

SATAR HABIB HAMDANI ETC.

v.

K.S. DILIPSINHJI & ORS.

DECEMBER 20, 1985

[C. CHINNAPPA REDDY AND V. KHALID, JJ.]

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Section 9 - 'Detention' and 'continued detention' - Difference between - Advisory Board - Duty of - Specifically consider and determine whether there is sufficient cause for 'continued detention' of the person concerned.

An order of detention under the COFEPOSA was made by the Additional Secretary to the Government of India against the appellant, and the grounds of detention were served on him on July 1, 1984. On July 13, 1984 the COFEPOSA was amended. Purporting to act under section 9(1) of the COFEPOSA as amended the Additional Secretary made a declaration that he was satisfied that the appellant was likely to abet the smuggling of goods into and through an area highly vulnerable to smuggling as defined in Explanation 1 to section 9(1) of the Act. Thereafter the usual reference to the Advisory Board was made and after obtaining its opinion the Government of India by an order dated December 22, 1984 confirmed the detention for a period of two years.

In the appeals to this Court, it was contended on behalf of the appellants that in every case where it was proposed to have recourse to s. 10 read with s. 9 it was necessary for the Advisory Board to state its opinion, that 'the continued detention' of the detenu was necessary and that in a case where the Advisory Board merely opined that 'the detention' of the detenu was necessary, recourse could not be had to s. 10 read with s. 9 so as to enable the detenu to be detained for two years. This contention was answered on behalf of the respondents through the counter affidavit by contending, that once the Advisory Board gives an opinion affirming the detention it must be regarded as an opinion in regard to both the aspects viz. the original 'detention' and the 'continued detention'.

Allowing the Appeals,

HELD: 1. In the absence of the Advisory Board's opinion to the effect that there is sufficient cause for the 'continued

A detention' of the detenus, their detention for a period exceeding one year is without legal sanction. More than one year has lapsed since the appellants have been detained. They are directed to be set at liberty forthwith. [1068 G]

B 2. The scheme of section 3,8,9 and 10 of the Act appears to be that while generally the period for which a person may be preventively detained under the COFEPOSA in connection with the smuggling activities may not exceed a period of one year, in case of certain kinds of activities of smuggling into, out of, or through 'any area highly vulnerable to smuggling', the period may extend upto two years. In the latter event, a declaration is required to be made within five weeks of the detention of such person in the manner provided by section 9(1) of the Act. [1067 G; 1068 A]

D 3. In a case to which s.9 applies, s.8 stands suitably amended, a reference is required to be made within four months and two weeks by the Government to the Advisory Board, and the Advisory Board is required to state its opinion within five months and three weeks from the order of detention where there is sufficient cause for the 'continued detention' of the person concerned. [1068 B]

E 4. The two safeguards provided to the detenu against 'continued detention' are the application of mind by the specified authority before making a declaration under s.9(1) and the consideration of the question by the Advisory Board. [1068 C]

F 5. The Advisory Board is to state its opinion not merely whether detention is necessary, but whether 'continued detention' is necessary. The Advisory Board will necessarily have to go behind the declaration under s.9 to consider the question whether there is sufficient cause for 'continued detention'. [1068 C]

G 6. In a case to which s.9 applies it is important that the Advisory Board specifically considers and answers the question whether in its opinion there is sufficient cause for the 'continued detention' of the person concerned. If the Advisory Board merely states that the detention of the person is necessary it is not for anyone else to supplement the Advisory Board's opinion and substitute the words 'continued detention' for the word 'detention'. [1068 E]

H CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 371 of 1985 etc.

From the Judgment and Order dated 18.12.1984 of the Gujarat High Court in Special Criminal Application No. 494 of 1984.

M.G. Karmali, U.R. Lalit, Vineet Kumar and N.D.B. Raju for the Appellants.

V.C. Mahajan, R.N. Poddar, Miss Sushma Rajhlan and Girish Chandra for the Respondents.

