
(1997) 01 CAL CK 0027

In the Calcutta High Court

Case No : Criminal Miscellaneous Jurisdiction (Habeas Corpus) Criminal Misc.
No. 514 of 1997

Anand Damani

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 30-01-1997

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 3(1)
Constitution of India, 1950 — Article 21, 22, 22(5), 226

Citation : (1998) 2 CALLT 52 : (1997) 2 CHN 119 : (1997) CriLJ 1599 : (1998)
59 ECC 105

Hon'ble Judges : Vidya Nand, J; Bhagabati Prasad Banerjee, J

Bench : Division Bench

Advocate : Mr. Balai Chandra Roy and Mr. Ashim Roy, for the Appellant; Mr. B.R. Ghoshal, Mr. R. Chowdhury and Mr. Prantosh Mukherjee, for the Respondent

Judgement

1. This is a writ application praying for a writ in the nature of Habeas Corpus for release of the petitioner Anand Damani, who was arrested on 9.12.95 on the strength of an order of detention dated 5th January, 1995 passed under the Conservation of Foreign Exchange Prevention of Smuggling Activities Act, 1994 by the Joint Secretary, COFEPOSA, Ministry of Finance, Department of Revenue, Government of India, New Delhi on the ground that the detenu had been dealing with the smuggled goods otherwise than by engaging in transporting or concealing or keeping the smuggled goods.

2. It is not necessary to consider the facts of this case in details in view of the limited submissions made by Mr. Balai Chandra Roy, learned counsel appearing on behalf of the writ petitioner that in the instant case as admittedly one more vital document viz., B. D. Mall's challans, which was specifically referred to at paragraphs 1, 7 and 28 of the detention order was not supplied in spite of demand being made by the defence and secondly, it was submitted by Mr. Roy that some of the documents on which the detaining authority relied on in the

order of detention were illegible and accordingly procedural safeguard as provided under Article 22 of the Constitution of India were not followed.

3. Next, it was submitted that in the affidavit-in-opposition filed by the detaining authority the detaining authority had referred to and relied upon on a spot memo, dated 28.4.94 on the basis of which a challan of M/s. S.P. Roadways was found to be fictitious. In this connection the detaining authority in the affidavit-in-opposition has stated as follows :

"That on subsequent follow up enquiry the road challan of M/s. S.P. Roadways of 23, Amratala St. Calcutta-1 dated 8.2.94 also proved fake and fictitious as there is no existence of M/s. S.P. Roadways in their given address which has been evident from the declaration in written on the body of spot memo, by Shri K.D. Sheth, the landlord of 23, Amratala St., Calcutta-1 against spot memo. dt. 28.4.94 as such there is not such tenant as above mentioned of ours in the past or present."

4. The document on which reliance was made in this affidavit was stated to be one of the documents on which detaining authority has relied upon but copy whereof was not given and was not disclosed earlier even in the detention order.

5. Mr. Roy learned counsel appearing on behalf of the petitioner submitted that on the basis of the self-same allegations and on the same fact or transaction two other orders of detention were passed but this court released them on these grounds.

6. It is submitted in the facts and circumstances of this case, particularly, the grounds and the materials were identical in the case of Govardhan Das Bhaoya who had already been released. Mr. Roy has also compared the order of detention both in the case of Govardhan Das Bhaiya and the petitioner herein, namely, Anand Damanl and pointed out word by word were same. The two orders of detention were identical excepting change in the name. The case of Govardhan Das Bhaiya was considered by a Division Bench of this court presided over by Mukul Gopal Mukherji, J. sitting with Vidya Nand, J. and by the order dated 4th May 1995 passed in Criminal Misc. Case No. 1433 of 1995 the said Division Bench for reasons indicating in the said judgment confirmed the order of detention could not be sustained and directed to release the detenu forthwith. In another similar case the case of Mukti Prosad Dutta was also considered almost on same facts by another Division Bench of this court in the case of Tapas Chowdhury v. Union of India reported in 1996 Cr LJ 579 Their Lordships of the said Division Bench took a similar view of the matter and allowed the writ petition and directed the detenu to be released forthwith. In the instant case B.D. Mall's challan was referred to in paragraphs 7 and 28 of the detention order and that in the representation that was filed by the petitioner on 21st December 1996 specifically pointed out that :--

"In any event no copy of the said road challan has been served on me although you have relied upon the said document. Since this road challan is an integral

part of the grounds and since the same has not been served upon me there has not been any communication of the grounds to me."

