1980 Cri LJ 555 (SC), Tara Chand 1980 Cri LJ 1015 (SC), Sabir Ahmad (1980) 3 SCC 295 and Ratan Lai 1982 Cri LJ 146 (supra) same propositions of law have also been laid down and those rulings are a guide on such points of law and we are bound by the observations made therein. We have already referred to those rulings and it is well borne out from the principles of law laid down in those rulings that Section 11 of the COFEPOSA (analogous to Section 14 of the National Security Act) confers a constitutional right and the procedure, as provided therein, must be observed and the representation must be considered without any inordinate delay, expeditiously and within reasonable time depending on the facts of each case. In fact, in the case of Sat Pal 1981 Cri LJ 1867 (SC) (supra) also in the end it has been made clear that any representation for revocation cannot be dealt with in a cavalier fashion. When that is the position of law, we are unable to agree with the submissions of the learned Additional Government Advocate that in the matter of consideration of representations for revocation the element of delay is not relevant or any amount of delay would not vitiate the detention.

19. In the present case we have neither any information about the fate of the representation of the detenu addressed to the Central Government, nor we have been informed by means of any counter-affidavit, how it has been processed. The representation was made on 2-7-1982 and in view of our aforesaid discussion we hold that the continued detention of the detenu, namely, Sushil Kumar, stands vitiated and he is entitled to be set at liberty.

20. A similar view has been taken in the case of Virendra Kumar Nayak v. Superintendent of Naini Central Jail (1082 Cri LJ 1) (All) and in the case of Sunil Kumar v. Superintendent, District Jail (Habeas Corpus Petition No. 3170 of 1982

decided by this Court on 18-5-82).

21. In the result, this habeas corpus petition is allowed and the detenu is set free, unless required to be detained in any other case.

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