

(1994) 08 BOM CK 0098

In the Bombay High Court

Case No : Criminal Writ Petition No. 64 of 1994

Sk. Samsher

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 08-08-1994

Acts Referred:

Constitution of India, 1950 — Article 226
Penal Code, 1860 (IPC) — Section 34, 392, 506

Citation : (1996) 1 BomCR 64 : (1995) CriLJ 1411

Hon'ble Judges : R.M. Lodha, J;M.B. Ghodeswar, J

Bench : Division Bench

Advocate : S.A. Jaiswal, for the Appellant; H. Ahmed, Assistant Public Prosecutor and M.G. and V.V. Bhangde, for the Respondent

Judgement

M.B. Ghodeswar, J.—The petitioner Sk. Samsher son of Sk. Ramzan has filed this petition under Article 226 of the Constitution of India, challenging the order of his detention passed by the Respondent No. 2, the Commissioner of Police, Nagpur on 8th December, 1993 under sub-section (2) of Section 3 of the National Security Act, 1980 (hereinafter referred to as the Act).

2. The copy of grounds (Annexure No. 2) dated 8-12-1993 was served upon the petitioner on 10-12-1993. It is stated in the grounds that since the year 1982 the petitioner was continuously engaging himself in the commission of violent and desperate acts such as committing murder, robbing and threatening people at the point of knives and swords etc. He was also externed twice from the municipal limits of Nagpur City and Nagpur district for two years each time vide externment orders dated 25-5-1982 and 15-10-1984 respectively. The petitioner repeatedly violated the externment order and entered into the City and committed grave, violent and desperate acts and continued to create terror in the minds of people. With a view to preventing the petitioner from committing acts prejudicial to maintenance of public order, he was detained five times under the Act by the Respondent No. 2 during the years 1986 of 1991. In spite of all

these preventive actions, the petitioner continued in the commission of violent and desperate acts which are prejudicial to the maintenance of public order. Two crimes are registered against the petitioner :

(1) Police Station Sadar - Crime No. 404/93 u/s 506(b) of I.P.C.

The incident took place on 20-10-1993 at about 15.00 hrs. in District Court premises. The complainant Rupendrasingh son of Balbirsingh Baxi, Resident of Kashmiri Galli, Police Station, Panchpaoli, Nagpur, owner of Dhaba, was brought in the Court of Chief Judicial Magistrate, Nagpur on arrest warrant by Panchpaoli police and while the complainant was standing in the corridor, the petitioner went there and threatened the complainant to kill. The petitioner after threatening went near Rupendrasingh to assault him but because of investigation of police, the petitioner could not succeed in assaulting the complainant. The reason behind this act was old rivalry and goondaism on the part of petitioner. As a result of this incident, feeling of insecurity and panic had spread in the Court premises. With a view to restoring public order, police had to keep vigil in the Court premises.

The petitioner was arrested in this crime on 22-11-1993.

(2) Police Station, Dhantoli - Crime No. 517/93 u/s 392 read with Section 34 of Indian Penal Code.

The incident in this crime took place on 18-11-1993 at about 19.30 hrs. The complainant Rajendra son of Suryakant Mehta, Resident of Rahate Colony, Nagpur is an owner of grocery shop, situated at his house. At the relevant time, the complainant along with his wife, mother and children were present in the house. The petitioner along with his one associate went there and demanded cash of Rs. 500/-. When complainant said that he had no money, the petitioner whipped out his knife and held it against the stomach of complainant and threatened him giving filthy abuses. The petitioner also said that he was acquitted from murder case and that he was collecting amount of about Rs. 20,000/- to get his associates released. Due to fear, the mother of complainant gave the petitioner Rs. 300/- and the petitioner forcibly took out her two gold bangles worth Rs. 12,000/- and then left the spot.

