R. Keshava vs M.B. Prakash & Ors on 12 December, 2000

Equivalent citations: AIR 2001 SUPREME COURT 301, 2000 AIR SCW 4496, 2001 CRILR(SC&MP) 110, 2001 SCC(CRI) 289, 2001 (3) LRI 1223, 2001 (2) SCC 145, (2001) 1 JT 183 (SC), 2001 (1) SRJ 467, 2001 CRILR(SC MAH GUJ) 110, 2000 (8) SCALE 336, (2000) 8 SUPREME 473, (2000) 8 SCALE 336, (2001) 1 EFR 420, (2001) 1 RECCRIR 489, (2001) 1 CURCRIR 39, (2001) 1 ALLCRIR 264, (2001) 42 ALLCRIC 354, (2001) 2 BLJ 23, (2001) 1 CHANDCRIC 53, (2001) 1 ALLCRILR 189, (2001) 1 CRIMES 67, (2001) SC CR R 510, 2001 (1) ANDHLT(CRI) 175 SC

Bench: U C Banerjee, R P Sethi, K.T.Thomas

CASE NO.:
Appeal (crl.) 1103 2000

PETITIONER:
R. KESHAVA

Vs.

RESPONDENT:
M.B. PRAKASH & ORS.

DATE OF JUDGMENT: 12/12/2000

BENCH:
U C Banerjee, R P Sethi, K.T.Thomas

JUDGMENT:

L.....I.....T.....T.....T.....T.....T.....T..J SETHI, J.

Leave granted. Alleging violation of Article 22(5) of the Constitution of India and relying upon a Judgment of this Court in Smt.Gracy v. State of Kerala & Anr. [1991 (2) SCC 1], the appellant has challenged the preventive detention of A. Maheshraj, a resident of Bangalore detained under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Act (hereinafter referred to as "the Act"). It is submitted that as the representation of the detenue to the Advisory Board has not been considered by the appropriate government, his continuous detention was unconstitutional and liable to be quashed. It is contended that notwithstanding the non filing of the representation to the appropriate government, a duty was cast upon the Advisory Board to transmit the representation,

received by it, to the government who had a corresponding obligation to consider it before confirming the order of detention. Placing its reliance upon a subsequent judgement of this Court in Jasbir Singh v. Lt.Governor, Delhi & Anr.[1999 (4) SCC 228] and distinguishing the facts of the present case, the High Court dismissed the habeas corpus petition filed before it vide the judgment impugned in this appeal. To appreciate the rival contentions of the learned counsel appearing for the parties, it is necessary to refer to some of the admitted facts in this case, which are: On receipt of an intelligence report that a passenger wearing dark grey coloured suit travelling from Singapore was carrying with him electronic goods which he shall attempt to get cleared without payment of duty, the officer of the Customs Headquarters, Preventive, Bangalore kept a watch on the passengers of Flight No.IC 958 which landed at 0930 hrs. on 3.12.1999, and noticed the detenu resembling the descriptions already received. He checked his baggages and completed formalities with Customs authorities. His luggage comprised of two suit-cases, one small hand suit-case, one green coloured zipper handbag and one plastic cover. He had, in his disembarkation Card, declared the goods with him worth Rs.35,000/-. Having a reasonable belief that the detenue had not made the correct declaration, the officers of the Customs made inquiries from him. Being suspicious, the officers opened the four baggages and checked baggage under Baggage Tag Nos.SQ 144161, SQ144162, SQ144141 and SQ144164 and on examination found to contain electronic goods, namely, Mobile Phones, Mobile Phones in CRD condition, computer parts in commercial quantity, having a total value of Rs.18,38,300/-. The detenu was informed that as he has attempted to smuggle goods and tried to evade custom duty, the baggage was liable to be confiscated under the provisions of Customs Act, 1962. All the goods found in the baggage of the detenu, as detailed in the Annexures to Mahzar dated 3.12.1999 were seized, packed into suit case, cartons and sealed with seal and signature of the detenue as well as of the Mahzar witnesses. After investigation the detaining authority, in exercise of the powers conferred under Sections 3(1)(i) and 3(1)(iii) of the Act directed the said A.Maheshraj to be detained and kept in custody in Central Prison, Bangalore vide order dated 9.3.2000. The grounds of detention were served upon the detenu in the jail. The detenu was also informed that he can file a representation against the detention order to the Government of Karnataka or the Government of India. The detenu made a representation to the Advisory Board and admittedly did not make any representation either to the Government of India or the State Government or any other authority. He did not even request to the Advisory Board or the jail authorities to forward his representation to any of the governments or authority. In the writ petition filed on his behalf, the appellant submitted: "The petitioner submits that the detenue has made a representation to the Advisory Board and/or any authority required to consider the same for his release from detention at the earliest. The respondent No.1 be called upon to explain how the same has been considered."

