Supreme Court of India
Kirit Kumar Chaman Lal Kundaliya vs Union Of India (Uoi) And Ors. on 30 January, 1981
Equivalent citations: AIR 1981 SC 1621, 1983 53 CompCas 107 SC, (1981) 0 GLR 1067, 1981 (1) SCALE 223, (1981) 2 SCC 436, 1981 2 SCR 718
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Bench: A Varadarajan, S M Ali
JUDGMENT S. Murtaza Fazal Ali, J.

1. By our Order dated 21-1-1981, we had already allowed the petition and directed the detenu to be released forthwith. We now proceed to set out the reasons for the order which we passed on 21-1-1981.

2. The writ petition and the criminal special leave arise out of the same subject matter, namely, that the petitioner Kumar Chaman Lal Kundaliya) was detained by an order passed by the Home Minister of the State of Gujarat on 9-9-1980 under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act.

3. The Petitioner/detenu in the first instance filed a petition for habeas corpus in the High Court of Gujarat which was dismissed by the High Court by its order dated 25-11-1980. The detenu thereafter filed a petition for special leave against the order of the High Court and also a writ petition under Article 32 of the Constitution of India in this Court. Both the petition for special leave and the writ petition have been heard together.

4. Before the High Court, the detenu assailed the order of detention mainly on the ground that certain materials relied upon or referred to in the order of detention were not supplied to the detenu and hence he was not in a position to make an effective representation to the Government. It was also pleaded by the detenu before the High Court that two of the documents which were referred to in the order of detention were not supplied to him because the Secretary thought that they were not relevant.

5. The High Court while examining the contention of the detenu sent for the entire file from the Government and after examining the documents itself found that as the documents concerned were not relevant and consisted of statements of some other persons, the failure to supply the documents to the detenu did not vitiate the order of detention. Hence the petition in this Court for grant of special leave against the order of the High Court.

6. A separate writ petition has also been filed by the detenu in this Court in which apart from the point canvassed before the High Court certain additional grounds have been taken. In the view that we take in the present case, it is sufficient to refer only to two important grounds that have been taken in the writ petition. In the first place, it was suggested that the endorsement by the Secretary shows that the question as to whether or not the documents demanded by the detenu were relevant was decided not by the Minister who was the detaining authority but by the Secretary. Secondly, it was urged that although the detenu made a representation to the State Government on 3-10-1980 the same was rejected on 14-10-1980 not by the detaining, authority, namely, the Hon. Home

Minister acting on behalf of the Govt, but by the Secretary, and this infirmity was sufficient to render the order of detention void.

7. Mr. Phadke appearing for the State took a preliminary objection regarding the maintainability of the writ petition filed by the detenu in this Court. The sheet-anchor of the argument of Mr. Phadke for the State was that as the detenu had not raised the additional points taken, in the High Court he could not be permitted to agitate those, very points in the writ petition filed under Article 32 of the Constitution, as the same were barred by the principles of constructive res judicata. In support of his argument he relied on a decision of this Court in the ease of Ghulam Sarwar v. Union of India, .

8. The learned Counsel for the petitioner, however, countered the submission of the respondents on the ground that a writ under Article 32 being guaranteed by the Constitution the doctrine of res judicata can have no application to a writ petition filed in this Court under Article 32. Mr. Dewan, learned Counsel for the detenu further submitted that the case relied upon by the respondents also does not decide that the writ petition was not maintainable as being barred by principles of res judicata. In our opinion, the contention raised by the learned Counsel for the detenu is well founded and must prevail. Ghulam Sarwar's case (supra) which was heavily relied on by the respondents does not at all support the contention raised before us by them. In that case this Court traced the history of habeas corpus writs end ultimately held that at least so far as petitions for habeas corpus are concerned, the doctrine of constructive res judicata could not apply. In this connection Subba Rao, C. J., observed as follows (at p. 1337):

If the doctrine of res judicata is attracted to an application for a writ of habeas corpus, there is no reason why the principles of constructive res judicata cannot also govern the said application, for the rule of constructive res judicata is only a part of the general principles of the law of res judicata, and if that be applied, the scope of the liberty of an individual will be considerably narrowed.... If the doctrine of constructive res judicata be applied, this Court, though it is enjoined by the Constitution to protect the right of a person illegally detained, will become powerless to do so. That would be whittling down the wide sweep of the constitutional protection.