On 13-11-1993 at about 18.00 hrs., the petitioner along with his 5-6-associate had gone to the shop complainant in an auto-rickshaw and demanded Rs. 500/-. When the complainant did not oblige the petitioner, his associate has threatened "You have displeased Samsher. There is danger to your life at any time. I always keep "katta" with me and will finish you at any time".

It is alleged that due to this incident, the residents of Rahate Colony closed their doors and were afraid to come out. There was a general scare in the area. The police assured the residents of their total protection and launched an intensive search for the petitioner and his associate. Police had to start patrolling at Rahate Colony in order to restore normalcy there. The petitioner was arrested in

this crime on 19-11-1993.

It is also alleged that the petitioner and his associates were continuously engaging themselves in criminal activities such as committing robberies by extorting money from the local residents and shopkeepers by threatening them with sharp weapons. The witnesses and the victims also apprehend grave danger from the petitioner and they therefore unwilling to come forward and lodge complaints against the petitioner. Only on a condition that their anonymity will be kept and the assurance that they will not be called upon to give evidence in the Court or any other open forum, the statements of three witnesses were recorded in Camera and in the gist of statements is given in the grounds.

These three witnesses are shopkeepers. The statement of witness "A" was recorded on 5-12-1993. This witness had stated that on 7-10-1993 at about 16.00 hrs. while he was sitting at the counter of his wine shop in Sakkardara, Nagpur, the petitioner with his two associates arrived there on a Hero Honda motor cycle, entered into the shop and forcibly took out cash amounting to Rs. 300/- from the cash-box. When this witness objected, the petitioner assaulted him with first blows and left the spot.

3. The statement of witness "B" was recorded on 5-12-1993. This witness sells eggs at Mirchi Bazar. He stated that on 9-10-1993 at about 15.00 hrs. while he was sitting in his shop, the petitioner along with his two associates went there and order for eggs. When this witness had asked for payment, the petitioner gave him a fist blow and shouted at him and also threatened him.

4. The statement of witness "C" who is an owner of Panthela, was recorded on 7-12-1993. This witness had stated that on 12-10-1993 at about 14.00 hrs., the petitioner along with one associate went there to book pan and cigarettes worth Rs. 30/- and when this witness had asked for payment, the petitioner threatened him.

All these witnesses did not make report to police due to fear of the petitioner. From the above grounds, the respondent No. 2 had arrived at, subject to his satisfaction, that the activities of the petitioner are prejudicial to the maintenance of public order and in order to prevent the petitioner from committing such acts, preventive detention is necessary.

5. The State of Maharashtra, respondent No. 1, in pursuance of sub-section (4) of Section 3 of the Act, approved the order of detention dated 8-12-993 passed by respondent No. 2. On 10-1-1994, the petitioner appeared before the Advisory Board and supplied five copies of his Representation and requested the Board to supply the copies of his Representation to the Detaining Authority, Supperintendent, Central Prison, Nagpur, Secretary Maharashtra State, Home Department, Mantralaya, Bombay-32 and also the Secretary, Govt. of India, Ministry of Home Affairs, Department of Internal Security, New Delhi. The Advisory Board forwarded its report along with representation of the petitioner to the State Government on 18-1-1994. The State Government confirmed the

detention by its order dated 1-2-1994 and rejected the representation and intimated the same by letter dated 2-2-1994 addressed to the petitioner through Superintendent, Central Prison, Nagpur which was received by the petitioner on 7-2-1994.

6. The petitioner amended the petition on 8-6-1994 and submitted that he was discharged by the Court in a case in Crime No. 517/1993 u/s 392 read with Section 34 of Indian Penal Code and further that he submitted five copies of his representation to the Jailor, Central Prison Nagpur for sending the same to the Detaining Authority, State Government and the Secretary, Government of India, Ministry of Home Affairs, Department of Internal Security, New Delhi, but his representation has not been considered by the Government of India.

