

(1997) 02 BOM CK 0025

In the Bombay High Court

Case No : Criminal Writ Petition No. 1057 of 1995

Shahista Sayed Haji Baitullah

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 06-02-1997

Acts Referred:

Constitution of India, 1950 — Article 22

Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 —
Section 10, 12, 3, 8, 9

Citation : (1997) 99 BOMLR 732

Hon'ble Judges : S.S. Parkar, J;A.V. Savant, J

Bench : Division Bench

Judgement

A.V. Savant, J.—Heard all the learned Counsel; Shri M.G. Karmali for the petitioner, Shri Agrawal for respondents No. 1, 2 and 5 and Shri Rajiv Patil for respondents No. 3 and 4.

2. This Petition is by Smt. Shahista Sayed Haji Baitullah, wife of the detenu Sayed Haji Baitullah son of Sayed Haji Abdul Aziz. Under Order dated 11th August 1995 (Exh "4"/pg. 34) passed by the second respondent - specially empowered officer, the detenu has been detained u/s 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (for short, the PITNDPS Act) with a view to preventing him from engaging in the procurement, storage and abetting in the export from India of Narcotic Drugs. The said order of detention has been served on the detenu on 23rd August 1995 along with the grounds of detention which are at Exhibit "B"/pg. 35. The incriminating instances which led to the passing of the order of detention are two. The first incident is of 19th February 1995 when on the basis of specific intelligence, Officers of the Narcotic Control Bureau, Mumbai searched Room No. 1006 of Taj Intercontinental Hotel, Mumbai. A bag containing 10 kgs. of heroin was recovered, though, at that time, the occupants of the room named John and Maggie were not available. The heroine was supposed to be exported to United Kingdom. The seizure was effected on the basis of the intelligence received from

Her Majesty's Customs and Excise, South-East Regional Squad, U.K. and in fact two officers, one male and female had acted as under-cover agents assuming the names of John and Maggie. They had come to Bombay on 17.02.1995 and had established telephonic contact with the detenu and his younger brother Nasarullah @ Nasir @ Munna. Nasarullah is alleged to have delivered the bag containing 10 kgs of heroin to John at about 10,00 A.M. on 19th February, 1995. Thereafter, John was alleged to have contacted the detenu and his brother from a Hotel in London on 21st February, 1995. In the follow up action the officers of the said South East Regional Squad, U.K. arrested one Ravikant Rambhai Patel and Nasir Chaudhari in U.K.

3. The second incident is regarding the interception of Shaikh Salahuddin Ibrahim and Salim Rahim Khan by the officers of the. Narcotic Control Bureau. Mumbai, when the two passengers were in the process of boarding Air Mauritius flight on 15th May 1995, at Sahar International Airport, Mumbai. A total of 455 gms, of heroin was seized from them which was found concealed in their body cavities. Their interrogation revealed the involvement of the detenu and his associate Javed in the procurement, distribution and concealment of heroin. The statements of Shaikh Salahuddin Ibrahim were recorded on 16th and 17th May 1995. The residence of the detenu was searched on 17th May 1995 Certain incriminating documents, including 7 Indian Passports and Rs. 23,000/- in Indian currency and some foreign currency was recovered. The statements of the detenu were recorded on 18th May and 1st June, 1995. The detenu disowned having known either John, or Maggie or even Mario, who was alleged to be a customer in U.K. The detenu was alleged to have used the STD and ISD telephone facility from Suvidha Communication Centre, Mumbai. The statement of the detenu was again recorded on 27th June, 1995. The statements of the detenus brother Nasirullah @ Nasir @ Munna, who is a co-detenu were also recorded on 18th May, 1st June and 27th June, 1995. The detenu and his brother Nasirullah were arrested on 18th May 1995. The detenu applied for bail on 26.7.1995, but it is not disputed before us that the application for bail was rejected.

4. The order of detention has been issued on 11th August 1995, as stated earlier, and has been served on 23rd August 1995 alongwith the grounds of detention. The grounds of detention refer to the two instances; one of the seizure of 10 kgms of heroin from Room No. 1006 of Taj Intercontinental Hotel, at Mumbai, on 19.2.1995 and the other of the seizure of 455 gms. of heroin from the body cavities of the two passengers Shaikh Salahuddin Ibrahim and Salim Rahim Khan on 15.5.1995 at the Sahar International Airport, Mumbai, when the two passengers were in the process of boarding the Air Mauritius Flight to Port Louis. However, it is not necessary to go into the details of the grounds of detention and the material in support of the said grounds in view of the only contention that has been canvassed before us, and on which there appears to be no dispute on fact. No doubt, Shri Karmali, learned Counsel appearing for the petitioner, tried to raise three contentions before us.