Bachawat, J., in his concurring judgment also endorsed the view of Subba Rao, C. J., and observed as follows (at p. 1341) :

The order of Khanna, J., dismissing the writ petition filed by the petitioner in the Punjab High Court challenging the legality of the detention order passed by the Central Government under Section 3(2)(g) of the Foreigners Act, 1946 and asking for the issue of a writ of habeas corpus is not a judgment, and does not operate as res judicata. That order does not operate as a bar to the application under Article 32 of the Constitution asking for the issue of a writ of habeas corpus on the same facts. The petitioner has fundamental right to move this Court under Article 32 for the issue of a writ of habeas corpus for the protection of his right of liberty. The present petition must, therefore, be entertained and examined on the merits.

Apart from the aforesaid case, there is a recent decision of a Constitution Bench of this Court in Shri Lallubhai Jogibhai Patel v. Union of India W. P. No. 4349 of 1980, Decided on 15-12-1980 : (), where

this Court has held that even successive petitions for habeas corpus under Article 32 would be maintainable in this Court provided the points raised in the subsequent petitions are additional points not covered or agitated in the previous petitions. In this connection, Sarkaria, J., speaking for the Court observed as follows (at p. 731):

The position that emerges from a survey of the above decisions is that the application of the doctrine of constructive res judicata is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Article 32 of the Constitution on fresh grounds, which were not taken in the earlier petition for the same relief.

9. Thus, if the principles of res judicata could not apply to successive writ petitions in this Court much less could they be attracted in cases where points were not agitated before the High Court but were raised for the first time in this Court in a writ petition under Article 32.

10. Apart from the cases discussed above there is another ground on which the argument of Mr. Phadke for respondents must be rejected. The doctrine of finality of judgment or the principles of res judicata are founded on the basic principle that where a Court of competent jurisdiction has decided an issue, the same ought not allowed to be agitated again and again. Such a doctrine would be wholly inapplicable to cases where the two forums have separate and independent jurisdictions. In the instant case, the High Court decided the petition of the detenu under Article 226 which was a discretionary jurisdiction whereas the jurisdiction to grant relief in a petition under Article 32 filed in the Supreme Court is guaranteed by the Constitution and once the Court finds that there has been a violation of Article 22(5) of the Constitution then it has no discretion in the matter but is bound to grant the relief to the detenu by setting aside the order of detention. The doctrine of res judicata or the principles of finality of judgment cannot be allowed to whittle down or override the express constitutional mandate to the Supreme Court enshrined in Article 32 of the constitution. In a recent decision in the case of Smt. Santosh Anand v. Union of India W. P. No. 1097/79 (decided on 31-10-1979) this Court has pointed out that the concept of liberty has now been widened by Maneka Gandhi's case where Article 21 as construed by this Court has added new dimensions to the various features and concepts of liberty as enshrined in Articles 21 and 22 of the Constitution. For these reasons, therefore we overrule the preliminary objection taken by the respondents.

11. We now come to the merits of the cases. So far as the writ petition filed in the High Court is concerned the only point taken was that two documents referred to in the order of detention were hot supplied to the detenu. The High Court rejected this contention on the ground that the documents were merely referred to and not relied on by the detaining authority and after having examined the documents it found that the same were not relevant. With due respect to the Judges we are unable to agree with the view taken by them. In the first place, it was not open to the Court to have waded through the confidential file of the Government in order to fish out a point against the detenu. Secondly, the question of relevance was not to be decided by the Court but by the detaining authority which alone had to consider the representation of the detenu on merits and then come to the conclusion whether it should be accepted or rejected. As the reasoning of the High Court, was legally erroneous the order of the High Court cannot be allowed to stand and is hereby quashed.

