A.F.R.

Court No. - 10

Case :- HABEAS CORPUS No. - 16660 of 2020

Petitioner :- Mohhammad Sazid

Respondent :- Superintendent, District Jail, Lucknow & Ors.

Counsel for Petitioner :- Manish Kumar Tripathi, Chandrakesh Mishra

Counsel for Respondent :- G.A.,Varun Pandey

Hon'ble Ramesh Sinha,J.

Hon'ble Jaspreet Singh,J.

(Per Jaspreet Singh, J. for the Bench)

1. The Court has convened through ***video conferencing***.

2. Heard Shri Daya Shankar Mishra, learned counsel for the petitioner, Shri S. P. Singh, learned A.G.A. for the State-respondents no.1, 2 and 3 and learned A.S.G. Senior Advocate Shri S. B. Pandey assisted by Shri Varun Pandey learned counsel for the Union of India.

3. The instant petition for habeas corpus has been preferred by the petitioner assailing his detention since 03.07.2020 in pursuance of the detention order passed by the respondent no.2 in exercise of powers conferred under Section 3(2) of the National Security Act, 1980.

4. The Court had required the State as well as the Union of India to file their counter-affidavits and in pursuance thereof the State as well as the Union of India have filed their respective counter-affidavits. The Union of India has also filed a

supplementary counter-affidavit, to which the petitioner filed his rejoinder-affidavit.

5. From the record, it appears that an incident had taken place on 20.02.2020 in pursuance whereof a First Information Report was also lodged bearing Case Crime No.74 of 2020 under Sections 302, 394, 216-A, 120-B/34 I.P.C. and Section 7 of Criminal Law Amendment Act relating to Police Station Chowk, District Lucknow.

6. The alleged incident as described is that on 20.02.2020, four men who had covered their faces with mask and were wearing helmet at around 1.30 P.M., entered the shop of a wholesale stockist of Kamlapasand and Supari situate in the busy market area of Yayaganj, having fire arms with them and forcibly took away two packets, one carrying cash and the other having keys to a cupboard and when an employee of the firm Subhash Chandra Gupta resisted, they fired at him and fled from the scene on two motorcycles. The said employee who was shot at, died during his treatment.

7. The State Government considering the facts and circumstances and the material before it approved the detention order passed by the detaining authority under Section 3(5) of the National Security Act, 1980. The detention order dated 03.07.2020 was served on the petitioner in jail through Superintendent District Jail, Lucknow-respondent no.1. Subsequently, after the detention order was approved from the Advisory Board Committee, it was further extended for another

period of three months i.e. six months from the date of initial detention and later the same was further extended.

8. It is in the aforesaid backdrop that the petitioner has instituted the above petition for habeas corpus challenging the detention order to be illegal and seeks his released forthwith.

9. The submission of the learned counsel for the petitioner is that the petitioner had moved a representation dated 13.07.2020 for seeking revocation of his detention through respondent No.1 Superintendent, District Jail, Lucknow which was addressed to the District Magistrate. The said representation was received by the respondent no.1 on 15.07.2020 and the same was rejected by the State Government on 28.07.2020. The petitioner has brought the representation dated 13.07.2020 on record as annexure no.12. The rejection order passed by the State Government dated 28th of July, 2020 has been brought on record as annexure no.13.

10. The petitioner thereafter preferred another representation addressed to the Advisory Board Committee, the Central Government as well as the State Government dated 21st July, 2020. It is the specific case of the petitioner as pleaded in paragraph-40 of the writ petition that despite the representation dated 21.07.2020 having been served on the Authorities yet the same has not been decided with expedition which has rendered the detention of the petitioner bad in the eyes of law, hence the petition be allowed.

11. Learned A.G.A. Shri S. P. Singh while refuting the aforesaid submissions has urged that the petitioner is involved in commission of a heinous crime. It is only after considering the dossier prepared relating to the petitioner, a copy of which has been brought on record as annexure C.A. No.1 with the counter-affidavit dated 09.11.2020, submits that there is ample material to form the subjective satisfaction that in order to prevent the petitioner from acting in any manner prejudicial to the maintenance of public order and authority, it was necessary to detain the said person and the detention order dated 03.07.2020 was passed.