5. Contention (xvi) in Para 4 of the Petition is to be found at Page 30-A of the Petition. It relates to the detenu's submitting the representation dated 9.10.1995 to the detaining authority-respondent No. 2, through the Prison Authority. The contention that is raised in ground (xvi) is about the alleged non-consideration of the said representation by (i) the detaining authority and (ii) the Central Government, independently of the opinion of the Advisory Board.

6. The second contention is ground No. (xvii) in Para 4 of the Petition at page 30-B. This relates to the petitioner's representation dated 9.10.1995 against the declaration dated 14.9.1995 u/s 10(1) of the PITNDPS Act. Section 10 deals with cases in which and the circumstances under which the persons may be detained for a period longer than three months without obtaining the opinion of the Advisory Board. In this case, having regard to the declaration made u/s 10(1) of the PITNDPS Act, the period of detention is two years which is likely to expire on 23rd August 1997. The contention raised is whether the representation dated 9.10.1995 against the declaration made u/s 10(1) of the PITNDPS Act has been considered expeditiously by (i) the declaring authority and (ii) the Central Government independently of the opinion of the Advisory Board.

7. We would have elaborated the pleadings on those two contentions taken by way of ground No. (xvi) and (xvii). But it is not necessary for us to deal with the same in details in view of ground No. (xiv), which has been taken by way of amendment pursuant to the leave granted by this Court on 3rd December, 1996. The amendment was carried out on the 5th December 1996 and the contention has been raised at page 30-1 of the Petition. In substance, the contention is that it was necessary for the detaining authority to have placed before the Advisory Board the detenu's representation dated 9.10.1995 against the order of detention issued u/s 3(1) of the PITNDPS Act, though the representation was only addressed to the detaining authority viz. Shri A.K. Srivastava, who had received the same on 11.10.1995. Admittedly, five copies of the said representation dated 9.10.1995 were given to the Jailor and prayer Clause 5(a) in the said representation contained a specific prayer that the representation should be considered by the appropriate authorities under Article 22(5) of the Constitution of India and the appropriate authorities be pleased to revoke the impugned order of detention and direct that the petitioner be released from detention forthwith and be set at liberty. The Central Government is authorised u/s 12 of the PITNDPS Act to revoke the order of detention and the contention therefore is that the Central Government was obliged to consider the representation dated 9.10.1995 against the order of detention made u/s 3(1) of the PITNDPS Act on 11th August 1995. In respect of this representation dated 9.10.1995 against the order u/s 3(1) of the PITNDPS Act the further contention is that the Central Government ought to have independently considered the representation dated 9.10.1995, though it was addressed to the second respondent detaining authority. The copies of the said representation were received by the Central Government when the detaining authority furnished the same to the Central Government. The Central Government was possessed of the

said representation between 11th October 1995 and 4th December 1995 in the first place. On the 4th December 1995 it was forwarded to the Advisory Board which considered the same and made its report on 29th January, 1996. The effective hearing before the Advisory Board was held on 15th January 1996. Even during this period - 4th December 1995 to 29th January 1996 the Central Government was obliged to consider the representation dated 9.10.1995 against the order of detention u/s 3(1) of the Act. It is further contended that even after the Advisory Board made its report on 29th January 1996, but before the order of confirmation was made by the Central Government, on 6th February 1996 the Central Government was obliged to consider the same. The confirmation u/s 9(f) of the PITNDPS Act was made by the Central Government on 6th February 1996 and Memo to that effect was issued by the Central Government on 8th February, 1996. However, during none of these three stages viz. (i) 11.10.1995 to 4.12.1995; (ii) 4.12.1995 to 29.1.1996; and (iii) 29.1.1996 to 6.2.1996, the Central Government considered the representation independently of the proceedings pending before the Advisory Board or the report of the Advisory Board.

8. It is then contended in ground No. (xxiv) that even in respect of the declaration dated 14th September 1995 made u/s 10(1) of the PITNDPS Act, the representation dated 9.10.1995 was addressed to the declaring authority, which was received by it at the 25th October 1995. It is contended that this representation ought to have been forwarded to the Advisory Board and independently of the consideration of the said representation by the declaring authority or the Advisory Board, there ought to be consideration of this representation also by the Central Government. The Central Government was possessed of this representation after its receipt by the declaring authority on 25.10.1995. At no point of time, however, has the Central Government independently considered the said representation dated 9.10.1995 against the declaration dated 14th September 1995. u/s 10(1) of the PITNDPS Act.

