

(1996) 04 AP CK 0033
In the Andhra Pradesh High Court
Case No : Writ Petition No. 4678 of 1996

Andrew Werner

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 25-04-1996

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) 1 ALD(Cri) 163 : (1996) 2 ALD(Cri) 883 : (1996) 4 ALT 9 : (1997) 1 ALT(Cri) 227 : (1996) CriLJ 4178

Hon'ble Judges : V. Rajagopala Reddy, J; M.N. Rao, J

Bench : Division Bench

Advocate : Harijinder Singh and D. Suryanarayana, for the Appellant; Additional Advocate General, for the Respondent

Judgement

M.N. Rao, J.—An order of detention made on 23-12-1995 by the specially empowered officer viz., the Secretary to Government (Political), General Administration Department, Government of Andhra Pradesh in No. 2367/1, L & O-II/95-01, u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short the COFEPOSA Act) read with G.O. Ms. No. 621, General Administration (General A) Department, dated 15-11-1990., detaining one Lackner Warner, son of Oto Lackner u/s 3(1)(i) and (iii) of the above Act is questioned in this writ petition by way of Habeas Corpus by one Andrew Warner claiming to be a friend of the detenu.

2. On 30-11-1995, the detenu was arrested by the officers of the Directorate of Revenue Intelligence at the Begumpet Airport, Hyderabad when he landed at the Airport having travelled by Flight I.C. 592 from Muscut and 66 gold biscuits were seized from his possession. There was another woman passenger by name Ms. Ute Eva Schulz who arrived by the same flight and she was also arrested and from her possession 72 bars of gold were seized. The order of detention dated 23-12-1995, challenged in this writ petition was passed by the specially

empowered officer in connection with the aforesaid seizure.

3. The grounds of detention were served on the detenu on 29-12-1995 by a letter dated 23-12-1995 in No. 2367/L & O-II/95-03. The grounds of detention inter alia state that :

"You are informed that you have a right to make a representation in writing against the order of detention to the detaining authority, the State Government, the Central Government and also to the Advisory Board. If you so desire to make a representation, you may address it to the concerned, i.e., the undersigned, namely, the Secretary to the Government (Political), General Administration Department, Government of Andhra Pradesh, Hyderabad or the Chief Secretary Government of Andhra Pradesh, Hyderabad or to the Secretary to Government of India, Ministry of Finance, Department of Revenue, New Delhi or to the Chairman, Advisory Board, Hyderabad, (under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1874), as the case may be or to all these authorities and forward representation through the Superintendent, Central Prison, in which you are confined, as expeditiously as possible. Any representation that is made by you to the detaining authority, the State Government, will be duly considered and will also be placed before the Advisory Board."

On 8-2-1996, the matter was referred to the Advisory Board which gave its report on 16-2-1996 and in consonance with that report the order of detention was confirmed by the State Government on 24-2-1996.

4. A representation was made by the detenu on 26-2-1996 to the specially empowered officer the detaining authority, pleading that since he was not conversant with English Language, a Polish translator or interpreter may be provided to him and he may be allowed legal assistance and presence of an advocate at the time of hearing of the matter by the Advisory Board. In para 3 of the representation it was specifically stated by the detenu that :

"3. As my detention is illegal, I would request you to kindly revoke the order of detention forthwith and order my release. In case you are not doing so, the above documents, detention order and grounds of detention be given to me in Polish language to enable me to make representation and my matter be placed before the Advisory Board. This representation be sent to all the authorities mentioned in the grounds of detention for their consideration and revocation of the order of detention."

5. The contention advanced by Shri Harijinder Singh learned counsel for the petitioner is that the failure on the part of the specially empowered officer to consider independently the representation of the detenu is in violation of the guaranteed fundamental rights under Article 22(5) of the Constitution of India and, therefore, the order of detention has to be set aside. He relied upon the judgment of a Constitutional Bench of the Supreme Court in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, .

6. The learned Additional Advocate General admits that the specially empowered officer has not considered the representation of the detenu but since he is part of the Government, the decision was taken by the Government to confirm the order of detention.

7. In the above cited case one of the questions that fell for consideration before the Supreme Court was in respect of a detention made under COFEPOSA Act, i.e.,

"Does failure to take independent decision of revocation of order of detention of order of detention by the specially empowered officer under the COFEPOSA Act and merely forwarding the same with recommendation to reject, result in non-compliance with constitutional safeguard under Article 22(5) of the Constitution ?

That case arose from a decision of the Full Bench of the Bombay High Court which had expressed the opinion in respect of the aforesaid question that :

"the failure on the part of the officer making the order of detention to consider the representation made by the detenu was of no consequence because the representation of the detenu was, in fact, in effect and in substance considered by the Finance Minister who was an appropriate authority for the purpose of consideration of such representation."

Overturning that view, the Constitution Bench of the Supreme Court speaking through S. C. Agrawal, J. held :

"Having found that the representation of the person detained was not considered by the officer making the order of detention the High Court was in error in holding that the said failure on the part of the detaining authority to consider and decide the representation is not fatal to the order of detention. We are, therefore, unable to uphold the answer given by the Full Bench to question No. 3 and, in our view, the said question should be answered in the affirmative. On that basis it has to be held that since there was a denial of the Constitutional safeguard provided to the detenu under Article 22(5) of the Constitution on account of the failure on the part of the officer who had made the order of detention to independently consider the representation submitted by the detenu against his detention and to take a decision on the said representation the further detention of the detenu Ishwardas Bechardas Patel is rendered illegal."

In view of the law laid down by the Supreme Court in the aforesaid binding precedent this writ petition must succeed.

8. The writ petition is, therefore, allowed. The order of detention dated 23-12-1995 made by the specially empowered officer viz., the Secretary to the Government (Political), General Administration Department, Government of Andhra Pradesh in No. 2367/1, L & O-II/95-01 is quashed. The detenu shall be set at liberty forthwith if not required in connection with any other case.

9. Petition allowed.