
(1984) 02 GUJ CK 0017
In the Gujarat High Court

Ratilal Devabhai Navik

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 17-02-1984

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3
Constitution of India, 1950 — Article 136, 21, 22, 226, 32
Customs Act, 1962 — Section 135
Foreigners Act, 1946 — Section 3

Citation : (1985) CriLJ 96 : (1985) 1 GLR 23 : (1983) 2 GLR 657

Hon'ble Judges : B.S. Kapadia, J;B.K. Mehta, J

Bench : Division Bench

Judgement

B.K. Mehta, J.—Whether successive applications for a writ of Habeas Corpus on the same and/or fresh grounds can be filed before the High Court is a moot question which arises in this criminal application. In order to appreciate the contentions which have been urged on behalf of the petitioner-detenu, it is necessary to briefly set out a few facts which are as under :

The petitioner has been detained by the order of the State Government dated Mar. 18, 1983 in exercise of the powers conferred by Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the COFEPOSA"). The petitioner was supplied with the grounds on which the detention order has been made, on the same day in Gujarati as well as in English. It appears that the wife of the petitioner Smt. Manjulaben Ratilal had moved this Court for appropriate writ, order and/or direction, and particularly a writ of or a writ in the nature of Habeas Corpus by her Spl. Criminal Appln. No. 547 of 1983 impugning the detention order. The said Special Criminal Application came up for hearing before a Division Bench of this Court (Coram : A.M. Ahmadi & M.B. Shah, JJ) which by its judgment and order of July 21, 1983 : Reported in (1983) 24 GujLR (2) 1505 rejected the said special criminal application after negating all the contentions urged therein and

upholding the detention order. By the present petition, however, the petitioner seeks to challenge the validity of the detention order on the grounds which he claims to be fresh grounds. It is not necessary to set out all the grounds which have been averred in the present petition. Suffice it to mention three grounds only which have been pressed by the learned Advocate for the petitioner as fresh grounds on which the jurisdiction of this Court is invoked for issuance of a writ of Habeas Corpus. Shortly stated, the three grounds which the learned Counsel for the petitioner claims to be fresh grounds are ;

(1) Denial by the Advisory Board of the assistance of a lawyer to the detenu at the time of hearing on his representation before the Board.

(2) Nonsupply of the material document, namely, log book maintained on board the mechanically propelled Vessel by name "Krishnaprasad UPR 1477" which is a fishing trawler.

(3) Refusal to summon witnesses as prayed for by the detenu and permitting their cross-examination.

2. These are the three grounds pressed in service in support of the present petition.

3. The petition has been resisted on behalf of the respondents by raising a preliminary objection that the second petition for a writ of Habeas Corpus is not competent before the High Court since the earlier petition dismissed by the Division Bench was an order made on behalf of this Court and, therefore, according to the correct practice and legal principles, the second petition, assuming to be on the fresh grounds even, is not competent. In any case, assuming without admitting that such a second petition is competent, the so called grounds are merely additional facets of the same challenge to the legality of the detention and, therefore, the petitioner is not entitled to press them in service as if they are the fresh grounds in support of the present petition.

4. Two questions, therefore, arise for our consideration in this petition. Firstly, whether successive petitions for a writ of Habeas Corpus are competent before the High Court even on the fresh grounds and, secondly, whether the grounds which have been pressed on behalf of the petitioner in support of the present petition can be said to be fresh grounds at all or are merely different facets of the same argument,, namely, denial of adequate opportunity of making adequate representation as enshrined in the Constitution which ground was squarely pressed on behalf of the petitioner by his wife in the earlier petition.