9. In short the contention is that in respect of both these representations dated 9.10.1995 viz. the one against the order of detention u/s 3(1) of the Act and the other against the declaration u/s 10(1) of the said Act, there is no consideration whatsoever by the Central Government at any stage. Admittedly, 5 copies of each of the representations were submitted to both the detaining authority and the declaring authority. The Advisory Board initially met at New Delhi on the 10th November 1995 when the matter was adjourned to 8th December 1995. In the meanwhile, the Central Government had sent the representation dated 9.10.1995 received by it to the Advisory Board, which was received by the Advisory Board on 5th December 1995. The meeting of the Advisory Board was again adjourned from 5th December 1995 to 15th January 1996 at which date effective hearing took place at New Delhi. The opinion of the Advisory Board is of 29th January 1996 and the order of confirmation is 6th February 1996 in respect of which the memorandum has been issued on 8th February 1996. In the prayer Clauses of both the representations; one addressed to the detaining authority

respondent No. 2 and the other addressed to the declaring authority - respondent No. 5 there is a specific prayer that the said representations should be considered by the appropriate authority under Article 22(5) of the Constitution, as also by the appropriate authorities who are entitled to revoke the order of detention or order of declaration as the case may be. Thus, there was a specific prayer calling upon the Central Government to consider both the representations; one against the order u/s 3(1) of the PITNDPS Act and the other against the order of declaration u/s 10(1) of the said Act. There is no dispute on these facts, including the fact that sufficient number of copies, 5 of each of the two representations were sent to the appropriate authorities through the Jailor.

10. When we turn to the affidavit of Shri A.K. Srivastava, sworn on 6th August 1996 we find that the first representation dated 9.10.1995 against the order of detention was received in his office on 11.10.1995. On receipt of this representation, undoubtedly, the detaining authority, as also the Central Government was obliged to consider the said representation. The pleadings in Para 3 of the affidavit of Shri Srivastava are very clear. Similarly, in para 4 of his affidavit he has admitted that the representation dated 9.10.1995 against the order of declaration u/s 10(1) of the Act was received by the declaring authority on 25.10.1995. The Central Government had, therefore, received both the representations, as is clear from the affidavit of Shri Srivastava. these averments are in reply to the grounds (xvi) and (xvii).

11. However, what is interesting to note is that in reply to ground (xxiv), which we have elaborated in paras 7-9 above, affidavit has been filed Shri R.K. Tewari, Deputy Director General Narcotics Control Bureau, New Delhi. The said affidavit dated 13th December 1996 is in reply to the amended plea in ground (xxiv) mentioned above. All that the said affidavit states in Para 3 is as under:

3. Regarding Item (xxiv) of paragraph 6 of the additional grounds of challenge, it may be stated that 3 copies each of the two representations dated 9th October, 1995 (and not 9th October, 1996) addressed to the detaining authority and the declaratory authority were forwarded to the Chairman and Members of the Central Advisory Board vide letter dated 4th December, 1995 and these representations were duly perused and taken into account by the Advisory Board in its meeting held on 15th January, 1996. The Advisory Board had perused the entire records as well as the representation of the detenu and had opined that there was sufficient cause for the detention and also the continued detention of Shri Syed Haji Baitullah @ Baitullah Khan @ Salim, In pursuance to this opinion, the Central Government had confirmed the detention of Shri Syed Haji Baitullah for a period of two years w.e.f. 23rd August, 1995 as conveyed to him vide order dated 8th February, 1996.

There is not even a whisper of any consideration whatsoever in respect of any of the two representations dated 9.10.1995, though the same were received by the Central Government on 11th October and 25th October 1995 respectively. Either before forwarding the copy thereof to the Advisory Board on 4th December 1995,

or even during the pendency of the reference to the Advisory Board, or even after the receipt of the opinion of the Advisory Board no consideration of either of the two representations has taken place at the hands of the Central Government. The affidavit of Shri Tewari leaves no doubt whatsoever on this important aspect of the matter.

12. We would only refer to two decisions on the point which leave us with no choice but to strike down the order of detention. In *Nand Lal Bajaj Vs. State of Punjab and Another*, , the Supreme Court considered the obligation of the appropriate government to apply its mind to the material on record and if there was failure on the part of the appropriate government to apply its mind to the material on record, it was held that it would be a serious infirmity which would make continued detention illegal. The Supreme Court referred to its earlier decision in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, , and then observed in Para 11 of the Judgment in *Nand Lal's* case at page 2045 as under:

11. The matter can be viewed from another angle. We were informed that the Advisory Board did not forward the record of its proceedings to the State Government. If that be so, then the procedure adopted was not in consonance with the procedure established by law. The State Government while confirming the detention order u/s 12 of the Act has not only to peruse the report of the Advisory Board, but also to apply its mind to the material on record. If the record itself was not before the State Government, it follows that the order passed by the State Government u/s 12 of the Act was without due application of mind. This is a serious infirmity in the case which makes the continued detention of the detenu illegal.

