Smt. Shalini Soni And Ors. vs Union Of India (Uoi) And Ors. on 24 October, 1980

Equivalent citations: AIR1981SC431, 1980CRILJ1487, (1980)4SCC544, [1981]1SCR962

Bench: O. Chinnappa Reddy, R.S. Sarkaria

JUDGMENT

Chinnappa Reddy, J.

1. By our orders dated October 7, 1980, we directed the release of the three detenus whose detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, was challenged in these three Writ Petitions. We now proceed to state our reasons.

2. Rajesh Soni, the detenu in Criminal Writ Petition No. 4344 of 1980 was arrested on June 27, 1980. The order of detention as well as the grounds of detention were served on him on the same day. On July 27, 1980, his Advocate addressed a communication to the Administrator, Delhi Administration, Delhi, alleging that the grounds were vague, (irrelevant and non-existent, that his client was unable to make any representation as he had not been given copies of the statements, documents and materials relied upon by the detaining authority in arriving at the satisfaction that Rajesh Soni should be detained, that in view of the time limit prescribed by Section 3(3) of the COFEPOSA and in view of Article 22(5) of the Constitution the continued detention of his client was illegal and that he was entitled to be released forthwith. Reference was made to a judgment of the Gujarat High Court where it had been held that if documents were not furnished within five days or fifteen days, as the case might be, the detenus were entitled to be released. It was further stated that if the Administrator was no revoking the detention order, copies of documents and material evidence relied upon in the grounds of detention should be forthwith supplied so as to enable the detenu to make a representation. The communication ended with a reiteration of the request that the detention order should be revoked and the detenu released forthwith. One of the main complaints of the learned Counsel for the detenu was that the representation dated July 27, 1980 made by the detenu through his Advocate was never considered by the Administrator and no orders had been passed thereon till now. Copies of the documents were, however, furnished on August 6, 1980. Meanwhile the Advisory Board met on July 30, 1980. The order of detention was confirmed by the Administrator on August 9, 1980. Another complaint of the learned Counsel for the detenu was that there was a delay of over one month in furnishing copies of documents which formed part of the grounds to the detenu and on that ground also the detention was vitiated. The learned Counsel invited our attention to several judgments of this Court and in particular to a recent one of Bhagwati and Venkataramaiah JJ in Icchu Devi Choraria v. Union of India and Ors. [1981] 1 SCR p. 642.

3. The answer of the respondents to the challenge based on the failure to consider the representation dated July 27, 1980 was that the communication dated July 27, 1980 was not a representation at all but was a mere request for copies of documents and therefore the detention could not be questioned on the ground of failure to consider the detenu's representation. The answer to the challenge based on the delay in furnishing copies of documents was that the detaining authority was not obliged in law to furnish copies of documents relied upon in the grounds of detention. All that the detaining authority was obliged to do under the law was to communicate to the detenu all the basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction and that obligation had been discharged in the present case. The learned Counsel urged that the view taken by Bhagwati and Venkataramaiah JJ in Icchu Devi Choraria v. Union of India and Ors. (supra) was inconsistent with the view taken by this Court in a series of cases and that the judgment required reconsideration.

4. The Writ Petition has to succeed on both the grounds. As we mentioned earlier the answer of the respondents in regard to the ground based on the failure of the detaining authority to consider the representation dated July 27, 1980 submitted by the detenu through his Advocate was not that the representation was ever considered but that it was not a representation at all. We are unable to agree with the submission made on behalf of the respondents. The representation has not to be made in any prescribed form. There is no formula nor any magical incantation like "open seasame" to be repeated or chanted in order to qualify a communication as a representation. So long as it contains a demand or a request for the release of the detenu in whatever form or language couched and a ground or a reason is mentioned or suggested for such release, there is no option but to consider and deal with it as a representation for the purpose of Article 22(5) of the Constitution. The communication dated July 27, 1980 contains a demand that the detenu should be released forthwith. It mentions a reason for the demand for release, namely, that copies of statements, documents and materials relied upon by the detaining authority in arriving at the requisite satisfaction were not furnished to the detenu and that the detention was therefore, illegal. In support of the claim that the detention was illegal reference was made to a decision of the Gujarat High Court. The communication, then, ended with a reiteration of the request for the release of the detenu. We find it impossible to read the communication as anything but a representation against the order of detention. True the detenu also asked for copies of documents to enable him to make a representation if the detaining authority was not prepared to accept his demand for revocation of the order of detention. The request for copies of documents to enable the detenu to make a further representation on merits as well as on other grounds in the event of the detaining authority not agreeing to revoke the order of detention for the reason mentioned in the communication would not divest the communication of its character as a representation. We have no doubt that the communication dated July 27, 1980 was a representation which was in law required to be considered by the detaining authority. Quite obviously, the obligation imposed on the detaining authority, by Article 22(5) of the Constitution, to afford to the detenu the earliest opportunity of making a representation, carries with it the imperative implication that the representation shall be considered at the earliest opportunity. Since all the constitutional protection that a detenu can claim is the little that is afforded by the procedural safeguards prescribed by Article 22(5) read with Article 19, the Courts have a duty to rigidly insist that preventive detention procedures be fair and strictly observed. A breach of the procedural imperative must lead to the release of the detenu. The