7. Further it was stated in the said representation :-- "I call upon you to serve me the aforesaid documents to enable me to make an effective representation."

8. This representation was made to the Joint Secretary (COFEPOSA) Government of India, Ministry of Finance, Department of Revenue, but admittedly this document, viz., the B.D. Mail's challan was not disclosed and the copy whereof was not furnished to the petitioner. Secondly, from the very beginning the petitioner was complaining about supply 65 illegible copies of the documents and that specifically on 2.1.97 out of 65 only 55 copies were furnished.

9. Mr. Roy learned counsel appearing on behalf of the petitioner produced the fresh copies that were served and it transpires that the copies at page Nos. 38, 116A, 116B, 148, 266 and 402 were still illegible. In this connection Mr. Roy submitted that the detenu has a right to get legible copies of the documents and the documents are all integral parts of the grounds and that if the legible copies of the documents on the basis of which the order of detention was passed are not supplied the same does not fulfil the constitutional requirement as provided under Article 22(5) of the Constitution of India as there is no proper and effective communication of the grounds. If the grounds of detention is based on any document the copy of those documents must be supplied. The copies must be given after the grounds of detention had been communicated and when the documents forms part of the grounds, in that event mere forwarding of some illegible copies, according to Mr. Roy denies the Constitutional safeguard as provided under Article 22(5) of the Constitution of India.

10. Further, Mr. Roy, submitted that the detaining authority has affirmed an affidavit to this court and disclosed that in support of the order of detention he has also relied on spot memo of K.D. Sheth, the landlord 23 Amratala Street, Calcutta against the spot memo dated 28.4.94 as such it was held there was no such tenant in the above mentioned premises and accordingly the said challan of M/s. S.P. Roadways was found to be fake and fictitious. This document was withheld by the detaining authority a vital one which was relied on in support of the detention but was not disclosed and supplied and accordingly Mr. Roy submitted that this has clearly violated the Constitutional protection and safeguard provided under Article 22(5) of the Constitution of India.

11. The questions raised in this case was same and identical to the case of Govardhan Das's case which was considered by the other Division Bench of which one of us was a party (Vidya Nand, J.) was considered by the Division Bench at length and the Division Bench on consideration of the facts and circumstances of the case in details and relying on the principles laid down by this court and the Supreme Court in this behalf held that the procedural safeguards as provided under Article 22(5) of the Constitution was clearly violated. In this connection reference as referred by the said Division Bench and

on which reliance was placed before this court is to the decision of the Supreme Court in the case of Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI) and Others, it was held that whether the documents concerned are "referred to" "relied upon" or "taken into consideration" by the detaining authority, they have to be supplied to the detenu as part of the grounds so as to enable the detenu to make an effective representation immediately on receiving the grounds of detention. Even if the documents concerned were merely referred to in the grounds of detention but did not form the basis of the subjective satisfaction of the detaining authority at the time when he passed the order of detention, if it could be shown that grounds were served on the detenu, the documents were placed before the detaining authority and therefore referred to in the grounds of detention, the subjective satisfaction could only be ascertained from or reflected in the grounds relying to the order of detention passed against the detenu, otherwise without giving the grounds the subjective satisfaction of detaining authority would render the order of detention incomplete and ineffective. Once the documents are referred to in the grounds of detention, it becomes the bounden duty of the detaining authority to supply the same to the detenu as part of the grounds or *pari passu* the grounds of detention. There is no particular charm in the expression "relied on", "referred to" or "based on" because ultimately all these expressions signify one thing, viz. that the subjective satisfaction of the detaining authority has been arrived at on the documents mentioned in the grounds of detention. The question whether the grounds have been "referred to", "relied on" or "based on" is merely a matter of describing the nature of the grounds. In the case of Ramchandra A. Kamat Vs. Union of India (UOI) and Others, it is clearly held that even when the documents referred to in the grounds of detention have to be furnished to the detenu, if there is undue delay in furnishing the statements and documents referred to in the grounds of detention, the right to make effective representation is denied. The detention could not be said to be according to the procedure prescribed by law. The same view was taken in Shri. Tushar Thakker Vs. Union of India (UOI) and Others, .