5. We will deal with both these questions in the same order in which we have set out above.

Re : Question No. 1

6. In Ghulam Sarwar Vs. Union of India (UOI) and Others, , a five Judge Bench of the Supreme Court was concerned with the question as to whether the

principle of *res judicata* is applicable in the context of a writ of Habeas Corpus so far as High Courts are concerned. Ghulam Sarwar was a Pakistani national who entered India without any travel documents. He was arrested by the Customs Authorities u/s 135 of the Indian Customs Act, 1962 on May 8, 1964. He was, however, enlarged on bail on the next day, that is May 9, 1964. Ultimately he was ordered to be released on May 18, 1965. At the point of time when he was actually released from the jail, he was served with a detention order passed by the Central Government u/s 3(2)(g) of the Foreigners Act, 1946. He was required to be detained since the police investigation was in progress in respect of a case of conspiracy to smuggle gold of which he was a member. He was convicted by the Magistrate, First Class, Delhi by his order of May 29, 1965 for an offence under the Customs Act and sentenced to undergo rigorous imprisonment for a period of 9 months and to pay a fine of Rs. 2000/-. His appeal before the Sessions Court failed. The petitioner served the course of sentence and paid the fine. However, before his term of imprisonment expired, he filed a writ of Habeas Corpus in Punjab High Court at Delhi challenging his detention. That petition also came to be dismissed by Khanna, J. on merits, it was common ground that before the learned single Judge the vires of Section 3(2)(g) was never canvassed. The learned Judge was of the view that in absence of the challenge to the said order of detention on the ground of *mala fides*, the Court has no power to scrutinise it judicially. The detenu therefore filed a fresh petition Under Article 32 of the Constitution on May 12, 1966. *inter alia*. on the ground that the provisions of the Foreigners Act were *ultra vires* the Constitution. In that context, the question arose whether the order of Khanna, J. operated as a bar to the fresh proceeding on the principle of *res judicata*. A five Judge Bench, speaking through Subba Rao C.J. (as he then was) held as under :

(8) On the question of *res judicata*. the English and the American Courts are agreed that the principle of *res judicata* is not applicable in a writ of habeas corpus but they came to that conclusion on different grounds. It was held in England that a decision in a writ of habeas corpus was not a judgment and, therefore, it would not operate as *res judicata* and on and basis it was thought at one time that a person detained could file successive applications before different Judges of the same High court. But subsequently the English Courts held that a person detained cannot file successive petitions for a writ of habeas corpus before different courts of the same Division or before different Divisions of the same High Court on the ground that the Divisional Court speaks for the entire Division and that each Division for the entire Court, and one Division cannot set aside the order of another Division of the same Court (see *Re Hastings* (No. 2) (1958) 3 All ER 625 and *Re Hastings* (No. 3) (1959) 1 All ER 698). The Administration of Justice Act, 1960 has placed this view on a statutory basis, for under the said Act no second application can be brought in the same Court except on fresh evidence. The American Courts reached the same conclusion but on a different principle. In *Edward M. Fav. v. Charles Noia* 1835 38 Law Ed 859, the following passage appears : "As put in by Mr. Justice Holmes in *Frank v.*

Mangum 1915 237 US 309 (348). If the petition discloses facts that amount to loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision of law. It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void. Hence, the familiar principle that *res judicata* is inapplicable in habeas proceedings." The same view was expressed in *Wong Doo v. United States* 1923 68 Law Ed 999. *Harmon Metz Waley v. James A Johnston* 1941 86 Law Ed 1302, *Salinger v. Loisel* 1923 265 US 224, *United States v. Shaughnessy* 1954 347 US 260 and others.

(9) But coming to India, so far as the High Courts are concerned, the same principle accepted by the English court will equally apply, as the High Court functions in Divisions not in benches. When it functions as a Division, it speaks for the entire Court and. therefore, it cannot set aside the order made in a writ of habeas corpus earlier by another Division Bench. But this principle will not apply to different court. The High courts of Allahabad. Bombay. Madras. Nagpur and Patna and East Punjab have accepted this view, though the Calcutta High Court took the view that successive applications of habeas corpus could be filed. But unlike in England in India the person detained can file original petition for enforcement of his fundamental right to liberty before a court other than the High court, namely, this Court. The order of the High court in the said writ is not *res judicata* as held by (he English and the American courts either because it is not a judgment or because the principle of *res judicata* is not applicable to a fundamentally lawless order. If the doctrine of *res judicata* is attracted to an application for a writ of habeas corpus, there is no reason why the principle of constructive *res judicata* cannot also govern the said application, for the rule of constructive *res judicata* is only a part of the general principles of the law of *res judicata*. and if that be applied the scope of (he liberty of an individual will be considerably narrowed. The present case illustrates the position. Before High Court the petitioner did not question the constitutional validity of the President's order made Under Article 359 of the Constitution. If the doctrine of constructive *res judicata* be applied, this Court, though enjoined by the Constitution to protect the right of a person illegally detained will become powerless to do so. That would be whittling down the wide sweep of the constitutional protection.

