
(1991) 12 KL CK 0007
In the High Court Of Kerala
Case No : O.P. No. 7726 of 1991 S

Ayisha Beevi

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 13-12-1991

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 10, 3(1), 8, 9, 9(1)
Constitution of India, 1950 — Article 22, 22(4)

Citation : (1991) 12 KL CK 0007

Hon'ble Judges : M. Jagannadha Rao, C.J;T.L. Viswanatha Iyer, J

Bench : Division Bench

Advocate : M.N. Sukumaran Nair, for the Appellant; Cyriac Joseph, A.A.G. for 1st Respondent, for the Respondent

Final Decision : Allowed

Judgement

M. Jagannadha Rao, C.J.—This Writ Petition is filed for the issue of a writ of Habeas Corpus. The Petitioner is the wife of Kattilakam Mammikutty, hereinafter referred to as the "detenu". The detention is u/s 3(1)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, hereinafter called the "Act". The detenu was initially detained on 8th July 1990. A criminal case was filed against him, and he was released on bail on 4th August 1990. While according to the authorities he is said to have made a confessional statement, the fact remains that the detenu retracted from the said confession on 4th August 1990. Subsequent to these events, the impugned order of detention was passed by the State Government as per Ext. P-1 dated 25th August 1990. The actual detention was effected on 10th September 1990, nearly one year and four months ago. This is a case in which the Central Government has also made a declaration u/s 9(1) of the Act to the effect that the detention of the detenu was necessary for a period beyond one year for the reasons mentioned in the said order Ext. P-6 dated 11th October 1990. Subsequent to the detention, the detenu was served with the grounds of detention, as per Ext.

P-2 dated 25th August 1990, on 11th September 1990. The detenu submitted a representation, Ext. P-4 dated 1st October 1990 to the detaining authority with copies to the Central Government, and to the Advisory Board. The State Government rejected the said representation by Ext. P-5 order dated 12th October 1990, and the Central Government rejected the same as per Ext. P-7 dated 25th October 1990. Thereafter, the Advisory Board sent its report on 1st December 1990, and on that basis the impugned order of confirmation of detention was passed by the State Government as per Ext. P-8 dated 12th December 1990. Under Ext. P-8 the State Government stated that u/s 8(f) of the Act, the Government was confirming the detention of the detenu and that it was ordering u/s 10 of the Act that the detention should continue for a period of two years from 10th September 1990. If this order is to stand, then the detention would be upto 10th September 1992. The present Writ Petition has been filed on 30th July 1991 raising various grounds questioning the validity of Ext. P-8.

2. Learned Counsel for the Petitioner, Sri M.N. Sukumaran Nair, did not think it fit to pursue the various points raised in the Writ Petition, but raised a point relating to the validity of the impugned order of detention, Ext. P-8 dated 12th December 1990, in the context of the principles laid down by the Supreme Court in *Satar Habib Hamdani Vs. K.S. Dilipsinhji and Others*, . We have permitted counsel for the Petitioner to raise this question and the learned Additional Advocate General has been heard in regard to the said question.

3. The point that has been raised is that in the impugned order of detention it is stated that the matter has been referred to the opinion of the Advisory Board, and it is argued that from that it appeared that the Advisory Board did not apply its mind independently to the question of continued detention of the detenu beyond one year. It is argued that the Advisory Board had recommended continued detention not independently, but upon being influenced by the order of the Central Government made u/s 9(1) of the Act. This, it is said, is clear from "the order of detention wherein the order refers to the opinion of the Advisory Board. In other words, the contention of the learned Counsel for the Petitioner is that the final order of confirmation, Ext. P-8, passed by the State Government does not disclose that the Advisory Board had applied its mind independently to the question of continued detention" without being influenced by the declaration made by the Central Government. It is also contended that for the purpose of finding out whether the Advisory Board had applied its mind independently to the question of continued detention, it is not open to this Court to refer to the entire report of the Advisory Board, but that this Court should confine itself to the separate paragraph relating to the final opinion of the Advisory Board. Reference in this connection is made to Clause (c) of Section 8 of the Act which requires that the Advisory Board should state its opinion in a separate paragraph in its report. According to learned Counsel for the Petitioner, Clause (f) of Section 8 permits reference only to the opinion of the Advisory Board in the separate paragraph, but not to the other parts of the reports of the Advisory Board. Reliance is also placed on Clause (e) of Section 8 of the Act which states that the

report of the Advisory Board is "confidential" except the part relating to the opinion.

