
(1995) 08 BOM CK 0055

In the Bombay High Court

Case No : Criminal Writ Petition No. 1242 of 1994

Smt. Laura Britto

APPELLANT

Vs

V.C.D. Singh Secretary Preventive Detention and Others

RESPONDENT

Date of Decision : 01-08-1995

Acts Referred:

Constitution of India, 1950 — Article 21, 21, 22(5)

Citation : (1996) 3 BomCR 265 : (1996) CriLJ 371

Hon'ble Judges : A.S.V. Moorthy, J;A.C. Agarwal, J

Bench : Division Bench

Advocate : S.B. Keswani and A.R. Khan, for the Appellant; Mrs. R.P. Desai, Assistant Public Prosecutor, for the Respondent

Judgement

Agarwal, J.—By an order bearing No. SPL 3 (A)/PND 0194/56 dated 24th August 1994 passed by Shri C. D. Singh, Secretary to the Government of Maharashtra u/s 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (46 of 1988) hereinafter for the sake of brevity PIT NDPS Act, Shri Victor Anthony Fernandes has been detained. The Petitioner who is the sister of the detenu seeks to challenge the aforesaid order of detention and the consequent detention of the detenu by filing the instant habeas corpus petition.

2. The incident which has led to the passing of the aforesaid order has taken place on 2nd September 1993. The Detenu came to be arrested in connection with the said offences on 18th September 1993. On 8th April 1994, the detenu was directed to be released on bail on condition of his reporting every week. The condition of reporting every week was relaxed and the detenu was directed to report every 15 days by an order passed on 31st August 1994. As already stated on 24th August 1994 an order of detention was issued. The detenu in compliance with the order of reporting reported to the investigating agency on 31st August 1994, 14th September 1994 and 28th September 1994. The order of detention was served on the detenu on 28th September 1994, and the detenu was taken under detention.

3. Shri Keswani, learned counsel appearing in support of the petitioner has firstly contended that there has been a total non-appraisal of the right of the detenu to make a representation to the detaining authority himself. He has submitted that the detaining authority has not informed the detenu of his right to make a representation against the order of detention to the detaining authority. It was enjoined upon the detaining authority to have the detenu informed of the right. The non-communication of the said right of the detenu vitiates the detention order as the detenu could not make a representation at the earliest opportunity and the same has not been considered within the stipulated period.

4. Smt. Desai, learned APP has sought to repel the submission by pointing out that the detenu in the instant case has on 5th October 1994 made a representation to the State Government. Advisory Board as also to the detaining authority. As far as the detenu is concerned he has been duly informed of his right to make a representation to the State Government, the Central Government and the Advisory Board. Though he has not been informed of his right to make a representation to the detaining authority himself, the same has not caused any prejudice to him as he has in fact made representations to all the four functionaries, simultaneously and on 5th October 1994. The non-appraisal of the right to make a representation to the detaining authority has not deprived the detenu of the right to make the earliest representation as even in respect of the functionaries, in respect of whom, the right has been duly communicated, he has made a representation only on the 5th October, 1994 on which day he has also made a representation to the detaining authority. There has therefore been no infraction of a right conferred upon the detenu under Article 22(5) of the Constitution. The order of detention and the consequent detention of the detenu therefore cannot be faulted.

5. In the case of *Kamaleshkumar Ishwardas Patel v. Union of India*, reported in j t. (1995) 3 SCC 639, the Supreme Court has observed :

"Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made out only to the Advisory Board but also to the detaining authority, i.e. the authority that has made the order of detention or the order for continuance of such detention, who is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation carried within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation."

6. The Supreme Court has further gone on to add This right of the detenu is in addition to his right to make the representation to the State Government and the Central Government where the detention order has been made by an officer specially authorised by a State Government and to the Central Government

where the detention order has been made by an officer specially empowered by the Central Government, and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation.

7. In the case of Wasiuddin Ahmed Vs. District Magistrate, Aligarh, U.P. and Others, , the Supreme Court has observed that the law insists upon literal performance of procedural requirement. Need for observance of the procedural safeguards, particularly in case of deprivation of life and liberty is of prime importance to the body police.