7. The majority of the High Courts also, as noted by the Supreme Court in para 9 above in *Ghulam Sarwar Vs. Union of India (UOI) and Others*, , hold the view that successive petitions for a writ of habeas corpus are not competent before the same Court. As far as (his Court is concerned, we may refer to the relevant decision of the Bombay High Court where the view has been taken (hat successive applications are not competent. A Full Bench of Bombay High Court in *In Re Prahlad Krishna Kurne* AIR 1951 Bom 23 : 1952 Cri LJ 305. was concerned with the competency of an application for review of the order made by another Division Bench of the same Court dt. June 12. 1950 rejecting the application of the detenu made u/s 491 of the Cri.PC. Since such an application was not competent in view of the earlier Full Bench decision of the Bombay High Court in

Emperor v. Malhari AIR 1948 Bom. 126 : 1948 Cri LJ 460 a further application was made by the petitioner that although a review may not lie it was a right of the detenu to make an application for a writ of Habeas Corpus Under Article 226 of the Constitution to (he successive Judges of the Court and in pursuance of that right, the petitioner was entitled to be heard by the judges other than the Judges who made that order. The Full Bench, speaking through Chagla C.J. referred to the legal position in U.K. in that behalf. The relevant paragraph from Halsbury's Laws of England Vo. IX p. 727. para 12.19 was quoted which read as under :

The applicant has a right to apply successively to every court competent to issue a writ of Habeas Corpus and each tribunal must determine such an application upon its merits unfettered by the decision of any other tribunal of co-ordinate jurisdiction, even though the grounds urged are exactly the same...." Thus each Judge of the High Court of Justice has jurisdiction to entertain an application for a writ in term time or vacation, and he is bound to hear and determine the application on its merits, notwithstanding that some other Judge has already refused a similar application.

8. After noting the above passage, the Full Bench observed that the right which is recognized is the right not to approach every Judge of a Court but to approach every Court and every Tribunal and (here is no right to approach the same Tribunal or the same Court. The Full Bench also noted that each Judge of the High Court of Justice in England is constituted a Court or a tribunal for the purpose of issuing writs of habeas corpus, and as each Judge is a separate Court, or a separate Tribunal for that purpose, the subject has a right to approach each Judge successively as if each Judge was a different Court or a different Tribunal. The Full Bench considered as to what is the position in India in respect of the orders passed by the High Court u/s 491 of the Code of Criminal Procedure. The Full Bench ruled as under :

(5) It is true that the High Court acts through a Judge or Judges nominated by the Chief Justice for that purpose, and although an application u/s 491 may be heard by a Division Bench of this Court the judgment that it ultimately pronounces is not the judgment of that Division Bench but the judgment of the High Court. The Division Bench acts on behalf of the High Court and as the High Court for the purpose of hearing and disposing of an application u/s 491. Therefore, when the decision is given, it is the decision of the High Court. There is no provision either in the Letters Patent or in any of the rules framed by the High Court for a Judge or Judges of the High Court to exercise independent jurisdiction in matters coming u/s 491. The question still remains whether in cases that may not fall u/s 491 and which may fall Under Article 226 there is any independent jurisdiction conferred upon any Judge of the High Court to issue writs contemplated by Article 226. It is clear that even Under Article 226 it is only the High Court that can issue a writ for the enforcement of a fundamental right. The jurisdiction is conferred upon the High Court as such and

not upon any Judge or Judges of that Court, and therefore when a Division Bench of this Court hears an application Under Article 226, it is hearing that application as the High Court, and its ultimate decision is not their decision but the decision of the High Court.