representation dated July 27, 1980 was admittedly not considered and on that ground alone, the detenu was entitled to be set at liberty.

5. In the view that we have taken on the question of the failure of the detaining authority to consider the representation of the detenu It is really unnecessary to consider the second question raised on behalf of detenu in Criminal Writ Petition No. 4344 of 1980. However, this question has been squarely and directly raised and, indeed, It was the only question raised in the other two Criminal Writ Petitions and we have, therefore, to deal with it.

6. Article 22(5) may be reproduced here for a better understanding of the rival submissions. It says :

> 22(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

7. The Article has two facets : (1) communication of the grounds on which the order of detention has been made; (2) opportunity of making a representation against the order of detention. Communication of the grounds pre-supposes the formulation of the grounds and formulation of the grounds requires and ensures the application of the mind of the detaining authority to the facts and materials before it, that is to say to pertinent and proximate matters in regard to each individual case and excludes the elements of arbitrariness and automatism (if one may be permitted to use the word to describe a mechanical reaction without a conscious application of the mind). It is an unwritten rule of the law, constitutional and administrative, that whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only eschewing the irrelevant and the remote. Where there is further an express statutory obligation to communicate not merely the decision but the grounds on which the decision is founded, It is a necessary corollary that the grounds communicated, that is, the grounds so made known, should be seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went in to make up the mind of the statutory functionary and not merely the inferential conclusions. Now, the decision to detain a person depends on the subjective satisfaction of the detaining authority. The Constitution and the statute cast a duty on the detaining authority to communicate the grounds of detention to the detenu. From what we have said above, it follows that the grounds communicated to the detenu must reveal the whole of the factual material considered by the detaining authority and not merely the inferences of fact arrived at by the detaining authority. The matter may also be looked at from the point of view of the second facet of Article 22(5). An opportunity to make a representation against the order of detention necessarily implies that the detenu is informed of all that has been taken into account against him in arriving at the decision to detain him. It means that the detenu is to be informed not merely, as we said, of the inferences of fact but of all the factual material which have led to the inferences of fact. If the detenu is not to be so informed the opportunity so solemnly guaranteed by the Constitution becomes reduced to an exercise in futility. Whatever angle from which the question is looked at, it is dear that "grounds" in Article 22(5) do not

mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences. The 'grounds' must be self-sufficient and self-explanatory. In our view copies of documents to which reference is made in the 'grounds' must be supplied to the detenu as part of the 'grounds'.

8. This was what was decided by Bhagwati and Venkataramiah JJ in Smt. Icchu Devi Choraria v. Union of India and Ors. (supra), it was observed by Bhagwati J., who spoke for the Court :

