

(1993) 07 KL CK 0073
In the High Court Of Kerala
Case No : O.P.H.C. No. 1983 of 1993

Sebina

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 02-07-1993

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 8
Constitution of India, 1950 — Article 14, 22, 22(1), 22(3)

Citation : (1994) CriLJ 1291

Hon'ble Judges : M. Jagannadha Rao, C.J;K. Sreedharan, J

Bench : Division Bench

Advocate : M.N. Sukumaran Nayar, B. Raman Pillai, George Jacob and S. Subash Chand, for the Appellant; Cyriac Joseph, A.A.G. No. I, Lal George, Govt. Pleader, (for 1) and K.P.G. Menon, Addl. C.G.S.C., (for No. 2), for the Respondent

Final Decision : Dismissed

Judgement

M. Jagannadha Rao, C.J.—This is a petition for the issue of a writ of Habeas Corpus. The petitioner is the wife of one Mohammed Ismail who is now detained under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the "COFEPOSA Act").

2. The detenu arrived at Thiruvananthapuram Airport on 25-5-1992 from Doha. He was arrested on 26-5-1992 by the Customs officers. He was granted bail on 6-6-1992 by the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam. On 4-9-1992, the detention order, Ext.P1, was issued u/s 3(1)(i) of the COFEPOSA Act. The order was executed on 18-9-1992 and the detenu was arrested under the COFEPOSA Act. On 19-9-1992, the grounds of detention were furnished to the detenu and he submitted Ext. P3 representation dated 12-10-1992 to the State of Kerala and to the Union of India (respondents 1 and 2). On 15-10-1992, Ext. P4 order was issued by the Union of India rejecting Ext. P3 representation and on 26-10-1992, the State Government rejected Ext. P3

representation. On 20-10-1992, the case of the detenu was referred to the Advisory Board. The Advisory Board submitted its report to the Government on 3-12-1992 and thereafter on 11-12-1992, Ext.P6 confirmation order was issued u/s 8(b) of the COFEPOSA Act by the State Government. Thereafter, the detenu submitted another representation, Ext. P7, on 18-1-1993 and the State Government and the Union Government rejected the same respectively as per Ext. P8 (dated 27-1-1993) and Ext.P9 (dated 29-1-1993). It is at that stage that the detenu's wife has filed this writ petition.

3. The only contention raised by the learned counsel for the petitioner is that even though in Ext. P3 representation dated 12-10-1992 the detenu stated that he was practically illiterate and did not know English ""and requested in para 4(h) that he may be "allowed to be assisted by a literate person who is conversant with the legal formalities and who is able to understand the contents of various documents connected with the case, so as to enable him to properly represent him before the Advisory Board", and even though a copy of Ext. P3 was placed before the Board, the latter did not pay any attention to the said request and that, therefore, the petitioner's fundamental right under Article 22 read with Section 8 of the COFEPOSA Act have been violated and that, therefore, the detention is vitiated.

4. On the other hand, it is urged by the 1st Additional Advocate General that the State Government, in its reply Ext.PS, had stated (in paras 12, 13) that the petitioner could read and write malayalam and that it was "for the COFEPOSA Advisory Board to decide whether you should be allowed to be assisted by a person conversant with legal formalities to present your case before the Advisory Board when the board considers your case", the detenu, did not make any request before the Board for any such "assistance" and, on the other hand, proceeded to conduct his case all by himself. It is also argued that admittedly, the detenu did not take any person answering the description in his representation Ext. P3, when he appeared in person before the Advisory Board. It is, therefore, contended that, on the particular facts of this case, there is no violation of Article 22 of the Constitution of India or of Section 8 of the COFEPOSA Act.

5. The point for consideration is whether the detenu should, apart from making a written request for a "friend" earlier, make a fresh oral request before the Advisory Board and whether he should keep the "friend" ready when he goes before the Advisory Board?

6. Now, while Article 22(1) speaks of the fundamental right of a detenu to consult and to be defended by a legal practitioner of his choice, Article 22(3) clearly states that this right is not available to a detenu coming under Article 22(3)(a) and (b). Sub-clause (a) of Section 22(3) refers to any person who is arrested or detained under any law providing for "preventive detention". This principle is also reiterated in Section 8(e) of the COFEPOSA Act which states that "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".

7. In *A.K. Roy and Others Vs. Union of India (UOI) and Others*, , a case under National Security Act, 1980, the Supreme Court (vide para 94) also stated that "the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board". But the Supreme Court made certain exceptions based on Article 14 and upon certain principles of natural justice which are not excluded by Article 22(3).

