Faruk Yusuf Kandawala Vs P.G. Gawai

Court: Bombay High Court

Date of Decision: March 8, 1976

Acts Referred: Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 â€" Section 12A, 3, 8, 9
Constitution of India, 1950 â€" Article 14, 21, 22, 23, 330

Citation: (1976) 78 BOMLR 318 : (1977) MhLj 90

Hon'ble Judges: Shah, J; Chandurkar, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Chandurkar, J.
The petitioner is a business man dealing in cloth having his shop at Abdul Rehman Street, Bombay, His premises were

searched by the Customs Officers on September 27, 1974, At that time the petitioner was not in this shop and, therefore, the shop premises were

sealed. The search yielded textiles and wearing apparel of foreign origin totally valued at Rs. 8,957. The petitioner attended the Customs Office on

October 8, 1974 and admitted that the goods seized belonged to him. The petitioner was prosecuted in criminal case No. 865/CW of 1974 and

he pleaded guilty to the charges in that case. His shop was again raided on January 24, 1975 and textiles bearing foreign markings of the market

value of Rs. 8,450 were seized. A prosecution was launched against him and during the pendency of the prosecution, an order of detention dated

March 81, 1975 issued u/s 8 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to

as the ""COFEPOSA Act""), came to be passed by the Secretary to the Government of Maharashtra, Home Department. Grounds were supplied

to the petitioner. These grounds referred to the searches and the conviction in criminal case No. 365/CW of 1974 in which he was sentenced to

one day''s simple imprisonment and to pay a fine of Rs. 2,000. It was also stated that liability of the foreign textiles seized on September 27, 1974

to confiscation and the liability to penalty were the subject-mattar of departmental proceedings. The other ground referred to the search dated

January 24, 1975 and a reference was made to the petitioner''s statement of the same date in which, according to the detaining authority, he had

stated that he was the owner of the said shop and he did not possess any purchase bill or document for the legal importation or acquisition of the

foreign textiles found. Thus, according to the detaining authority, the petitioner was indulging in smuggled activities. The petitioner"s case was

referred to the Advisory Board on May 24, 1975. An order of confirmation of the said detention order came to be passed by the State

Government on July 14, 1975. These are the only material facts necessary to be stated having regard to the nature of the challenge which is made

by the petitioner to the order of detention.

2. Mr. Merchant appearing on behalf of the petitioner has raised two contentions. The first contention is that the reference to the Advisory Board

was made beyond the period of five weeks as provided by Clause (6) of Section 8 of the COFEPOSA Act and, according to the learned

Counsel, the provisions of Section 8(6) being mandatory in nature, the order of detention was liable to be quashed on the ground of non-

compliance with the mandatory provisions of Section 8, Clause (b). The second contention raised is that the order of detention was confirmed

admittedly beyond the period of three months and this order of confirmation made on July 14, 1975 was, therefore, bad in law and the detention of

the petitioner being illegal, ha was entitled to be set at liberty. In support of the second proposition that if the order of confirmation is not made

within the period of three months the detention is illegal the learned Counsel for the petitioner relied on two decisions of the Supreme Court in

Madan Malik Vs. State of West Bengal, and Deb Sadhan Roy Vs. State of West Bengal, . In the first case the Supreme Court was dealing with

the detention order u/s 8 of the West Bengal (Prevention of Violent Activities) Act and the Supreme Court observed (p. 1879) :

...There is a string of authorities -wherein this Court has held, after referring to Article 22(4) of the Constitution, that unless., on December 20,

1074 (Nagpur Bench) on February 5, 1976 (Unrep.). (Unrep. the State Government exercises its power of confirming the detention order within

three months from the date of detention, the detention after the expiry of that period would be without the authority of law.