12. In order to avoid the repetition, after fully perusing the judgments of the Division Bench we fully agree with the view expressed by the said Division Bench. The said Division Bench in support of the Judgment and also relied on the decision of the Supreme Court in the case of Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, , Anand Prakash Vs. The State of Uttar Pradesh and others, Their Lordships in the said Division Bench held that :--

"Withholding the said B.D. Mall's challan as well as supply of illegible copies of some documents has violated the procedural safeguard as provided under the Constitution."

13. Further Their Lordships were of the view relying upon the decision of the Supreme Court in Anand Prakash Vs. The State of Uttar Pradesh and others, that there should be proximity of the order of detention to the object of such detention and Their Lordships held that the test had not been satisfied in that

case.

14. Another Division Bench of this court has also considered the order of detention of Mukti Prosad Dutta which was moved by Tapas Chowdhury against Union of India reported in 1996 Cr LJ 579. Their Lordships Gitesh Ranjan Bhattacharjee and Basudev Panigrahi, JJ after considering the several decision of the Supreme Court have taken the same view.

15. With regard to the supply of illegible copy the Supreme Court in the case of Hindustan Oil Mills Ltd. and Another Vs. Special Deputy Collector (Land Acquisition), held that if the copies are illegible in that event safeguard as provided under the Constitution has not to be followed. Further in the instant case as it is evident from the affidavit-in-opposition filed by the detaining authority, the detaining authority had also relied upon a document on which the detaining authority considered and relied upon before passing the order of detention was the spot memo which was not at all disclosed earlier. This has also clearly violated the Constitutional protection and safeguard as provided under Article 22(5) of the Constitution as it is now well settled principle laid down by the Supreme Court that the documents on which the order of detention was passed amounts to integral part of the order of detention. Failure to give the copies of documents amounts to failure to communicate the grounds and constitutional safeguards also for the purpose of making effective representation is also denied to the detenu by withholding of such vital and important document on which the order of detention was passed.

16. The other Division Bench in case of Tapas Chowdhury v. Union of India & Ors. (supra) has also considered the effect of non-supply of road challan of B.D. Mall and that Their Lordships on consideration of the various case laws of the Supreme Court took a similar view that of other Division Bench in the case of Narayan Das Bhaiya v. Union of India & Ors (supra). We also agree with the view expressed by the said Division Bench of this court.

17. Accordingly, two Division Bench of this court had taken a similar view in respect of withholding of B.D. Mall's challan are involved in this case and that the same on identical points.

18. Mr. Ghoshal, learned counsel appearing on behalf of Union of India could not advance any argument regarding effect of withholding and/or non-supply of B.D. Mall's challan in the facts and circumstances of this case. When earlier two Division Bench had considered the same facts and had come to the conclusion that such an important piece of documents were relied in the order of detention particularly in three different grounds clearly amounts to violation of the procedural safeguard as provided under Article 22(5) of the Constitution of India. Accordingly, in the facts and circumstances of this case we do not find any reason to differ with the view taken by the two other Division Bench of this court and in view of the fact stated above and the consistent view of the Supreme Court in this behalf we have no hesitation in holding that withholding of the same

was very fatal and such withholding had resulted in violation of the procedural safeguards as provided under Article 22(5) of the Constitution of India. We have to remember that Article 21 of the Constitution of India provides that life and liberty of a citizen could not be taken away by any authority of law and when Article 22 specifically laid down the procedure that has to be followed for curtailing the liberty of a citizen, those procedures should be strictly followed inasmuch as the constitutional safeguard if not followed will result in vitiating the order of detention passed by the detaining authority.

19. Mr. Roy appearing in this case had raised a very important question of law, viz., the role played by the Screening Committee in this behalf under Article 22 of the Constitution of India. It is specifically provided that order of detention could not be continued after some time unless it is approved by an Advisory Board.

20. Accordingly, Advisory Board is a creature of the Constitution of India but we do not find there is any role to play under Constitution or COFEPOSA Act regarding the role of the Screening Committee. The detaining authority in the affidavit has stated that :--

"I say that the concern authority has to consider not only the recommendation of the Screening Committee but also the materials produced before it before passing an order of detention. I say that the Screening Committee is not a by-stander and has a vital role to play before the provisions under the COFEPOSA Act are invoked by the competent authority."

