**Suresh Chander Chowdhary Vs. the Administrator and ors.**

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**Court** : Delhi

**Decided On :** Feb-15-1985

**Reported in** : 1985(8)DRJ302

**Judge** : Prakash Narain, C.J. and; N.N. Goswaimy, J.

**Acts** : Constitution of India - Article 22(4)(7); Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - Sections 8

**Appeal No.** : Criminal Writ Appeal No. 123 of 1984

**Appellant** : Suresh Chander Chowdhary

**Respondent** : The Administrator and ors.

**Advocate for Pet/Ap.** : Harjinder Singh,; B.P.S. Mangat,; Naveen Malhotra,;

**Judgement** :

Prakash Narain, C.J.

(1) The petitioner has been detained by virtue of an order passed by the Administrator of the Union Territory of Delhi under the provisions of Section 3(1), read with Section 2(f) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, hereinafter referred to as the Act, with a view to preventing him from smuggling goods into India and also engaging in transporting, concealing and keeping smuggled goods, viz. wrist watches. The petitioner was

arrested in execution of the said order of detention on July 2. 1984 and has been in detention in the Central Jail, Tihar, eve'since. The grounds of detention etc. were served on the detenu in jail on July 6, 1984.

(2) The President was pleased to promulgate Ordinance No. 8 of 1984 on July 13, 1984 amending certain provisions of the aforesaid Act. On August 2, 1984 declaration was made in regard to the petitioner in exercise of the powers conferred by Section 9(1) of the aforesaid Act, as amended, read with Sub-section (2) of Section 9 of the said Act. This ordinance was repealed by Act 58 of 1984 amending the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The Act came into force on August 30, 1984 The reference was made to the Advisory Board on November 13, 1984. The petitioner was produced before the Advisory Board on November 23, 1984. The detention of the petitioner was confirmed on November 30, 1984, communication regarding which was received by the petitioner on December 18, 1984.

(3) The petitioner has challenged his detention on diverse grounds. All these have been traversed by the respondents and we shall deal with the respective stands of the petitioner and the respondents as we deal with each contention raised by the petitioner.

(4) The first contention of the petitioner is that neither Ordinance 8 of 1984 nor Act 58 of 1984 have any retroactive effect inasmuch as the amendments brought about by the Ordinance and the amending Act could only be regarded as being operative from the respective dates of the promulgation of the Ordinance and the enforcement of the amending Act. The amended provisions cannot be retroactive in regard to detention orders passed and executed prior to the Ordinance for the amending Act coming into force. It is submitted by Mr. Herjinder Singh, learned counsel for the petitioner, that the petitioner got a vested right on the date he was arrested or detained under Article 22(4) of the Constitution and Section 8 of the aforesaid Act, as unamcnded, which could not be taken away by subsequent amendments in the law. The right, according to the learned counsel, contemplated by Article 22(4) of the Constitution was a substantive right which could not be interfered with. It was also submitted that even if the amending Act is held to be

retrospective in its operation, the Ordinance was not so. The declaration made in regard to the petitioner was made after the promulgation of the Ordinance but before the enforcement of the amending Act which made the declaration non est as there was no power to make a declaration which would have retroactive effect.

(5) The respondents' stand is that no right of the petitioner has been jeopardised, the Ordinance and the amending Act both had retroactive effect and the declaration was thus validly made.

(6) There can be no doubt that the right guaranteed by Article 22(4) of the Constitution is a substantive right, being a fundamental right guaranteed by the constitution. One has, however, to examine what this right is. This provision of the Constitution reads as under :

'No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless : (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as. Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention; Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or (b) Such person is detained in accordance with the provisions of any law made Parliament under sub-clauses (a) and (b) of clause (7).'

(7) As reference has been made to clause (7) of Article 22, we may read that as well. This provision reads as under :

'Parliament may by law prescribe : (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4); (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).'

The relevant provision of Section 8 of the aforesaid Act on which reliance has been placed reads as under :

'Save as otherwise provided in Section 9, the appropriate Government shall, within five weeks from the date of detention of a person under a detention order make a reference in respect thereof to the Advisory Board constituted under clause (a) to enable the Advisory Board to make the report under sub-clause (a) of clause (4) of Article 22 of the Constitution.'