4. The learned Additional Advocate General, Sri Cyriac Joseph, however, submitted that the operative portion of the order of detention cannot lead to any inference that the Advisory Board had rendered its opinion either solely on the basis of the declaration made by the Central Government u/s 9(1) of the Act, or upon being influenced by the said declaration. According to him, the opinion part of the report of the Advisory Board, as referred to in the order of the State Government, Ext. P-8, will show that the Board had applied its mind independently to the question of continued detention beyond one year. He also contends that for the purpose of finding out whether the Advisory Board had applied its mind independently to the question of continued detention, it is permissible to this Court to refer to other parts of the report of the Advisory Board and this Court is not restricted to the separate paragraph relating to the opinion of the Board. He argued that the Court would be entitled to look into the entire report, notwithstanding the fact that except for the paragraph relating to opinion of the Advisory Board, the rest of the report is confidential u/s 8(e).

5. Article 22(4) of the Constitution of India states that:

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.

The proviso to the said sub-clause, Sub-clause (a) of Clause (4) of Article 22, states that:

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) or Clause (7).

Sub-clause (b) states:

Such person is detained in accordance with the provisions of any law made by Parliament under Sub-clause (a) and (b) of Clause (7).

Clause 7 of Article 22 further states that the 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).

6. Section 8 of the Act states:

For the purposes of Sub-clause (a) of Clause (4), and Sub-clause (c) of Clause (7), of Article 22 of the Constitution,--

(a) the Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards each of which shall consist of a Chairman and two other persons possessing the qualifications specified in Sub-clause (a) of Clause (4) of Article 22 of the Constitution;

(b) save otherwise provided in Section 9, the appropriate Government shall, within five weeks from the date of detention of a person under a detention order made 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(4) of the Constitution;

(c) the Advisory Board to which a reference is made under Clause (b) shall after considering the reference and the materials placed before it and after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if, in any particular case, it considers it essential so to do or if the person concerned desires to be heard in person, after hearing him in person prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned;

(d)....

(e) a person against whom an order of detention has been made under this Act shall not be entitled to appear by any legal practitioner in any matter connected with the reference to the Advisory Board and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

(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.

7. Coming to Section 9, it deals with cases in which and circumstances under which persons may be detained for periods longer than three months without obtaining the opinion of Advisory Board. Sub-section (2) of that section states that:

In the case of any person detained under a detention order to which the provisions of Sub-section (1) apply, Section 8 shall have effect subject to the following modifications, namely,--

(i) in Clause (b) for the words "shall; within five weeks", the words "shall, within four months and two weeks" shall be substituted.

(ii) in Clause (c),--

(1) for the words "the detention of the person concerned", the words the continued detention of the person concerned" shall be substituted.

(2) for the words "eleven weeks", the words "five months and three weeks" shall be substituted.

(iii) in Clause (i) for the words "for the detention" at both the places where they occur, the words "for the continued detention" shall be substituted.

A combined reading of Sections 8 and 9 would, therefore, lead to the conclusion that in cases where the Central Government has issued a declaration u/s 9(1) it will be necessary for the Advisory Board to be consulted within four months and two weeks, rather than five weeks as u/s 8, and it will also be necessary for the Advisory Board to submit its report within five months and three weeks, rather than eleven weeks. It will also be necessary for the Advisory Board to submit its opinion separately u/s 8(c) as to whether or not there is sufficient cause for the "continued detention" of the person concerned, and further u/s 8(f) in cases where the Advisory Board has reported that there is sufficient cause for the continued detention" of the person concerned, the Government should confirm the said "continued detention" and thereby continue the person in detention for such period as it may deem fit. In the present case, as already stated, the Central Government has given a declaration as per Ext. P-6 dated 11th October 1990 that the concerned authorities were satisfied that the detenu is likely to engage in transporting, concealing and keeping smuggled goods in the areas of Bombay and Ponnani which are highly vulnerable to smuggling. The order also states that the detenu has a right to represent to the Central Government and the Advisory Board against the said declaration. The Advisory Board submitted its report dated 1st December 1990, and thereafter. Ext. P-8 order dated 12th December 1990 was passed by the Government confirming the detention. The relevant portion of the said order of the Government is as follows:

As required u/s 8(b) of the COFEPOSA Act, 1974 (as amended) the case of Shri Kattilakam Mammikutty was referred to the COFEPOSA ADVISORY BOARD on 10th October 1990. The representation read as third paper above was also forwarded to the Advisory Board on 15th October 1990 for its consideration. After hearing the detenu in person, perusing the records and after considering the representation the Advisory Board in its report read as sixth paper above has opined that the order of detention passed by the Government of Kerala against the detenu Sri Kattilakam Mammikutty is with sufficient reason and since the

Government of India have issued declaration u/s 9(1) of the Act continued detention of the detainee is also justified.

Accordingly u/s 8(f) of the Act, Government confirm the detention of Shri Kattilakam Mammikutty, COFEPOSA detainee No. 1164 and order u/s 10 of the said Act that the detention shall continue for a period of two years from 10th September 1990.

8. We may point out that the broad contention of the Petitioner that it is not open to this Court to look into the entire report of the Advisory Board cannot be accepted. It is true that Section 8(e) states that except that part of the opinion of the Advisory Board mentioned in separate paragraph the other part of the report shall be treated as confidential. That, in our opinion, does not mean that the same can be withheld from the Court. There may be cases where the detainee raises questions relating to natural justice, or the manner in which the Advisory Board had conducted the proceedings, and in such cases it would obviously be necessary for the Court to look into the entirety of the report of the Advisory Board. We are, therefore, of the view that the broad contention urged by the Petitioner's counsel that this Court is precluded from looking into the report, "except the opinion part of it", cannot be sustained. We are of the view that this Court can read the entire report submitted by the Advisory Board to the Government.

9. So far as the main contention of the Petitioner is concerned, the question would be whether the Advisory Board could be said to have not applied its mind to the question of continued detention of the detainee as envisaged in Section 9(2) of the Act. After considering the portion of the detention order passed by the Government (which we have extracted above), we are of the view that the said paragraph is capable of an interpretation that the Advisory Board was recommending continued detention upon being influenced by the declaration made by the Central Government u/s 9(1). However, for the purpose of deciding whether such an inference could be correct or not, we are entitled, as stated hereinabove, to look into the remaining part of the report, and we are not confined to the opinion part of the report of the Advisory Board. It is in that context that we have thought it fit to peruse the report of the Advisory Board in its entirety, rejecting the contention of the Petitioner's counsel to the contrary.

10. After perusing the report of the Advisory Board as a whole, we find the following facts. The Advisory Board referred to the declaration made by the Central Government u/s 9(1) of the Act at the beginning of its report, and then it considered the various facts and circumstances of the case, and arrived at the following conclusion:

6. In these circumstances, we are of opinion that there are reasonable grounds to conclude that the detainee would continue to engage in the transporting, concealing and keeping smuggled gold unless prevented from doing so by detaining him under the provisions of the COFEPOSA.

It is after this paragraph that the ultimate opinion as per Section 8(e) is arrived at. It is to the following effect:

7. The Board is of opinion that the order of detention passed by the Government of Kerala against the detenu Shri Kattilakam Mammikutty is with sufficient reason and since the Government of India has issued declaration u/s 9(1) of the Act continued detention of the detenu is also justified. We confirm the order of detention passed by the Government.

