CONSTITUTIONAL SAFEGUARDS AGAINST PREVENTIVE DETENTION

By

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The circumstances prevailing in India at the present time political, Economical and Social have again brought the provisions of the preventive detention Acts into new prominence. There is no authoritative definition of the Term Preventive Detention in Indian Law. Detention is of two types (1) Punitive (2) Preventive.

The word "Preventive" is used in contradiction to the word "Punitive". While the object of punitive detention is to punish a person for what he has already done. The objective of preventive detention is not to punish a man for having done something but to stop him before he does it and to prevent him from doing it. When the liberty of the individual crosses the limits and threatens the very existence of the state and at that point of time it feels to control the enjoyment of individuals liberty then the state uses the Preventive Detention measures.

The Constitution has enshrined some of these procedural safeguards as fundamental rights in Clause (4-7) of Article (22). A bare perusal of the clauses reveals :

a. The detenue has to be communicated the grounds on which order of detention has been made.

b. The grounds have to be communicated, as soon as may be.

c. The opportunity for representation has to be afforded at the earliest.

d. To constitute an advisory board to report on the desirability of continuance of the detention.

e. If the advisory board is satisfied that there is a sufficient cause for detention, then only the detention should be continued.

f. Parliament may by law prescribe the maximum duration of detention.

g. Parliament may by law prescribe the procedure to be followed by the advisory board.

Preventive detention laws are repugnant to democrat constitution and they are not found in any of the democratic countries of the world. No country in the world has made these laws integral part of the constitution as has been done in India.

Indian Constitution however recognizes preventive detention in normal times also. In the case of AIR 1950 SC 27, *AK Gopalan v. State of Madras*, *Pantanjali Shastri*, J, Explaining the necessity of this provisions said.

There are various laws that supports that preventive detention, namely :

1. The preventive detention Act (PDA) 1950.

2. The maintenance of internal security Act (MISA) 1971.

3. The Conversion of foreign prevention of smuggling activities (COFEPOSIA) 1974.

4. The Defence and Internal Security of India Act 1971.

5. National Security Act.

6. The prevention of Black Marketing

and Maintenance of supplies of essential commodities Act 1980.

Though the constitution has recognized the necessity of laws as to preventive detention it has also provided safeguards to mitigate on the legislature. It is for this reason that Article 22 has been given a place in the chapter on "guaranteed rights". Article 22 Clause (4-7) guarantees. That following safeguards to a person arrested under preventive detention law.

(a) Review by Advisory Board

(b) Grounds of Detention to be communicated

(c) Rights of representation

a. Review by Advisory Board :

Clause (4) of Article 22 has been amended by the Constitution 44(A) Amendment Act 1978. Article 22 (a) deals with the constitution of an advisory board. It says that an advisory board shall consist of persons who are, or have been or are qualified to be appointed as Judges of a High Court.

The advisory board, independent impartial and free from executive control. It is safeguard against executive and high-handedness. The Advisory Board will decide whether the detention justified or not. If it is justified the detenue will continue his detention up to the required time. If the detention is not justified then the detenue is released immediately. The Advisory Board should then submit its report before the expiry of said period failure would render the detention illegal. The function of the board is purely advisory and it does nor makes the detention valid if it is *ultra virus* of the constitutional.

In *NandLal v. State of Punjab*, AIR 1981 SC 2041. In the instant case Sections 11- 13 of the prevention of Black marketing and maintenance of supplies of essential commodities Act, 1980 was challenged on the ground that the procedure adopted by the advisory board in allowing legal assistance of lawyer to state and design such circumstances to detenue, was both arbitrary and unreasonable and thus violative of Article 14 and Article 21 of the Constitution.

In *Abdul Latif Abdul Wahab v. B.K. Jha*, 1987 (2) SCC 22 : The instant case the petitioner was in jail awaiting trial on a charge of murder and was due for release on June 23, 1985.

On that day *i.e.,* 23rd June an order for prevention was made under the Gujarat Prevention of Anti-Social Activities Act, 1985. On that date there was no Advisory Board in existence to which a reference could be made under Section 11 of the Act and whose report was required to be obtained within 3months under Article 22(4) of the constitution. On August 7th 1986 when the order of detention dated June 23 rd was revoked afresh order of detention was made.

b. Grounds of detention must be communicated to the detenue :

Article 22 (5) gives rights to the detenue : (a) the authority making the order of detention must "as soon as may be "communicated to the person, detained the grounds of his arrest that is the grounds which led to the subjective satisfaction of the detaining authority (b) To give to the detenue the "earliest opportunity" of making a representation against the order of detention, that is, he should be furnished with sufficient particulars to enable him to make a representation.

In *Kishore Mohan v. State of West Bengal,* AIR 1972 SC 1749 **:** In the instant case the petitioner was detained under 5/3 of MISA 1971, with a view to prevent him acting in any manner prejudicial to the maintenance of public order or security of state.