(8) The relevant portion of Section 9 before the promulgation of the aforesaid Ordinance reads as under :

'9.Cases in which and circumstances under which persons may be detained for longer than three months without obtaining opinion of Advisory Board-(1) Notwithstanding anything contained in this Act, any person (including a foreigner) in respect of whom an order of detention is made under this Act at any time before the 31st day of December 1977 may be detained without obtaining, in accordance with the provisions of sub clause (a) of clause (4) of Article 22 of the Constitution, the opinion of an Advisory Board for a period longer than three months but no exceeding one year from the date of his detention, where the order of detention has been made against such person with a view to preventing him from smuggling goods or abetting the smuggling of goods or engaging in transporting or concealing or keeping smuggled goods and the Central Government or any officer of the Central Govern- ment, not below the rank of an Additional Secretary to that Government, is satisfied that such person : (i) smuggles or is likely to smuggle goods into, out of or through any area highly vulnerable to smuggling; or (ii) abets or is likely to abet the smuggling of goods into, out of or through any area highly vulnerable to smuggling; or iii) engages or is likely to engage in transporting or concealing or keeping smuggled goods in any area highly vulnerable to smuggling; and makes a declaration to that effect within five weeks of the detention of such person.'

(9) The right contemplated by Article 22(4) of the Constitution on a plain reading is that a person cannot be detained under a law providing for preventive detention for more than three months unless that very law makes provision for a reference to be

made to an Advisory Board constituted of persons leaving the requisite qualifications, as contemplated by clause (a), and the opinion of that Advisory Board is obtained in regard to the detention before the expiry of a period of three months. This right is, however, not unqualified. If a law is made by Parliament, as postulated by Article 22(7) of the Constitution authorising detention for a period longer than three months without obtaining the opinion of the Advisory Board in accordance with sub-clause (a) of clause (4) of Article 22, then the right under Article 22(4)(a) would be the right as provided by such law made by Parliament. Such law has in the present case been made by the promulgation of the Ordinance and passing of the amending Act. Mr. Herjinder Singh urged that his right was that a reference must be made to the Advisory Board within five weeks. Admittedly, the reference was not made to the Advisory Board within five weeks in view of the declaration made in regard to the petitioner by taking advantage of the provisions of the Ordinance. The vested right of a reference being made within five weeks was, urges the counsel, illegally taken away. There is a fallacy in the argument. The vested right is as guaranteed by Article 22(4), read with Article 22(7) of the Constitution. The statutory right created by Section 8(b) of the unamended Act was not an absolute right. Section 8(b) itself says that the reference had to be made within five weeks from the date of detention to the Advisory Board but the opening words of clause (b) make it clear that this right, if at all it can be called a right, was subject to the provisions of Section 9. The opening words of clause (b) are 'Save as otherwise provided in Section 9'. thereforee, Section 8(b) cannot be read in isolation and has to be read along with Section 9. The obligation on the appropriate Government to make a reference within five weeks is subject to the provisions of Section 9. That this obligation creates a corresponding right in a detenu cannot be disputed but the right is that action will be taken by the appropriate Government keeping in view the provisions of Section 8(b) and Section 9 of the Act. If before the expiry of five weeks the law stood amended, the obligation has to be discharged by the appropriate Government in accordance with the amended law. It cannot be disputed that the appropriate Government had the right to make the reference to the Advisory Board till the last day of the expiry of five weeks from the date of detention. If before those five weeks expired, the Parliament in its wisdom extended the time within

which the reference could be made provided the necessary conditions like making a declaration are fulfillled, it cannot be said that the appropriate Government acted illegally. The question of retrospectivity or retroactivity, thereforee, does not really arise for consideration in the present case. The declaration was made prior to the expiry of five weeks in consequence of the Ordinance having been promulgated before the expiry of five weeks. The fundamental right is that the law must provide for the constitution and reference to the Advisory Board where preventive detention is resorted to under that law. That provision exists in the Act, both amended as well as unamended. We have already commented upon the statutory right claimed by the petitioner. There is, thereforee, no force in the first contention.

(10) The next point urged was that the Advisory Board had to give its opinion on 'the continued detention of the person concerned' in view of the amendment in Section 8 of the principal Act and not merely whether there was sufficient cause 'for the detention' of the person concerned. Sub-section (f) of Section 8, as unamended, read as under :

'(f) in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith.'

After the amendments brought about by the Ordinance and the amending Act, it reads as under :

'In every case where the Advisory Board has reported that there is in its Opinion sufficient cause for the continued detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the continued detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith.'

