

(1975) 10 BOM CK 0013

In the Bombay High Court

Case No : Special Civil Application No. 1952 of 1975

Jamna Mahadeo Patil and Another

APPELLANT

Vs

Devarat Mehta and Others

RESPONDENT

Date of Decision : 16-10-1975

Acts Referred:

Bombay High Court (Appellate Side) Rules, 1960 — Rule 1

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1973 (CrPC) — Section 491

Maintenance of Internal Security (Maharashtra Conditions of Detention) Order, 1971 — Rule 38

Citation : AIR 1977 Bom 4

Hon'ble Judges : Dighe, J;Deshmukh, J

Bench : Division Bench

Advocate : Porus Mehta, Sethna and K.D. Shah, for the Appellant; H.G. Advani and V.P. Tipnis, Asst. Govt. Pleader, for the Respondent

Judgement

Deshmukh, J.—This is a petition where the petitioner has been detained under the Maintenance of Internal Security Act, 1971, subject to the conditions of the Maintenance of Internal Security (Maharashtra Conditions of Detention) Order, 1971. These Rules were amended later by the addition of Rule 38, which vests in the State Government power to withdraw any concessions or facilities laid down by the order. Some of the facilities like supplementing diet with the help of food from outside have been withdrawn by the State Government in view of certain orders passed under the added Rule 38. Most of the petitioners filed applications where detention order itself is not being challenged nor the validity or legality of the conditions incorporated in the said order of 1971 are concerned. The only complaint that is being made is that the conditions of detention, which were available under the said Order of 1971 are also not permitted to be availed of by the petitioner, and as such he merely wants a writ of mandamus to be issued directing the State Government or the Authorities detaining the petitioner to follow the provisions of the Maintenance of Internal Security (Maharashtra Conditions of Detention) Order, 1971 (hereinafter referred to as "the Order of

1971"),

2. Several such applications, including the present petition, have been presented in this Court as Special Civil Applications. A question arose whether these petitions should be filed under Chapter XXVIII of the Bombay High Court Appellate Side Rules, 1960, before a Division Bench doing criminal business on the Appellate Side or they should be Special Civil Applications under Article 226 before a Division Bench doing constitutional work. Since such a question arose, the learned Chief Justice by his order dated 4th October, 1975, as amended later, referred this matter to the present Bench for hearing the advocates concerned on this subject and give a decision whether such applications should be directed to be registered as Criminal Applications under Chapter XXVIII or Special Civil Applications under Chapter XVII of the Bombay High Court Appellate Side Rules, 1960.

3. There was an earlier reference when Special Civil Applications Nos, 2212 and 2213 of 1975 were referred for the specific decision as to whether applications challenging the detention and in the nature of habeas corpus would lie under Chapter XXVIII or under Chapter XVII of the Bombay High Court Appellate Side Rules, 1960. The question raised was that after the repeal of Section 491 of the Criminal Procedure Code, 1898, the provisions of Chapter XXVIII have become ineffective and do not apply to writ petitions challenging the detention and claiming a writ of habeas corpus. That reference was decided on 1st and 2nd October, 1975, and on the construction of the Rules it has been held that all such applications, where the subject-matter is the writ of habeas corpus, would appropriately lie under Chapter XXVIII of the Bombay High Court Appellate Side Rules, 1960.

4. Before we consider the classification of such petitions let us analyse the prayers that are made and find out the real nature of the petition. What is being stated before us is that the detenu is not challenging the order of detention at all. He is also not challenging the validity and legality of the order of 1971 dealing with the conditions of detention. The detenu is willing to stay behind the bars but under the condition of the Order of 1971 and in conformity thereof. Since he is not being so detained but some of the rights available to him under that Order are also being deprived, he is merely requiring the Court's assistance for a writ order in the nature of mandamus requiring the statutory authorities connected with the detention of the petitioner to observe the law and the rules that are laid down in that Order of 1971. So viewed, there is nothing in the contents of the petition nor the prayer of relief which smacks of any claim or relief of the nature of habeas corpus. That being the real nature of the petition, the proper classification would be a Special Civil Application under Chapter XVII of the Bombay High Court Appellate Side Rules, 1960.