C. Right to Representation :

The other right given to the detenue is that he should be given earliest opportunity of making a representation against detention order. It means that the detenue must be furnished with sufficient particulars of the grounds of his detention to be enabling him to make a representation ..... on being considered, may give him relief.

Article 22(5) of the Constitution it self does not say to whom the representation will be made or who will consider the representation. By statute (*e.g.,* 5(8(1)) of the MISA) it has been provided that the representation is to be made to the appropriate Government, which means the State Government. This rights to have his representation considered by appropriate Government is safeguarded by Article 22(5) and the Government must bear in mind that it shall consider within an unbiased mind. It is not necessary that the order should be a speaking order, it is sufficient if there is a real and proper consideration - not in a casual or mechanical manner. This obligation upon the Government is an independent one and separate from the detenue's representation before the Advisory Board.

The reason why grounds are required to be communicated as soon as possible is two-fold

(1) Firstly it Acts as a check against ordinary exercise or power.

(2) The detenue has to be afford an opportunity of making a representation against the order of detention.

The "materials and documents" relied on in the order of detenue must be supplied to the detenue along with the grounds.

In *T.A Abdul Rahaman v. State of Kerala,* AIR 1990 SC 434 : The Court held that the delay of 72 days in the absence of justificatory explanation was too long a period of for ignoring the indolence on the part of the concerned authority and hence the order of detention was invalid. The explanation given that delay had occurred in seeking the comment of the collector of customs *etc.,* was held to be not at all convincing and acceptable.

In *Balchand Chorasia v. Union of India* : The representation was filled by the detenue through his Counsel. The Government did not consider the representation and approved the detention on the ground it was not filled by the detenue. The Court held that the high Court was wrong in constructing that the representation was not made the detenue himself but his Counsel of the detenue lawyer had filed the representation on the instruction of the detenue. The Supreme Court said that in matters where the liberty of the individual is concerned and a highly cherished right is involved, the representation should be constructed liberally and not technically so as to frustrate or defeat the concept of liberty, which is guaranteed by Article 21 of the Constitution. As the representation was not considered at all by the Government which it was duty bound and, to consider the detention order was vitiated and detenue is to be released forthwith.

In *Meruggu Satyanarayana v. State of Andhara Pradesh,* 1983 (SCC) CR P 18-25: In the instant case the District Magistrate who was the detaining authority did not file an affidavit. The Sub-Inspector of Police filed the affidavit in Apposition. Would this apply that the Police Inspector had access to the file of the District Magistrate for making the detention order.

Conclusions : Thus an extraordinary power of high potency is given to the executive. If these powers are exercised with due discretion and care it may prove to be an effective weapon for fighting social

evils, that are eating into the vitals of the nations and pose a threat to its stability, but yielded casually and capriciously the power may turn into an engine of oppression posing a threat to the democratic way of life itself. The need for atmost good faith and cautions required while exercising of this powers.

TERRITORIAL JURISDICTION

NEED OF AMENDMENT TO SECTION 125 AND 126 OF CRIMINAL PROCEDURE CODE:

By

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Now the latest trend of judiciary is justice delivery to the door steps of the victim. This is how the judgments have come up and like so even by going through a News paper and by receiving a post-card, the Constitutional Courts *i.e.,* (Hon'ble Supreme Court of India and Hon'ble High Courts of India) are taking cognizance of the matters s*uo moto* by treating them as *suo moto* litigation and public interest litigation, like which the justice is being delivered to the victims who are even not approaching the Courts by filing the proper petitions before the respective Courts.

With this backdrop, I would like to share my views about the recent judgment delivered by their Lordships *Doraiswamy Raju and Arijit Pasayat in Vijayakumar Prasad v. State of Bihar and others,* which was reported in 2004 (1) ALD (Crl.) 736 (SC), with regard to the Territorial jurisdiction of maintenance case filed by the father against son. In para No.13 it was Held "It is to be noted that Clauses (b) and (c) of sub-section (1) of Section 126 relate to the wife and the children under Section 125 of the Code. The benefit given to the wife and the children to initiate proceeding at the place where they reside is not given to the parents. A bare reading of the Section makes it clear that the parents can not be placed on the same pedestal as that of the wife or the children for the purpose of Section 126 of the Code." Because of the language employed in Section 126(1)(b) (c) of the Code the Apex Court delivered the above judgment holding that, the father has no territorial jurisdiction to file the maintenance case against his son, where he resides.

A person who approaches the Court to obtain maintenance from his son or daughter to getrid of the starvation *i.e.,* as because he is unable to maintain himself or herself. The father or mother approaches the Court to get a megre amount for their survival from their son or daughter. It is a social, moral, legal duty casts upon the son to maintain his parents irrespective of his income. If he fails to provide food *etc.,* the law provides the parents to file a maintenance application to get the maintenance amount from this son or daughter. According to the above judgment a father has to file a petition for claiming maintenance against the son, where his son is resides *i.e.,* the jurisdiction for filing of a maintenance