(11) The opinion of the Advisory Board is a confidential document and is never made available to the detenu. We, thereforee, asked the learned counsel for the respondents to place the opinion of the Advisory Board in this case before us. We find from the opinion of the Advisory Board that they have opined that there was sufficient cause for the detention of the petitioner. The words 'continued detention' have not been used by the Advisory Board. On a mere construction of the words learned counsel for the petitioner has urged that the Advisory Board having applied its mind only to the sufficiency of the cause for the detention of the petitioner and not to the aspect of 'continued detention' of the petitioner, the safeguard postulated has been violated and the petitioner is entitled to be set at liberty. We do not agree. In matters of detention for each day that the detention continues, a detenu is being detained. When a party comes for a writ of habeas corpus what the courts have to examine is whether his detention on the date when the matter is considered is lawful. It may be unlawful because the order under which the person was detained originally is invalid, illegal or void, or the detention may be unlawful on the date that the matter is heard because of breach of any other provision of law or the Constitution. The fact of the matter is that on a particular date it has to be seen whether the detention is lawful or not lawful. thereforee when the Advisory Board gives an opinion that there is sufficient reason for the detention of the petitioner, it must be taken to mean that on the day the Advisory Board gives its opinion) in its opinion the detenu's detention was on account of sufficient cause and lawful. That the Parliament has thought it advisable to change the phraseology has to be given a meaning, when a person is detained and he challenges his detention, what is really being challenged is that on the day he puts forth his challenge his detention is invalid. This may be for various reasons, as we have stated earlier. In some cases, it may be that the original detention may be valid but continued detention may be invalid. The term ''continued detention' really means the detention right from the beginning till the day an opinion is given or a pronouncement is made that it is valid. So, when the Advisory Board gives an opinion affirming the detention, it must be regarded as an opinion in regard to both aspects, viz., the original detention and the continued detention. If the Advisory Board has used the phraseology which is a phraseology in presenti, it must automatically mean that right from the date of arrest till the date

of the giving of the opinion, the detention is considered valid. This would sufficiently meet the requirement to opine as required by the amended provision of 'continued detention'.

(12) It was next contended by learned counsel for the petitioner that the show cause notice issued to the petitioner under the Customs Act in the course of adjudication proceedings and his reply were not placed before the Administrator. These were relevant documents which could have affected the subjective satisfaction one way or the other. The real gravamen of the complaint of the petitioner is that the allegations made in the show cause notice were denied by him in the reply sent. In other words, the retraction made by the petitioner that he was in no way concerned with the alleged activity had to be brought to the notice of the Administrator. Normally, this would have been a good ground. In the present case, however, it has no force The retraction made in the reply to the show cause notice by the petitioner was in almost identical to his averments made in his bail application moved on September 6, 1983 when originally the petitioner was arrested in proceedings under the Customs Act. The Administrator has taken the petitioner's averments in the bail application into consideration and has specifically mentioned about them in ground No, 8 served on the petitioner. thereforee, the petitioner denying his complicity is made known to the Administrator and he has taken note of it. The petitioner has said nothing more in the reply to the show cause notice and on this aspect. It may be regarded as reiteration of his protestations of innocence. Nothing, thereforee, turns on the show cause notice and the reply not having been considered by the Administrator.

(13) Lastly, it was urged that the declaration made on August 2, 1984 should have been made after giving an opportunity to the petitioner to make a representation in regard to it as the declaration would affect his lights. The rule of natural justice cannot be made applicable to such administrative acts as the declaration contemplated by Section 9 of the Act. Further, the right that the petitioner had was subject to Article 22(4) and Article 22(7) of the Constitution. A valid law in regard to the obligation of the appropriate Government having been made and the obligation having been discharged by the appropriate Government within the time specified by the amended law, no complaint can be made that the obligation could not be

discharged except after giving due notice or prior hearing to the detenu. In any case, post-decisional hearing is available to the detenu in the form of a representation. This he could always avail of and has been availed of.

(14) We cannot accept the contention of Shri Herjinder Singh that in preventive detention the rule enunciated in Maru Ram etc. v. Union of India and others : 1980 CriLJ1440 would be attracted. The rule enunciated by the Supreme Court is in regard to penal action. Preventive detention, it is well-known, is not penal action. By no stretch of imagination such detention can be given the complexion of imprisonment, as contemplated by penal laws. The law is well-settled that preventive detention is not penal in character. We may further observe that the time aspect in making a reference to the Advisory Board is a procedural aspect. The substantive right is that a reference must be made to an Advisory Board. The time within which it is to be made and the time within which the opinion must be obtained are all procedural in nature though the procedural aspects must also be strictly observed in detention without trial.

(15) We, thereforee, find no force in the pleas raised by the petitioner. The rule is discharged. The petition is dismissed.