The High Court found that the petition filed before it was lacking in particulars and directed the appellant to give full details of the representation and its consideration by the Board or by the Government and, if possible to place on record the copy of the representation submitted by the detenue. The appellant filed an application seeking permission to place on record the additional facts. The prayer was allowed. The appellant stated that the detenue had submitted to the Senior Superintendent of Central Prison, Bangalore on 22nd March, 2000 six copies of representation addressed to the Advisory Board. Upon inquiry he was informed that the representation addressed to the Advisory Board was forwarded on 24th March, 2000. The detenue also appeared before the Advisory Board on 10.4.2000. After receipt of the report of the Advisory Board the Government of

Karnataka vide order dated 18.4.2000 confirmed the order of detention. As the fact of representation filed by the detenu to the Chairman of the Advisory Board was not within the knowledge of the respondents 1 and 2, they did not consider the aforesaid representation before confirming the order of detention. It is true that the courts of law do not see the detention of a person without trial with favour but it is equally true that our constitutional scheme itself contemplates the preventive detention, however, subject to rigours of law relating to such detention and the guarantees enshrined in part III of the Constitution. One of the rights conferred upon the detenu, as incorporated in Article 22(5) of the Constitution, is to make representation and obligation upon the appropriate government to consider such representation before confirming the detention. It is further obligation of the detaining authority to communicate to the detenue the grounds of detention on which the order has been made and apprise him of his right to make a representation against the order. Order of preventive detention is liable to be quahsed if the constitutional obligations in terms of clause (5) of Article 22 of the Constitution are not complied with. There is no gainsaying that preventive detention is a serious invasion of personal liberty and such meagre safeguards, as the Constitution has provided against the improper exercise of the power, must be zealously watched and enforced by the courts. However, where despite intimation, the detenu omits to exercise his constitutional right, he cannot, thereafer, allege its violation on the ground that the authorities should have made an inquiry to ascertain as to whether he had made any representation to any person, authority or the Board. The thrust of the argument of the appellant revolves around the observations made by this Court in Smt.Gracy's case (supra) to the effect: "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 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 frome 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 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 the 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. 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 refernece 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."

On facts we find that in that case the detenu had made a representation to the Advisory Board who considered it before sending its opinion to the Central Government along with the entire record including the representation submitted by the detenu. The Central Government confirmed the order of detention without independent consideration of the detenu's representation sent to it by the Advisory Board. On the above facts the court formulated the point of law for its consideration as under: "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."

and made observations as noted hereinabove. In the instant case the respondent No.1 in his affidavit has categorically stated: "I respectfully submit that the Advisory Board has not forwarded the representation filed by the detenu to the State Government and consequently I did not consider the said representation filed by the detenu before the Advisory Board.

I respectfully submit that the Advisory Board has forwarded its report along with the covering letter dt.12.4.2000, to the State Government. However, the respondents 1 and 2 did not receive any representation given to the Advisory Board in as much as the Advisory Board has not sent the copy of the representation of the detenue, to the State Government. Therefore, the State Government could not consider the said representation. As the representations were addressed to the Advisory Board alone, there is no obligation on the part of the Superintendent of Central Prison to forward the copy of the representation to the State Government or the Central Government. Consequently,

the third respondent has not forwarded the representation to the respondents 1 and 2. I submit that the Advisory Board will be having the records which are sent by the State Government such as the order of detention, grounds of detention and the documents relied upon. Except these documents, the State Government will not furnish any other document to the Advisory Board. However, the documents which were produced by the detene in the course of hearing before the Advisory Board, do not form part of the records sent by the State Government. In this case, the only extra document which was produced by the detenue was the representation. The copy of the representation was not sent by the Advisory Board to the State Government while sending its report to the State Government.