5. For the purpose of making such an argument it is stated that the earlier order passed by this Court in Special Civil Applications Nos. 2212 and 2213 of 1975 may be accepted as basis for classifying the applications. If the present petitions

could also be described as applications for habeas corpus or applications falling in that category of matters, a direction may be given to treat them as criminal applications falling under Chapter XXVIII of the Bombay High Court Appellate Side Rules. However, that order has analysed the provisions of Rule 622 of the Original Side Rules, Chapters XVII, XXVI and XXVIII of the Appellate Side Rules, and has concluded that for all applications under Article 226 for issue of writ of habeas corpus the Court made available is the Division Bench taking criminal business on the Appellate Side as per Rule 1 of Chapter XXVIII of the Bombay High Court Appellate Side Rules, 1960. Barring this kind of application under Article 226, all other applications falling under Article 226 of the Constitution are held to lie properly under Chapter XVII. Accepting that classification it is stated that an application of the present type would on that classification itself fall under Chapter XVII.

6. There is an obvious fallacy in the argument that is addressed to us. If there is a rule like Rule 38 in the Order of 1971, the State Government is purporting to act under that rule and deprived the detenus of certain conditions comprising the Order of 1971. It was brought to our notice that a rule in similar terms contained in the conditions of detention order under COFEPOSA have been struck down by the judgment of this Court in *Ramesh Ram Lal Narang v. C. T. A. Pillai*, (1975) 77 Bom LR 506. However, this does not mean that Rule 38 of the Order of 1971" automatically gets struck or becomes ineffective unless there is a judicial pronouncement. We were further told that the detenus are not yet informed by the Government as to how they are deprived of the facilities which were earlier available under the conditions incorporated in the Order of 1971. They are merely told that they will get orders in due course. Whether the deprivation is after passing an order under Rule 38 or without acting under that rule is not known to the litigants. So far as they are concerned and on the basis of the information supplied by the Government or, in fact, not supplied by the Government, they treat the deprivation of certain conditions as a stark illegal act and, therefore, want a writ of mandamus to be issued by this Court.

7. What reality is the nature of the petition even on the basis of all that is stated before us ? There may be an order under Rule 38 which is responsible for depriving the facilities earlier available. In that case the Government is seeking to act under Rule 38. If there is no such order either individually against each detenu or collectively against a class, the action is clearly contrary to the provisions of the Order of 1971. Whatever the real manner in which interference with the conditions of detention is being brought about, the fact remains that there is a complaint against the legality thereof and, therefore, some relief is asked for from this Court.

8. It is here that the real nature of the writ of habeas corpus and the manner in which this important writ can be utilised by the citizen, falls for consideration. Historically speaking this is being considered in England as one of the most important writs and practically the main writ in the field for obtaining a swift and

