

(2006) 04 KAR CK 0002
In the Karnataka High Court
Case No : Writ Petition (H.C.) No. 13 of 2006

Iranna

APPELLANT

Vs

The Government of Karnataka and Others

RESPONDENT

Date of Decision : 18-04-2006

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 22 (5), 226, 32
Karnataka Prevention of Dangerous Activities of Bootleggers Drug Offenders Gamblers
Goondas Immoral Traffic Offenders and Slum Grabbers Act, 1985 — Section 10, 11
(1), 3 (2), 3 (3), 9

Citation : (2006) 3 KCCR 1673

Hon'ble Judges : P. Viswanatha Shetty, J;N. Kumar, J

Bench : Division Bench

Advocate : Venkatesh, for R.B. Deshpande, for the Appellant; S. Dore Raju,
State Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

N. Kumar, J.—The Petitioner is the brother of one Ranaji and son of Barmaji. He has challenged in this writ petition the order of detention dated 2.6.2005 passed by the 2nd Respondent against the detenu Ranaji on several grounds under the provisions of the Karnataka Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1985, (for short herein after referred to as the "Act").

2. The main ground on which the Petitioner is challenging the order of detention is non-compliance of Section 10 of the Act. The order of detention was passed on 2nd November, 2005 u/s 3(2) of the Act. In pursuance to the said order of detention, the detenu was taken into custody on 4.6.2005. Thereafter, the 2nd Respondent submitted a report to the State Government. The State Government has approved the order of detention u/s 3(3) of the Act on 13.6.2005. Thereafter, the State Government has placed before the Advisory Board the detention order and the grounds on which the detention had been made and the representation of the detenu on 13.6.2005 as required u/s 10 of the Act. These facts are not in

dispute.

3. The learned Counsel appearing for the Petitioner Sri Venkatesh, contended that the detention order is liable to be quashed on the short ground of not placing the detention order before the Advisory Board within three weeks from the date of detention of the detenu. According to the learned Counsel, the provisions contained in Section 10 of the Act are mandatory. In support of his submission, he relied upon the judgment of the Supreme Court in the case of S.M.D. Kiran Pasha Vs. Government of Andhra Pradesh and Others, .

4. However, the learned SPP contended that this petition is not maintainable for the simple reason that the Petitioner had earlier challenged the very order of detention and the same having been dismissed by this Court in Writ Petition No. 95 of 2005, he cannot be allowed to raise additional ground which is urged today seeking quashing of the order of detention. Secondly, he submitted that the provisions contained in Section 10 being directory in nature, the order of detention is not vitiated.

5. In the light of rival contentions, the two questions that would arise for our consideration are:

- i) Whether the time stipulated u/s 10 of the Act for reference to the Advisory Board is mandatory or directory ?
- ii) Whether the doctrine of constructive Res judicata apply to proceedings under the preventive detention ?

6. Reg: Question No. 1

In order to answer the first question, it is necessary to refer to Section 10 of the Act which reads as under:

10. Reference to Advisory Board.-In every case where a detention order has been made under this Act, the government shall within three weeks from the date of detention of a person under the order, place before the Advisory board constituted u/s 9, the grounds on which the order has been made and the representation, if any made by the person affected by the order, and in the case where the order has been made by an officer, also the report by such officer under Sub-section (3) of Section 3.

The reading of the aforesaid section makes it clear that in every case where a detention order has been made under the Act, the State Government shall within three weeks from the date of detention of a person under the order, place the same before the Advisory Board. Having regard to the language employed in the aforesaid section, it is clear that the requirement is mandatory in nature. It is necessary to point out that the detenu is kept in detention without any trial. In Section 10 the word employed is "shall". Having regard to the fact that the person is deprived of his right to liberty guaranteed under Article 21 of the Constitution, the requirement of Section 10 which mandates the authority to

place the grounds of detention to the Advisory Board within three weeks must be construed as mandatory in nature. While considering Sub-section (1) of Section 11, wherein the Advisory Board is required to submit its report to the State Government within seven weeks, we have taken the view that the said requirement of submitting report by the Advisory Board to the State Government is mandatory in nature. In our view, what is stated while considering Sub-section (1) of Section 11 would apply to the provisions contained in Section 10 of the Act.

