

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 16 OF 2008

Gopal Dass Thru. Brother Anand Vir .. Petitioner

-versus-

Union of India and anr. .. Respondents

JUDGMENT**Markandey Katju, J.***"Qafas udaas hai yaaron sabaa se kuch to
kaho**Kaheen to beher-e-khuda aaj zikr-e-yaar chale"*-- **FAIZ AHMED FAIZ**

1. This is a writ petition filed under Article 32 of the Constitution of India praying for a direction to the respondent, Union of India, to take immediate and necessary steps for release and repatriation of the petitioner, who is allegedly detained in the Lahore Central Jail in Pakistan, through the diplomatic channel of the Ministry of External Affairs, Government of India, New Delhi.

2. It is alleged by the petitioner that he is an Indian national. He was intercepted and arrested by the Pakistan Border Security Force in July 1984 when he alleged to have mistakenly crossed over the Indo-Pakistan border into Pakistan.

3. The petitioner was tried by a Field General Court Martial at Sialkot Cantonment in Pakistan and was awarded life sentence on 27.12.1986 under Section 59/3 of the Pakistan Official Secrets Act, 1923. The said sentence was confirmed by Brigadier Mallik, Commander, 10th Brigade. He was lodged in different jails, and presently is allegedly in Mianwali Jail in Pakistan.

4. It is alleged that due to the petitioner's detention his whole family is suffering from the year 1986. His brother, through whom this petition has been filed, made several representations to the concerned authorities of the Government of India requesting them to take up the matter with the Pakistan authorities for taking necessary action for release of the petitioner and repatriation on humanitarian grounds, but as yet nothing has been done. It is further alleged that about 182 Indian prisoners have been languishing in Pakistan jails for many years. The petitioner has written several letters to his family members, copies of which have been annexed to this petition.

5. A counter affidavit has been filed on behalf of the Ministry of External

Affairs, Government of India dated January 2011. It has been stated therein that although the petitioner is an Indian citizen, he has been convicted by a Pakistani Court, and hence his detention is governed by the law in force in Pakistan. The Government of India has an agreement with Pakistan on Consular Access, and has been continually pursuing the issue of release of Indian prisoners in Pakistani jails. On a request made by the Government of India a list of prisoners in Pakistani jails was received from Pakistan's Ministry of Foreign Affairs in January 2010, which authenticates that the petitioner was awarded sentence of 25 years from 27.6.1986. On instructions from the Ministry of External Affairs, Government of India, the Indian High Commission in Pakistan has requested the Ministry of Foreign Affairs, Pakistan to urgently clarify whether the Court order sentencing the petitioner required pre-trial detention to be adjusted in the sentence. The Indian High Commission is still waiting for a response.

6. It is also stated in the counter affidavit that the Government of India has been consistently taking up the issue of Indian prisoners in Pakistani jails with the Pakistan authorities at all levels. An 'India-Pakistan Judicial Committee on Prisoners', consisting of retired Judges, four from each country, has been set up to recommend steps to ensure humane treatment and expeditious release of prisoners of the respective countries in each other's jails. The petitioner was produced before this Committee during their visit to

Pakistani jails in June 2008. The Committee has held several meetings and made certain recommendations, and the response is awaited. It is alleged that there is no confirmation from the Government of Pakistan about completion of his sentence by the petitioner.

7. We have heard learned counsel for the petitioner and learned Solicitor General of India for the Union of India.

8. We cannot give any directions to Pakistan authorities because we have no jurisdiction over them. The Indian authorities have done all that they could in the matter.

9. However, that does not prevent us from making a request to the Pakistani authorities to consider the appeal of the petitioner for releasing him on humanitarian grounds by remitting the remaining part of his sentence.

10. It may be noted that while in the counter affidavit of the Government of India, it is mentioned in paragraphs 5 and 7 that the petitioner has been awarded a sentence of 25 years imprisonment with effect from 27.6.1986 (which means he will be released on 26.6.2011), the order of the Lt. Colonel, Commanding Officer, 27 A.K. Regiment of Pakistan (Annexure P-1 to this appeal) states that the petitioner has been awarded life sentence by the Field General Court Martial, which has been confirmed by the higher authority.

11. Thus there is a discrepancy here. At any event, we think it appropriate to make an appeal on humanitarian grounds to the Pakistan authorities to release the petitioner as he has served almost 27 years in jail. For this we refer to Portia's famous speech in Shakespeare's 'Merchant of Venice' :

"The quality of mercy is not strain'd;
It droppeth as the gentle rain from heaven
Upon the place beneath. It is twice blest:
It blesseth him that gives and him that takes.
It is an attribute to God himself;
And earthly power doth then show likest God's
When mercy seasons justice."

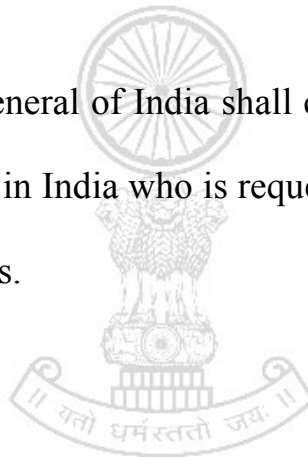
12. It may be mentioned in this connection that a delegation from Pakistan had recently come to India to request for release of Pakistani prisoners in Indian jails. This delegation was headed by Hon'ble Mr. Justice Nasir Alam Zahid, a very respected former Judge of the Pakistan Supreme Court, and it included Mr. Syed Iqbal Haider, Senior Advocate of the Pakistan Supreme Court (who had been Pakistan's Law Minister in Mrs. Bhutto's Cabinet). This delegation, accompanied by Mr. Kuldeep Nayyar and Mr. Mahesh Bhat of the Hind-Pak Dosti Manch, met the Prime Minister, Union Home Minister, Minister of External Affairs and other authorities in India, and informed them that a petition was filed by them in the Pakistan Supreme Court and the Court ordered release of 442 Indian prisoners languishing in Pakistan jails. (The Pakistan Supreme Court deserves to be commended in this connection). They requested for similar release of Pakistani prisoners in Indian jails, and the Indian

Government generously reciprocated the gesture by releasing many Pakistani prisoners in our jails. Thus there is a humanitarian spirit on both sides, which we applaud.

13. We, therefore, request the Pakistani authorities to consider the appeal of the petitioner for remitting the remaining period of sentence and release him (as well as other similarly Indian prisoners) in the same spirit.

14. With the above observations this petition is disposed off.

15. Learned Solicitor General of India shall communicate this order to the Pakistan High Commissioner in India who is requested to communicate it to the concerned Pakistan authorities.



.....J.
(Markandey Katju)

.....J.
(Gyan Sudha Misra)

New Delhi:
March 14, 2011