7. The State Government and Detaining Authority have filed their return and the Union of India, respondent No. 3, has also filed the counter-affidavit. Respondent No. 3 has stated that the State Government, vide its letter dated 20-12-1993, has sent a report of the Central Government as envisaged under sub-section (5) of Section 3 of the Act about the detention of the petitioner and the Central Government received the same on 24-12-1993 and that was immediately attended to. That after examination of the report, the concerned Joint Secretary authorised to act under Sections 3(5) and 14 of the Act decided on 4-1-1994 that there was no necessity to interfere with the order of detention approved by the State Government and therefore there was no reason to revoke the order of detention. As there is no statutory obligation on the part of Central Government to inform the detenu about the result of consideration. The Central Government did not consider it necessary to inform the petitioner or anybody about the outcome of consideration of the report of the detention. This counter affidavit filed on behalf of Union of India is silent about the receipt of any representation of the petitioner.

8. The petitioner has raised several grounds to challenge his detention including the ground that there is inordinate delay for consideration of the representation of the petitioner. It is not necessary to consider all the challenges raised in the petition.

9. The learned counsel for the petitioner has submitted that there is delay caused by the authorities for consideration of the representation of the petitioner and the Union of India has not considered the representation so far. It is further submitted that on 10-1-1994 when the petitioner appeared before the Advisory Board, the petitioner gave five copies requesting the Board to send those copies to the Detaining Authority, State Government and respondent No. 3. The petitioner has averred in Ground "F" that on 10-1-1994 he has supplied four copies of representation to the Board and one copy is sent by the Advisory Board to the State Government. The State Government has stated that the representation submitted by the detenu, at the time of hearing before the Advisory Board, was received along with the report of Advisory Board on 18-1-1994 and the said Representation was considered by the Minister of State

for Home on 31-1-1994 and rejected at the time of confirming the continued detention of the detenu. It is, therefore, clear that the Advisory Board has sent the copy of representation as requested by petitioner to State Government. The affidavit of respondent No. 3 is silent on this point. However, the learned Counsel for respondent No. 3 has stated that the Union of India has not received the copy of representation dt. 10-1-1994. The submission of the learned counsel for the petitioner is that when the petitioner has supplied the copies of representation to the Advisory Board to be delivered to the concerned authorities, it was the duty of Advisory Board to send the copies of representation as requested. The return of State Government does not show that the copy of representation dated 10-1-1994 was sent to Central Government.

10. The learned Additional Public Prosecutor, relying on the decision of *Hirabai v. State of Madhya Pradesh* reported in 1987 Cri LJ 659 has submitted that the Advisory Board is not duty bound to send the representation of the petitioner to the concerned authorities. It is observed in para 19 of the judgment at page 664 :

"19. x xx xx xx xx xx xx xx xx xx xx when the Advisory Board considered the matter in its meeting on 28-2-1986 the detenu was present in the said meeting of the Board and was granted a personal hearing by it. In our opinion, it is carrying things too far to suggest that while giving personal hearing to the detenu the Advisory Board was duty bound to enquire from him as to why he did not make a representation in writing to the State Government and to afford an opportunity to make such a representation in writing to it. In our opinion, there is nothing contained in Art. 22(5) of the Constitution or S. 11 of the Act to compel the Advisory Board to adopt such a course."

The facts of the present case are different. Here the detenu had made representation and had also given copies of the same to the Advisory Board to be sent to concerned authorities.

11. In the decision reported in *Smt. Gracy Vs. State of Kerala and another*, , it is observed in paras 8 and 9 as under at page 1093 of AIR :