The Supreme Court in the case of Abdul Latif Abdul Wahab Sheikh Vs. B.K. Jha and another, has held as under:

5. Neither of the cases cited by the learned Counsel for the State deal with the question now at issue even in a remote way. They do not have any application. We only desire to add that in a habeas corpus proceeding, it is not a sufficient answer to say that the procedural requirements of the Constitution and the statute have been complied with before the date of hearing and therefore, the detention should be upheld. The procedural requirements are, the only safeguards available to a detenu since the Court is not expected to go behind the subjective satisfaction of the detaining authority. The procedural requirements are therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard. If a reference to an Advisory Board is to be made within three weeks, it is no answer to say that the reference, though not made within three weeks, was made before the hearing of the case. If the report of the Advisory Board is to be obtained within three months, it is no answer to say that the report, though not obtained within three months, was obtained before the hearing of the case. If the representation made by the detenu is required to be disposed of within a stipulated period, it is no answer to say that the representation, though not disposed of within three months, was disposed of before the hearing of the case. We mentioned that we were intrigued that an order of detention should have been made, knowing full well that there was no Advisory Board in existence to whom a reference could be made under the Act and whose report could be obtained as required by the Constitution. Such a casual and indifferent approach betrays a disregard for the rights of citizens and this has to be deprecated. We have no option but to allow the appeal and quash the order of detention dated August 7, 1986. The Petitioner is now on parole. He need not surrender to his parole. In the view that we have taken, we have refrained from referring to the other submissions of the learned Counsel for the Petitioner.

Further, the Supreme Court in the case of S.M.D. Kiran Pasha referred to supra dealing with the identical provision under the Andhra Pradesh Act has held as under:

29... Thus Section 10 makes it mandatory for the Government to place the ground on which the detention order has been made and the representation, if any made by the person affected by the order and in case where the order has been made by an officer, also the report by officer under Sub-section (3) of

Section 3. The section prescribes three weeks from the date of detention irrespective of whether the person continues to be in detention or not. Therefore, even though the detenu was released, if the detention order was in force, his case was required to be placed before the Advisory Board. This being a mandatory provision and having not been complied with, the detention order even if otherwise it was in force, cannot be said to have been in force after three weeks. Under Article 22 of the Constitution of India a person cannot be kept in detention beyond three months without referring his case to an Advisory Board under the appropriate law. In either case, the Appellant's case having not been referred to Advisory Board the detention order cannot be said to have remained in force after the statutory period. It is, therefore, not necessary to go into the validity or otherwise of the grounds of detention.

30. In the result we set aside the impugned judgment of the High Court and hold that the detention order ceased to be in force after 12 days of making thereof and even if it was in force it ceased to be in force for failure to refer the Appellant's case to the Advisory Board within the time prescribed by law; and accordingly we quash the same.

From the aforesaid judgments of the Supreme Court, it is clear that the procedural requirements, are the only safeguards available to a detenu since the Court is not expected to go behind the subjective satisfaction of the detaining authority. The procedural requirements are therefore, to be strictly complied with, if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard. Section 10 makes it mandatory for the Government to place the ground on which the detention order has been made and the representation, if any made by the person affected by the order and in case where an order has been made by an officer, also the report by officer under Sub-section (3) of Section 3 of the Act before the Advisory Board. This being a mandatory provision which has to be complied with under Article 22 of the Constitution of India, a person cannot be kept in detention beyond three months without referring his case to an Advisory Board. If the procedural requirements of law has not been complied with, the order of detention ceases to be in existence after the expiry of three weeks from the date of detention and therefore, the said order of detention is liable to be quashed.

