
(1977) 10 DEL CK 0008

In the Delhi High Court

Case No : Criminal Writ Appeal No's. 58, 64 and 65 of 1977

Mohd. Sadiq etc.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-10-1977

Acts Referred:

Citation : (1978) ILR Delhi 557

Hon'ble Judges : Prakash Narain, J;A.B. Rohtagi, J

Bench : Division Bench

Advocate : P.P. Malhotra and D.R. Sethi, for the Appellant;

Judgement

Avadh Behari Rohatgi, J.

(1) These three writ petitions are a part of a bunch of seven writ petitions.

(2) By our order dated September 15, 1977, we accepted four writ petitions (Criminal Writ Petition Nos. 53,(1) 54,(2) 55,(3) and 56(4) of 1977) and ordered the release of those four petitioners. These three writ petitioners also seek writs of habeas corpus challenging the validity of their detention. At the conclusion of the hearing on October 4, 1977, we announced our decision.. We accepted the writ petitions, made the rule absolute and issued a writ of habeas corpus in each of these three cases directing the respondents to set these petitioners at liberty forthwith, if not required in any other case. Now we give our reasons.

(3) In these three cases the Additional District Magistrate passed three separate orders of detention in respect of each of the three petitioners in April 1977 under sub-clause (i) of clause (a) of subsection (1) of section 3 of the Maintenance of Internal Security Act 1971 (26 of 1971) (the Act) directing that the petitioners be detained on the ground that it was necessary to do so with a view to preventing them "from acting in any manner prejudicial to the security of India". Immediately they were served with the grounds of detention.

(4) The grounds of detention in all the three cases are very much alike. The

substance of the grounds of detention is that the petitioners were harbouring Pakistani spies, that they were engaged in espionage work prejudicial to the security of India, that they were obtaining by surreptitious means information about activities and enterprises for political and military uses and were secretly communicating the same to Pakistan intelligence.

(5) The grounds disclose that the three petitioners were arrested by the police in connection with case Fir No. 263 dated October 8, 1976, under sections 3, 9 and 10 of the Indian Official Secrets Act read with section 120-B of the Indian Penal Code registered against them at the Police Station Seelampur. The three cases, it would seem, arise out of one transaction and conspiracy is the common bond between the three petitioners.

(6) Counsel for the Administration Mr. D. R. Sethi frankly conceded that these three cases were in no way different from the four cases in which we ordered the release of four petitioners on September 15, 1977. These cases are, Therefore, directly covered by our decision dated September 15, 1977 in Criminal Writs Nos. 53, 54, 55 and 56 of 1977. No serious attempt was made on behalf of the respondents to support the legality of the impugned orders either by distinguishing these cases or Otherwise.

(7) Mr. Sethi, however, raised one additional point in these cases. Relying upon Haradhan Saha Vs. The State of West Bengal and Others, he argued that it was not obligatory on the State to give opportunity to the detenu to make representation against the order of detention as it was always open to him to do so if he was so minded.

(8) In Eknath Laxman Choudhury v. Superintendent Central Jail and others, Criminal Writ No. 39 of 1977 decided on August 11, 1977, (6) we held that an independent and distinct obligation to give an opportunity to the detenu to make a representation against the order of detention flows from the words of section 8(1) of the Act as from Article 22(5) of the Constitution of India. That is an essential step in the procedure. We interpreted the words "and shall afford" used in section 8(1) of the Act as words of affirmative content both in tone and tenor and as laying down a positive obligation on the detaining authority to give the detenu an opportunity of making a representation.

(9) Counsel contended that we were wrong in our view and that our view did not have the support of Haradhan Saha's case.

(10) After hearing further arguments we remain of the same opinion as before. As we read section 8 of the Act we find there are two distinct obligations laid on the State. It says that the detaining authority shall

(1) communicate to the detenu the grounds on which the detention order has been made ; and

(2) shall afford to the detenu the earliest opportunity of making a representation against the order to the appropriate Government.

(11) The sole question is : What is the meaning of the words "and shall afford". The dictionary meaning of the word "afford" is to give, grant, confer, bestow. The primary rule of construction is : plain words must be given their plain meaning. Applying this rule it means that an opportunity has to be afforded to the detenu to make a representation. It is not a favor that the detaining authority is pleased "to bestow on him. It is not an act of grace. It is his right-a right conferred on him by the statute and a corresponding duty cast on the detaining authority. This is a procedural safeguard, as we have said in Eknath Laxman Choudhury's case.

(12) To all lovers of freedom preventive detention is an odious thing. Preventive detention, it is true, has the sanctity of the Constitution. But this sinister-looking feature, so strangely out of place in a democratic Constitution which invests personal liberty with the sacrosanctity of a fundamental right and so incompatible with the promises of its preamble was doubly designed to prevent an abuse of freedom, by anti-social and subversive elements which might imperil the national welfare: The object of the framers of the Constitution in giving a constitutional status to preventive detention was that though they recognised the necessity of the law of preventive detention, they wanted to provide certain safeguards to prevent an abuse of the power. The procedural requirements are all mandatory and failure to comply with any of them will render the detention invalid.