9. The Full Bench thereafter addressed itself to another facet of the question as to whether the decision of the High Court on an application for a writ for enforcement of fundamental right Under Article 226 is subject to the review of the High Court. The Full Bench negated such a power and observed that a power of review like a power of appeal must be conferred by statute. No such power is available under the Cri PC and there is nothing in Article 226 which would induce the Full Bench to hold that the constitution has conferred a power upon the High Court of review in matters falling under that article. The view expressed by the Full Bench on an appeal made by the Counsel for the detenu before the Bombay High Court that the court should exercise the jurisdiction since the question involved was a question of individual liberty, the Full Bench did record that an appeal on the ground of individual liberty is difficult to resist but found that the apprehension expressed on behalf of the detenu was not well founded since the decision of High Court reviewing a writ or an order Under Article 226 may become final qua the High Court subject to the other remedy which the Constitution provides for the citizens who have an independent right to approach the Supreme Court Under Article 32 of the Constitution since the powers of both the Courts are concurrent and notwithstanding the refusal of the High Court to enforce the fundamental right of the citizen, he can approach the Supreme Court in its primary jurisdiction, and also a right to ask for special leave to appeal Under Article 136. The net result of this decision is that under Art 226 a citizen has no right to present successive applications for issuing a writ of Habeas Corpus to different Judges of the same High Court.

10. The above decision is binding as far as this Court is concerned. The other High Courts have also taken a similar view as noted by the Supreme Court in Ghulam Sarwar Vs. Union of India (UOI) and Others, . The Madras High Court has also taken a similar view that successive applications to seek same relief either u/s 491 of the Cri.PC or Under Article 226 of the Constitution are not maintainable (see : P. Ramakrishna Sastry Vs. C.T.S. Raganayakulu and Another, .

11. A Full Bench of Allahabad High Court has taken a similar view in respect of successive applications u/s 491 of the Cri.PC. though that is a pre-constitution judgment (see : Satish Gupta Gurha and Another Vs. Rex, .

12. Two other High Courts have taken a different view in the matter. A Full Bench of Calcutta High Court has held that successive applications for issuing a writ of or an order in the nature of Habeas Corpus either Under Article 226 of the Constitution or u/s 491 of the Cri.PC do not lie in the same High Court except under two circumstances viz. that facts and materials were in existence at the time of the first application but were not available to the petitioner and that events have arisen subsequent to the making of the first application. The Full

Bench of the Calcutta High Court has considered two relevant decisions of the Supreme Court, namely, P.L. Lakhanpal Vs. Union of India (UOI) and Others, and Ghulam Sarwar Vs. Union of India (UOI) and Others, , as well the decision of the Bombay High Court in In re Prahalad Krishna Kurne"s case 1951 Cri LJ 306 (FB) (supra) (See : Ram Narayan Gupta Vs. District Magistrate and Others, . This decision of the Full Bench has been followed by the Calcutta High Court in another judgment in Tapan Kumar Ganguly Vs. The State of West Bengal and Others, . The Punjab High Court has also taken somewhat similar view in the matter where the Full Bench was concerned with this very question as to whether successive applications for a writ of Habeas Corpus would lie on the same ground and/or fresh grounds. The Full Bench ruled that no second petition for a writ of Habeas Corpus lies to the Court on a ground on which a similar petition has already been dismissed by the Court. However, a second such petition would lie when a fresh and a new ground of attack against the legality of detention or custody has arisen after the decision on the first petition and also where for some exceptional reason a ground has been omitted in an earlier petition, in appropriate circumstances, the High Court will hear the second petition on such a ground for ends of justice. The Full Bench clarified that the second petition would, however, not be competent on the same ground merely because an additional argument is available to urge with regard to the same (see : Ram Kumar Pearay Lal Vs. District Magistrate, .