12. It is also urged that the State thereafter complied with the time line as provided in Section 3(4) and (5) of the Act, 1980 scrupulously and there is no illegality committed at any stage of proceedings. Moreover, the representation dated 13.07.2020 was rejected hence the subsequent representation on similar facts dated 21.07.2020 was not maintainable. Accordingly, the writ petition deserves to be dismissed.

13. Learned A.S.G., Senior Advocate Shri S. B. Pandey submits that even the representation which was forwarded to the Central Government (dated 13.07.2020 which was received by the Authority on 15.07.2020) was rejected on 26.08.2020 and the same was communicated to the detenue (the petitioner) on 31.08.2020 and thus on the strength thereof it is urged that the representation was decided without much delay, through the delay, if any, has been explicitly explained, hence

there is no violation of any provision of the Act. Consequently the writ petition deserves to be dismissed.

14. Shri Daya Shankar Mishra, learned counsel for the petitioner while refuting the submission in rejoinder has specifically drawn the attention of the Court to the averments contained in paragraph 40 of the writ petition and it has been submitted that the earlier representation dated 13.07.2020 which was received by the authority on 15.07.2020 was rejected by the State Government on 28.07.2020 and the Central Government rejected the same on 26.08.2020 which was communicated to the petitioner on 31.08.2020. However, it is urged that in so far as the subsequent representation dated 21.07.2020 is concerned, the same has not been decided by the Central Government till date. He further submits that there is no bar for the petitioner to move a subsequent representation though the subject matter of both the representation was different.

15. It is also urged that even the State Government who was seized of the said representation did not decide the same and only as late as on 10.06.2021 the same was decided by the State Government much after exchange of the pleadings in the instant petition and submits that in view of the decisions of the Apex Court in the case of (i) ***Rajammal Vs. State of Tamil Nadu & another reported in 1999 (1) SCC page 417***,(ii) ***Ayya alias Ayub Vs. State of U.P. & another reported in AIR 1989 SC page 364***, (iii) ***Mohinuddin Vs. District***

Magistrate, Beed & other reported in AIR 1987 SC page 1977 and (iv) referring to the case of ***Satyapriya Sonkar Vs. Superintendent, Central Jail, Naini & other reported in 2000 Cr.L.J. (Alld.) (DB)***, the detention order stands vitiated and the petition deserves to be allowed.

16. The Court has considered the submissions and also perused the record.

17. As far as the facts are concerned, the same are not much in dispute. It is not disputed that the provisions of the National Security Act, 1980 has been invoked against the petitioner on the basis of a solitary case i.e. Case Crime No.74/2020. The petitioner has been in jail since 06.03.2020 and during this period the detaining authority has passed the detention order. It is also not disputed that during this detention the petitioner had initially preferred the representation dated 13.07.2020, a copy of which has been brought on record as annexure no.12. It is also not disputed by the petitioner that in so far as the said representation is concerned, the same was rejected by the State Authority on 28th of July, 2020 and it reveals from the counter-affidavit filed by Union of India dated 25.03.2021 that the representation dated 13.07.2020 which was received by the authority on 15.07.2020 was decided by the Central Government Authority on 26.08.2020 which was communicated to the detenue i.e. the petitioner on 31.08.2020.

18. From the perusal of the counter-affidavit filed by the Union of India, it indicates that an attempt has been made by

the Central Government to justify the delay in deciding the representation. In paragraph 5 (a) to 5 (d) various dates have been mentioned which only indicates the movement of file from one desk to the other which only further amplifies the bureaucratic/redtapism in the movement of the files, without considering that the issue of detention is a priority and the matter should have received prompt attention.