The Judgment of the Court was delivered by

CHINNAPPA REDDY, J. These several Criminal Appeals raise a common question and may be disposed of by a single judgment. It is sufficient if we state that the facts in one case : Criminal Appeal No. 371 of 1985. On 29.6.84 an order of detention under the COFEPOSA was made by the Additional Secretary to the Government of India, Finance Department against Satar Habib Hamdani. The grounds of detention were served on him on July 1, 1984. On July 13, 1984 the COFEPOSA was amended by an Ordinance which was replaced by an Amending Act. We will presently refer to the provisions of the Act. Purporting to act under s.9(1) of the COFEPOSA as amended, the Additional Secretary to the Government of India made a declaration that he was satisfied that 'Shri Satar Habib Hamdani abets and is likely to abet the smuggling of goods into and through Porbandar which is an area highly vulnerable to smuggling, as defined in Explanation 1 to section 9(1) of the Conservation of Foreign Exchange and Prevention of smuggling Activities Act, 1974.' Thereafter the usual reference to the Advisory Board was made and after obtaining the opinion of the Advisory Board, the Government of India, by an order dated December 22, 1984 confirmed the detention of Satar Habib Hamdani for a period of two years. The order was as follows :

"WHEREAS an order F.No.673/75/84-Cus. VIII dated 28/29 June, 1984 has been passed by the Additional Secretary to the Government of India u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974 for the detention of Shri Satar Habib Hamdani whereas a declaration u/s 9(1) ibid has been made against him by the Additional Secretary to the Government of India :

AND WHEREAS the case of Shri was placed before the Advisory Board who are of the opinion that there is sufficient cause for his detention ;

A NOW, THEREFORE, in exercise of the powers conferred by
section 8(f) read with section 9(2) of the aforesaid
Act, the Central Government here - by confirms the
aforesaid detention order and Satar Habib Hamdani u/s
10 of the said Act, the said Shri be detained
for a period 1-7-1984 two years from the date of his
B detention i.e. from

Sd/-

(A.N. AGNIHOTRI)

UNDER SECRETARY TO THE GOVERNMENT OF INDIA
Shri Satar Habib Hamdani,
C Central COFEPOSA Detenu,
C/o Supdt. District Prison Rajkot."

The submission of Shri Karmali learned counsel for the
appellants who presented the case neatly and with precision was
that in every case where it was proposed to have recourse to s.10
D read with s.9 it was necessary for the Advisory Board to state
its opinion that 'the continued detention' of the detenu was
necessary and that in a case where the Advisory Board merely
opined that 'the detention' of the detenu was necessary, recourse
could not be had to s.10 read with s.9 so as to enable the detenu
to be detained for two years. The answer to the claim of the
E appellant was stated in the counter affidavit as follows :

"With reference to para 10(xv) I submit that it is not
incumbent upon the Advisory Board to send its report
to the effect that there is sufficient cause for
continued detention once having observed and reported
F that there was sufficient cause for detention. Once
the Advisory Board gives an opinion affirming the
detention it must be regarded as an opinion in regard
to both the aspects viz. the original detention and
the continued detention i.e. right from the date of
arrest till the date of giving opinion deny that the
G continued detention of the appellant is violative of
sec.8(c) of the Act."

In order to appreciate the submission of Shri Karmali we may
refer to the relevant provisions of the COFEPOSA as amended by
the Amending Act of 1984. Section 3(1) empowers the authority
H specified therein -

"If satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from -

A

(i) smuggling goods, or

B

(ii) abetting the smuggling of goods, or

(iii) engaging in transporting or concealing or keeping smuggled goods, or

(iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or

C

(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,

D

It is necessary so to do, make an order directing that such person be detained."

Section 8 provides for the Constitution of Advisory Boards, prescribes their function and specifies their procedure. For the purposes of the present case we are concerned with clauses (b), (c) and (f) which are as follows :-

E

"8. Advisory Boards:- For the purposes of sub-clause (a) of clause (4), and sub-clause (c) of clause (7), of Article 22 of the Constitution, -

(a)

F

(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;

G

(c) the Advisory Board to which a reference is made under clause (b) shall after considering the reference and the materials placed before it and after calling for such further information as it may deem necessary

H

A from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if in any particular case, to considers it essential so to do or if the person concerned desires to be heard in person, after hearing him in 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 concerned and submit the same within eleven weeks from the date of detention of the person concerned;

C (d).....

