

PETITIONER:
SMT.GRACY

Vs.

RESPONDENT:
STATE OF KERALA AND ANR.

DATE OF JUDGMENT 15/02/1991

BENCH:
VERMA, JAGDISH SARAN (J)
BENCH:
VERMA, JAGDISH SARAN (J)
RAY, B.C. (J)
SHARMA, L.M. (J)

CITATION:
1991 AIR 1090 1991 SCR (1) 421
1991 SCC (2) 1 JT 1991 (1) 371
1991 SCALE (1) 211

ACT:

Constitution of India, 1950: Article 22(5)-Preventive detention -Safeguards-Representation of detents under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act-Addressed to the Advisory Board-Consideration by Government independent of Board's consideration-Dual obligation of both the authorities-mode of address only a matter of form-constitutional guarantee-Mandatory.

Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988: Section 3-Preventive detention-Representation of detents addressed to Advisory Board-Consideration by Government independent of Board's consideration-Dual obligation of both the authorities-Mode of address only a matter of form-Constitutional mandate under article 22(5)-Can't be whittled down.

HEADNOTE:

The petitioner's son was arrested on 19.10-1989 on the accusation that he and his brothers were involved in extensive illicit cultivation of ganja plants in violation of the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The Magistrate before whom he was Produced, rejected the bail application. The Sessions Court granted conditional bail. The detention order dated 25.1.1990 was served on the detenu on 30.1.1990. The order stated that though prosecution was likely to be initiated under the NDPS Act, there was every likelihood of his continuing the cultivation of ganja plants and thus there was a compelling reason to detain him under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988. The detenu was informed of his right to make a representation to the detaining authority, Central Government and the Central Advisory Board against the detention order. The mode of representation was also indicated along with the grounds of detention, in accordance with Article 22(5) of the Constitution of India.

In accordance with the procedure, the Central Government referred the case to the Central Advisory Board. During the pendency of the reference, the detenu made a

representation to the Advisory Board. The Advisory Board considered the reference along with the detenu's

422

representation and came to the conclusion that there was sufficient cause to justify his preventive detention. Thereafter, the Central Government made an order dated 24.4.1990 confirming its earlier order and directing his detention for a period of two years.

In the present Writ Petition, the mother of the detenu prayed for quashing of the detention order contending that there has been infraction of the guarantee under Article 22(5) of the Constitution as a result of the Central Government's omission to consider the representation of the detenu, independent of its consideration by the Advisory Board. Petitioner also challenged the stand of the Central Government that there was no obligation on it to consider the representation of the detenu independently since the same was addressed to the Advisory Board and not to the Central Government.

Allowing the Writ Petition, this Court,

HELD: 1. The obligation of the Government to consider the representation is different and in addition to the obligation of the Advisory Board to consider it at the time of hearing the reference before giving its opinion to the Government. Consideration of the representation by the Government has to be uninfluenced by the view of the Advisory Board. The detenu's right to have the representation considered by the Government under Article 22(5) of the Constitution is independent of the consideration of the detenu's case and his representation by the Advisory Board. [426G-H]

K.M. Abdulla Kunhi and B.L. Abdul Khader v. Union of India and Ors., State of Karnataka and Ors., JT 1991 (1) SC 216; relied on.

2. 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 clauses (4) and (5) of Article 22, even though express mention in Article 22(5) is only of the detaining authority. The order of detention is by the detaining authority and so also the order of its revocation of 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. (427G-H; 428A-B)

423

3. It being settled that this dual obligation flows from Art. 22(5) when only one representation is made and addressed to the detaining authority, there is no reason to hold that the detaining authority is relieved of this 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. So long as there is a representation made by the detenu against the order of detention, the 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. [428B-E]

4. In the instant case, there has been a breach by the Central Government of its duty under Article 22(5) of the Constitution to consider and decide the representation independently of the Advisory Board's opinion. The order of detention dated 25.1.1990 as well as the order dated 24.4.1990 of its confirmation passed by the Central Government are quashed. [428F-G]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition (CRL.) No. 1218 of 1990.

(Under Article 32 of the Constitution of India).

John Joseph and T.G.N. Nair for the Petitioner.

A.D. Giri, Solicitor General, Ashok Bhan, Ms. A. Subhashini and T.T. Kunhikannan for the Respondents.

The Judgment of the Court was delivered by

VERMA J. This writ petition under Article 32 of the Constitution of India is by the mother of the detenu Noor alias Babu to quash the detention order F. No. 801/1/90 PITNDPS dated 25.1.1990 passed under Section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (in short 'PIT'NDPS Act') and the order of confirmation F. No. 801/1/90 PITNDPS dated 24.4.1990 'passed under Section 9(f) read with Section 10(2) of the PITNDPS Act, by the Central Government directing detention of the detenu for a period of two years w.e.f. 30.1.1990. The only argument advanced in support of this writ petition is infraction of Article 22(5) of the Con-

424

stitution of India. The facts material for the point raised are stated hereafter.