19. Be that as it may, the second representation dated 21.07.2020, a copy of which has been brought on record as annexure no.16 and addressed to the Advisory Board Committee, the State Government as well as the Central Government concerned. The State by filing its counter-affidavit dated 23.11.2020 in paragraphs-6 and 7 has clearly stated that the said representation dated 15.07.2020 was considered by the authority and rejected by the State Government on 28.07.2020. However, in so far as the representation dated 21.07.2020 addressed to the Central Government is concerned, there is nothing on record to indicate that the said representation was decided. A specific query was put to the learned A.S.G. in this regard who responded by saying that as per his instructions, representation dated 21.07.2020 was never received by the Central Government Authority.

20. This Court is not inclined to accept this reply; inasmuch as right from the inception, a specific averment was made in paragraph-40 of the writ petition regarding the fact that the representation dated 21.07.2020 was sent to the Authority

which has not been decided which has vitiated the detention order.

21. Yet there has been no reply to the aforesaid paragraph though the Central Government filed its counter-affidavit on 18.02.2021. Subsequently another counter-affidavit was filed by the Central Government dated 25.03.2021 and yet again there is neither any categorical reply to paragraph-40 of the writ petition nor any plea was raised by stating on oath in the counter-affidavit that the Central Government did not receive the representation dated 21.07.2020.

22. Thus what transpires from the record is that in so far as the first representation dated 13.07.2020 is concerned (received by the Authority on 15.07.2020), the same came to be decided both by the State Government as well as by the Central Government though the Central Government pushed the file in a casual manner.

23. However, in so far as the subsequent representation dated 21.07.2020 is concerned, the same came to be decided by the State Government only on 10.06.2021 i.e. almost after 10 months and there is no explanation forthcoming for this humongous delay. So also there is nothing on record to indicate that the same was decided by the Central Government till date.

24. Noticing the dictum of the Apex Court in the case of **Mohinuddin (supra)**, the relevant portion as contained in para 6 and 7 of the said report is being reproduced for convenient reference:-

"....6. *It is somewhat strange that the State Government should have acted in such a cavalier fashion in dealing with the appellant's representation addressed to the Chief Minister. We are satisfied that there was failure on the part of the Government to discharge its obligations under Art. 22 (5). The affidavit reveals that there were two representations made by the appellant, one to the Chief Minister dated September 22, 1986 and the other to the Advisory Board dated October 6, 1986. While the Advisory Board acted with com- mendable despatch in considering the same at its meeting held on October 8, 1986 and forwarded its report together with the materials on October 13, 1986, there was utter callousness on the part of the State Government to deal with the other representation addressed to the Chief Minister. It was not till November 17, 1986 that the Chief Minister condescended to have a look at the representation. When the life and liberty of a citizen is involved, it is expected that the Government will ensure that the constitutional safeguards embodied in Art. 22 (5) are strictly observed. We say and we think it necessary to repeat that the gravity of the evil to the community resulting from anti-social activi- ties can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The history of personal liberty is largely the history of in- sistence on observance of the procedural safeguards*.

7. *Apart from the admitted inordinate delay, there is a fundamental defect which renders the continued detention of the appellant constitutionally invalid. As observed by one of us (Sen, J.) in Narendra Purshotam Umrao V. B.B. Gujral & Ors. , [1979] 2 SCC 637 there was a duty cast on the Govern- ment to consider the representation made by the detenu without waiting for the opinion of the Advisory Board. The constitution of.an Advisory Board undern s.9 of the Act does not relieve the State Government from the legal obligation to consider the representation of the detenu as soon as it is received by it. It goes without saying that the constitu- tional right to make a representation guaranteed by Art. 22 (5) must be taken to include by necessary implication the constitutional right to a proper consideration of the repre- sentation by the authority to whom it is made. The right of representation under Art. 22 (5) is a valuable constitutional right and is not a mere formality. The representation made by the appellant addressed to the Chief Minister could not lie unattended to in the portals of the Secretariat while the Chief Minister was attending to other political affairs. Nor could the Government keep the representation in the archives of the Secretariat till the Advisory Board submit- ted its report. In Narendra'Purshotam Umrao's case it was observed: "Thus, the two obligations of the Government to refer the case of the detenu to the Advisory Board and to obtain its report on the one hand, and to give an earliest opportunity to him to make a representation and consider the representation on the other, are two distinct obligations, independent of each other." After referring to the decisions of this Court in Abdul Karim V. State of West Bengal, [1969] 3 SCR 479;*

