MANU/BH/0184/1984

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IN THE HIGH COURT OF PATNA
FULL BENCH

C.W.J.C. No. 379 of 1983

Decided On: 13.04.1984

Appellants:**Vikash Chandra Mishra**
Vs.
Respondent:**State of Bihar and Ors.**

Hon'ble Judges/Coram:
S.S. Sandhawalia , C.J., Brishketu Sharan Sinha and R.N. Thakur , JJ.

JUDGMENT

S.S. Sandhawalia, C.J.

1. Whether the right of representation contended, in terms, by Clause (5) of Article 22 of the Constitution and equally by Section 17(1) of the Bihar Control of Crimes Act, 1981, in pari materia therewith can be extended to any and every friend or relation of the detenu (inevitably with the mandatory strictitude of an expeditious decision on such representation) is the core question in this reference to the Full Bench.

2. The relevant facts deserve notice only within the narrow confines of the issue aforesaid which alone was debated before us. Vikash Chandra Mishra, the writ petitioner, was directed to be detained by the order dated the 27th of July, 1983 passed by the District Magistrate of Saharsa in exercise of his power under Section 12(2) of the Bihar Control of Crimes Act, 1981 (hereinafter called the 'Act') with a view to preventing him from acting in a manner prejudicial to the maintenance of the public order. The aforesaid order of detention was duly approved by the State Government (vide its order dated the 6th of August, 1983) and in pursuance thereof the writ petitioner was arrested on the 11th of August, 1983 and was served with a copy of the said order as well as the grounds of detention in the District Jail, Saharsa. On the petitioner's own showing, he was later produced before the Advisory Board on the 15th of September, 1983 and subsequently (vide annexure 2) it was communicated to him that the State Government had approved the order of his detention and directed that he be so detained till the 11th of August, 1984.

3. On the 22nd of, November, 1983 the present writ petition was filed challenging the detention on merits and factual grounds. However, in a supplementary affidavit filed on behalf of the writ petitioner on the 25th of November, 1983 an additional ground was sought to be taken that on the J 5th of August, 1983 the writ petitioner had made a representation, in obedience to the direction contained in annexure 1, to the Deputy Secretary (Home), Police Department, Government of Bihar, Patna, which was forwarded through the Superintendent of Jail, Saharsa, and that the said representation was not at all considered by the State Government and no decision thereof was at all communicated to the petitioner.

4. In the counter affidavit filed on behalf of respondents 2 and 3 the factual stand

with regard to the anti-social activity of the writ petitioner and the lack of satisfaction of the detaining authority was expressly controverted. It was categorically stated that the writ petitioner never filed any representation on the 15th of August, 1983 through the Superintendent, Jail, and this allegation was false and consequently no question of any decision on the said representation at all arose. However, in paragraph 10 of the counter affidavit it was indicated that merely a representation was filed by the father of the petitioner, which, after careful consideration, was rejected by the respondent State and the same was communicated to the father of the petitioner by letter No. 11816 dated the 17th of November, 1983.

5. The writ petitioner then chose to file a reply to the counter affidavit wherein he took the plea that the petitioner's father had filed a representation before the State Government on the 27th of September, 1983, which had been rejected by the State Government and the order was communicated on the 17th of November. 1983. On this factual! matrix, the plea was sought to be raised that there was a delay of one month and 21 days sin disposing of the said representation made by the father of the writ petitioner, which remained unexplained on the record and, consequently, the detention order was void on this score.

6. When the present writ petition came up before the Division Bench, the only question raised on behalf of the writ petitioner was that the representation filed by the father of the writ petitioner was not expeditiously disposed of by the State Government, and relying on the decision in the case of Tara Chand v. The State of Rajasthan and Ors. MANU/SC/0252/1980 : 1980CriLJ1015 it was contended that the detention should be invalidated on that narrow ground. The Division Bench, however, took the view that the issue, whether any and every representation preferred merely by a relative or a friend but not by the detenu himself would come within the ambit of "representation" as employed in Article 22(5) of the Constitution, was not free from difficulty, and, consequently, referred the matter for an authoritative decision by a larger Bench.

7. As earlier, so before us, Mr. Chandra Shekhar, learned Counsel for the writ petitioner, had put in the fore-front the observations in Tara Chand v. The State of Rajasthan and Ors. (supra) for pressing the primary (and indeed the sole) submission that the representation filed by the father of the writ petitioner was within the meaning of the statute and, therefore, deserved the most expeditious decision thereon. Admittedly, the delay of more than 1 month and 21 days in disposing of the same having occurred, it was contended that the detention of the writ petitioner was consequently rendered void thereby. Learned Counsel very fairly conceded that the writ petitioner's somewhat belated claim that he had himself riled an earlier representation on the 15th of August, 1983, having been categorically controverted by the respondent State, any submission on that ground could not now be agitated within the confines of the writ jurisdiction.