13. In P.L. Lakhanpal Vs. Union of India (UOI) and Others, , the Supreme Court was concerned with the challenge to a detention order made under Rule 30(I)(b) of the Defence of India Rules, 1962 and passed by the Central Government on Dec. 10, 1965 on the ground that the said rule was ultra vires Section 3(3) of the Defence of India Act, 1962. The said writ petition No. 47 of 1966 was heard and dismissed on April 19, 1966 Reported in P.L. Lakhanpal Vs. Union of India (UOI), rejecting the aforesaid contentions. On June 11, 1966 a fresh order was made by the Central Government continuing the said detention order under Rule 30-A(9). The petitioner preferred fresh writ petition being Writ Petition No. 137 of 1966 before the Supreme Court Under Article 32 again. In that context, the Supreme Court ruled that in subsequent writ petition, the petitioner cannot be permitted to re-agitate the same contentions when no new circumstances have arisen justifying the re-agitation. It, therefore, appears to be settled legal position, so far as this Court is concerned, that successive writ petitions are not permissible on the same grounds which have been urged, agitated and decided in the earlier petition by the High Court. The question which arises is whether such a writ petition on fresh grounds is competent or not. We find it difficult to persuade ourselves in view of the position unequivocally set out by the Supreme Court in Ghulam Sarwar Vs. Union of India (UOI) and Others, and also in view of the Full Bench"s decision of the Bombay High Court in In re Prahalad Krishna Kurna"s case 1951 Cri LJ 305 (supra). The learned Counsel for the petitioner before us made an attempt to impress upon us that in Ghulam Sarwar"s case the Court was not concerned with the question about the successive application before the

same High Court, and in any case the decision in Ghulam Sarwar's case (supra) is no authority for the proposition that a second application for a writ of Habeas Corpus on fresh grounds is not competent. In support of his contention, the learned Counsel referred to us the three recent decisions of the Supreme Court "where the Supreme Court has ruled that a second application for a writ of Habeas Corpus on fresh grounds is competent and there cannot be any bar to such an application on the principle of res judicata since the procedural principle cannot be allowed to whittle down the fundamental right of personal liberty and cannot be allowed to operate as a protective umbrella to an illegal order of detention. The basic decision of the Supreme Court, which has been referred to, is in Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others, where the Court ruled that the principle of constructive resjudicata must be confined to civil actions and civil proceedings, and the principle of finality of judgment on the ground of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of Habeas Corpus Under Article 32 on fresh grounds which were not taken in the earlier petition for the same relief.

14. The second decision of the Supreme Court to which our attention is invited is in Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI) and Others, where the Court ruled that the principle of res judicata would not apply in cases where the points were not agitated before the High Court in a petition Under Article 226 but were raised for the first time in Supreme Court in a writ petition Under Article 32, and the doctrine of finality of judgment or the principles of res judicata based on that authority cannot be allowed to be reagitated again and again which has been already adjudicated and decided by a competent Court would be wholly inapplicable to cases where two forums have separate and independent jurisdictions.

15. The third decision is that of Sunil Dutt Vs. Union of India (UOI) and Others, where the Court found it a settled position that dismissal of a writ petition for Habeas Corpus Under Article 32 would not operate as. a bar to the maintainability of a fresh writ petition under the said article.

16. The learned Counsel for the petitioner, therefore, urged that in view of the aforesaid three decisions of the Supreme Court the legal conclusion is inescapable that a second application for a writ of Habeas Corpus on the fresh grounds is also competent before the High Court. We find it difficult to agree with the learned Counsel for the petitioner since this is too specious a contention. The reasons for our disagreement are obvious. In the first place, the five Judge Full Bench's decision in Ghulam Sarwar Vs. Union of India (UOI) and Others, in respect of the competency of such an application before the same High Court which has already heard and decided an earlier application on behalf of the same detenu against the same order, rules the field and stands as good law since the decision has been approvingly referred to in the basic decision of the Supreme Court in Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others, and Kirit Kumar's case 1981 Cri LJ 1267 (supra). Secondly, the Supreme Court in all