Pankaj Kumar Chakrabarty V. State of West Bengal, [1970] 1 SCR 543 and Khairul Haque v. State of West Bengal, W.P. No. 246 of 1969, decided on September 10, 1969 the nature and dual obligation of the Government and the corresponding dual right in favour of the detenu under Art. 22 (5) was reiterat- ed. The following observations of the Court in Khairul Haque's case were quoted with approval:

"It is implicit in the language of Art. 22 that the appropriate Government, while dis- charging its duty to consider the representation, cannot depend upon the view of the Board on such representation. It has to consider the representation on its own without being influ- enced by any such view of the Board. There was, therefore, no reason for the Government to wait for considering the petitioner's representation until it had received the report of the Advisory Board. As laid down in Abdul Karim V. State of West Bengal, the obli- gation of the appropriate Government under Art. 22(5) is to consider the representation made by the detenu as expeditiously as possi- ble. The consideration by the Government of such representation has to be, as aforesaid, independent of any opinion which may be ex- pressed by the Advisory Board.

The fact that Art. 22 (5) enjoins upon the detaining authority to afford to the detenu the earliest opportunity to make a representation must implicitly mean that such representation must, when made, be considered and disposed of as expeditiously as possible, otherwise, it is obvious that the obligation to furnish the earliest opportunity to make a representation loses both its purpose and meaning."

In the circumstances, there being a failure on the part of the State Government to consider the representation made by the appellant addressed to the Chief Minister without wait- ing for the opinion of the Advisory Board, renders the continued detention of the appellant invalid and constitu- tionally impermissible."

25. The Apex Court in the case of **Rajammal (supra)** in para 6 to 8 has held as under:-

***"6.** Learned counsel also cited an earlier two-Judge Bench decision of this Court in Raghavendra Singh v. Supdt., District Jail, Kanpur [(1986) 1 SCC 650 : 1986 SCC (Cri) 60] in which similar delay of a few days in considering the representation was found to have vitiated the detention. That is a case where delay was held to be "wholly unexplained". A three-Judge Bench of this Court in Rumana Begum v. State of A.P. [1993 Supp (2) SCC 341 : 1993 SCC (Cri) 551] disapproved the delay in considering the representation on the mere ground that the representation was not addressed to the Chief Secretary. That was a case where representation was sent to the Governor. Hence it was found that there was unexplained and unreasonable delay and consequently the detention was held vitiated. We are reminded of the following*

observations made by this Court in Kundanbhai Dulabhai Sheikh v. District Magistrate, Ahmedabad [(1996) 3 SCC 194 : 1996 SCC (Cri) 470 : JT (1996) 2 SC 532] : (SCC p. 203, para 21)

> *"21. In spite of law laid down above by this Court repeatedly over the past three decades, the Executive, namely, the State Government and its officers continue to behave in their old, lethargic fashion and like all other files rusting in the Secretariat for various reasons including red-tapism, the representation made by a person deprived of his liberty, continue to be dealt with in the same fashion. The Government and its officers will not give up their habit of maintaining a consistent attitude of lethargy. So also, this Court will not hesitate in quashing the order of detention to restore the 'liberty and freedom' to the person whose detention is allowed to become bad by the Government itself on account of his representation not being disposed of at the earliest."*

7. *It is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay. Though no period is prescribed by Article 22 of the Constitution for the decision to be taken on the representation, the words "as soon as may be" in clause (5) of Article 22 convey the message that the representation should be considered and disposed of at the earliest. But that does not mean that the authority is pre-empted from explaining any delay which would have occasioned in the disposal of the representation. The court can certainly consider whether the delay was occasioned due to permissible reasons or unavoidable causes. This position has been well delineated by a Constitution Bench of this Court in K.M. Abdulla Kunhi v. Union of India [(1991) 1 SCC 476 : 1991 SCC (Cri) 613] . The following observations of the Bench can profitably be extracted here: (SCC p. 484, para 12)*