8. The first exception culled out by the Supreme Court in *A. K. Roy's* case (supra) is based on Article 14 (in para 94). Their Lordships stated that if the detaining authority or the Government is permitted to appear before the Board with the aid of a legal practitioner or a legal advisor, then if a similar facility is not given to the detenu, then Article 14 will be violated. This exception also clarifies that if sometimes officers of the concerned department appear before the Board with a view to justifying the detention orders, the Board should not permit the authorities to do indirectly that they cannot do directly and -

"no one should be enabled to take shelter behind the excuse that such officers are not "legal practitioners" or legal advisers".

Regard must be had to the substance and not the form since, especially, in matters like the proceedings of Advisory Boards, whosoever assists or advises on facts or law, must be deemed to be in the position of a legal adviser.

9. The second exception laid down by the Supreme Court in *A.K. Roy and Others Vs. Union of India (UOI) and Others*, deals with the right of the detenu to be aided or assisted by a "friend" who, of course, is not a legal practitioner, in truth and substance. This exception is based on the fact that the detenu who goes straight from his cell to the Board's room, may lack the necessary ease and composure to present his point of view. He may be "tongue tied, nervous, confused or wanting in intelligence" (See *Pett v. Greyhound Racing Association Ltd.* (1969) 1 QB 125); *Maynard v. Osmond* (1977) 1 QB 240. Their Lordships observed (at p. 378 of Cri LJ):

"Fairness, as said by Lord Denning M.R. in *Maynard v. Osmond* (1977) 1 QB 240, can be obtained without legal representation. But. it is not fair, and the statute does not exclude that right that the detenu should not even be allowed to take the aid of a friend, Whenever demanded, the Advisory Boards must grant that facility."

(Emphasis supplied)

10. A third exception accepted by the Supreme Court (paragraph 105) in *A. K. Roy's* case (1982 Cri LJ 340) (supra) is the right to lead rebuttal evidence. This right is again accepted as it is not excluded by Article 22(3) of the Constitution of India. But, their Lordships sounded a warning (para 105):

"We would only like to add that if the detenu desires to examine any witnesses he shall have to keep them present at the appointed time and no obligation can be cast on the Advisory Board to summon them. The Advisory Board, like any other Tribunal, is free to regulate its own procedure within the constraints of the Constitution and the Statute. It would be open to it, in the exercise of that power to limit the time within which the detenu must complete his evidence."

(Emphasis supplied)

Therefore, the detenu has to keep his rebuttal witnesses ready before the Board. This is because the Advisory Board is compelled to submit its report within a specified and limited time-frame.

11. It, therefore, emerges from A. K. Roy's case (*supra*) that there is no fundamental right for being represented by a legal practitioner or legal adviser before the Advisory Board unless the detaining authority has the similar assistance or the assistance of its officers in defence of the detention. Even otherwise, the detenu has a right to be represented by a friend who is not a legal practitioner or a legal adviser if he so demands. In case the detenu wants to adduce rebuttal evidence, he has a right to do so provided he keeps the rebuttal evidence ready at the appointed time and there is no obligation on the Board to summon the witnesses. This is because of the fact that if the witnesses are not kept ready or are sought to be summoned, the Board might find it difficult to submit its report within the time frame.

12. Two other important aspects fall for consideration so far as the present case is concerned. One is whether, even apart from the request for a friend made in the representation to Government, which is to be placed before the Advisory Board, the detenu is to make a further oral request for permission to be so assisted by the "friend" when he actually appears before the Board. The second question is whether he should keep the "friend" also ready just as he is bound to keep the rebuttal evidence also ready.

13. The first of these questions arises because, on the facts of this case, there is a request for the assistance of a "friend" as stated in Ext. P3, representation. But the point is whether the detenu ought to have made a further oral request when he appeared before the Board? From the available precedents decided by the Supreme Court, we are unable to answer -the first question, one way or the other. We shall here confine ourselves to cases relating to a "friend" and start with A.K. Roy's case.

14. A. K. Roy's case goes to this extent, namely, (see paragraphs 85 and 100 of A.K. Roy and Others Vs. Union of India (UOI) and Others, that there is no "prescribed standard of reasonableness and therefore, what kind of procedural rights should be made available to a person in any proceeding depends upon the nature of the proceeding in relation to which the rights are claimed." The Advisory Boards (see paragraph 94 of A.K. Roy and Others Vs. Union of India (UOI) and Others, have to "take that the provisions of Article 14 are not violated

