

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.4840 OF 2014

Chanda Birju Garunge.

.. Petitioner

Vs

The State of Maharashtra and Others.

.. Respondents

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Mrs. Aisha Mohammed Zubair Ansari along with Mrs. Nasreen Ayubi for the Petitioner.

Shri J.P. Yagnik, APP for the Respondents.

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CORAM : A.S. OKA & A.K.MENON, JJ

DATED : 17TH FEBRUARY 2015

ORAL JUDGMENT : (A.S.OKA, J)

. By this Petition under Article 226 of the Constitution of India, the Petitioner has taken an exception to the order of preventive detention passed under Section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons and Video Pirates Act, 1981 (for short “the said Act of 1981”). The Petitioner is the mother of the detenu. The first ground canvassed by the learned counsel appearing for the Petitioner who is the mother of the detenu is that there is a gross delay on the part of the State Government in deciding the representation made against the order of preventive detention. The learned counsel appearing for the Petitioner is relying upon three different representations. The first representation is a common representation made by the detenu to the

Chairman of the Advisory Board and to the State Government. The second representation made by the Petitioner was in the form of a letter dated 19th December 2014 received through the Superintendent of Nashik Road Central Prison where he has been detained. The learned counsel appearing for the Petitioner is relying upon a third representation which, according to her, was forwarded by the detenu's wife. There is a serious dispute regarding the receipt of the third representation.

2. On the earlier date, after perusing the affidavits, on the consideration of the submissions canvassed by the learned counsel appearing for the Petitioner regarding the delay in disposing of the representations, we had called upon the learned APP to produce the relevant files. Accordingly, photocopies of the relevant files have been produced for the perusal of this Court.

3. As far as the representation made by the detenu to the Chairman of the Advisory Board and to the State of Maharashtra is concerned, it appears that the same was forwarded by the Advisory Board to the State of Maharashtra along with a letter dated 21st November 2014. There is an affidavit filed by Shri S.J. Sovitkar, the Deputy Secretary of the Government of Maharashtra, Home Department (Special), Mantralaya, Mumbai. The said affidavit records that the

report of the Advisory Board was received by the State Government on 21st November 2014. In Paragraph 2 of the affidavit, there is a specific statement made that the said representation was received in the Desk along with the report of the Advisory Board dated 21st November 2014. Thus, on conjoint reading of the statements made in Paragraph 2 and Paragraph 5(vii) of the said affidavit, it appears that the representation was received by the State Government on 21st November 2014 along with the report of the Advisory Board. Perusal of the file produced before this Court shows that the same was put up for the first time before an officer of the State Government on 26th November 2014. There is a remark on the file made by the Additional Chief Secretary (Home) on 27th November 2014 recording that the remarks of the District Magistrate who is the Detaining Authority should be called for. Though this endorsement is signed on 27th November 2014, a letter was dispatched to the District Magistrate on 26th November 2014 calling upon her to furnish parawise comments. Parawise comments were dispatched on 2nd December 2014 by the District Magistrate which were received on 5th December 2014 by the State Government. The concerned Authority of the State passed an order of rejection on 6th December 2014.

4. We have perused the affidavit of Mrs. Rubal Aggrawal, the District Magistrate, Jalgaon, who is the Detaining Authority. It is stated

in Paragraph 16 of the affidavit that the letter dated 26th November 2014 of the State Government was received by her on 28th November 2014. She has stated that parawise comments were collected from the Sponsoring Authority and the same were sent to the State Government on 2nd December 2014.

5. The learned counsel appearing for the Petitioner submits that though the State Government had received the representation on 21st November 2014, the same was kept pending till a decision was taken on the recommendations of the Advisory Board. Her submission is that thus there is no independent consideration of the representation made on behalf of the Petitioner by the State Government. Her submission is that there is a complete inaction on the representation from 21st November 2014 till 26th November 2014. The Detaining Authority received a letter calling upon her to submit parawise comments by 28th November 2014 and the parawise comments were forwarded on 2nd December 2014 which were received by the State Government on 5th December 2014. She submits that this delay on the part of the State Government as well as the Detaining Authority has not been explained. She has placed reliance on a decision of the Apex Court in the case of *Mrs. Nafisa Khalifa Ghanem v. Union of India*¹. The learned APP submitted that the officers of the State Government knew that the matter was fixed on 25th November 2014 for taking a decision

1 (1982)1 SCC 422

on the recommendations of the Advisory Board and, therefore, only after taking a decision on the report of the Advisory Board that the representation was processed. He urged that there is no delay.