8. As the controversy here inevitably revolves around Article 22(5) of the Constitution and Section 17(1) of the Act it seems not only apt but necessary to read these provisions at the very outset and indeed to juxtapose them:

Article 22(5)	Section 17(1)
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.	When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days, and, in exceptional circumstances and for reasons to be recorded in writing, not later than ten days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the State Government.

9. It is manifest from the above that barring the marginal difference of the specification of time the provisions of Section 17(1) of the Act are in pari materia, with the constitutional provisions of Article 22(5). Therefore the issue here has to be viewed within the parameters of the law settled by the final Court whilst interpreting Article 22(5) of the Constitution. Way back in Sk. Abdul Karim and Ors. v. The State of west Bengal MANU/SC/0059/1969 : 1969CriLJ1446 it was laid down that the Constitutional right to make a representation guaranteed by Article 22(5) must be taken to include by necessary implication the Constitutional right to a proper consideration of the representation by the authority whom it is made and a decision thereon with utmost expedition. The aforesaid view was reiterated and affirmed by a Constitution Bench in Pankaj Kumar Chakrabarty v. The State of West Bengal MANU/SC/0052/1969 : [1970]1SCR543 . Their Lordships therein drew pointed attention to the expressions "as soon as may be" and the "earliest opportunity" employed in Clause (5) of Article 22, and, by precedent, imposed a virtual time limit for the communication of the grounds of detention to the detenu and, on that very premise, equally imposed a time imperative for a decision on the representation made by the detenu against the said grounds of detention. Thus, it is from the fountain head of the aforesaid two expressions that the final Court has elicited the elixir of a decision with the utmost promptitude on the representation made by the detenu against the grounds of detention as a procedural safeguard, failing which the detention itself would be nullified. The aforesaid two decisions were then followed in Sk. Rashid v. The State of West Bengal MANU/SC/0218/1972 : 1973CriLJ656 wherein a delay of 27 days in deciding the representation in the context of a somewhat vague explanation therefore was held to be unreasonable and the order of detention quashed. It unnecessary to multiply authorities and it suffices to mention that the law so laid down holds the field with the innumerable precedents of the final Court subsequently following or affirming the same.

10. Now it is in the light of the law settled, as above, that the twin argument of Mr. Chandra Shekhar, learned Counsel for the writ petitioner, has to be examined. He was logically compelled to contend that firstly the representation envisaged by Clause (5) of Article 22 of the Constitution is not confined to the original representation against the grounds of detention served upon the detenu, but includes within it any number of successive representations which detenu may choose to make later at any stage. It was argued on this premise that any number of successive representations by the detenu are not only permissible, but visualised by the law and, being on the same footing as the original representation (against the grounds of detention first served on him), have to be decided with the same amount of expedition and with the same legal consequences (of the nullification of the detention) in the case of failure or unexplained delay in doing so.

11. As a necessary corollary to the above, learned Counsel contended that the representation visualised by Clause (5) of Article 22 of the Constitution was not

confined to those made by the detenu alone, but equally by any and every relation or friend independently in his own right. It was submitted that on parity of reasoning successive representations by such friends and relations were permissible and equally entitled to a decision with utmost expedition and with identical legal consequences.

12. Since the precedent in Tar a Chand's case (supra) was sought to be put in the forefront in support of; the aforesaid submissions and indeed it was contended that the same was bidding on the point, it is apt to deal with the same in the first instance. That Was a case under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. It is common ground that under the said Act both the State Government and the Central Government have the discretion to revoke the detention. The detenu therein was arrested on July 19, 1979, and, on the same day was served with the grounds of detention. It would appear that his wife, Smt. Nita, made two representations dated July 25, 1979, and July 31, 1979 to the State Government, which were rejected on or before August 30, 1979, and the learned Counsel appearing for the petitioner did not make any grievance at all regarding the rejection of those two representations. What was noticed and weighed with the Court was as under:

> From a letter sent to the detenu from the President's Secretariat on October 9, 1979, it appears that the President had received his representation before October 9, 1979, and the same had been forwarded to the Finance Ministry of the Union Government for necessary action. It is common ground that neither the representation was considered by the Union of India nor was any order passed by it.