8. In the case of Hem Lall Bhandari Vs. State of Sikkim and Others, , the Supreme Court observed thus (at p. 722 of Cri LJ) :

"It is not permissible, in matters relating to the personal liberty and freedom of a citizen, to take either a liberal or a generous view of the lapses on the part of the officers. In matters where the liberty of the citizens is involved, it is necessary for the officers to act with utmost expedition and is strict compliance with the mandatory provisions of law. Expeditious action is insisted upon as a safeguard against manipulation."

As indicated the mandate enacted in the provision is a safety valve for a citizen who is robbed of his liberty and to disable the authority from manipulating the grounds of detention. The provision has to be interpreted literally. No relaxation is permissible.

9. In the case of K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others, it has been observed as follows (Para 12) :

"The representation relates to the liberty of the individual, the highly cherished right enshrined in Article 21 of our Constitution. Clause (5) of Article 22 therefore, casts a legal obligation on the Government to consider the representation as early as possible."

The right of a detenu to make representation and the corresponding obligation of the detaining authority to communicate to a person detained with the grounds of detention so as to afford the detenu the earliest opportunity of making a representation is a safeguard provided by Article 22(5) of the Constitution. The article provides that the authority making order shall as soon as may be communicated to the person detained the grounds of detention. The article further provides that the detaining authority shall offer the detenu an earliest opportunity of making the representation against the order. The mandate contained in the aforesaid article cannot be ever emphasised. The promptitude with which the authorities concerned are expected to act also cannot be

overstated. The article deals with the obligation cast on the detaining authority who has been entrusted with the extraordinary power to detain a person without trial. He has been given the authority to curtail rather deprive the liberty of a person. Hence while exercising this extraordinary power the detaining authority has to perform corresponding obligation viz., to, without loss of time, communicate the grounds of detention so as to afford the detenu the earliest opportunity of making the representation. It is no doubt true that the aforesaid article does not lay down a specific time within which the aforesaid obligation has to be performed. The article provides that the obligation should be performed with all promptitude and without loss of time.

10. We have further provisions contained in sub-section (3) of Section 3 of the PIT NDPS Act which gives an indication regarding the time within which a detaining authority is expected to communicate the grounds of detention. The sub-section provides that for the purpose of clause (5) of Article 22 of the Constitution a communication to a person detained in pursuance of a detention order of the ground on which the order of detention has been made, shall be made as soon as may be after the detention but ordinarily not later than five days and for exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of detention. In our view the provision is clear and unambiguous. It provides that the grounds of detention should be communicated to the detenu as soon as may be i.e. preferably at the time of service of the order of detention on the detenu. The grounds should ordinarily be served within a period of five days. The intention of the legislature has been made clear for it provides that the same should be served not later than 5 days. The section thereafter provides for a further time limit viz., of 15 days and the said time limit can be claimed only in exceptional circumstances and for reasons to be recorded in writing. It goes without saying that not only are the reasons required to be recorded but the same should be duly communicated to the detenu, as it would always be open to the detenu to challenge the reasons recorded for exceptional circumstances shown for serving the grounds later than five days and within fifteen days. It follows in our view that in no case can the grounds of detention be permitted to be served beyond the period of 15 days. Service of the grounds of detention beyond the period of 15 days would be per se bad in law and would render the order of detention null and void. Similarly serving the grounds of detention beyond the period of 5 days from the date of detention and within 15 days thereof without assigning exceptional circumstances and giving reasons for the delay in writing and without serving the same on the detenu within the said period of 5 days and 15 days will also render the detention invalid. Hence the aforesaid provisions, in our view, mandate that the grounds of detention should be served as soon as possible preferably along with the service of the order of detention. The said grounds are invariably required to be served within a period of 5 days from the date of detention and the aforesaid period of 5 days can be relaxed only in rare and exceptional circumstances and that too by giving valid reasons for the delay which reasons

should be recorded in writing and duly served on the detenu along with the grounds of detention and that too within a period of 15 days from the date of detention. Any departure from the aforesaid provisions cannot be tolerated as, as pointed out by the Supreme Court in the aforestated cases, the provisions invade upon the right of liberty of citizens which is a highly cherished, right enshrined in Article 21 of our Constitution.