(e).....

D (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."

Section 9(1) empowers the authority specified therein to make a declaration that the person against whom an order of detention has been made

F (a) smuggles or is likely to smuggle goods into, out of or through any area highly vulnerable to smuggling; or

G (b) abets or is likely to abet the smuggling of goods into, out of or through any area highly vulnerable to smuggling; or

(c) engages or is likely to engage in transporting or concealing or keeping smuggled goods in any area highly vulnerable to smuggling,

H Whereupon such person may be detained without obtaining the opinion of an Advisory Board for a period longer than three

months but not exceeding six months from the date of his detention. Explanation 1 to S.9(1) defines 'area highly vulnerable to smuggling'.

A

Section 9(2) is important and it is as follows :-

"(2) In the case of any person detained under a detention order to which the provisions of sub-section (1) apply, Section 8 shall have effect subject to the following modifications, namely:-

B

(i) in clause (b), for the words "shall, within five weeks", the words "shall, within four months and two weeks" shall be substituted:

C

(ii) in clause (c), -

(1) for the words "the detention of the person concerned", the words "**the continued detention of the person concerned**" shall be substituted;

D

(2) for the words "eleven weeks" the words "five months and three weeks" shall be substituted;

(iii) in clause (f), for the words "**for the detention**", at both the places where they occur, the words "**for the continued detention**" shall be substituted."

E

Section 10 stipulates the maximum period for which any person may be detained pursuant to an order of detention to which the provisions of section 9 do not apply and which has been confirmed under s.8(f) as one year from the date of detention or the specified period; and, the maximum period for which any person may be detained pursuant to an order of detention to which the provisions of s.9 apply and which has been confirmed under s.8(f) read with s.9(2) as two years from the date of detention, or the specified period. As we see, the scheme of section 3, 8, 9 and 10 appears to be that while generally the period for which a person may be preventively detained under the COFEPOSA in connection with smuggling activities, may not exceed a period of one year, in case of certain kinds of activities of smuggling into, out of or through 'any area highly vulnerable to smuggling', the period may extend upto two years. In the latter event a declaration is required to be made within five weeks of

F

G

H

A the detention of such person in the manner provided by s.9(1) of
the Act. That is not enough. In a case to which s.9 applies, s.8
stands suitably amended, a reference is required to be made
B within four months and two weeks by the Government to the
Advisory Board and the Advisory Board is required to state its
opinion within five months and three weeks from the order of
detention whether there is sufficient cause for the continued
C detention' of the person concerned. In other words, the Advisory
Board is to state its opinion not merely whether detention is
necessary but whether 'continued detention' is necessary. The
Advisory Board will necessarily have to go behind the declaration
under s.9(1) to consider the question whether there is sufficient
D cause for 'continued detention'. The two safeguards provided to
the detenu against 'continued detention', at that stage, are the
application of mind by the specified authority before making a
declaration under s.9(1) and the consideration of the question by
the Advisory Board. Section 8 is enacted and professedly enacted
E for the purpose of Art.22, clause (4), sub-clause (a) and Art.22,
Clause(7), sub-clause(c) and s.9 expressly refers to Art.22,
D clause (4), sub-clause(a). That is why in a case to which s.9
applies it is important that the Advisory Board specifically
considers and answers the question whether in its opinion there
is sufficient cause for the 'continued detention' of the person
concerned. If the Advisory Board merely states that the detention
F of the person is necessary it is not for any one else to supple-
ment the Advisory Board's opinion and substitute the words
"continued detention" for the word "detention". The matter is of
vital importance for that. The omission of the words "continued
detention" in the opinion of the Advisory Board cannot be slurred
over in the fashion we are invited to do in the counter affi-
G davit. Nor can we treat the omission as a mere clerical or typo-
graphical error when that is not the express case of the respon-
dents. We are of the opinion that in the absence of the Advisory
Board's opinion to the effect that there is sufficient cause for
the 'continued detention' of the detenus, their detention for
period exceeding one year is without legal sanction. It is
G already much more than one year since the appellants have been
detained. They are directed to be set at liberty forthwith.