JOHNEY D' COUTO

v.

STATE OF TAMIL NADU

NOVEMBER 4, 1987.

[RANGANATH MISRA AND S. RANGANATHAN, JJ.]

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974: s. 8(e)—Detenu's representation—Consideration of by Advisory Board—Detenu whether entitled to the assistance of a friend.

The detenu, a clearing and forwarding agent aged around 26 or 27 years, was detained under s. 3(1)(i) of the COFEPOSA Act. On the day the representation was heard by the Advisory Board the detaining authority was being assisted by a Deputy Collector and a Superintendent of Central Excise. A specific request of the detenu to permit a retired Assistant Collector of Central Excise to assist him as a friend was turned down on the ground that he was not a friend of the detenu, though the person was inclined to assist the detenu because of his professional experience. The detention order was confirmed on the recommendation of the Advisory Board.

In the writ petition under Art. 226 of the Constitution challenging the order of detention it was contended for the detenu that he had sought the assistance of the retired officer because the case before the Board involved certain facets which required acquaintance with the legal provisions and the procedure and practice adopted by the Customs authorities, with which he was not well versed. The writ petition having been dismissed, the father of the detenu filed special leave to appeal to this Court.

Allowing the appeal,

HELD: 1.1 The detenu was entitled to the assistance of a friend. The refusal of the Advisory Board to permit him to be assisted by the retired officer was bad and his continued detention became vitiated. [793E-F]

1.2 The detenu was not very much acquainted with the legal provisions and the procedure and practice adopted by the customs authorities. If the retired officer had been permitted to assist him,

A **his case would have been better placed before the Advisory Board. Moreover, when the detaining authority had the assistance of the Deputy Collector and a Superintendent of Central Excise, who play the role of legal advisers, the Board had no justification to refuse the assistance sought for by the detenu. There was, therefore, denial of a fair hearing before the Advisory Board. [792G-H]**

B

Nand Lal Bajaj v. *State of Punjab*, [1982] 1 SCR 718; *Smt. Kavita* v. *State of Maharashtra,* [1982] 1 SCR 138 and *A.K. Roy etc.* v. *Union of India & Anr.*, [1982] 2 SCR 272, **applied.**

2.1 The term 'friend' used in the judgments of this Court was more in the sense of 'an ally in a fight or cause, or a supporter', C **than meaning 'a person known well to another and regarded with liking, affection and loyalty'. A person not being a friend in the normal sense could be picked up by a detenu for rendering assistance before the Advisory Board within the frame of the law as settled by this Court. [793B-C]**

D

2.2 The advisory Board has, of course, to be careful in permitting assistance of a friend in order to ensure due observance of the policy of law that a detenu is not entitled to representation through a lawyer. What cannot be permitted directly should not be allowed to be done in an indirect way. [793C-D]

E

3. Matters relating to preventive detention are strict proceedings and warrant full compliance with the requirements of law. It is not for this Court to examine and assess what prejudice has been caused to the detenu on account of denial of assistance. [793D-E]

F **4. The order of detention is quashed. The detenu be set at liberty forthwith.**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 232 of 1987.

G From the Judgment and Order dated 23.2.1987 of the Madras High Court in W.P. No. 6290 of 1986.

K.K. Venugopal, C.S. Vaidyanathan, Probir Chowdhry, S.R. Bhatt and S.R. Setia for the Appellant.

H M.M. Abdul Khader and A.V. Rangam for the Respondent.

The Judgment of the Court was delivered by

RANGANATH MISRA, J. This appeal is by special leave. Appellant challenged his order of detention under section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA for short) by filing a writ petition before the High Court and that application has been dismissed. As many as six contentions had been advanced before the High Court. Though raised in the writ petition, the point relating to denial of a fair hearing before the Advisory Board has not been noticed by the High Court as a contention on behalf of the appellant, but counsel for the appellant has raised the same point before this Court and since the facts on which the ground is raised are not in dispute we find no objection to entertaining this contention now specifically raised in this appeal.