11. As far as the right of the detenu to make representation to the detaining authority is concerned, the same has been made abundantly clear in the case of Kamleshkumar Ishwardas Patel 1995 (3) SCC 639. Once it is held that the detenu has a right to make a representation to the detaining authority there arises a corresponding obligation on the part of the detaining authority to appraise the detenu of the said right. The said right, as we have found in the earlier paragraphs of this judgment, has to be communicated at the earliest and without loss of time. The said right has to be communicated immediately preferably at the time of the service of the order of detention and the grounds of detention. If for any reasons it is not possible to do so, the same in any event has to be communicated within a period of 5 days from the date of detention. It is only in exceptional circumstances that the communication can be effected at a later date i.e. beyond the period of 5 days. This communication has in any event to be made within a period of 15 days from the date of detention. This later communication is permissible only in exceptional circumstances and the detenu has to be communicated the exceptional circumstances in writing and this has also got to be done within the period of 15 days from the date of detention. This will enable a detenu to challenge the exceptional circumstances which have been mentioned by way of reasons for late communication. If the reasons recorded are not found to be exceptional circumstances justifying the delayed communication the order of detention can successfully be assailed on this ground alone. Delayed communication of the grounds of detention can by itself vitiate the order of detention.

12. In the case at hand we find that the communication of the grounds of detention containing the intimation to the detenu of his right to make a representation to the detaining authority has not at all been communicated to the detenu. Detenu has however sent a representation dated 5-10-1994. This was beyond the period of 5 days from the date of the detention. This will not absolve the obligation of the detaining authority to communicate to the detenu of his right to make the representation. The order of detention therefore will stand vitiated on this ground alone.

13. There is yet another ground on which the impugned order can be successfully assailed viz., delay in the service of the order of detention, on the detenu. As we have narrated the order of detention has been issued on 24th August 1994. Prior to that an order was passed on 8th April 1994 directing the detenu to be released on bail on conditions of reporting once a week. By a later order passed the condition of reporting was relaxed and the detenu was directed to report

every fortnight. Pursuant to the order of reporting the detenu has reported to the investigating agency on 31st August 1994, 14th September 1994 and 28th September 1995. Even though the order of detention had already been issued on 24th August 1994 the same was not served on the detenu on 31st August 1994 as also on the 14th September 94 even though the detenu was available as he had reported in compliance with the order of bail. It was only on the 28th September 1994 that the order was served on the detenu and the detenu was taken in detention. If the very purpose of issuing the order of detention was to prevent the detenu from again indulging in prejudicial activities the same ought to have been served on the detenu expeditiously and without loss of time. This indicated that the arresting officers did not make any real and genuine efforts to secure and detain the detenu. In the case of K.P.M. Basheer Vs. State of Karnataka and another, , the Supreme Court on facts similar to the present ones has quashed and set aside the order of detention. An order of detention has to be passed with utmost promptitude. Once it is passed the same is also to be executed also with the same promptitude failure of which will only snatch the live link between the prejudicial activities of the detenu and the need to detain him in order to prevent him from re-indulging in the said prejudicial activities. Since the present order of detention has not been served on two occasions within a gap of about two weeks, the order of detention has lost its efficacy rendering the same null and void. The order of detention and the consequent detention of the detenu is liable to be quashed on this ground also.

Since the petition succeeds on these grounds we do not think it necessary to refer to the other grounds/ contentions raised in order to assail the order of detention.

For the foregoing reasons the petition succeeds. The impugned order of detention No. SPL 3(A)/PND 0194/56 dtd. 24th August 1994 is quashed and set aside. The detenu is directed to be released forthwith unless required in some other case. Rule is made absolute.

14. Petition allowed.