> *"It is a constitutional mandate commanding the authority concerned to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words 'as soon as may be' occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the detention law concerned, within which the representation should be dealt with. The requirement, however, is that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal."*

> ***8.*** *The position, therefore, now is that if delay was caused on account of any indifference or lapse in considering the representation, such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing of the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned.*

26. A Co-ordinate Bench of this Court in the case of **Satyapriya Sonkar (supra)** in para 16 to 18 has noticed as under:-

> *"**16**. Questions No. 2, 3 and 4 are related to each other and can be conveniently considered and decided together. There is no doubt about the legal position that the right of representation against preventive detention is constitutional and safeguard provided under Article 22(5) of the Constitution in Section 8 of the Act is only extention of the same right. The detaining authority is required to afford the detenu earliest opportunity of making representation against the order to the appropriate government. The representation so made has to be forwarded to the Advisory Board while making the reference under Section 10 of the Act. It is also to be considered by the State Government (appropriate government) at the earliest. In addition to the aforesaid right petitioner has also a remedy under Section 14 of the Act under which Central Government and the State Government may revoke the order of detention. The relief under Section 14 of the Act may be claimed at any namely before the order of detaining authority is confirmed by the State Government under Section 12 of the Act or subsequent there to. Thus from the provisions of Act, it is clear that the right to make representation by the detenu is not confined under Section 8 only. The detenu may make a second representation to the State Government and the Central Government under Section 14 of Act for invoking the power of revocation. Thus the detenu can make representation more than once during the period he is under detention. Whether the successive or frequent representations amount to abuse of the right conferred under the provisions of the Act, can be dealt with by the State Government and the Central Government and not by any other authority. The submission of the learned A.G.A. was that the subsequent representations can be permitted only on the basis of fresh ground which were not available at the time the first representation was made. The analogy behind this submission appears to be based on the doctrine of constructive res judicata. A Division Bench of this Court in case of Sushil Kumar V. Adhiskshak, Kendriya Karagar, Naini Allahabad, 1983 Cri LJ 744 held that the application of the doctrine of constructive res judicata is confined only to civil action and is entirely inapplicable to any illegal detention and do not bar a subsequent petition for a writ of habeas corpus. The Court also observed that*

Section of the Act providing for revocation or modification, has a very wide scope which is not the position in the matter of habeas Corpus before the Court.. The relevant extract from judgment is being reproduced below :-

"..... When a detention is challenged before a Court, the Court considers whether legal imperatives have been observed and the right procedure has been followed and the proper opportunity, as envisaged in Article 22 (4) of the Constitution *as well as under the provisions of the Act in question, has been afforded. The Court does not examine the desirability of the detention of the detenu, which depends on so many other factors including conditions prevailing in any particular region and the need of the detention, the matter comes within the ambit of subjective satisfaction of the detaining authority. Besides, while the Court cannot modify the order as to reduce the period of detention etc. even that scope is open to the appropriate authority under Section 14 of the Act.*

17. *Hon'ble Supreme Court in case of Sabir Ahmed V. Union of India, 1980 (3) SCC 295 in paragraph No. 12 while repelling the contention of the Central Government that it is not under duty to consider a representation made to it by the detenu for revoking his detention, if it simply repeats the same allegations, statement of facts and arguments which may be contained in the representation made to the detaining authority, held as under :-*

It is true that Section 3(2) of COFEPOSA mandates the State Government to send a report to the Central Government. But it does not mean that the representation made by the detenu, if any, should also be sent along with that report. There appears to be no substance in the contention that the Central Government is under no duty to consider a representation made to it by the detenu for revoking his detention, if it simply repeats the same allegations, statement of facts, and arguments which were contained in the representation made to the detaining authority. It is common experience that an argument or submission based on certain facts, which does not appeal to a tribunal or authority of first instance, may find acceptance with a higher tribunal or supervisory authority. Whether or not the detenu has under Section 11 a legal right to make a representation to the Central Government is not the real question. The nub of the matter is whether the power conferred by Section 11 on the Central Government, carries with it a duty to consider any representation made by the detenu, expeditiously. The power under Section 11 may either be exercised on information received by the Central Government from its own sources in eluding that supplied under Section 3 by the State Government, or, from the detenu in the form of a petition or representation. Whether or not the Central Government on such petition/representation revokes the detention is a matter of discretion. But this discretion is coupled with a duty. That duty is inherent in the very nature of the jurisdiction. The power under Section 11 is a supervisory power. It is intended to be an additional check or safeguard against the improper exercise of its power of detention by the detaining authority or the State