imperative remedy in all cases of illegal restraint or confinement. These observations are made by Lord Birken-head in *Secretary of State for Home Affairs v. O'Brien* 1923 AC 603 . Mr. Seervai in his learned treatise *Constitutional Law of India*, 1967 Edition has traced the history of the writ jurisdiction in England and particularly relating to the habeas corpus writ in Section 1 of Chapter XVI. After quoting an extract from the judgment of Lord Birkenhead, the learned author observed that the brief historical account of the writ of habeas corpus shows that the writ is available in all cases of wrongful deprivation of personal liberty and is available against the Crown, its ministers and its servants. In our view, where detention itself is challenged on the ground that it is unlawful; here is a challenge to the deprivation of liberty in its entirety. When a person is detained and is required to be detained under the statutory provisions in a certain manner, not to detain him as such but to interfere with the statutory conditions under which he must be detained also amounts in principle and in law to an interference with his personal liberty. It may be that this interference is of partial character, when the action touches only a part of the liberty, in the sense, the manner of detention. This approach is historically well founded and it is not possible to accept the argument that unless detention itself is challenged or the legality of the conditions of detention are challenged, there is no challenge to any part of the personal liberty at all. If the action of the State Government is in clear breach of the provisions of the Order of 1971, and that alone is challenged to the extent of the conditions under which the detenu should have been restrained, there is undoubtedly a challenge to a part of the deprivation of personal liberty of the detenu. When there is such partial interference with the personal liberty of a person, a writ of habeas corpus seems to be available. That inference can be drawn from the observations in the *Halsbury's Laws of England*, Third Edition, Volume II, in paragraph 41" on page 24. The learned author observed that the writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. If the detention itself is not challenged, but the manner of detention is challenged, it amounts to throwing the challenge to a partial deprivation of personal liberty and in essence the remedy is nothing but a writ of habeas corpus. It appears that general observations are made by the Supreme Court in relation" to the conditions of detention, when the detenu is not being permitted to transfer his manuscript to his wife for its ultimate publication. It was admittedly a book on scientific subject and the question was whether the detenu could be prevented from publishing such a book simply because he was under detention. The Supreme Court observed in *State of Maharashtra Vs. Prabhakar Pandurang Sangzgiri and Another*, that if the appropriate authority seeks to impose on a detenu a restriction not so prescribed, the said authority will be interfering with the personal liberty of the detenu in derogation of the law where-under he is detained. If that happens, the High Court, in terms of Article 226 of the Constitution, can issue an appropriate writ or direction to the authority concerned to act in accordance with law. No direct judgment has been cited before us, but observations of this type," which are made from time to time by the Supreme Court, have been relied on to point out that the deprivation of

personal liberty can arise in several ways. Not to detain a detenu in terms of the conditions validly enacted or to put restrictions or conditions not validly enacted, to disregard the conditions which are valid and to act in derogation thereof would be very much a shade of the deprivation of the liberty. There is, therefore, no doubt that as and when the question of personal liberty arises and the allegation is that the detention is unlawful, in any of the ways including the partial challenge to conditions only, as we have discussed above, the petition seems to be either a petition for claiming habeas corpus or a petition of that nature falling under Article 226 of the Constitution.

9. If this is the real nature of the petition that is before us, could it be said that such a petition would not fall under the provisions of Chapter XXVIII of the Bombay High Court Appellate Side Rules, 1960, as interpreted by this Court in Special Civil Applications Nos. 2212 and 2213 of 1975. For applications of habeas corpus or applications in the nature of habeas corpus under Article 226, the only provisions made by the Bombay High Court are those contained in Chapter XXVIII. If those rules apply, the applications for seeking any relief of the nature contemplated by that Chapter in relation to Article 226 of the Constitution must always be marked as Criminal Applications falling under that Chapter. This is purely a procedural provision and this Court has pointed out in the earlier judgment that the real nature of the dispute with reference to the right of appeal can always be raised and point out to the Court when the question of leave arises.

10. One of the arguments that was addressed to us was what the petitioner is seeking is a writ of mandamus to the authorities to observe law. That may be the form in which the prayer has been drafted. However, if the State Government seeks to detain the detenu under some orders by which the facilities earlier given are not made available, the new pattern of detention represents the conditions of detention. Unless this action is struck down, a further detention to detain "the detenu in a certain manner or under certain rules may not be possible. In spite of the manner of drafting, we are satisfied that the present petition as also similar other several petitions of that type are properly applications for habeas corpus or applications of that nature and properly lie within the ambit of Chapter XXVIII of the Bombay High Court Appellate Side Rules. This being our view, we direct that the present application as also all similar applications should be registered as Criminal Applications under Chapter XXVIII of the Bombay High Court Appellate Side Rules, 1960, and they should be processed and dealt with accordingly.

11. Any interim relief granted in this and similar other Applications marked as Special Civil Applications to continue as an interim relief under their new designations as Criminal Applications.

12. Order accordingly.