(13) The Constitution imposes constitutional constraints upon the authority of the Government. This is why in broad majestic language Article 21 declares:

""No person shall be deprived of his life or personal liberty except according to procedure established by law."

(14) This Article enunciates the rule of law, life and liberty. It opens with the word "NO". The word "no" has a finality in all languages that few other words enjoy.

(15) In Article 22(5) the primary mandate of the Constitution to the detaining authority is that it shall communicate to the detenu the "grounds" of his detention :

""And shall afford him the earliest opportunity of making a representation against the order" (Art. 22(5)).

(16) This is also the legislative command in section 8 of the Act in consonance with the constitutional provision.

(17) The procedure established by law requires the detaining authority to afford to the detenu the earliest opportunity of making a representation against the order of detention. How is this obligation to be discharged ? Plainly by giving opportunity to the detenu to make a representation against the detention order. It is another thing that he does not avail of the opportunity. That is up to him. But the giving of opportunity is a must.

(18) If an opportunity is afforded to the detenu to make a representation as is enjoined on the State by the Constitution and the Act and the detenu makes a representation to the State protesting against his preventive detention then the further question of consideration of his representation arises. Of course the representation of the detenu has to be considered. But that is an altogether different obligation on the State. The duty to consider the representation should not be confused with the duty of affording opportunity to the detenu of making representation against the order of detention.

(19) The duty of affording an opportunity is not a matter of mere form. It is a matter of substance. Even if it were a matter of form the detaining authority has to follow the forms scrupulously. As long as 1881 Cotton L.T. said :

".....I quite agree with Brett L.J. that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be matters of mere form."

(THOMASPELHAM DALE'S Case (1881) 6 Q.B. 376 .

(20) In Patanjali Sastri C.J. said :

".....those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of law."

(21) Hardhan Saha's case is important for two reasons. Firstly, it was in this case that the constitutional validity of the Act was upheld. It was held that the Act did not violate Articles 14, 19, 21 and 22 of the Constitution.

(22) Secondly, a constitution bench of five judges held that merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence would not by itself debar the Government from taking action for his detention under the Act. The view of two judges to the contrary in *Waman* was overruled :

(23) In Hardhan Saha's case Ray C.J. said :

"SECTION 8 of the Act follows the provisions of Article 22(5) of the Constitution. Article 22(5) enjoins upon the detaining authority obligation to afford to the detenu earliest opportunity of making a representation against the order."

(Page 215).

(24) We do not find anything in Hardhan Saha's case which militates against the view which we have taken in the case of *Eknath Laxman Choudhury*.

(25) Our research has brought to our attention an English case on the point in support of our view, though we think no support is needed as the words of the Act are quite plain. The case in point is the decision of Donaldson J. in *Lee v. Weir*.

Department of Education and Science, (1967) 66 L.G.R. 211. Before exercising his powers, conferred upon him by section 17(5) of the Education Act 1944, to alter the articles of government of a school, the Secretary of State must give persons concerned with the government of the school an opportunity of making representations to him. The words in the statute were that the Secretary of State "shall afford to the local education authority. . . . an opportunity of making representation to him. . . ."

(26) By a letter dated September 14, and addressed to the governors of a grammar school the Secretary of State for Education and Science announced his intention to alter the school's articles of government to a particular end under ss. 17(5) and Iii, and he stated that representations might be made to him before 12 noon on September 18. The plaintiffs, a governor, an assistant master and the parent of a pupil sued the Secretary of State asking the court for a declaration that the time for representations was insufficient. Granting the declaration Donaldson J. held : (1) that upon their true construction ss. 17 and Iii required reasonable notice; and (2) that in the circumstances the notice given was unreasonable amounting in fact to denial of opportunity; (See (1958) 7 Current Law item No. 138, Stroud's Judicial Dictionary 4th edition volume Iii page 1857 and Halsbury's Statutes of England, 3rd edition volume Ii page 177).

(27) It may, Therefore, be stated as a principle that a wholly unreasonably short period for representation amounts to a denial of opportunity. This applies with equal force to our Act as it does to the English Education Act. Lee's case supports us in the view that the detaining authority has to give a reasonable opportunity to the detenu to make a representation against the order of detention to a designated authority. If the time given to the detenu is pitifully inadequate how can he make a representation. It will amount to an erosion of his statutory right.

(28) In none of these cases was any opportunity afforded to the petitioners for making a representation. This is a fatal flaw and enough to dispose of these cases.

(29) The orders of detention in all the three cases are also invalid because the Administrator of the Union territory of Delhi and the Central Government did not have before them all that material that was present before the detaining authority at the time of making the orders. Therefore, the orders of the Administrator approving the impugned orders of detention are not in a strict compliance with subsection (3) of section 3 of the Act. Nor in our opinion did the Central Government discharge its functions under sub-section (4) of section 3 of the Act when it did not have before it all the material on which it could satisfy itself about the "necessity" of the order of detention.