Government. If this statutory safeguard is to retain its meaning and efficacy, the Central Government must discharge its supervisory responsibility with constant vigilance and watchful care. The report received under Section 3 or any communication or petition received from the detenu must be considered with reasonable expedition. What is 'reasonable expedition' is a question depending on the circumstances of the particular case. No hard and fast rule as to the measure of reasonable time can be laid down. But it certainly does not cover the delay due to negligence, callous inaction, avoidable redtapism and unduly protracted procrastination.

18. *From the aforesaid legal position expressed by Hon'ble Supreme Court about the representation, it is clear that the second or successive representation may be made by the detenu during the period of his detention and such representations are to be considered and decided expeditiously. The provisions of COFEPOSA in this regard are similar to Act. The contention of the learned A.G.A. was that the representation dated 12th June, 1999 contained similar allegations, as were made in the representation dated 18th June, 1999 by the petitioner and hence no prejudice has been caused to petitioner as earlier the representation was already rejected by the Central Government. But this submission can not be accepted in view of the legal position expressed by Hon'ble Supreme Court in Sabir Ahmed's case, (1980 (3) SCC 295) wherein it has been held that it is common experience that an argument or submission based on certain facts, which does not appeal to a tribunal or authority of first instance, may find acceptance with a higher tribunal or supervisory authority. This analogy may be applicable to the same authority as well. It is well known that an authority or Court which at first instance does not accept the submission, on re-hammer accepts the same on subsequent occasion. From the aforesaid observations, it is clear that the representation submitted to the Central Government or the State Government even if it is based on same ground, it cannot be ignored and has to be considered by the appropriate authority. The observations of the Division Bench in case of Sushil Kumar, (1983 Cri LJ 744) (supra) are also very material. The power under Section 14 of the Act, conferred on State Government and Central Government is very wide and they can revoke order of detention for various considerations. They may come to conclusion that the preventive detention is no longer necessary, looking to the incident of the present case on which basis the impugned order of detention was passed, was related to the use of unfair means during examination. Admittedly, examinations were over long back. This could, by lapse of time, be one of the important consideration for the State Government and Central Government to revoke the order of detention on the ground that its purpose has already been served. But if the representations are allowed to be ignored in the manner it has been done in the present case it shall defeat the very purpose for which the right of representation has been conferred on the detenu. We have already found that the representations sent by father of the petitioner on 27th June,*

1999 were served on the State Government as well as on the Central Government but they have not been considered and decided though more than three months have passed. In our opinion, for this lapse on the part of the respondents No. 3 and 4, the continued detention of petitioner has been rendered illegal."

27. In view of the settled position of law as noticed above and its application to the facts of the instant case, there is no doubt that the State failed to discharge its obligation in deciding the representation expeditiously and moreover the Central Government has not decided the representation dated 21.07.2020 till date which is fatal and vitiates the detention order.

28. In view of the aforesaid facts and the law noticed above, the writ petition **succeeds** and the detention order is quashed. The petitioner shall be released forthwith by the respondents unless he is required in any other case.

29. In the facts and circumstances, there shall be no order as to costs.

30. The party shall file computer generated copy of order downloaded from the official website of High Court Allahabad, self attested by it alongwith a self attested identity proof of the said person(s) (preferably Aadhar Card) mentioning the mobile number(s) to which the said Aadhar Card is linked, before the concerned Court/Authority/Official.

31. The concerned Court/Authority/Official shall verify the authenticity of the computerized copy of the order from the

official website of High Court Allahabad and shall make a declaration of such verification in writing.

Order Date : 29.06.2021
ank/-