In the absence of the representation of the detenu, the order of detention is stated to have been confirmed on the basis of other material available with the Government. Mr.B. Kumar, Senior Advocate who appeared for the appellant submitted that a duty was cast upon the Advisory Board to submit all records including the representation of the Advisory Board to the appropriate government. We are not impressed with such a general submission and the proposition of law. Section 8 of the Act provides that for the purposes of sub-clause (a) of clause (4), and sub-clause (c) of clause (7) of Article 22 of the Constitution, the Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards and shall within five weeks of the detention of a person make a reference in respect thereof to the Advisory Board constituted to enable such Board to make a report to the effect. Clause (c) of Section 8 of the Act provides: "The Advisory Board to which a reference is made under clause (b) shall after considering the reference and the materials placed before it and after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if in any particular case, it considers it essential so to do or if the person concerned desires to be heard in person, after hearing him in person, prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned." Clause

(f) of the said Section reads:

> "In every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith."

A perusal of the aforesaid Section and other relevant provisions of the Act makes it abundantly clear that no duty is cast upon the Advisory Board to furnish the whole of the record and the representation addressed to it only to the Government along with its report prepared under Section 8(c) of the Act. It may be appropriate for the Board to transmit the whole record along with the report, if deemed expedient but omission to send such record or report would not render the

detention illegal or cast an obligation upon the appropriate government to make inquiries for finding out as to whether the detenu has made any representation, to any person or authority, against his detention or not. We are of the opinion that in Gracy's case (supra) it was not held that any such duty was cast upon the Board but even if the observations are stretched to that extent, we feel that those observations were uncalled for in view of the scheme of the Act and the mandate of the Constitution. In Nand lal Bajaj v. State of Punjab & Anr. [1981 (4) SCC 327] this Court made the following observations: "The matter can be viewed from another angle. We were informed that the Advisory Board did not forward the record of its proceedings to the State Government. If that be so, then the procedure adopted was not in consonance with the procedure established by law. The State Government while confirming the detention order under Section 12 of the Act has not only to peruse the report of the Advisory Board, but also to apply its mind to the material on record. If the record itself was not before the State Government, it follows that the order passed by the State Government under Section 12 of the Act was without due application of mind. This is a serious infirmity in the case which makes the continued detention of the detenu illegal."

In view of the constitutional and legal position, as noted by us, we find it difficult to agree with the reasoning in the aforesaid observations. In the absence of constitutional or statutory provisions, we are unable to observe that the Advisory Board was under an obligation to forward the whole of the record of its proceedings to the State Government. The State Government while confirming the order of detention has to peruse the report of the Advisory Board along with other records, if any, in its possession, and cannot determine the legality of the procedure adopted by the Advisory Board. Under Clause (f) of Section 8 of the Act, the Government is not bound by the report of the Advisory Board and in every case where the Advisory Board reports that there is, in its opinion, sufficient cause for the detention of a person, may confirm the detention order. The word "may" used in this clause does not cast duty upon the appropriate government to necessarily accept the opinion for further detention. However, where the Board reports that there is, in its opinion, no sufficient cause for the detention of the person concerned, the appropriate government has no option but to revoke the detention order and cause the person to be released forthwith. When the report of the Advisory Board opining that there exists sufficient cause for detention of a person is not binding upon the appropriate government, there is no infirmity in its order passed without consideration of the proceedings of the Advisory Board. The obligation of the appropriate government is restricted to the extent of examining the report conveying the opinion of the Board regarding further detention of the detenu. Similarly the observations made by this Court in Harbans Lal v. M.L. Wadhawan & Ors. [1987 (1) SCC 151 to the effect that the non submission of the entire record being the requirement of law, cannot be held to be good law on the point. In Jasbir Singh's case (supra) similar argument based upon Gracy's case was considered and disposed of by observing: "But the question for consideration is when the representation has not been addressed to the Central Government but is addressed to the Advisory Board can it be said that the Central Government also owes an obligation to consider the same and decide one way or the other. The detaining authority was the Lt.Governor of Delhi. In such a case if the representation had not been addressed to the Central Government even though indicated in the grounds of detention then it cannot be said that any representation made by the detenu to the Advisory Board ought to have been considered by the Central Government."