We have already stated that the opinion part of the report (paragraph 7 referred to above) is capable of a construction that the recommendation regarding continued detention of the detenu was influenced by the declaration made by the Central Government u/s 9(1). Therefore, we are thrown back to the earlier paragraph (i.e., paragraph 6) extracted above to find out if there is any independent decision recorded by the Advisory Board in regard to the need for "continued detention" of the detenu as required by Section 8 read with Section 9(2). The first part of paragraph 6 uses the word "continued" but that word is used not in connection with the recommendation for the continued detention of the detenu, but only in the context of the future conduct of the detenu which would require his preventive detention. The words "transporting, concealing and keeping smuggled gold" are grounds for detention u/s 3(1) of the Act, and reference to those activities of the detenu will be necessary even for the purpose of ordering preventive detention u/s 8, as distinct from continued detention. In other words, the language employed by the Board in paragraph 6 of its report is not categorical as to whether the Board was, in that paragraph, dealing with the need for preventive detention of the detenu or in regard to the need for the continued detention of the detenu. When once such a doubt is raised in our minds, the detenu, in our opinion, is entitled to be given the benefit of such a doubt.

11. In this context we are bound to make reference to the decision of the Supreme Court in Satar Habib Hamdani Vs. K.S. Dilipsinhji and Others, . In that case, which also arose under the COFEPOSA Act, the Supreme Court had occasion to hold that the Advisory Board should for the purpose of Section 9(2), opine that there is sufficient cause for the "continued detention" of the detenu, when the detention is for a period exceeding one year. If there is no such opinion expressed by the Advisory Board with regard to continued detention, there will be no legal sanction for such continued detention. In that case, what happened was that the detention order showed that the Advisory Board was of opinion that "there is sufficient cause of his detention". It was contended that the Advisory Board merely considered the question whether there was sufficient cause for the detention, but that it had not expressed any opinion as to whether there was sufficient cause for "continued detention". After referring to the provisions of the Act, as amended in 1984, Chinappa Reddy, J. observed as follows:

...In a case to which Section 9 applies, Section 8 stands suitably amended, a reference is required to be made within four months and two weeks by the

Government to the Advisory Board and the Advisory Board is required to state its opinion within five months and three weeks from the order of detention whether there is sufficient cause for the "continued detention" of the person concerned. In other words, the Advisory Board is to state its opinion not. merely whether detention is necessary but whether "continued detention" is necessary.

Chinnappa Reddy, J. further stated as follows:

The Advisory Board will necessarily have to go behind the declaration u/s 9(1) to consider the question whether there is sufficient cause for "continued detention". The two safeguards provided to the detenu against "continued detention", at that stage, are the application of mind by the specified authority before making a declaration u/s 9(1) and the consideration of the question by the Advisory Board.... That is why in a case to which Section 9 applies, it is important that the Advisory Board specifically considers and answers the question whether in its opinion there is sufficient cause for the "continued detention" of the person concerned. If the Advisory Board merely states that the detention of the person is necessary it is not for anyone else to supplement the Advisory Board's opinion and substitute the words "continued detention", for the word "detention". The matter is of vital importance for that. The omission of the words "continued detention" in the opinion of the Advisory Board cannot be slurred over in the fashion we are invited to do in the counter affidavit. Nor can we treat the omission as a mere clerical or typographical error when that is not the express case of the Respondents.

(emphasis supplied)

We are, of the view that in paragraph 6 of the report of the Advisory Board there is no separate finding except the recommendation of the Board of there being sufficient cause for the detention of the detenu. It is true that paragraph 7 contains the opinion of the Advisory Board with regard to the need for "continued detention" of the detenu, but as stated earlier, a reading of paragraph 7 would give an impression that the opinion was influenced by the declaration made by the Central Government u/s 9(1) of the Act. From paragraph 7 alone it cannot, in our opinion, be postulated that the Advisory Board reached the said conclusion by independent application of the mind. Our view is supported by the contents and language of paragraph 6 of the report.

For the aforesaid reasons, we allow the Writ Petition, and direct the release of the detenu, Sri Kattilakam Mammikutty, son of Kunhimohammed, COFEPOSA detenu No. 1164, Central Prison, Trivandrum. He should be set at liberty forthwith, if not required to be detained under any other order.