It was on the aforesaid ground that their Lordships held that there being inordinate delay in considering the representation of the detenu by the Central Government, which had the discretion under Section 11 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, to revoke the order of detention, the same would be rendered invalid. This judgment, therefore, is clear that what was under consideration was the representation of the detenu himself upon which no decision had been taken at all and in any case there had been inordinate delay in doing so. This case is, therefore, no warrant for the proposition that the representation by the wife in her own right would be within the scope and ambit of Article 22(5) of the Constitution, or that any such representation or similar successive representation would attract the legal requirement of a decision with the utmost expedition and the necessary legal consequences on a failure to do so. In the said judgment there is a passing reference to a third representation on December 6, 1979, made by the wife of the detenu (which manifestly was long after the representation of the detenu himself, which was received by the President's Secretariat on October 9, 1979), but the said representation seems to be wholly irrelevant to the issue. A close reading of the very brief judgment in this case makes it plain that the issue had turned entirely on the facts of the case and no point whatsoever with regard to the maintainability of representation by any or every relation or friend of the detenu or successive representations by them was at all raised, far from being adjudicated. Consequently, this precedent is of little and indeed of no aid whatsoever to the case of the writ petitioner.

13. This precedent being thus out of the way, the deck is now clear for examining the matter on principle and the language of the statute. A plain reading of Clause (5) of Article 22 of the Constitution would indicate that the constitutional right of making a representation against the order of detention is co-related to the constitutional

obligation of the authority to communicate the grounds upon which the order rests to the detenu as soon as may be. It would thus appear that those are corresponding or co-related rights and liabilities, which are not to be isolated or separated from each other or to be construed in a vacuum. Immediately after detention, the communication of the grounds of detention to the detenu is first obligated and mandated on the detaining authority, and, this in a way is a sine qua non for the continuance of the deprivation of the personal liberty to him. It is with this communication of the order of detention and the grounds on which the order has been made that the Constitutional right to representation is inextricably linked. In a sense the said representation would be a challenge against those grounds of detention or to explain them away or to exhibit their incorrectness or their falsity. Therefore, it is in this particular context of the service of the grounds of detention "as soon as may be" (or the specific periods prescribed by individual Statutes) on the one hand, and the representation of the detenu against the same at "the earliest opportunity" on the other, that the law has mandated the most expeditious consideration and disposal thereof. If one may put it in a syllogism, there is a Constitutional right of the detenu to receive the order of detention and the grounds on which it is rested, with the corresponding obligation on the detaining authority to communicate the same to him. There is then a constitutional right in the detenu to make a representation against the order and the grounds of detention and the Constitutional obligation on the authority to consider the same and decide it speedily.

14. Apart from the language of the statute and on principle, the aforesaid result seems to equally flow from precedent as well. In Sk. Abdul Karim's case (supra) it was observed:

> A person detained under a law of Preventive Detention has a right to obtain information as to the grounds of detention and has also the right to make a representation protesting against the order of preventive detention.... In our opinion, the Constitutional right to make a representation guaranteed by Article 22(5) must be taken to include by necessary implication a Constitutional right to a proper consideration of the representation by the authority to whom it is made. The right of representation under Article 22(5) is a valuable Constitutional right and is not a mere formality.

More pointedly, in Punkaj Kumar Singh's case the Constitution Bench had observed at p. 101;

> In our view it is clear from Clauses (4) and (5) of Article 22 that there is a dual obligation on the appropriate Government and a dual right in favour of the detenu, namely, (1) to have his representation, irrespective of the length of detention, considered by the appropriate Government, and (2) to have once again that representation in the light of the circumstances of the case considered by the Board before it gives its opinion.

Thus, it seems to follow on principle, the language of the Statute and from the precedents that the word ''representation" in Clause (5) of Article 22 of the Constitution (and the statutes corresponding to the same) has now come to acquire the status of a term of Article We are here concerned stricto sensu with the specific right of representation conferred by the Constitution on the detenu and not with any and every complaint or representation made by any one of his relations and friends to protest against such detention. Therefore, for reasons of terminological exactitude, it is necessary to notice that in this context it means specifically the representation

originally made by the detenu himself after the service of the grounds of Retention and challenging the same. This right is afforded in terms to 'him', that is to the detenu. Though this may not be conclusive it deserves notice that the Statute does not say that such representation may be made by any one of his friends or relatives. This appears to be so because, as noticed earlier, since the right is co related to the grounds of detention and the detenu alone is entitled to be served with such grounds and not any of his friends or relatives. To put it negatively, a person who has not been served with the grounds of detention has no corresponding right to make this representation. Consequently, friends and relatives in their own right are not visualised and would not have the privilege of making the Constitutional or Statutory representation , to which alone the mandate of expeditious disposal attaches. Equally it calls for notice that the statute entitles the "making a representation against the order". This cannot be extended to making a series of unlimited representations either by the detenu himself or his friends and relatives in their own right on the other.