the three cases was concerned with the successive writ petitions filed Under Article 32 of the Constitution. Thirdly, in the decision in Ghulam Sarwar's case (supra), no exception has been made by the Supreme Court while dealing with the competency of such an application before the same High Court that a second petition is competent on fresh grounds. The opinion expressed by the Supreme Court in the said ruling appears to us to be absolute. No decision of the Supreme Court has been pointed out to us which qualifies or clarifies the principle enunciated by the Supreme Court in Ghulam Sarwar Vs. Union of India (UOI) and Others, . The learned Counsel for the petitioner, however, invited our attention to the observation of the Full Bench of Calcutta High Court in Ram Narayan Gupta Vs. District Magistrate and Others, where the Court referred to the conflicting views of the two Division Benches of the same Court where one Division Bench took the view on legal position stated in para 9 in Ghulam Sarwar's case that a second application was not competent while another Division Bench has taken the view that since the doctrine of res judicata did not apply a second application could be successively made. After referring to these conflicting views which prevailed in Calcutta High Court and for resolving which the matter came before the Full Bench, the Court ruled that it seemed to it for the purposes of that reference that in both the aforesaid judgments, namely. P.L. Lakhanpal Vs. Union of India (UOI) and Others, and Ghulam Sarwar's case (both supra) the Supreme Court has consistently followed the principle that a second application to the same High Court cannot be made except in new circumstances. No doubt, the Full Bench of the Calcutta High Court has read the two decisions of the Supreme Court in that manner, but with respect, we have not been able to find any such observation in Ghulam Sarwar's case (supra) to that effect. On the contrary, in Ghulam Sarwar's case the position has been already stated in absolute terms to the effect that when High Court functions as a Bench it speaks for the entire Court and, therefore, it cannot set aside the order made in a writ petition for a writ of Habeas Corpus earlier by another Division Bench and that this principle will not apply to different Courts.

17. The learned Counsel, therefore, took us through the decision of Punjab High Court in Ram Kumar Pearay Lal Vs. District Magistrate, , but we must state that the Punjab High Court had not the benefit of the decision of the Supreme Court in Ghulam Sarwar Vs. Union of India (UOI) and Others, . In Lakhanpal's case AIR 1967 SC 9081 (supra) though Head Note (A) indicates that a second application for a writ of Habeas Corpus is competent on fresh grounds, Under Article 226, we do not find any observation in the judgment of the Supreme Court to that effect. We are, therefore, of the opinion that the second application for a writ of Habeas Corpus would not be competent before the same High Court even on fresh grounds.

Re : Question No. 2 :

18. Even assuming that the learned Counsel for the petitioner was justified in invoking the jurisdiction by making a second application on behalf of the same

detenu, whose earlier application by his wife had been rejected by this Court, on the basis of fresh grounds which have been urged in this petition, we are unable to agree with the learned Counsel that the grounds which he pressed at the time of hearing were fresh grounds. Fresh grounds would mean those facts or circumstances which though in existence at the time of the first application, were not available or to the knowledge of the petitioner or the detenu or they may have arisen subsequent to the dismissal of the first application. The three grounds which have, been pressed by the learned Counsel for the petitioner before us cannot be said to be fresh grounds at all. In order to decide whether the learned Counsel was justified in urging these grounds as fresh grounds, we have gone through the earlier petition, namely, Special Criminal Application No. 547 of 1983 moved by the wife of the detenu, and we find that all the three grounds which have been now sought to be pressed in service were the grounds which were actually raised by the petitioner expressly or by necessary implication.

19. The first ground is merely an additional facet of the broad challenge that the petitioner has not been given adequate opportunity of making a representation as enshrined in Article 22(5) of the Constitution. In paragraph 26 of the earlier petition (Spl. Cr.Appln 547/83) it has been inter alia stated as under :

26 The petitioner is, therefore, deprived of a reasonable, fair and just procedure guaranteed Under Articles 21 and 22(5) of the Constitution and, therefore, the order of the detention is illegal, bad in law and void ab initio.

20. As regards ground No. 2 about the non-supply of the material documents, particularly log book, in the earlier petition, it has been averred in paragraph 23 as under :

23. The detention order is bad in law, illegal and void ab initio as the most material documents are not supplied to the detenu and, therefore, the detenu has been prevented from making an effective representation and, therefore, his fundamental right is infringed Under Article 22 of the Constitution of India.