in any manner in the proceedings before them. Serving or retired Judges of the High Court will have no difficulty in understanding this position. The Advisory Board (see paragraph 105 of A.K. Roy and Others Vs. Union of India (UOI) and Others, is "free to regulate its own procedure within the constraints of the Constitution and the statute". It would be open to it, in the exercise of that power, to adopt a procedure to suit the time limitations regarding submission of its report. In Phillipa Anne Duke v. State of Tamil Nadu, : 1982CriLJ1389 decided by Chinnappa Reddi, J. it was found that there was never may demand for a "friend" to assist the detenu and the proceedings of the Board were held valid. But in Abdul Zabbar Vs. State of Rajasthan and Others, , there was a demand to be represented by a "friend" made not only in the earlier representation in writing, but also when he was actually produced before the Board. As permission was not granted, it was held that the proceedings were invalid. This case though relied upon by the petitioner is distinguishable because in the present case the request for the "friend" is made only in the representation, but not before the Board. Of course, as stated below, we do not want to decide whether this makes any difference. Again Tusher Govindji Shah Vs. Union of India (UOI) and Others, is not helpful because there was again no request at all for a friend. Asha Keshavrao Bhosale Vs. Union of India (UOI) and Another, , is a case where representation for a friend was made before the Board but the Board's refusal was held valid on the ground that the "friend was not available on the date of hearing" and the Board was not inclined to adjourn the matter. The Board talked to the detenu and ascertained that the detenu was (see paragraphs 3 and 14 of Asha Keshavrao Bhosale Vs. Union of India (UOI) and Another, healthy, studied up to 8th standard, was having business and active in politics. He was worldly wise, was sufficiently educated and did not suffer from any deficiency and was in a fit condition to represent his case. The court held that:

"The rule to be applied is one of prejudice and on the facts of the case, we are inclined to agree with Mr. Raina for the State that the detenu was not prejudiced in making an effective representation of his case at the hearing by the Advisory Board in the absence of a friend."

Again in Johnney D'couth Vs. State of Tamil Nadu, , it was held that the refusal to permit assistance of one Mr. Sundararajan, Retired Assistant Collector of Excise, who was physically present before the Board was bad particularly when the detaining authority was "assisted" by a Deputy Collector and a Superintendent of Central Excise. We may add here that, according to A.K. Roy and Others Vs. Union of India (UOI) and Others, the detenu in that case was, in fact, entitled even to have a legal practitioner when the other side was assisted by its officers. Otherwise, the proceedings would be hit by Article 14 of the Constitution of India. A "friend" could have always been asked for irrespective of what assistance the department was having before the Board. State of Andhra Pradesh and another Vs. Balajangam Subbarajamma, makes this clear because the refusal to have the assistance of a lawyer or friend was held to be bad when the detaining authority was having the benefit of high ranking police officers. The

High Court, in fact, observed that the prisoner did not anticipate that the detaining authority would have the benefit of such officials. It was held that the detenu was prejudiced not only because his request for a lawyer or friend was rejected, but also because the department had the assistance of its officers. This case also states that the Board has to follow a fair procedure to see that detenu is not prejudiced. *Sharad Kumar Tyagi Vs. State of Uttar Pradesh and Others*, was a case where the detenu was permitted to bring a friend but he failed to take a friend along with him. It is important to note that the Court observed the where was no plea that he had not enough time to take a friend before the Advisory Board. Finally, in *Anil Vats Vs. Union of India and others*, , when the Board refused to permit a friend's assistance on the ground that the detenu was a graduate, the Court held this to be bad for the reason that the detenu who comes before the Board straight from the cell may not be in a position to effectively represent his case. Practically, these are all the cases relating to a "friend" decided by the Supreme Court.

15. The case in *Vijay Kumar Vs. Union of India (UOI) and Others*, , is also in our opinion very relevant. In that case, the detenu had asked in writing earlier for permission to be assisted by a "friend" and also to produce rebuttal evidence. Permission was granted. But when he came before the Board, he did not make any fresh request on that date that he wanted to use the services of the "friend", who was waiting outside or that he wanted to adduce rebuttal evidence by examining the witnesses whom he had brought. He straightway proceeded to defend the case all by himself. It was held by the Supreme Court that he could not complain of any illegality. The Supreme Court observed *Vijay Kumar Vs. Union of India (UOI) and Others*, that the conduct of the detenu who :

"started arguing his own case, which in all probability, had given an impression to the members of the Advisory Board that the appellant would not examine any witness. The appellant should have made a specific prayer before the Advisory Board that he would examine witnesses, who were standing outside. The appellant, however, did not make any such request to the Advisory Board.

(Emphasis supplied)

The Supreme Court further observed, in relation to the "friend" (paragraph 21):

"There is no reason for not accepting the statement of the detaining authority that the appellant was permitted by the Advisory Board to have the assistance of an advocate or a friend at the time of hearing, but the appellant did not avail of the same.

(Emphasis supplied)

This case can perhaps give room for a contention that even if a written request for a "friend" was granted earlier, a further specific request must be made by the detenu before the Board for permission to have the assistance of the friend,, who is physically present. We leave the question open.