The detenu was arrested from his family estate at Kochuveetil House, Kuthugal, Udumpanchola Taluk, Idikki District, Kerala on 19.10-1989 on the accusation that he and his brothers were involved in extensive illicit cultivation of ganja plants (Cannabis Sativa) in violation of the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act'), He was produced before the Judicial Magistrate who rejected his bail application. The Sessions Judge also rejected the bail application once but late, granted conditional bail. Thereafter, the detention order dated 25.1.1990 was served on the detenu on 30.1.1990. It was stated therein that even though prosecution of the detenu was likely to be initiated under the NDPS Act, there was likelihood of the detenu indulging in cultivation and production of narcotic drugs (ganja) on the detenu being released on bail on account of which there was compelling necessity to detain him under the PITNDPS Act. The detenu was informed that he had a right to make representation to the detaining authority, Central Government and the Central Advisory Board against the detention order. The mode of address of the representation to the Central Government and the Central Advisory Board was also indicated in the detention order along with the grounds of detention in accordance with Article 22(5) of the Constitution of India. The detenu's case was referred by the Central Government to the Central Advisory Board on 2.3.1990. During pendency of the reference before the Advisory Board, the detenu made his representation on 24.3.1990 and addressed it to the Advisory Board. The

Advisory Board considered the reference relating to the detenu made by the Central Government and also the detenu's representation submitted to it. The Advisory Board, gave the opinion that there was sufficient cause to justify his preventive detention. The Central Government then made the order dated 24.4.1990 confirming his detention and directed that the detenu Noor alias Babu be detained for a period of two years w.e.f. 30.1.1990.

It is admitted that the Advisory Board considered the detenu's representation before sending its opinion to the Central Government along with the entire record including the representation submitted by the detenu. It is also admitted that the Central Government made the order of confirmation dated 24.4.1990 on receipt of the opinion of the Advisory Board, but there was no independent consideration of the detenu's representation by the Central Government at any time. In the counter-affidavit filed initially by Shri A.K. Roy, Under Secretary to

425

the Government of India, this fact was not clearly stated and, therefore, we directed an additional affidavit to be filed. In the additional affidavit filed by Shri A.K. Roy, it has not been disputed that the Central Government did not at any time consider independently the detenu's representation addressed to and given to the Advisory Board. In the additional affidavit, the stand of the Central Government in this behalf has been stated thus:

"..... Since the detenu in the present case has not made any representation to the Central Government, the assertion in para 2 of the grounds of petition that no opportunity was afforded by the Central Government to the said detenu is vehemently denied. The question of consideration of a representation and providing of an opportunity would only arise when a representation is duly made to the Central Government."

On the above facts, the question is: Whether there has been any infraction of the guarantee under Article 22(5) of the Constitution 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.

The Constitutional mandate in Article 22(5) was considered recently by a Constitution Bench in K.M. Abdulla Kunhi and B.L. Abdul Khader v. Union of India and Ors., State of Karnataka and Ors., JT 1991 (1) SC 216, in view of some conflict in earlier decisions of this Court regarding the detaining authority's obligation to consider the detenu's representation independently of the Advisory Board's duty in this behalf. The Constitution Bench held as follows:

"It is now beyond the pale of controversy that the constitutional right to make representation under clause (5) of Article 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. Secondly, the obligation of the Government to afford to the detenu an opportunity to make representation is distinct from the Government's obligation to refer the

426

case of detenu along with the representation to the Advisory Board to enable it to form its opinion and send a report to the Government. It is 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 on its own 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. The Government considers the representation to ascertain essentially whether the order is in conformity with the power under the law. The Board, on the other hand, considers the representation and the case of the detenu to examine whether there is sufficient case (sic) for detention. The consideration by 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 cl. (5) of Article 22 and it is independent of the consideration of the detenu's case and his representation by the Advisory Board under cl. (4) of Art. 22 read with Section 8(c) of the Act. (See: Sk. Abdul Karim & Ors. v. State of West Bengal, [1969] 1 SCC 433; Pankaj Kumar Chakrabarty & Ors. v. State of West Bengal, [1970] 1 SCR 543; Shayamal Chakraborty v. The Commissioner of Police Calcutta and Anr., [1969] 2 SCC 426; B. Sundar Rao and Ors. v. State of Orissa, [1972] 3 SCC 1 1; John Martin v. State of West Bengal, [1975] 3 SCR 2 1 1; S. K. Sekawat v. State of West Bengal, [1975] 2 SCR 161 and Haradhan Saha & Anr. v. State of West Bengal and Ors., [1975] 1 SCR 778)."

(emphasis supplied)

It is thus clear that the obligation of the Government to consider the representation is different and in addition to the obligation of the Board to consider it at the time of hearing the reference before giving its opinion to the Government. Consideration of the representation by the Government has to be uninfluenced by the view of the Advisory Board. In short, the detenu's right to have the representation considered by the Government under Article 22(5) is independent of the consideration of the detenu's case and his representation by the Advi-

427

sory Board. This position in law is also not disputed before us.

The learned Solicitor General, however, contended that in the present case there being no representation addressed to the Central Government, the only representation made by the detenu being addressed to the Advisory Board during pendency of the reference, there was in fact no representation of the detenu giving rise to the Central Government's obligation to consider the same. The question is: Whether this contention can be accepted in the face of the clear mandate in Article 22(5) of the Constitution?

It is undisputed that 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. 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 requirement 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 teamed 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 Article 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. Article 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 implies the duty to consider and decide the representation when made, as soon as possible. Article 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 clauses (4) and (5) of Article 22, even though express mention in Article 22(5) is only of the detain

428

ing authority. Moreover, the order of detention is by the 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.

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 this 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.

We are, therefore, unable to accept the only argument advanced by the learned Solicitor General to support the detention. On this conclusion, it is not disputed that there has been a breach by the Central Government of its duty under Article 22(5) of the Constitution of India to consider and decide the representation independently of the Advisory Board's opinion. The order of detention dated 25.1.1990 as well as the order dated 24.4.1990 of its confirmation passed by the Central Government are, therefore, quashed. This shall not, however, affect the detenu's prosecution for the alleged offence and it shall also not be construed as a direction to release him in case he is in custody as a result of refusal of bail. The writ petition is allowed, accordingly.

G.N.

Petition allowed.

429