> Now it is obvious that when Clause (5) of Article 22 and Sub-section (3) of Section 3 of the COFEPOSA Act provide that the grounds of detention should be communicated to the detenu within five or fifteen days, as the case may be, what is meant is that the grounds of detention in their entirety must be furnished to the detenu. If there are any documents, statements or other materials relied upon in the grounds of detention, they must also be communicated to the detenu, because being incorporated, in the grounds of detention, they form part of the grounds and the grounds furnished to the detenu cannot be said to be complete without them. It would not therefore be sufficient to communicate to the detenu a bare recital of the grounds of detention, but copies of the documents, statements and other materials relied upon in the grounds of detention must also be furnished to the detenu within the prescribed time subject of course to Clause (6) of Article 22 in order to constitute compliance with Clause (5) of Article 22 and Section 3, Sub-section (3) of the COFEPOSA Act. One of the primary objects of communicating the grounds of detention to the detenu is to enable the detenu, at the earliest opportunity, to make a representation against his detention and it is difficult to see how the detenu can possibly make an effective representation unless he is also furnished copies of the documents, statements and other materials relied upon in the grounds of detention. There can therefore be no doubt that on a proper construction of Clause (5) of Article 22 read with Section 3, Sub-section (3) of the COFEPOSA Act, it is necessary for the valid continuance of detention that subject to Clause (6) of Article 22 copies of the documents, statements and other materials relied upon in the grounds of detention should be furnished to the detenu alongwith the grounds of detention or in any event not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days from the date of detention. If this requirement of Clause (5) of Article 22 read with Section 3, Sub-section (3) is not satisfied, the continued detention of the detenu would be illegal and void.
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> It was argued that the observations of Bhagwati J were inconsistent with the earlier decisions of this Court and, therefore, the decision of Bhagwati and Venkataramiah JJ required reconsideration. Reference was made in particular to the decision in Khudiram Das v. the State of West Bengal and Ors. . We do not find anything in Khudiram Das's case which necessitates reconsideration of Smt. Icchu Devi Choraria's case. On the other hand in our view what has been said in Smt. Icchu Devi Choraria's case is but a further development and elaboration of what was said earlier in Khudiram Das's case. In Khudiram Das's case it was said (at p. 848-849) :

> Section 8(1) of the Act, which merely re-enacts the constitutional requirements of Article 22(5), insists that all basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to the making of the order of detention must be communicated to the detenu, so that the detenu may have an opportunity of making an effective representation against the order of detention. It is, therefore, not only the right of the Court, but also its duty as well, to examine what are the basic facts and materials which actually and in fact weighed with the detaining authority in reaching the requisite satisfaction. The judicial scrutiny cannot be foreclosed by a mere statement of the detaining authority that it has taken into account only certain basic facts and materials and though other basic facts and materials were before it, it has not allowed them to influence its satisfaction. The Court is entitled to examine the correctness of this statement and determine for itself whether there were any other basic facts or materials, apart from those admitted by it, which could have reasonably influenced the decision of the detaining authority and for that purpose, the Court can certainly require the detaining authority to produce and make available to the Court the entire record of the case which was before it. That is the least the Court can do to ensure observance of the requirements of law by the detaining authority.

9. Earlier in Vakil Singh v. State of Jammu & Kashmir and Anr. one of us (Sarkaria, J.) had pointed out that apart from conclusions of fact, grounds had a factual constituent also. Grounds meant materials on which the order of detention was primarily based, that is to say, all primary facts though not subsidiary facts or evidential details. Recently in Ganga Ramchand Bharvani v. Under Secretary to the Government of Maharashtra and Ors. was observed by one of us (Sarkaria, J.) speaking for himself and Pathak J :

> The mere facts that the grounds of detention served on the detenu are elaborate, does not absolve the detaining authority from its constitutional responsibility to supply all the basic facts and materials relied upon in the grounds to the detenu. In the instant case, the grounds contain only the substance of the statements, while the detenu had asked for copies of the full text of those statements. It is submitted by the learned Counsel for the petitioner that in the absence of the full texts of these statements which had been referred to and relied upon in the grounds 'of detention', the detenus could not make an effective representation and there is disobedience of the second constitutional imperative pointed out in Khudiram's case. There is merit in this submission.
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> One of the submissions of Shri Abdul Khader, learned Counsel for the respondents was that in several earlier cases the question that was always considered was whether there was an adequate explanation for the delay in the supply of copies after a request for such copies had been made by the detenu but that the expression 'grounds' had never been understood to comprise factual material as well as factual inferences so that failure to communicate the factual material as part of the 'grounds' was straightaway to be treated as an infringement of the rule contained in the first facet of

> Article 22(5), This has been sufficiently answered by Bhagwati J. in Icchu Devi Choraria v. Union of India and Ors. (supra) and by one of us (Sarkaria J.) in Ganga Ramchand Bharvani v. Under Secretary to the Govt. of Maharashtra and Ors. (supra). It is unnecessary for us to say anything further.

10. Shri Abdul Khader finally advanced a desperate argument invoking the rule of "prospective overruling" enunciated in Golaknath's case. The rule has no application since Icchu Devi's case did not overrule any earlier case.

11. All the three Writ Petitions are therefore allowed.