6. We have considered the submissions. Firstly, it is not explained as to why it was necessary to call for the parawise comments of the Detaining Authority to enable the State Government to consider the representation. The files produced before us do not disclose the reasons. Instead of calling for the parawise comments by sending a letter either by the fax or by e-Mail, a letter was physically dispatched on 26th November 2014 which was received by the Detaining Authority at Jalgaon on 28th November 2014. The Detaining Authority which is the District Magistrate in her affidavit has stated that on receipt of the requisition by the State Government, she called for the parawise comments from the Sponsoring Authority. We fail to understand the necessity to call for the parawise comments from the Sponsoring Authority. She has stated that she has received parawise comments on 2nd December 2014 which were forwarded to the State Government along with a letter. Again, no attempt was made to forward parawise comments either by fax or by e-Mail. The State Government had called upon the Detaining Authority to submit parawise comments. In turn, the Detaining Authority called for the parawise comments from the Sponsoring Authority. All this was unnecessary. In any event, no

reasons have been stated for doing this exercise. In a case where in the representation against an order of preventive detention, any new fact or document is pleaded of which the State or Detaining Authority is not aware, there can be a necessity of calling for the parawise comments from the Detaining Authority or the Sponsoring Authority. However, it cannot be done mechanically. If it is done mechanically thereby resulting in delay, it will be a violation of Clause (5) of Article 22 of the Constitution of India.

7. We have perused the files. As stated earlier, admittedly, the representation was received on 21st November 2014 by the State Government from the Advisory Board alongwith the report of the said Board. The file shows that on receiving the representation, immediately there is no noting made on the representation or on the file. The first noting is of 26th November 2014. It is pointed out by the learned APP that 22nd November 2014 and 23rd November 2014 were the holidays being the fourth Saturday and Sunday. However, there is absolutely no explanation as to why the representation was not even placed before the Appropriate Authority of the State Government on 21st November 2014, 24th November 2014 and 25th November 2014. We have perused a copy of the representation in the file. The affidavit of Shri S.J. Sovitkar, Deputy Secretary of the Government of Maharashtra, Home Department (Special), records that the report of the Advisory Board was

considered by the Additional Chief Secretary (Home) on 25th November 2014. On 26th November 2014, the impugned order of preventive detention was confirmed after considering the report of the Advisory Board. From the submissions made by the learned APP and from the contents of the file, it is apparent that the representation received on 21st November 2014 was simply kept pending till the order of confirmation of preventive detention was passed by the State Government on 26th November 2014 after considering the report of the Advisory Board. Thus, no steps were taken on the basis of the said representation till 26th November 2014. The learned APP relied upon a decision of the Constitution Bench of the Apex Court in the case of *K.M. Abdulla Kunhi and B.L. Abdul Khader v. Union of India and Others*². He relied upon the observations made by the Apex Court in Paragraphs 16 and 20 of the said decision. What is laid down by the Apex Court in the said decision in Paragraph 16 can be summarized as under:

(a) If a representation is received before a case is referred to the Advisory Board, the representation must be also forwarded to the Advisory Board along with the case of the detenu;

(b) If a representation is received after the case of the detenu is referred to the Advisory Board, in such a

2 (1991)1 SCC 476

situation, the representation should be forwarded to the Advisory Board provided the Board has not concluded the proceedings;

- (c) In both the aforesaid situations, there is no question of consideration of a representation before receipt of the report of the Advisory Board and, therefore, it cannot be said that the Government has delayed the consideration of the representation for awaiting the report of the Advisory Board;
- (d) It is, therefore, proper that the Government considers the representation in the aforesaid two situations only after the receipt of the report of the Advisory Board;
- (e) If the representation is received by the State Government after the Advisory Board had made its report, then there could be of course be no question of sending it to the Advisory Board and the same will have to be dealt with and disposed of by the Government as early as possible.

8. It is also necessary to make a reference to the paragraph 20 of the same decision relied upon by the learned APP which reads thus:

“20. It is necessary to mention that with regard to liberty of citizens the Court stands guard over the facts and requirements of law, but Court cannot draw presumption against any authority without material. It may be borne in mind that the confirmation of detention does not preclude the government from revoking the order of detention upon considering the representation. Secondly, there may be cases where the government has to consider the representation only after confirmation of detention. Clause (5) of Article 22 suggests that the representation could be received even after confirmation of the order of detention. The words 'shall afford him the earliest opportunity of making a representation against the order' in Clause (5) of Article 22 suggests that the obligation of the government is to offer the detenu an opportunity of making a representation against the order, before it is confirmed according to the procedure laid down under Section 8 of the Act. But if the detenu does not exercise his right to make representation at that stage, but presents it to the government after the government has confirmed the order of detention, the government still has to consider such representation and release the detenu if the detention is not within the power conferred under the statute. The confirmation of the order of detention is not conclusive as against the detenu.”

(Underline supplied)

9. Thus, the Apex Court has interpreted Clause (5) of Article 22 of the Constitution of India to mean that it is the obligation of the Government to offer a detenu an opportunity of making a representation against the order before its confirmation according to

the procedure laid down under Section 8 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short “the COFEPOSA Act”) .