The hearing of the representation of the appellant by the Advisory Board was fixed for 25th November, 1986. On that day the appellant had specifically requested the Advisory Board to permit one Mr. Sundararajan, a retired Assistant Collector of Central Excise to assist him as a friend. The Board, as appears from the counter affidavit filed in this Court, turned down the request. The counter affidavit states:-

> "The Advisory Board has given its finding in rejecting the detenu's request for assistance of a friend, namely, Mr. Sundararajan in paragraphs 2 and 3 of its report sent to the Government. The Advisory Board has stated in paragraph 2 that the detenu filed a petition requesting the assistance of Mr. Sundararajan, a retired Assistant Collector of Customs. The Advisory Board has stated in paragraph 3 that Mr. Sundararajan has appeared before it and had stated that he was formerly employed in the customs department and he would like to assist the detenu. In the same paragraph, the Advisory Board has also stated that it was admitted by Mr. Sunderarajan before the Advisory Board that he is not a friend of the detenu and because of his professional experience he liked to help the detenu. In the same paragraph the Advisory Board has given its findings and reasons for rejecting the request of the detenu on the ground that Mr. Sundararajan not being a friend of the detenu, the Advisory Board did not consider it proper to allow him to represent the case of the detenu."

A It is thus clear from the allegations in the special leave petition and the counter affidavit that the appellant had requested the Board to allow him the assistance of a friend at the hearing and for the reasons and in the manner indicated in the counter affidavit the request was turned down.

B In paragraph 9 of the special leave petition the appellant had alleged that on 25th November, 1986, the detaining authority was represented by customs officers of the rank of Deputy Collector of Customs and Superintendent. In the counter affidavit filed before this Court there has been no denial of this fact. Learned counsel appearing for the respondent did not dispute the allegation on the basis of the record as also the papers available with him that the department was C represented at the hearing before the Advisory Board by a Deputy Collector of Customs. The position, therefore, is that on 25th November, 1986 while the detaining authority was assisted by a Deputy Collector and a Superintendent of Central Excise the detenu was denied the assistance of a retired Assistant Collector of Central Excise. On the recommendation of the Advisory Board, the detention D order was confirmed.

The appellant is a clearing and forwarding agent at Madras and is said to be a youngman aged around 26 or 27 years. The case before the Board involved certain facets which require acquaintance with the legal provisions and the procedure and practice adopted by the E customs authorities. It is the case of the appellant that he was not very much acquainted with them and that is why he had sought the assistance of Sundararajan and even brought him before the Board that day. In the facts of the case we are not in a position to reject the contention that if Sundararajan had been permitted to assist the appellant his case would have been better placed before the Advisory Board.

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In the premises indicated above, two aspects have to be examined—(1) whether the appellant was entitled to the assistance of Sundararajan as a friend; and (2) whether when the detaining authority was assisted by a Deputy Collector and a Superintendent of Central Excise, was the request of the appellant to be assisted by a retired G Assistant Collector of Central Excise unjust and should the same had been refused? A two-Judge Bench of this Court in *Nand Lal Bajaj* v. *State of Punjab*, [1982] 1 SCR 718 was considering the question of legal assistance for the detenu before the Advisory Board. It referred to the decision of this Court in the case of *Smt. Kavita* v. *State of Maharashtra*, [1982] 1 SCR 138 where Chinnappa Reddy, J. made the H following observation:-

"It is true that while section 8 (e) disentitles a detenu from claiming as of right to be represented by a lawyer, it does not disentitle him from making a request for the services of a lawyer."

The learned Judge further stated:-

"As often than not adequate legal assistance may be essential for the protection of the Fundamental Right to life and personal liberty guaranteed by Article 21 of the Constitution and the right to be heard given to a detenu by section 8(e), COFEPOSA Act."

It was further observed by Reddy, J.:-

"Therefore, where a detenu makes a request for legal assistance, his request would have to be considered on its own merit in each individual case. In the present case, the Government merely informed the detenu that he had no statutory right to be represented by a lawyer before the Advisory Board. Since it was for the Advisory Board and not for the Government to afford legal assistance to the detenu the latter, when he was produced before the Advisory Board, could have, if he was so minded, made a request to the Advisory Board for permission to be represented by a lawyer."