15. In the aforesaid context, one must, however, record the strongest note of caution. It is not to be forgotten that herein we are dealing with the cherished right of personal liberty and one cannot be hypertechnical to hold that the law imposes any embargo on a subsequent representation by the detenu himself or such other representations by his relatives or friends in their own right. One can well visualise that the grounds of challenge against the detention may change or the passage of time may provide fresh basis for the challenge against the detention. If that be so, there is no gain saying the fact that the detaining authority would give its ear to such fresh or subsequent representations However, the only sharp distinction herein is that to such subsequent representations by the detenu or independent representations by his friends and relatives, the Constitutional or, in any case, the precedential obligation to decide the same with the utmost expedition would not attach and the detention would not ipso facto be invalidated by some delay. That result or necessary consequence by precedent is linked or related to only the original representation by the detenu himself challenging the grounds of detention initially served upon him.

16. Secondly, one must also guard against some loose terminology with regard to representations or complaints made by friends or relatives. As at present advised, I am inclined to hold that the detenu may expressly authorise a relative or a friend or a lawyer to frame a representation on his behalf. Indeed, in the context of the complexities of the law in our country, the illiteracy or the ignorance of the detenu, a meaningful original representation against the grounds of detention can, perhaps, be made only by a person having some knowledge or expertise of the matter. One may not be misunderstood to mean that the representation by the detenu must be in his own handwriting or necessarily under his particular signature. Plainly enough, a representation duly authorised by the detenu would, in the eye of law, be a representation by him. The real question which we are called to consider is with regard to cases where a representation is claimed to be made by a friend or a relative not authorised to do so by the detenu, but in his own right because of friendship or relationship. In strictness, the question is, whether a representation by a friend or relation or successive representations by them in their own right, equally attract the mandate of expeditious disposal and the consequent invalidation of detention in the event of delay. I am of the view that this precedential mandate attaches only to the original representation by the detenu himself or a representation by any person duly authorised by him to make the same after the set vice of the grounds of detention. It applies neither to the subsequent or the successive representations by the detenu himself later, nor to the representations by his friends or relatives in their own right

or subsequent such representations by them. Indeed, it appears to me that if it were to be held otherwise, a detenu may well be prejudiced by a frivolous representation by any or every friend of his in his own right, which only merits rejection.

17. I am not unmindful of the fact, that herein we are called upon to interpret the provisions that impinge on the guaranteed and cherished right of personal liberty. If two views were possible, one would necessarily tilt in favour of the detenu and in support of the right of personal liberty. Yet this tilt is not to be extended to an angle so as to virtually topple and erode the law of preventive detention altogether. There is no gain saying the fact that preventive detention is recognised by the Constitution and the legislations enacted under its umbrella have been upheld even though as a necessary evil to be countenanced by law, within closely circumscribed limits and procedural safeguards. Therefore, any interpretation, which, in essence, would virtually nullify the very object and purposes of the statute of preventive detention, has to be avoided on sound cannons of construction.

18. Now the cumulative effect of the submissions canvassed on behalf of the writ petitioner that any number of successive representations by the detenu himself and the same number by his relations and friends in their own right must be considered and decided with the utmost promptitude is indeed startling. As has already been noticed, precedent has now settled it beyond the pale of doubt that the failure to record a expeditious decision on the statutory representation, which is not adequately explained, would by itself nullify the detention itself. Therefore, the inevitable result of the stand taken on behalf of the writ petitioner on the matrix of the settled law would be that unless the authority meticulously decides each and every one of the spate of representations both by the detenu himself and by all those who purport to be his friends and relatives, the detention would necessarily have to be set aside. I do not think, the law countenances any such anomalous situation. Indeed, when this aspect was pointedly confronted to the learned Counsel for the writ petitioner, be, with gay abandoned, stated that the State should create a second Secretariat for dealing with all representations, if necessary. I find myself unable to easily subscribe to so doctrinaire a stand.