In the second case also, the Supreme Court was dealing with a detention order under the same Act and it was observed that the confirmation of

the opinion of the Advisory Board to continue the detention beyond three months must ha within three months from the date of detention in

conformity with the mandate in Clause (4) of Article 22. Mr. Gumaste, the learned Government Pleader could not dispute the proposition that if

the detenu had a right to approach the Court to enforce his right under Article 22 of the Constitution, then admittedly the detention order not having

been confirmed within a period of three months, the continued detention of the petitioner would become bad. He, however, raised a contention

that the provisions of Section 8(6) were not mandatory and, according to him, the delay in submitting the case of the petitioner to the Advisory

Board was due to reasons beyond the control of the State Government inasmuch as there was a strike of Government servants with effect from

April 18, 1975 which ended on May 26, 1975 and the Government servant resumed work on May 27, 1975. Thus, according to the learned

Counsel, though there was a delay, that delay has been properly explained and since it was impossible in the circumstances of the ease to make a

reference to the Advisory Board within a period of five weeks from the date of detention, that delay should be condoned and in any case,

according to the learned Counsel, since the Advisory Board had submitted it a report on June 18, 1975, that is, well within the period prescribed

by Section 8, the petitioner was not entitled to challenge his continued detention as illegal. It was further contended that when the petitioner seeks

to have his order of detention quashed because of non-compliance with the provisions of Section 8 of the COFEPOSA Act or because the order

of detention was not confirmed within three months, he is in substance enforcing his right under Article 22 and in view of the Presidential orders

dated December 28, 1974 and June 27, 1975, such a contention is not open to him.

3. It appears to us that this contention is well founded- Section 8 of the COFEPOSA Act of which a breach is alleged to have been committed by

not referring the case of the petitioner to the Advisory Board run as follows :

8. Advisory Boards.-For the purposes of Sub-clause (o) of Clause (4), and Sub-clause (c) of Clause (7), of Article 22 of the Constitution,;-

(a) the Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards each of which shall

consist of a Chairman and two other persons possessing the qualifications specified in Sub-clause (o) of Clause (4) of Article 22 of the

Constitution;

(b) save as otherwise provided in Section 9, the appropriate Government shall, within five weeks from the date of detention of a person under a

detention order make a reference in respect thereof to the Advisory Board constituted under Clause (a) to enable the Advisory Board to make the

report under Sub-clause (a) of Clause (4) of Article 22 of the Constitution ;

(c) the Advisory Board to which a reference is made under Clause (6) shall after considering the reference and the materials placed therefore 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, any particular case, it considers it essential so to do or if the person

concerned desires to be heard in person, after hearing him is 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 non-corned and submit the same within eleven weeks from the date of

detention of the person concerned ;

(d) when there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be

deemed to the opinion of the Board;

(e) a person against -whom an order of detention has been made under this Act shall not be entitled to appear by any legal practitioner in any

matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the

report in which the opinion of the Advisory Board is specified, shall be confidential;

(f) 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.

4. Now, the scheme of Section 8 is that reference has to be made to the Advisory Board constituted under Clause (a) of Section 8 within five

weeks from the date of detention and within eleven weeks from the date of detention the Advisory Board has to submit its report. Now, what is

contended by the learned Counsel for the petitioner is that Section 8 gives an independent right apart from the constitutional right under Article 22

and the right u/s 8 is to have the case of the detenu submitted to the Advisory Board within a period of five weeks and to have the report of the

Advisory Board within a period of eleven weeks from the date of detention. The question which, therefore, arises is whether having regard to the

opening words of Section 8, Section 8 can be said to be a repository of a special statutory right of a detenu to have the matter referred to the

Advisory Board within the prescribed period or whether the provisions in Section 8 are correlated, to the provisions of Article 22 of the

Constitution. The material provisions referred to in the opening words of Section 8 are Clauses (4) and (7) of Article 22. These material provisions

of the Constitution run as follows :

22. Protection against arrest and detention in certain cases....

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than throe months unless-

(a) an Advisory Board consisting of persons who arc, or have been, or ore qualified to be appointed as, Judges of a High Court has reported

before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention :

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by

Parliament under Sub-clause (6) of Clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under Sub-clauses (a) and (6) of Clause (70)....

(7) Parliament may be law prescribe

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months

under any law providing for a preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of Sub-

clause (a) of Clause (4);

(b) the maximum period for which any person may in any class or classes of eases be detained under any law providing for preventive detention;

and

(c) the procedure to be followed by an Advisory Board in an inquiry under Sub-clause (a) of Clause (4).

