

**(1996) 10 BOM CK 0090**

**In the Bombay High Court**

**Case No : Criminal Writ Petition No. 181 of 1996**

Abdul Gafar Rasoolbhai Memon

APPELLANT

Vs

D.K. Jain and Others

RESPONDENT

**Date of Decision : 18-10-1996**

**Acts Referred:**

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —  
Section 3(1)  
Constitution of India, 1950 — Article 22(5)

**Citation :** (1997) 2 ALT(Cri) 16 : (1997) BomCR(Cri) 350

**Hon'ble Judges :** Vishnu Sahai, J;A.S. Venkatachala Moorthy, J

**Bench :** Division Bench

**Advocate :** M.G. Karmali and Tejus Mazumdar, for the Appellant; D.G. Bagwe, for Respondents Nos. 1, 2 and 5 to 7 and R.M. Agarwal, for the Respondent

**Final Decision :** Allowed

## Judgement

Vishnu Sahai, J.—By means of this petition preferred under Article 226 of the Constitution of India the petitioner who is the brother of the detenu seeks to challenge the detention order dated 26th August, 1996 passed by respondent No. 1, in exercise of the powers vested in him by sub-section (1) of section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974), read with Government Order, Home Department (Special) No. SPL. 3(A) /PSA 1092/4 dated 4th August 1992 detaining the detenu under the said Act.

2. It may be stated that the original petitioner was one Rasoolbhai Amibhai Memon, the father of the detenu, but as during the pendency of this petition he expired, by way of amendment Abdul Gafar Rasoolbhai Memon has been impleaded as petitioner, in this petition.

3. In our view, since this petition can be disposed off on a purely legal ground no reference to the prejudicial activities of the detenu contained in the grounds of detention bearing the same date as the detention order, which were served

contemporaneously along with the detention order, on the detenu on 1-12-1996, is called for.

4. Mr. M.G. Karmali, the learned Counsel for the petitioner strenuously urged that the decision rendered by the Apex Court in Smt. Gracy Vs. State of Kerala and another, , makes it obligatory for the detaining authority to consider the representation addressed to the Advisory Board under Article 22(5) of the Constitution of India. The correctness of Mr. Karmali's contention is borne out by the observations of the Apex Court contained in paragraph 9 of the said judgment.

Mr. Karmali contended that in the right vested in the detenu by Article 22(5) of the Constitution of India to make a representation at the earliest opportunity against detention order and the grounds of detention, is inherent an obligation on the part of the authority to whom such representation is addressed to consider the same at the earliest opportunity.

Mr. Karmali pointed out that in the instant case the said fundamental right of the petitioner guaranteed by Article 22(5) of the Constitution of India has been flouted. He urged that on 29th January 1996 the petitioner made a representation to the Advisory Board which was received by the State Government on 7-2-1996. He further urged that the said representation was disposed off after an inordinate delay by the State Government on 14-3-1996.

5. The contentions of Mr. Karmali referred to in the preceding paragraph has been replied to in paragraph 7 of the return filed by Mr. G.J. Kulkarni, Desk Officer, Government of Maharashtra, Home Department, (Special), Mantralaya, Mumbai. In the said paragraph Mr. G.J. Kulkarni has not disputed that the petitioner's representation was received by the Home Department along with the report of the Advisory Board on 7-2-1996. He has stated that it was processed through the Under Secretary and Deputy Secretary on 13-3-1996 and submitted to the Deputy Chief Minister who considered and rejected the same on 14-3-1996.

6. Even if the averments contained in the said return are accepted as gospel truth the inescapable position, regrettably to the detriment of respondent No. 2 (the State), is that for practically full 6 weeks there was a lamentable indolence on the part of the State Government in processing the petitioner's representation.

7. We would like to emphasise that the attitude of indolence on the part of the officers of the State Government has always to be deprecated and this is all the more where the result of such indolence is infringement of the fundamental rights of persons, like the detenu. The fundamental rights are the most cherished rights; in fact the show piece of the Indian Constitution. If they are to be done away with, in a given case, cogent and plausible reasons have to be assigned for the same in the return. To our dismay the return in the instant case, filed on behalf of the respondent No. 2 i.e. the State Government, is blissfully devoid of them.

In such a situation we are left with no other option but to quash the impugned detention order.

8. In the result this petition is allowed. The impugned detention order is quashed. The detenu is directed to be released forthwith unless wanted in some other case. Rule is made absolute.