21. It should be noted that by this ground, the petitioner wants to urge that he has been denied adequate opportunity of representing his case with the assistance of lawyer which right has been recognized by the Supreme Court in *A.K. Roy and Others Vs. Union of India (UOI) and Others*, . In the reply affidavit of Shri K.D. Chhaya, who happened to be Joint Secretary in the Home Department of the State Government at the relevant time which has been filed on behalf of the Advisory Board also it has been stated to the effect that though the detenu was not permitted to be represented by a lawyer, he was granted the assistance of a next friend Shri R.R. Soni, who was ex-Customs Officer and conversant with the Customs Act, the COFEPOSA and the relevant legal principles governing the detention matters. The learned Counsel for the petitioner, however, emphasised one fact that refusal of the services of a lawyer took place after the first petition was filed and before the said petition was finally heard and decided and, therefore, it is a fresh ground. The learned Public Prosecutor

pointed out that the case of the detaining authority was not presented either by the Deputy Secretary or by Raksh Kumar who were present at the time of hearing before the Board only for the purposes of giving information which the Board required, and the Board has recorded their statements for some information. We are not entering into the merits on this ground since we do not find that this can be said to be a fresh ground which was not known to the detenu. In any case, it is an additional facet of the broad contention that he had no sufficient opportunity of making representation (see Para 7 of the reply affidavit of Shri K.D. Chhaya dt. 19th Oct. 1983).

22. As regards his particular grievance of failure to supply a copy of the log book, in the earlier petition in ground (I) it has been stated as under :

(I) It is respectfully submitted that the report vide Exh. D, are false and are got up subsequent to the incident and the detaining authority has not given the reasons why the said reports are acceptable, vis-a-vis the long look of the Krishnaprasad and, therefore, the grounds of the detention order are vague on the following reasons :

(i).....

(ii) The log look of the vessel Krishnaprasad shows that the said vessel was lying idle or under repairs on 4-7-82, 13-7-82 to 26-7-82 and 1-8-82 to 2-8-82 in various parts of Bombay and on other dates had gone out for fishing.

In para 8 of the earlier petition, it has been further stated as under :

8. From the above reasons, it is amply clear that the entry in the log book is not incorrect and only reasonable conclusion that can be drawn is that the vessel Krishnaprasad was not at all involved in the smuggling mission and the reports are subsequently got up to involve the said vessel Krishnaprasad and the detenu. According to the log book, Krishnaprasad vessel was at Bombay from 1-8-82 to 2-8-82 and then certainly the said vessel cannot go to Dubai and come back in three days....

23. It is, therefore, difficult to imagine much less agree with the learned Counsel. for the petitioner that the detenu was denied the opportunity of making representation in absence of the extract from the log book. As a matter of fact, in the earlier petition, the petitioner had, by reference to various dates in the log book, contended that the vessel was not in a fit seaworthy condition, and, in any case, could not have gone to Dubai and come back within a short period of three days. In our opinion, therefore, the ground which has been sought to be pressed in service is a fresh ground is merely an afterthought since the detenu had all the information and details contained in the log book. The Board, however, did not attach much importance to these entries in the log book because in its opinion they were not genuine entries. Now this cannot be a matter for the Court to decide. The only question is whether the detenu was prejudiced in the absence of the copies or the abstracts from the log book, and since the detenu had the

information and particulars of the log book as stated in the earlier petition, he was not so prejudiced.

24. Regarding the third ground about the refusal to summon witnesses and allowing cross examination, we do not think that this can be said to be again a fresh ground because in the ultimate analysis it is an additional facet of the right of adequate representation enshrined in the Constitution, In any case, the reply affidavit filed on behalf of the detaining authority indicates that it was not possible for the Board to summon the witnesses as it had no power to summon witnesses, and if at all the detenu wanted the presence of some witnesses to be examined on his behalf, it was his duty to keep them present and he was accordingly intimated by letter dt. 23-4-83 (see : para 2, Annexure "I" annexed to the reply affidavit of Shri K. D. Chhaya dt. 17-11-83). The right of cross-examination of such witnesses or any witnesses before the Board is not legally recognized vide : A.K. Roy and Others Vs. Union of India (UOI) and Others, .

25. In that view of the matter, therefore, assuming that the Court's jurisdiction can be invoked again by fresh application for a writ of Habeas Corpus, we do not think that the grounds which have been pressed into service by the learned Counsel for the petitioner can be said to be fresh grounds which would justify us to exercise our jurisdiction.

26. No other contentions have been urged.

27. The result is that this petition fails and is dismissed with no order as to costs.