Thus, Clause (4) of Article 22 makes it obligatory that if a law has to be made authorising the detention of a person for a longer period than throe

months, then the law must provide for an Advisory Board and that Advisory Board must report before the expiration of a period of three months

that there is in its opinion sufficient cause for such detention. There is power given to the Parliament under Article 22(7) to make a law prescribing

the procedure to be followed by an Advisory Board in an enquiry under Sub-clause (a) of Clause (4). It is because of this constitutional imperative

requiring a reference to be made to an Advisory Board that in the COFE-POSA Act, which provides for a power to make orders detaining

certain persons u/s 8 of the said Act, a provision for an Advisory Board has been made in Section 8. There can be no doubt that the opening

words of Section 8 were put there only with a view to correlate the provisions of Section 8 to the provisions of Article 22(4)(a) and Article 22(7)

(c). Indeed it is clear that the provisions of Section 8 of the COFEPOSA Act have been enacted in order to carry out and give effect to the

constitutional protection in the matter of detention contained in Article 22(4) of the Constitution of India. Section 8 of the COFEFOSA Act,

therefore, does not create any independent right because the right to have the detenu''s matter referred to the Advisory Board is a right which is

created by the Constitution itself and it is only to work out that right that detailed provisions have been made providing for the constitution of the

Advisory Board, making reference of the case of the detenu to the Advisory Board and getting the opinion of the Advisory Board within the

prescribed period on the question as to whether there is sufficient cause for the detention of the detenu as contemplated by Article 22(4).

5. It is important to note that there was some controversy prior to the enactment of the COFEPOSA Act, which came into force on December 20,

1974, as to whether Section 8 of the Maintenance of Internal Security Act (hereinafter referred to as ''MISA''), which provides for disclosing

grounds of detention to persons affected by the detention order, created an independent right apart from the provisions of Act or whether it was

the same right as the one contained in Article 22 of the Constitution of India and when the enforcement of the rights under Article 22 was

suspended, the alleged statutory right u/s 8 could still be independently enforced. By the President''s order dated December 28, 1974 it was

declared that:

...the right to move any court with respect to orders of detention -which have already been made or which may hereafter be made under the

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1874 (52 of 1974), or with respect to any other action (including

the making of any declaration u/s 0 of the said Act) which has already been, or may hereafter be, taken or omitted to be taken in respect of

detention under such orders, for the enforcement of the rights conferred by Article 14, Article 21 and Clause (4), Clause (5) read with Clause (6),

and Clause (7) of Article 23 of the Constitution,... shall remain suspended for a period of six months from the date of issue of this Order or the

period during which the Proclamation of Emergency issued under Clause (1) of Article 352 of the Constitution on the 3rd December, 1971, is in

force, whichever period expires earlier....

Later, on June 27, 1975 a second order under Article 359 of the Constitution of India was issued by the President of India. This order states :

In exercise of the powers conferred by Clause (1) of Article 330 of the Constitution, the President hereby declares that the right of any person

(including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution

and all proceedings pending in any court for the enforcement of the above-mentioned rights shall remain suspended for the period during which the

Proclamations of Emergency made under Clause (1) of Article 852 of the Constitution on the 3rd December, 1971 and on the 25th June, 1075

are both in force....

This order further makes it clear that this order shall be in addition to and not in derogation of any order made before the date of this order under

Article 359(i) of the Constitution. Beading these two Presidential orders there cannot be any doubt that a citizen is not entitled to enforce any right

under Article 22 in any Court during period of emergency. Now, as we have already observed, the provisions of Section 8 of the MISA originally

did not make any particular reference to any provision of the Constitution requiring the detaining authority to furnish grounds of detention. Such an

obligation was in terms created by Article 22(5) of the Constitution and Section 8 of the MISA was apparently intended to work out the

provisions of Article 22(5) of the Constitution. This Court had taken the view in Sharda H. Kamdar v. V.V. Naik (1974) Criminal Application No.