The reliance of the learned counsel of the appellant on the judgment of this Court in Dr.Rahamatullah v. State of Bihar & Anr. [1981 (4) SCC 559] is misplaced inasmuch as in that case the point of law as canvassed before us, was not in issue. The detention in that case was quashed on the ground of non consideration of the report by the appropriate government and delay in the compliance of the provisions of the Act. We are satisfied that the detenu in this case was apprised of his right to make representation to the appropriate government/authorities against his order of detention as mandated in Article 22(5) of the Constitution. Despite knowledge, the detenu did not avail of the opportunity. Instead of making a representation to the appropriate government or the confirming authority, the detenu chose to address a representation to the Advisory Board alone even without a request to send its copy to the concerned authorities under the Act. In the absence of representation or the knowledge of the representation having been made by the detenu, the appropriate government was justified in confirming the order of detention on perusal of record and documents excluding the representation made by the detenu to the Advisory Board. For this alleged failure of the appropriate government, the order of detention of the appropriate government is neither rendered unconstitutional nor illegal. Taking a cue from the objections filed by Sh.M.B. Prakash, Principal Secretary to Government, Home and Transport Department of the State of Karnataka, it was argued on behalf of the detenu that as the Government had allegedly not considered the whole of the record pertaining to the detention, the order of confirmation of detention was illegal and unconstitutional. The submission is based upon wrong assumption both on facts as well as on law. Reliance was placed on the words "since the Advisory Board has not sent the records to the State Government" appearing in the affidavit, to contend that the State Government had passed the order of confirmation without consideration of the record. The appellant did not notice the earlier part of that sentence in the context of which those words were used. This part reads: "Thus, as the respondents 1 and 2 did not have knowledge about the representations filed by the detenue, the said representations were not considered by the respondents 1 and 2."

The emphasis of submission in the objections was with respect to the non submission of the record pertaining to the representation filed by the detenu only upon which the appellant had built his case. The failure of the respondent to comply with the court directions dated 15.11.2000 was also made the basis of such a contention. In our order dated 29th November, 2000, we felt that the Principal Secretary to the Government of Karnataka had not complied with our directions, directing him to intimate us as to "what all records were with the Government/what all records were considered by the Government before passing the order of confirmation". Prima facie we felt that our order had been flouted by said Sh.M.B. Prakash which necessitated the issuance of notice to him to show cause why adverse remarks shall not be made against him for flouting the court directions. In response to our notice an affidavit has been filed in this Court on 5th December, 2000 wherein it is specifically stated: "In response to the notice issued to me to show cause why adverse remarks shall not be made against me, I respectfully submit that while passing the order of confirmation, the following documents were with Government:

> (a) The entire file concerning the Detention Order in No.HTD 2 SCF 2000 containing the following among other documents:

i) Detention order dated 9.3.2000.

ii) Grounds of detention dated 9.3.2000, along with entire documents relied upon in the Grounds of detention.

iii)Reference dated 3.4.2000 referring the case to the Advisory Board.

iv) Report and opinion dated 12.4.2000 of the Advisory Board.

v) While confirming the order of the detention, Government considered the report and opinion dated 12.4.2000 of the Advisory Board."

In the presence of the aforesaid affidavit we cannot give any credence to the ipse dixit of the appellant and his effort to aim arrows in the darkness to find out some ground even though he is not sure about any one of such ground to challenge the order of detention. We are satisfied that the order of confirmation was passed by the appropriate government after perusal of the whole record available with it and such power was not mechanically exercised as alleged. The order of detention and its confirmation appears to have been based upon the subjective satisfaction arrived at by objective considerations with reference to all the record pertaining to the matters relating to the circumstances warranting the detention of the detenu.

We do not find any error of law or jurisdiction in the order of the High Court, the detaining authority and the confirming authority. The present appeal being misconceived is, therefore, dismissed.

Shri M.B. Prakash, Principal Secretary to the Government of Karnataka has realised his mistake of not referring to the documents upon the basis of which the confirmation order was passed and has stated: "I respectfully submit that inadvertently I did not refer to the file and documents now mentioned above in my earlier affidavit. This omission is neither deliberate nor intentional. I deeply regret for the same. I sincerely tender my unconditional apology."

In view of above, no further action is required to be taken in the matter. We close the matter, so far as, Sh.M.B. Prakash is concerned, reminding him to be careful in compliance of the orders of this Court in future.