(30) Take the case of Syed Akhtar Hussain (Cr. Writ No. 65 of 1977). Mr. Ashok Pradhan, the then Additional District Magistrate has sworn an affidavit dated September 29, 1977, wherein he says in paragraphs 9 and 20(M) :

".....IT is submitted that the orders of detention were passed not at the instance of anybody but only on the perusal of the record of the prejudicial activities of the petitioner sent by the police" to me.

(31) Now the question is : Was this police record of the "prejudicial activities of the petitioner" sent to the Administrator when he was requested to approve the order ? On this the detaining authority in its affidavit has this to say in paragraph 20(H) :

""As the grounds of detention completely disclose the prejudicial activities of the petitioner there was no necessity of sending any other document to the State Government."

(32) This would show that except the grounds of detention nothing else was shown to the Administrator at the time of the approval of the order under s. 3(3). The affidavit of Mr. T. R. Kalia, Deputy Secretary (Home) Delhi Administration and Raghbir Singh, Inspector of Police, Cid Special Branch, Delhi are at variance with the affidavit of the detaining authority. Basing ourselves on the affidavit of the detaining authority we find that there was no record of the prejudicial activities of the petitioner in Cr. Writ No. 65 of 1977 before the Administrator and he did not. Therefore, discharge his statutory functions in the manner required by the Act.

(33) In the case of Moin-Uddin (Cr. Writ No. 64 of 1977) Mr. T. R. Kalia in his affidavit-in-opposition says :

""The administrator approved the order of detention of the petitioner on 28th April, 1977, on perusal of the prejudicial activities of the petitioner as mentioned in the grounds of his detention."

(34) It would, Therefore, appear that basic material or particulars having a bearing on the matter were not sent to the Administrator as required by s. 3(3) of the Act. He was shown only grounds of detention. Obviously the grounds will be based on some material or information which was before the detaining authority. In the affidavit of Shri Raghbir Singh, Inspector Police it is said that :

""A record of the material collected against the petitioner was submitted to the detaining authority to enable the detaining authority to decide the question of the detention of the petitioner."

(35) This "record of material" was never sent to the Administrator. How could the Administrator then apply his mind for the purpose of approving the order? How could the Central Government satisfy itself about the "necessity" of the order?

(36) In Moin-uddin's case the grounds disclose that he visited Pakistan four times and accompanied Pak spy to Bhatinda and "provided as an effective cover to Pak spy during his stay in India."

(37) These grounds lack particulars. The time of the visits to Pakistan is not stated. Nor has the time of visit to Bhatinda been given. We think these

particulars were necessary in order to enable the detenu to make an effective representation against the order of detention. The need for giving particulars has again and again been emphasised by the Supreme Court and this court. In this connection reference may usefully be made to two decisions of the Supreme Court : We, Therefore, hold that the grounds in respect of Moin-uddin are vague.

(38) One word more. We have been at pains to point out in earlier cases that the three-tier system envisaged by the Act was enacted by a legislature ever jealous of the freedom of the individual and ever watchful to see that the Administrator and the Central Government act as a check and countercheck on the vast powers of the detaining authority. One authority is set over the other so that it oversees what the other does. It can check a second time for verification whether the order of detention is grounded in "necessity". The Central Government has to be the judge of the "necessity of the order", to use the words of the Act [S. 3(4)]. "Necessity" alone and not expediency is the guiding star under the Act. The legislature intended the two authorities of the three-tier set-up, namely, the appropriate Government and the Central Government, to do their real job of supervisors and overseers of the detaining authority and not merely act in a casual or mechanical manner. "Preventive detention is a jurisdiction of suspicion against the person concerned in the mind of the executive. This explains why courts have traditionally championed the individual. Through the medium of the prerogative writs the courts protect the citizen's rights, even against interference by the executive.

(39) But if there is no check or verification either because of no application of mind or because the relevant material has not been placed before the higher authority the built-in safeguards will avail nothing to the detenu. His prayer for deliverance will remain unanswered. His memorial or remonstrance of innocence will remain unheard. In such a situation what detdenu to He can only find solace in the thought : "Against the decree of fate there is no appeal".

(40) The procedural safeguards are, Therefore, of the highest importance. They are not trivial or secondary. They are primary and basic. Their role in guarding personal liberty is that of sentinel to a treasure house of infinite riches. Indeed so precious is the cherished It is like oxygen in the air, a life-giving spirit (Bryce-Modern Democracies Vol. I page 67). It will not be untrue to say that the history of liberty is essentially the history of procedural safeguards.

(41) We need not elaborate our reasons further as elaborate reasons we have already given in the connected writ petitions 53, 54, 55 and 56 of 1977.

(42) For these reasons we accept the petitions and make the rule absolute.