16. It will be noticed that in none of these cases, except perhaps Vijay Kumar Vs. Union of India (UOI) and Others, , the question arose as to whether, in spite of an earlier request for a friend, the detenu should have made a further oral request before the Board at the time of hearing. As there is no direct case, we do not propose to decide this aspect for we feel that the petitioner has anyway to fail for not bringing his friend before the Board, as stated below. We do-not also decide whether the Advisory Board is obliged to suo motu ask the detenu if he wants to have a friend, even if the detenu has not renewed his request made in his earlier representation.

17. Coming to the second aspect, there are at least three cases of the Supreme Court which give a clue. On account of these three decisions, we are of the view that the detenu having not, admittedly, taken his friend along with him before the Board, he cannot fall back on his right to be represented by a "friend" and contend that the Advisory Board did not, on its own, ask him if he had brought his "friend" with him.

18. In Sharad Kumar Tyagi Vs. State of Uttar Pradesh and Others, - though it was a case where permission to be assisted by a friend was given - the detenu not having taken the friend along with him, it was held that he had to blame himself. Again in Asha Keshavrao Bhosale Vs. Union of India (UOI) and Another, referred to above, there was a representation by the detenu before the Board for being assisted by a "friend" and the refusal by the Board to grant permission on the ground that the detenu had not brought his friend along with him before the Board on that date, was held to be valid. These two cases, in our opinion, deal with the two alternatives that could be adopted by the Advisory Board when the detenu does not bring the "friend along with him. In Sharad Kumar Tyagi's case (supra) permission was given while in Asha's case (supra) permission was refused but, in both alternative situations, the detenu failed because the Supreme Court held that no prejudice could be said to be caused to the detenu who, after a request for a "friend", failed to take the "friend" along with him. In the case before us too, the detenu did not admittedly take the "friend" along with him and, therefore, he cannot blame the Board for adopting such a procedure. The reason is that even if the Advisory Board had not told him one way or the other in regard to his earlier representation for a "friend", he had not gone there ready with his friend. The Addl. Advocate General is right in contending that the fact that the detenu proceeded before the Board to argue his own case without again reiterating his earlier request, is a clear indication of the detenu's subsequent attitude of mind before the Board, Supposing the Board had given him permission, he would not have obviously been able to use the services of the "friend" who was, as in Sharad Kumar Tyagi Vs. State of Uttar Pradesh and Others, , not physically there. If the Board had refused on the ground that he had not brought his friend, the Board could not have been faulted in view of Asha Keshavrao Bhosale Vs. Union of India (UOI) and Another, . If the Board had, let us assume, been silent on the earlier written request for a friend, the detenu, on the same line of reasoning could not make it an issue when he did

not take his friend there.

19. The cases of the detenu not going with his witnesses for rebuttal also bear a close analogy. Even in *A.K. Roy and Others Vs. Union of India (UOI) and Others*, , the Supreme Court observed (paragraph 105):

"The detenu may, therefore, offer oral and documentary evidence before the Advisory Board in order to rebut the allegations are made against him. We would like to add that if the detenu desires to examine any witnesses, he shall have to keep them present at the appointed time and no obligation can be cast on the Advisory Board to summon them."

(Emphasis supplied)

20. These are the principles which can be gleaned from the judgments of the Supreme Court from 1982 up to date. Applying the aforesaid principles, we are of the view that no case is made out for interference.

21. The fact remains that no officer of the State or any department was assisting the Advisory Board and therefore there is no case made out of unequal treatment. Further in as much as the detenu very confidently proceeded to argue his case personally before the Board and "could read and write Malayalam", no prejudice was caused in regard to fair procedure.

22. Admittedly, the detenu did not take any "friend" with him before the Board, even-though he made a request for a friend in his earlier representation. Even if the Board had permitted him, he would not have been able to use the services of "a friend" who was, in fact not there.

23. It was, however, further argued by the petitioner's counsel that the detenu received the notice of hearing from the Board (Ext. R1(a)) only on 28-11-1992 when the Board meeting was on 1-12-1992, and there was no time for the detenu to make arrangements. It must be noted that the representation, Ext. P3, making this request for a friend is dated 12-10-1992. In *Sharad Kumar Tyagi Vs. State of Uttar Pradesh and Others*, too, there was a contention that the detenu who was permitted to bring a "friend" had not enough time. It was observed that there was no such plea in the petition. In the case before us also, there is no such plea (see : *Sharad Kumar Tyagi Vs. State of Uttar Pradesh and Others*, , 2nd column).

24. Further, as stated in the various cases decided by the Supreme Court, the Advisory Board here, which consisted of two Judges of this Court and a Retired Judge, cannot be said to be oblivious of the rights of the detenu.

For all the aforesaid reasons, we hold that the detenu not having taken the "friend" with him before the Board, cannot claim any breach of due procedure on the part of the Advisory Board. The Writ Petition fails and is accordingly dismissed.