21. Under the laws of detention the detention order could only be passed by the detaining authority on the basis of materials and records and after the detaining authority is satisfied in respect of any person, that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of some activities as specified in section 3 of the said Act. In this connection, the detaining authority has to apply his mind and has to form an opinion on being satisfied that the person is required to be detained for preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from some activities specified in Clauses (iv) and (v) of section 3 of sub-section (1) of the said Act and he cannot surrender to an opinion already formed by any other authority. He cannot act as mere post-office or act mechanically on the basis of the opinion or recommendation framed or made by the said extra-constitutional body. In that event that will violate the provision of the COFEPOSA Act and the provisions laid down under Article 22(5) of the Constitution of India. The Screening Committee might have been set up by the department for their convenience and they cannot perform any part of the duties of the detaining authority. In this connection reference to a decision of the Supreme Court has been relied upon in the case of State of Gujarat v. R.G. Teredesai reported in AIR 1969 SC 1295 wherein the Supreme Court has held that in case enquiry officer makes some recommendation which is not ordinarily his duty but if made that

recommendation has to be disclosed to the delinquent officer for the purpose of making effective representation against the second show cause notice and that it is now well settled principle that an authority who is in charge under the law to take a decision on its own on subjective satisfaction on consideration of all materials cannot surrender to the recommendation made by a stranger body or busy body in this behalf if he surrenders the order vitiates.

22. Records of the case have not been produced before us and accordingly in the facts and circumstances of this case we are unable to hold whether the detaining authority had completely surrendered to the opinion or recommendation of the Screening Committee or the detaining authority has applied his mind irrespective of the recommendation. But in view of the admission made by the detaining authority that authority has also to consider the recommendation but the administrative order cannot override the Constitutional protection inasmuch as when the Government of India has authorised the particular officer to pass an order u/s 3(1) of the said Act, no other authority can act beyond that. The Government of India is directed to take note of this position and to see that without amending the law conferring powers upon such a Screening Committee is illegal and the Screening Committee may prepare a case but they are not entitled to make any recommendation to the detaining authority. In the Cabinet system of administration in this country for the purpose of taking a decision by the Cabinet as there is no recommendation in this behalf but a Cabinet memo is prepared for consideration of the Cabinet and the Cabinet takes an independent decision on consideration of the matter. When the liberty of a citizen is taken away by infringing the provisions of Article 22, the sanctity of the order has to be maintained strictly in the light of the constitutional protection and mandates and in the decision making process as envisaged by the Constitutional makers under Article 22(5) read with section 3(1) of the COFEPOSA Act cannot be influenced or dictated by some extraneous body. Such recommendation by such body is wholly irrelevant matter. Consideration of some irrelevant matter vitiates the decision of the authorised body. Such a body can only collect the materials for the purpose of placing the matter for consideration before the Screening Committee but the Screening Committee had no jurisdiction to make any recommendation to the detaining authority and the detaining authority have also no Jurisdiction to consider the recommendation of such a body. It is the detaining authority who is to take a decision after applying its mind to the facts and circumstances of this case as required under the law and form opinion as required under the law.

23. Mr. Roy has also pointed out certain defects in this matter, but we think that in view of the fact that some of the grounds have already been considered by another Division Bench of this court, we agree with the same in the facts and circumstance of this case as we do not find any reason to take a contrary view.

24. Accordingly, in the facts and circumstances, we are clearly of the view that withholding of a vital and important document and supply of some illegible copies of documents numbering about seven for which it was pointed out earlier that

some of the documents are illegible and this has resulted in deprivation to the detenu from making effective representation against the order of detention. Apart from the fact that this has a serious impact inasmuch as the word "communicate" means not merely supply or send but the said word means to make the detenu to understand and to know all the grounds though the documents. Within the scope of the power under Article 226 of the Constitution of India dealing with the order of detention no other points could not be decided by us and, accordingly, the writ petition succeeds on the ground of non-supply of very important and vital documents, namely, B. D. Mall's challan and non-supply of legible documents as discussed earlier, we allow the writ petition and direct the detenu to be released forthwith.

There will be no order as to costs.

25. Petition allowed