Sen, J. in *Nand Lal's* case (supra) observed:-

". . . . . while the detenu was not afforded legal assistance, the detaining authority was allowed to be represented by counsel. It is quite clear upon the terms of sub-section (4) of section 11 of the Act that the detenu had no right to legal assistance in the proceedings before the Advisory Board, but it did not preclude the Board to allow such assistance to detenu, when it allowed the State to be represented by an array of lawyers."

A Constitution Bench of this Court in *A.K. Roy etc.* v. *Union of India & Anr.*, [1982] 2 SCR 272 dealt with this aspect. Chandrachud, CJ, speaking for the Court stated:-

"We must therefore, held, regretfully though, that

A the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. It is, however, necessary to add an important caveat. The reason behind the provisions contained in Article 22(4)(b) of the Constitution clearly is that a legal practitioner should not be permitted to appear before the Advisory Board for B any party. The Constitution does not contemplate that the detaining authority or the Government should have the facility of appearing before the Advisory Board with the aid of a legal practitioner but that the said facility should be denied to the detenu. In any case, that is not what the Constitution says and it would be wholly inappropriate to read and such meaning into the provisions of Article 22. C Permitting the detaining authority or the Government to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be in breach of Article 14, if a similar facility is denied to the detenu. We must therefore make it clear that if the detaining authority or the D Government takes the aid of a legal practitioner or a legal adviser before the Advisory Board the detenu must be allowed the facility of appearing before the Board through a legal practitioner. We are informed that officers of the Government in the concerned departments often appear before the Board and assist it with a view to justifying the E detention orders. If that be so, we must clarify that the Boards should not permit the authorities to do indirectly what they cannot do directly; and no one should be enabled to take shelter behind the excuse that such officers are not "legal practitioners" or legal advisers. Regard must be had to the substance and not to the form since, especially, in F matters like the proceedings of Advisory Boards, whosoever assist or advises on facts of law must be deemed to be in the position of a legal adviser. We do hope that Advisory Boards will take care to ensure that the provisions of Article 14 are not violated in any manner in the proceedings before them .....".

G Learned counsel for the respondent does not dispute that what has been stated above is the law applicable to the facts of this case. We have already found that the detaining authority had the assistance of the Deputy Collector of Central Excise and a Superintendent of Central Excise. In the words of Chandrachud, CJ, "they play the role of H legal advisers". The Board had no justification to refuse assistance of

Sundararajan to the appellant in such circumstances. A

The rule in *A.K. Roy's* case (supra) made it clear that the detenu was entitled to the assistance of a 'friend'. The word 'friend' used there was obviously not intended to carry the meaning of the term in common parlance. One of the meanings of the word 'friend', according to the Collins English Dictionary is "an ally in a fight or cause; supporter". The term 'friend' used in the judgments of this Court was more in this sense than meaning 'a person known well to another and regarded with liking, affection and loyalty.' A person not being a friend in the normal sense could be picked up for rendering assistance within the frame of the law as settled by this Court. The Advisory Board has, of course, to be careful in permitting assistance of a friend in order to ensure due observance of the policy of law that a detenu is not entitled to representation through a lawyer. As has been indicated by this Court, what cannot be permitted directly should not be allowed to be done in an indirect way. Sundararajan, in this view of the matter, was perhaps a friend prepared to assist the detenu before the Advisory Board and the refusal of such assistance to the appellant was not justified. It is not for this Court to examine and assess what prejudice has been caused to the appellant on account of such denial. This Court has reiterated the position that matters relating to preventive detention are strict proceedings and warrant full compliance with the requirements of law. B C D E

In view of the position of law and the facts of the case, we must hold that the refusal by the Advisory Board to permit the appellant to be assisted by Sundararajan as a friend was bad and continued detention of the appellant became vitiated. Accordingly, this appeal is allowed and the order of detention is quashed. The appellant is directed to be set at liberty forthwith. F

P.S.S. Appeal allowed.