"8. It is undisputed that if there be only one representation by the detenu addressed to the detaining authority, the obligation arises under Art. 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. In other words, one representation of the detenu addressed only to the Central Government and not also to the Advisory Board does not dispense with the requirement of its consideration also by the Advisory Board. The question, therefore, is : Whether one of the requirements of consideration by Government is dispensed with when the detenu's representation instead of being addressed to the Government or also to the Government is addressed only to the Advisory Board and submitted to the Advisory Board instead of the Government ? On principle, we find it difficult to uphold the learned Solicitor General's contention which would reduce the duty of the detaining authority

from one of substance to mere form. The nature of duty imposed on the detaining authority under Art. 22(5) in the context of the extraordinary power of preventive detention is sufficient to indicate that strict compliance is necessary to justify interference with personal liberty. It is more so since the liberty involved is of a person in detention and not of a free agent. Art. 22(5) casts an important duty on the detaining authority to communicate the grounds of detention to the detenu at the earliest to afford him the earliest opportunity of making a representation against the detention order which implied the duty to consider and decide the representation when made, as soon as possible, Art. 22(5) speaks of the detenu's "representation against the order", and imposes the obligation on the detaining authority. Thus, any representation of the detenu against the order of his detention has to be considered and decided by the detaining authority, the requirement of its separate consideration by the Advisory Board being an additional requirement implied by reading together Cls. (4) and (5) of Art. 22, even though express mention in Art. 22(5) is only of the detaining authority. Moreover, the order of detention is by detaining authority and so also the order of its revocation if the representation is accepted, the Advisory Board's role being merely advisory in nature without the power to make any order itself. It is not as if there are two separate and distinct provisions for representation to two different authorities viz. the detaining authority and the Advisory Board, both having independent power to act on its own.

9. It being settled that the aforesaid dual obligation of consideration of the detenu's representation by the Advisory Board and independently by detaining authority flows from Art. 22(5) when only one representation is made addressed to the detaining authority, there is no reason to hold that the detaining authority is relived 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 Art. 22(5) in support of the contention of the learned Solicitor General. The contents of Art. 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 Art. 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 Art. 22(5) enacted as one of the safeguards provided to the detenu in case of preventive detention."

As the Advisory Board has sent a copy of representation of detenu to State Government along with its opinion, the Advisory Board ought to have sent the copy of representation to Central Government also. As there is no specific denial by the State Government to the averments of the petitioner in this regard, we hold that the Advisory Board was duty bound to send the copy of representation to Central Government.

12. From the return of the State Government, it is clear that the Jail authorities have forwarded the representation of the detenu on 12-5-1994 which was received on 16-5-1994 and it was considered on 27-5-1994 and reply was given to the detenu on 30-5-1994. This return of State Government further discloses that the Government of India received the representation of detenu dated 12-5-1994 and Government of India requested the State Government to send parawise comments on the representation, opinion of the Advisory Board etc. The State Government replied by wireless message on 31-5-1994 and State Government also intimated that detaining authority was requested to send his parawise remarks on the representation directly to the Government of India.

13. The learned counsel for Respondent No. 3 has made a statement that Government of India has received the representation of the detenu dated 12-5-1994, but parawise remarks of detaining authority are not received so far by the Central Government and, therefore, the representation is not yet considered. The learned counsel for State and detaining authority has also made a statement that there is nothing on record to show that the detaining authority has sent the parawise remarks on the representation of detenu of Central Government.

In this regard, the observations of the Constitution Bench in K. M. Abdulla Kunhi and K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others, are very much relevant at page 794 of Cri LJ :

"It is now beyond the pale of controversy that the constitutional right to make representation under Cl. (5) of Art. 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation."

After receipt of the representation, there is an obligation on the Government to consider and dispose of the same expeditiously. Though State Government has considered the representation of detenu dated 12-5-1994 on 27-5-1994 and informed about the same to Government of India, the Government of India has not considered that representation so far. Therefore, there is unreasonable delay in considering the representation of detenu by Central Government. Thus there has been infraction of the guarantee under Art. 22(5) of the Constitution as a result of Central Government's omission to consider the detenu's representation and dispose of the same expeditiously. Hence the continued detention of the petitioner is illegal. Therefore, the petitioner succeeds in the petition.

14. In the result, the petition is allowed. The impugned order is quashed and set aside and the Respondents are directed to release the petitioner forthwith, if not required in any other case.

15. Petition allowed.