RIGHTS OF DETENUS : PERSONAL HEARING

THE INDIAN Constitution, while guaranteeing the right to personal liberty, qualifies it by permitting laws to be made by the appropriate legislature to provide for preventive detention for specified purposes. However, this power is itself subject to certain safeguards and conditions. Thus, there is a complex structure wherein a right is guaranteed in the first place. But, in the second place, the right is qualified. Then, in the third place, the qualification itself is further qualified. Such a complex scheme is bound to lead to controversies as to the ambit of the main right, the qualification and the qualification of that qualification.

The safeguards connected with preventive detention are expressed in a complicated manner. For the present purpose, it is sufficient to mention that in general, when the executive orders the preventive detention of an individual, the case must, in due course, be placed before an Advisory Board. The detenu has a right to represent to the detaining authority; and statutes provide a right to be heard by the Advisory Board. The detenu must be informed (*i*) that he has the right to make a representation to the detaining authority, and (*ii*) that he has a right to personal hearing before the board. The right to be so informed has been woven into the fabric of the Constitution by judicial decisions.

The precise question is this. What are the legal consequences if the detenu is not informed of his right of representation and right to personal hearing ?

(*a*) Does it invalidate the detention in every case ? or

(*b*) Does it have no effect at all, on the validity of the detention ? or

(*c*) Is the validity dependent on the facts ?

The question arose before the Gujarat High Court in *Hitesh Bhanuprasan Soni* v. *Union of India.* A majority of the judges in the Full Bench *viz.*, Justices R.C. Mankad andS.B. Majmudar held that proposition (*c*) mentioned above was the correct position. In other words, failure on the part of the detaining authority to inform the detenu about his rights would not, by itself, render the detention invalid, if no prejudice was caused to the detenu. Justice R.J. Shah in the minority held the detention to be invalid, for the reason that the detenu had not been informed that he had a right of personal hearing before the court.

This difference of views between the majority and the minority, arose because there was a difference of opinion amongst the judges as to what was the precise effect of certain rulings of the Supreme Court, particularly the

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1. (1988) *Gujarat Law Herald* 209 (F.B.).

judgment in *Wasi Uddin Ahmed* v. *District Magistrate, Aligarh.*[2] In *Wasi Uddin* the petitioner had moved the Supreme Court for a writ of *habeas corpus* on the ground that the detention of his brother under the National Security Act 1980 was illegal. The detention was challenged on five grounds, two of which were as under. (*i*) When the order of detention was served on the detenu, he was not informed of his right to make a representation against the order of detention and also of the right to be heard by the Advisory Board, and (*ii*) the procedural safeguards of article 22(5) of the Constitution and section 8 of the National Security Act had not been complied with, in as much as copies of certain documents were supplied late, a few of them were not supplied at all and moreover the documents were in Hindi, with which the detenu was not conversant.

The Supreme Court did not find any substance in the second ground mentioned above. The point had not been taken in the representation which the detenu had made to the Advisory Board. No doubt, the right to make a representation meant the right to make an effective representation. Where certain documents are relied upon, the grounds would be incomplete without such documents. The right to be supplied with copies of such documents flows as a necessary corollary from the right to be afforded the earliest opportunity of making a representation against the detention because unless the former right is available, the latter right cannot be meaningfully exercised. But in the instant case, there was no failure to supply copies. The detenu had not taken this point in his representation which appeared to have been drafted by a person conversant with the law. The objection seemed to be an after-thought and did not appeal to the court.

However, the position was different as regards ground (*i*) mentioned above. Failure to inform the detenu of the right of personal hearing was, in the opinion of the Supreme Court a breach of a constitutional obligation. The Supreme Court observed :

> It is unfortunate that there was a failure to mention in the grounds of detention, that the detenu had the right to make a representation against the order of detention as envisaged by Article 22 (5) of the Constitution read with Section 8 of the Act, and also the right of being heard before the Advisory Board while he was served with the order of detention. It is expected of a detaining authority while serving an order of detention, as a rule, to mention in the grounds of detention, that the detenu has a right to make a representation against the order of detention and also a right to be heard by the Advisory Board. In the present case, the grounds of detention served upon the detenu do not contain any such recital. It, however, appears that the detenu was furnished a copy of the Constitution on March 25, 1981 at the Central Jail,

2. A.I.R. 1981 S.C. 2166.

> Fatehgarh, presumably at his own request, for the purpose of making a representation against the order of detention. The words "and shall afford" in Article 22 (5) have a positive content in matters of personal liberty. The law insists upon the literal performance of a procedural requirement. The need for observance of procedural safeguards, particularly in cases of deprivation of life and liberty is of prime importance to the body politic. It is, therefore, imperative that the detaining authority must 'apprise' a detenu of his constitutional right under Art. 22(5) to make a representation against the order of detention and of his right to be heard before the Advisory Board. The right of the detenu to make a representation under Art. 22(5) would be, in many cases, of little avail if the detenu is not 'informed' of this right. The failure to comply with this requirement, however, does not have the effect of vitiating the impugned order of detention or render the continued detention of the detenu illegal in this case for the reason that the detenu is an enlightened person and has been in active politics and was, therefore, fully cognisant of his right to make a representation under Art. 22 (5) of the Constitution and under Section 8 of the Act. In fact, the detenu appeared before the Advisory Board and filed a representation against the order of detention and was also personally heard by the Advisory Board.[3]

This passage led to a difference of views in the Gujarat High Court. The majority took the view that the fact that the Supreme Court itself, in *Wasi Uddin* had upheld the validity of the detention, notwithstanding the failure of the authorities to inform the detenu of the right to personal hearing showed that the defect did not necessarily invalidate the detention. The judge in the minority in the Gujarat case, however, thought that since the Supreme Court itself had described the requirement as "imperative" and stated that the law insists upon "literal performance of a procedural requirement", it followd that such defects would be fatal.

The division of views amongst the judges of the Gujarat High Court raises the question : What is the *ratio decidendi* of a case ? The majority took the view that the *ratio decidendi* is to be gathered from the statements of principles applicable to the legal problems disclosed by the facts of the case. If the Supreme Court wished to lay down an absolute rule, it would have held the detention to be void. According to the judge in the minority, the answer provided by the Supreme Court to the point in issue would be "the law declared" under article 141 of the Constitution and not the conclusion that the Supreme Court arrived at on the facts and in connection with the detention order that was before it in *Wasi Uddin.* In his view, how the *ratio*

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3 *Id.* at 2173-74 quoted in *supra* note 1 at 231

decidendi had been applied to the facts could not whittle down the *ratio* laid down by the court itself. The law declared is applied to the facts. What conclusion is arrived at on the said facts by the Supreme Court cannot be regarded as "law declared", "because facts have no binding force and the facts of no two cases would be identical".

If one may say so with respect, the whole controversy has arisen because the Supreme Court's observations in *Wasi Uddin* after expressing in strong terms the obligation of the authorities, start losing their vigour towards the end. What entered as a storm, took leave as a mild whiff of air, in the Supreme Court.

Most probably the view of the majority in the Gujarat case will be agreed in, by other courts.

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