12. The matter does not rest here but two additional points which have been taken in the writ petition before us are sufficient to void the order of detention passed against the detenu. In the first place, it was submitted that the endorsement on the file produced before us by the Government shows that the documents concerned were examined not by the detaining authority but by the Secretary and there is nothing to show that the note or endorsement of the Secretary was placed and approved by the detaining authority. In these circumstances, therefore, it must be held that there was no decision by the detaining authority that the documents were irrelevant. It was, however, submitted by Mr. Phadke that the documents concerned were merely referred to in the grounds of detention but did not form the basis of the subjective satisfaction of detaining authority at the time when it passed the order of detention. It was, however, conceded by Mr. Phadke that before the grounds were served on the petitioner, the documents were placed before the detaining authority and were, therefore, referred to in the grounds of detention. It is manifest therefore, that the subjective satisfaction could only be ascertained from or reflected in the grounds of the order of detention passed against the detenu otherwise without giving the grounds the mere subjective satisfaction of detaining authority would make the order of detention incomplete and ineffective. Once the documents are referred to in the grounds of detention it becomes the bounden duty of the detaining authority to supply the same to the detenu as part of the grounds or pari passu the grounds of detention. There is no particular charm in the expressions 'relied on', 'referred to' or 'based on' because ultimately all these expressions signify one thing, namely, that the subjective satisfaction of the detaining authority has been arrived at on the documents mentioned in the grounds of detention. The question whether the grounds have been referred to relied on or based on is merely a matter of describing the nature of the grounds Even so in the case of Ram Chandra A. Kamat v. Union of India a three Judge, Bench decision of this Court to which one of us (Fazal Ali, J.) was a party, clearly held that even the documents referred to in the grounds of detention have to be furnished to the detenu. In this connection the Court observed as follows (at p. 767 of AIR) :

If there is undue delay in furnishing the statements and documents referred to in the grounds of detention the right to make effective representation is denied. The detention cannot be said to be according to the procedure prescribed by law.

The same view was taken in a later decision of this Court in Tushar Thakker v. Union of India , where this Court observed as follows (at p. 439 of AIR):

This Court has repeatedly held that the detenu has a constitutional right under Article 22(5) to be furnished with copies of all the materials relied upon or referred to in the grounds of detention, with reasonable expedition." Thus, it is absolutely clear to us that whether the documents concerned are referred to, relied upon or taken into consideration by the detaining authority they have to be supplied to the detenu as part of the grounds so as to enable the detenu to make an effective representation immediately on receiving the grounds of detention. This not having been done in the present case the continued detention of the petitioner must be held to be void.

13. Lastly, the order of detention suffers from yet another serious infirmity which makes the order of detention absolutely non est. The respondents in their counter-affidavit have categorically averred that the order of detention was passed by the Home Minister, vide the counter affidavit of P. M.

Shah at page 86 of the writ petition, where the following averments have been made by Mr. Shah Deputy Secretary to the Government of Gujarat:

Referring to ground No. XXII of paragraph 7 of the petition, I say that the file relating to the detention of the petitioner was placed before the Home Minister of the State of Gujarat and the Home Minister on careful consideration of the same passed the impugned order of detention.

The representation made by the detenu on 3-10-1980 has been rejected on 14-10-1980 not by the Home Minister but. by the Secretary; thus, the representation has been rejected by an authority which had no jurisdiction at all to consider or pass any orders on the representation of the detenu. This, therefore, renders the continued detention of the petitioner void. In an identical case this Court in Smt. Santosh Anand's case (W. P. No. 1097 of 1979 D/- 31-10-1979) (supra) observed as follows:

The representation was, therefore, not rejected by the detaining authority and as such the constitutional safeguard under Article 22(5) as interpreted by this Court, cannot be said to have been strictly observed or complied with.

For the reasons given above, therefore, we allow this petition and direct the detenu to be released forthwith. The special leave petition is disposed of accordingly.