13. In *Smt. Gracy Vs. State of Kerala and another*, , the point arose directly as to whether it was necessary for the Central Government to consider the detenu's representation, independent of its consideration by the Advisory Board. In Para 3 of the Judgment, at page 1092, it was observed that the Central Government which had made the order of confirmation upon receipt of the opinion of the Advisory Board was obliged to independently consider the detenu's representation and if there was a failure to do so, the order of detention would be vitiated. In Para 4 of the Judgment, it has been observed as under:

4. On the above facts, the question is : Whether there has been any infraction of the guarantee under Article 22(5) of the Central Government as a result of Central Government's omission to consider the detenu's representation independent of its consideration by the Advisory Board? The Central Government's stand is that the detenu's representation being addressed to the Advisory Board to which it was submitted during pendency of the reference before the Advisory Board, there was no obligation on the Central Government also to consider the same independently since the representation was not addressed to the Central Government.

Then in Para 5 of the decision in *Smt. Gracy's* case, the Supreme Court

considered its earlier Constitution Bench decision in *K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others*, , and held that it was implicit in Clauses (4) and (5) of Article 22 that the Government while discharging its duty to consider the representation cannot depend upon the views of the Board on such representation. It has to consider the representation without being influenced by any such view of the Board. The obligation of the Government to consider the representation is different from the obligation of the Board to consider the representation at the time of hearing the references. It was further reiterated that the consideration of the Board is an additional safeguard and not a substitute for consideration of the representation by the Government. The right to have the representation considered by the Government is safeguarded by Clause (5) of Article 22 and it is independent of the consideration of the detenu's case and its consideration by the Advisory Board of Clause (4) of Article 22 read with Section 8(c) of the PITNDPS Act. The observations to this effect are to be found at pages 1092 and 1093. It was then emphasised in para 8 of the Judgment at page 1093 of the Report that even if there be only one representation by the detenu addressed to the detaining authority, the obligation arises under Article 22(5) of its consideration by the detaining authority independent of the opinion of the Advisory Board in addition to its consideration by the Advisory Board while giving its opinion. Then, in Para 9 of the Judgment at page 1094 of the Report it was observed as under:

9. It being settled that the aforesaid dual obligation of consideration of the detenu's representation by the Advisory Board and independently by the detaining authority flows from Article 22(5) when only one representation is made addressed to the detaining authority, there is no reason to hold that the detaining authority is relieved of his obligation merely because the representation is addressed to the Advisory Board instead of the detaining authority and submitted to the Advisory Board during pendency of the reference before it. It is difficult to spell out such an inference from the contents of Article 22(5) in support of the contention of the learned Solicitor General. The contents of Article 22(5) as well as the nature of duty imposed thereby on the detaining authority support the view that so long as there is a representation made by the detenu against the order of detention, the aforesaid dual obligation under Article 22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the advisory Board or to both. The mode of address is only a matter of form which cannot whittle down the requirement of the constitutional mandate in Article 22(5) enacted as one of the safeguards provided to the detenu in case of preventive detention.

15. The above observations of the Supreme Court leave no doubt whatsoever that independent of the consideration by either the detaining authority or the declaring authority or the Advisory Board, the Central Government which was in receipt of the representations both against the order u/s 3(1) of the PITNDPS Act, as also the order of declaration u/s 10(1) of the Act was obliged to consider the said representation. Admittedly, having regard to the affidavit of Shri R.K.

Tewari, this has not been done. There was not even an attempt made by the Central Government to independently consider the representations made by the detenu either against the order of detention or against the order of declaration. Having regard to the law laid down by the Supreme Court in the case of Smt, Gracy (*supra*), we have no choice but to hold that the continued detention is not permissible in accordance with law. The order of detention is, therefore, liable to be struck down

16. In the result, Rule is made absolute. The order of detention at Exhibit "A" dated 11 August 1995 is quashed and set aside and the detenu is ordered to be released from detention. We hasten to clarify that it was fairly stated before us that the detenu is in custody in connection with the pending cases under the NDPS Act where bail has either been refused or has not been granted. It, therefore, follows that, as of this date, though the order of detention is set aside, the detenu will not be entitled to be released from jail.