58 of 1974, decided by Padhye and Dhaimadhikari JJ., on December 20, 1074 (Nagpur Bench) (Unrep.) that Section 8(2) of the MISA was

merely a reflection of Article 22 of the Constitution of India and when the detention is challenged by the detenu on the ground that the provisions of

Section 8(1) have been violated, ho was in fact enforcing the right guaranteed to him under Article 22(3) of the Constitution. The Division Bench

had further taken the view that if Section 8 is construed as giving an independent right which could be enforced, the Presidential order with respect

to the suspension of Article 22(5) would become ineffective and the very purpose for which the Presidential order has been proclaimed would be

defeated. It appears, however, that some other Courts have taken the view that Section 8 incorporated an independent right apart from the

provisions of Article 22(5) and it appears to us that in order to exclude such an argument, the opening words of Section 8 of the COPEPOSA Act

were deliberately added. In the view which we are taking, we are supported by a Full Bench decision of the Gujarat High Court in Vasantlal v. G,

N. Dike (1975) 17 Guj. L.R. 138, F.b. The learned Judges in their judgment contrasted the provisions of the GOFEPOSA Act and the provisions

of the MISA. Referring to the new provisions in the COFEPOSA Act, the Full Bench observed as follows (p. 152):

One very important change which has been made in the COFE POSA Act is that the furnishing of the grounds of detention so as to enable the

detenu to make a representation is now correlated to the specific provisions of Article 22 of the Constitution. Section 3(8) of the COPE POSA

Act provides-

For the purposes of Clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the

grounds on which the order has been made shall be made....

in a particular manner within a particular number of days etc. Again in Section 8 which dealt with Advisory Boards, the COFK POSA Act

provides "For the purposes of Sub-clause (u) of Clause (4), and Sub-clause (o) of Clause (7), of Article 22 of the Constitution whereas under the

MISA as amended by Ordinance No. 11 of 1074, a specific provision was made in Section 8 for furnishing of the grounds of detention and

affording an opportunity of making a representation to the appropriate Government. The constitution of the Advisory Boards under the MISA was

provided for by the Act itself without correlating it to the definite clauses of Article 22, It is necessary at this stage to refer to a historical fact of

which judicial notice can be taken, namely, that after MISA as amended by the Ordinance No. 11 of 1974 and the Presidential Order of

November 16, 1974, this High Court as well as some of the other High Courts had taken the view that though by the Presidential Order of

November 10, 1074 the right to move the Court for breach of the provisions of Article 22(5) had been suspended, the right to move the Court for

violation of the statutory right which was a separate and independent right conferred by Section 8 of the MISA was not suspended and if any of

the grounds did not satisfy the requirements of sec, 8 of MISA, the order was liable to be struck down. It is to eliminate the contention based on

the existence of a separate statutory right as distinguished from the fundamental rights conferred by the different clauses of Article 22 of the

Constitution that the Parliament has in COFE POSA Act abstained from referring to any statutory right but it has correlated in Section 3(3) the

furnishing of the grounds to Article 22. This no doubt is a material change and what may be even called a drastic change. At the same time it must

be remembered that when the COFE POSA Act was passed, Article 22(5) remained on the statute book and was not suspended by any

Presidential order. Hence at the time when the Parliament enacted the COFE POSA Act, in order to avoid the invalidity of any of the provisions of

COFE POSA Act was necessary to comply strictly with the requirements of the Constitution regarding what a law of preventive detention should

contain and what provisions should be set out in such a law. However, with the possibility that the Presidential Order suspending some of these

fundamental rights may be issued after the enactment of COFE POSA Act in connection with an order passed under COFE POSA Act, the

Parliament has correlated the rights conferred by the Constitution by Article 22(5) of the Constitution not by a separate statutory provision but by

correlating it directly for the purposes of Article 22(3). Thus there is a deliberate departure from the provisions of the MISA in the COFE POSA

Act.