19. In fairness to Mr. Chakdra Shekhar, one must also notice an ancillary submission of his, even though it appears to be very wide of the mark. Counsel contended that the law countenances in terms any number of successive habeas corpus petitions by friends and relations to challenge any assault on personal liberty. There is no dispute that by the very nature of things, in a case of the violation of personal liberty, where the victim is in unlawful confinement, a writ of habeas corpus is not only permitted to be preferred by a friend or relative, but is almost the rule. Equally it is not in dispute that the dismissal of a petition for a writ of habeas corpus does not attract either the principle of res judicata, nor does it bar a second habeas corpus petition. However, this in no way advances the case of the writ petitioner. Herein we are not dealing in abstract with the forum of the remedy by way of a writ. We are called upon to construe the particular provisions of Clause (5) of Article 22 of the Constitution and the corresponding provisions of Section 17(1) of the Act. I am unable to see, how the case of a writ of habeas corpus is in any way analogous or even relevant.

20. Lastly, the conclusion I We arrived at, in the light of the aforesaid detailed discussions, seems to be well buttressed by the observations of the final Court itself. In Phillippa Anne Duke v. State of Tamil Nadu and Ors. : 1982CriLJ1389 which was a case of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act. It was sought to be argued therein that the bout de papier

prepared and presented to the Prime Minister was a representation under the said Act, which merited consideration and decision with the utmost expedition, and, in the event of its failure, the nullification of such detention. Rejecting such contention categorically, Chinnappa Reddy. J., observed as follows:

...Nor is it possible to treat the countless petitions, memorials and representations which are everywhere presented to the Prime Minister and other Ministers as statutory appeals or petitions, statutorily obliging them to consider and dispose of such appeals and petitions in the manner provided by statute. No doubt the Prime Minister and other Ministers, as leaders in whom the people have reposed faith and confidence, will deal with such appeals and petitions with due and deserved despatch. But quite obviously that will not be because they are discharging statutory obligations. It is not also possible to treat representations from whatever source addressed to whomsoever officer of one or other department of the Government as a representation to the Government requiring the appropriate authority under the Cofeposa to consider the matter. I do not consider that the Bout be Papier presented to the Prime Minister during her visit to Britain and the subsequent reminder addressed to the External Affairs Ministry by the British High Commission are representations to the Central Government which are required to be dealt with in the manner provided by the Cofeposa.

Again in Devji Vallabhbhai Tandel v. The Administration of Goa, Daman and Diu and Anr. MANU/SC/0133/1982 : 1982CriLJ799 Baharul Islam, J., speaking for the Court, observed as under:

> Article 22(5), which has provided a safeguard in the matter of preventive detention, confers the right on the detenu and simultaneously casts an obligation on the detaining authority, as soon as may be, after the arrest to communicate to the detenu the grounds on which the order has been made and to afford the earliest opportunity of making a representation against the order. The Representation is to be made by the detenu. The detenu is already deprived of his liberty.
>
> Giving the ordinary connotation to the expression earliest opportunity of making a representation', as set out in Sub-article (5) would only imply that the person can send his written representation through the jail authorities. It would be open to him to send it by any other communicating media, but the opportunity to make a representation does not comprehend an oral hearing....
>
> It is, therefore implicit in Sub-article (5) of Article 72 that the representation has to be a written representation communicated through the jail authorities or through any other mode, which the detenu thinks fit of adopting, but the detaining authority is under no obligation to grant any oral hearing at the time of considering the representation. Now, if the representation has to be a written representation, there is no question of hearing any one much less a lawyer.

21. To finally conclude, the answer to the question posed at the very outset is rendered in the negative and it is held that the right of representation conferred by Article 22(5) of the Constitution and Section 17(1) of the Act does not extend to any and every friend or relation (of the detenu) in his own right.

22. Applying the above to the facts of the present case, it is common ground that the

claim of the writ petitioner to have himself made the representation has been expressly controverted in the counter affidavit of the State and no submission on that score is thus entertainable, nor was, in fact, advanced. It would appear that long after the detention of the writ petitioner on the 11th of August, 1983, and, even after he was produced before the Advisory Board on the 11th of September, 1983, his father, in his own right, presented a sketchy representation, as late as on the 27ih of September, 1983. Even this representation was duly considered by the State Government and rejected. This was duly communicated to the representationist on the 17th of November, 1983. I have taken the view that the mandatory strictitude of an expeditious decision is not attracted to a representation by any friend or relative of the detenu, and, consequently, the detention cannot be nullified on that score alone. Therefore, the primary ground on which the writ petition was pressed is rejected and the detention must be upheld. The writ petition is accordingly dismissed.