7. Reg: Question No. 2:

It is true that the Petitioner had preferred writ petition in W.P. No. 95 of 2005 challenging the very same order on several grounds and the said writ petition had been dismissed by this Court by an order dated 6th August, 2005. Admittedly, in the aforesaid writ petition, the grounds urged in this writ petition was not raised and accordingly, the said ground was not considered and no finding was recorded. Therefore, the question for consideration is whether the doctrine of constructive res judicata would apply to the case on hand. In this regard, the Supreme Court in the case of Kirit Kumar Chamanlal Kundaliya v. Union of India and Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI)

and Others, dealing with the application of doctrine of constructive res judicata to proceedings under preventive detention has observed at paragraphs-9 and 10 as follows:

9. 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.

10. Apart from the cases discussed above there is another ground on which the argument of Mr. Phadke for Respondents must be rejected. The doctrine of finality of judgment or the principles of res judicata are founded on the basic principle that where a Court of competent jurisdiction has decided an issue, the same ought not to be agitated again and again. Such a doctrine would be wholly inapplicable to cases where the two forums have separate and independent jurisdiction. In the instant case, the High Court decided the petition of the detenu under Article 226 which was a discretionary jurisdiction whereas the jurisdiction to grant relief in a petition under Article 32 filed in the Supreme Court is guaranteed by the Constitution and once the Court finds that there has been a violation of Article 22(5) of the Constitution then it has no discretion in the matter but it is bound to grant the relief to the detenu by setting aside the order of detention. The doctrine of res judicata or the principles of finality of judgment cannot be allowed to whittle down or override the express constitutional mandate to the Supreme Court enshrined in Article 32 of the Constitution. In a recent decision in case of *Smt. Santosh Anand v. Union of India* W.P. No. 1097 of 1979 [decided on 31.10.1979] this Court has pointed out that the concept of liberty has now been widened by *Mrs. Maneka Gandhi Vs. Union of India* (UOI) and *Another*, where Article 21 as construed by this Court has added new dimensions to the various features and concepts of liberty as enshrined in Articles 21 and 22 of the Constitution. For these reasons, therefore, we overrule the preliminary objection taken by the Respondents.

Though in the aforesaid judgment, the question which was not raised under Article 226 was raised by filing a petition under Article 32 before the Supreme Court, we are of the view, the same principle ought to be applied even if a particular ground is not urged in the earlier writ petition under Article 226 and it is urged in a subsequent petition. The reason being that when there is violation of Article 22(5) of the Constitution, the doctrine of res judicata or principles of finality of judgment cannot be allowed to whittle down or override the express constitutional mandate in protecting the fundamental right of a citizen. Therefore, when the facts are not in dispute and when there is violation of mandatory provisions of law and in view of the mandate of Article 22(5) of the Constitution, the personal liberty of a person cannot be curtailed except in a manner known to law, merely because the grounds urged in this writ petition could have been taken in the earlier writ petition filed by the Petitioner, is not a ground to deny the relief to the Petitioner. The aforesaid principle enunciated by

the Supreme Court in the case of Kirit Kumar Chamanlal Kundaliya (supra) squarely applies to the facts of this case. Therefore, we are unable to accede to the submission of the learned SPP that the filing of the writ petition earlier and the dismissal of the same should be construed as a res judicata and on that ground, this petition should be dismissed. Therefore, we answer the second question accordingly.

8. In the light of discussion made above, we make the following order:

ORDER

i) The writ petition is allowed. The impugned order of detention dated 2.6.2005 passed by the 2nd Respondent in No. Revenue/MAG/33 of 2005-06 (Annexure-A) is hereby quashed and the Respondents are directed to release Ranaji s/o Barmaji, at liberty forthwith, if he is not required in any other case.

ii) However, we make it clear that setting aside of this order will not come in the way of the authorities concerned, making a fresh order of detention, if they so desire, in accordance with law.

9. The learned SPP, Sri S. Dore Raju is permitted to file memo of appearance within four we