These observations, in our view, clearly bring out the reason as to why the opening words of Section 8 were introduced in that section. It is thus

clear that in view of the opening words of Section 8 of the COFEPOSA Act, the provisions of Section 8 must be correlated to the provisions of

Article 22(4) and when the petitioner complains of a breach of the provisions of Section 8 of the COFEPOSA Act with a view to have his

detention set aside, he is in terms enforcing his right under Article 22, the very enforcement of which has been suspended by the two Presidential

Orders.

6. Mr. Merchant appearing on behalf of the detenu has referred us to certain observations of a Division Bench of this Court to which one of us

(Shah J.) was a party in Shivshanherlal Gupta v. C.T.A. Pillai (1976) Criminal Application No. 1819 of 1975, decided by Tulaapurkar and Shah J

J., on February 5, 1976 (Unrep.). The Division Bench in that case was considering the effect of the newly added provisions of Section 12A in the

COFEI"OSA Act with effect from July 1, 1975, The question which was posed for consideration before the Division Bench was whether if the

impugned declaration u/s 12A (2) of the COFEPOSA Act gets vitiated for any of the reasons urged against it, the impugned order of detention

must also fall to the ground or not. In that context, it was argued on behalf of the detaining authority that even if the impugned declaration was bad

or invalid, still the detenu will not be entitled to be released straightaway be pause the observance of the safeguards contained in Sections 3(3).,

8(b) and 8(c) cannot be said to be any condition precedent to the order of detention and since Articles 21 and 22 were suspended during the

emergency by reason of the Presidential order dated June 27, 1975, even the right u/s 8(3) also remained suspended and the detenu was not

entitled to the grounds of detention. It was in that context that the Division Bench pointed out that Section 12A was introduced in the COFEPOSA

Act with effect from July 1, 1975 on which day the Presidential Order dated June 27, 1975 was already operative. The Division Bench, therefore,

took the view that oven after the issue of the Presidential Order dated Juno 27, 1975 whereunder Articles 21 and 22 of the Constitution have been

suspended, the Parliament has thought fit to make an express provision like Sub-sections (4), (5) and (6) in Section 12A of the COFEPOSA Act

and it was pointed out :

...The very fact that express provision has been made by enacting Sub-section (5) whereunder this detaining authority has been enabled to

withhold the grounds of detention from the detenu (which by implication means grounds must be given in oases where the declaration is not made)

even after Article 22 has been suspended by the Presidential Order goes to show that it was not intended by the legislature to equate the rights pf

the detenu spoken of by this provision with the rights under Articles 21 and 23 of the Constitution, the opening words of Section 3(3)

notwithstanding.

The Division Bench further observed as follows :

We are clearly of the view that even after the suspension of Articles 21 and 22 under the Presidential Order dated 27-6-1975 the legislature has

conferred the procedural safeguards under Sub-sections (5) and (6) of Section 12A read with Section 3(3), 8(6) and 8(c) and therefore though

the initial Detention Order may not be rendered invalid by reason of subsequent non-compliance of the safeguards in favour of the detenu, the

continuance of the Detention Order would become illegal if there is non-compliance of such safeguards.

One important feature which distinguishes the case before the Division Bench from the instant one is that the detention order in that case was made

on July 1, 1975, that is, the date on which Section 12A also came into force. The detention order in the instant case was passed much earlier on

March 31, 1975. So far as the present petition is concerned, we must, therefore, consider the position without any reference to the provisions of

Section 12A which could only mean that we must take the provisions of Section 8 as they stand with the opening words expressing a clear

intention on the part of the Parliament to correlate those provisions to the constitutional provision in Articles 22(4)(a) and 7(c) of the Constitution

of India. That decision cannot, therefore, be of any assistance to the petitioner. We must, therefore, hold that the petitioner is not entitled to

challenge his continued detention on the ground that there is any violation of the provisions of Section 8 of the COFEPOSA Act.

7. In this view of the matter, it, is not necessary for us to consider whether the provisions of Section 8(b) are mandatory in nature and whether

merely on the ground that the question of detention of the petitioner was referred to the Advisory Board beyond the period of. five weeks, the

detention had become illegal.

8. In the view which we have taken, the petition must stand dismissed. Rule discharged.