10. Thus, what follows is that an opportunity of making a representation against an order of detention is required to be made available to a detenu before it is confirmed by the State Government or by the Appropriate Authority. Thus, it follows that if a representation is made by the detenu or on behalf of the detenu before confirmation of the order by the Government, but after the receipt of the recommendations of the Advisory Board, the consideration of the representation cannot be postponed till confirmation of the order of preventive detention by the State Government. Paragraph 20, therefore, clearly lays down that an opportunity has to be made available to the detenu to make a representation against the order of detention before it is confirmed. If a representation is received by the Government after the receipt of the report or recommendations of the Advisory Board but before the confirmation of the order of detention on consideration of report, the consideration of the representation cannot be postponed till the decision is taken on the report. If the decision on the representation is postponed till the decision on the report of the Advisory Board, it will amount to defeating the constitutional right of the detenu to make a representation before the consideration of the

report of the Advisory Board. This will be violation of Clause (5) of Article 22 of the Constitution of India.

11. It is in this context that the observations made by the Apex Court in the case of *Mrs.Nafisa Khalifa Ghanem* will have to be appreciated. Paragraph 7 of the said judgment reads thus:

“7. Lastly, it was pointed out that although the representation was received by the Detaining Authority on February 25, 1980, the representation was rejected on March 13, 1980, a day after the Advisory Board had given its opinion. The Collector's remarks which were sent for were available to the Detaining Authority as far back as on March 6, 1980 and there could be no reason for the Detaining Authority to have deferred its decision on the representation till the receipt of the opinion of the Advisory Board. This Court has held that the detenu has an independent constitutional right to have the representation considered by the Detaining Authority irrespective of whatever the Advisory Board may do. In the instant case, though the respondents do not admit that they awaited the decision of the Advisory Board, the facts put together lead to the irresistible inference that the Detaining Authority waited for the opinion of the Advisory Board.”

(Underline supplied)

12. Of course, this decision is in the context of the contention that the representation was kept pending awaiting opinion of the Advisory Board.

13. Now coming back to the facts of the present case, the representation was received from the Advisory Board on 21st November 2014 along with its report. Therefore, the State was under an obligation to deal with the said representation as expeditiously as possible. From the affidavit of Shri Sovitkar, it appears that on 25th November 2014, the report of the Advisory Board was considered by the Additional Chief Secretary of the Home Department and on 26th November 2014, the impugned order of preventive detention was confirmed. As stated earlier, first remark on the representation is of 26th November 2014. Thus, it is crystal clear that the representation was not dealt with till 26th November 2014 as the State Government was considering the question of confirmation of the order of detention in accordance with Section 12 of the said Act of 1981. Only inference which can be drawn is that the representation was kept pending till the decision on the report of the Advisory Board. In our view, in light of the constitutional mandate under Clause (5) of Article 22 of the Constitution of India, the representation could not have been kept pending till the final decision was taken on the report of the Advisory Board by the State Government on the issue of the confirmation of order of detention. As observed above by the Apex Court in the case of *K.M. Abdulla Kunhi and B.L.Abdul Khader*, a right was available under Clause (5) of Article 22 of the Constitution of India to a detenu to make a representation before an order of confirmation and to have the

representation considered before the order of confirmation was passed. At highest, when the State Government applied its mind to the report of the Advisory Board for the purposes of consideration in accordance with Section 12 of the said Act of 1981, the representation of the detenu could have been considered. In the present case, consideration of the representation was postponed till the confirmation of the order by the State Government. Apart from the delay involved, this is a complete violation of the right to make a representation against the order of preventive detention conferred by Clause (5) of Article 22 of the Constitution of India.

14. There is one more aspect. On 27th November 2014, the same Additional Chief Secretary (Home) passed an order calling for the remarks of the Detaining Authority. Though the Detaining Authority received a letter calling for parawise remarks on 28th November 2014, the remarks were not sent immediately as the Detaining Authority in turn called for the parawise comments from the Sponsoring Authority. This is another crucial aspect for the delay. Firstly, necessity of calling for report from the Detaining Authority is not explained. Secondly, the necessity of the Detaining Authority calling for the report from the Sponsoring Authority is not explained. Thus, there is an unexplained delay in dealing with the representation made by the Petitioner. Apart from the delay, the constitutional rights of the detenu are violated as

the representation made by the detenu was kept pending till confirmation of the order of preventive detention by the State Government. Thus, the Petition must succeed on both the grounds.

15. Hence, we hold that the continuation of detention of the detenu is vitiated and accordingly, the Petition must succeed and we pass the following order.

ORDER :

The Rule is made absolute in terms of prayer clause (a), which reads thus:

“(a) This Hon'ble Court be pleased to issue a Writ of Habeas Corpus or any other appropriate writ, order or direction quashing and setting aside the impugned order of detention bearing No.Dandpra-4/Kavi-06/2014 dated 13.10.2014 (Annexure “A”), issued by Rubal Aggarwal the District Magistrate, Jalgaon, against Ajay Birju Garunge, the detenu be released from detention forthwith and be set at liberty.”

All concerned to act upon an authenticated copy of the operative part of this Judgment.

(A.K.MENON, J)

(A.S. OKA, J)