

(1996) 06 AP CK 0067

In the Andhra Pradesh High Court

Case No : Writ Petition No. 7505 of 1996

Andrew Werner

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 11-06-1996

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 5, 8

Citation : (1996) 2 ALT 956

Hon'ble Judges : S.R. Nayak, J;M.N. Rao, J

Bench : Division Bench

Advocate : Harjinder Singh, for P.P. Reddy and D. Suryanarayana, for the Appellant; P. Innayya Reddy for Respondent No. 1, The A.A.G. and Vijaya Lakshmi, for Respondent Nos. 2 to 4., for the Respondent

Final Decision : Dismissed

Judgement

M.N. Rao, J.—In the early hours of 30-11-1995, the officers of the Directorate of Revenue Intelligence intercepted two passengers - Lackner Warner, said to be a national of Austria and M/s Ute Eva Shultz, said to be a Dutch national - who arrived at the Hyderabad Airport by International Flight I.C. 592 coming from Muscut and recovered 86 foreign marked gold bars from Lackner Warner and 72 foreign marked gold bars from Ute Eva Shultz concealed in their shoes. Both the passengers did not declare the possession of gold bars and they came out of the Airport through the green channel claiming that they did not have in their possession any dutiable goods. Both the passengers were arrested and two separate detention orders were passed by the Specially Empowered Officer directing their detention u/s 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (for short "the Cofeposa Act"). W.P.No. 4678 of 1996 filed on behalf of Lackner Warner was allowed by a Division Bench of this Court on 25-4-1996 following the ruling of a Constitution Bench of the supreme Court in Kamalesh Kumar Ishwardas Patel v. Union of India and Ors., JT 1995 (3) SC 639 on the short ground that the specially Empowered officer did

not independently consider the representation made by the detenu in that writ petition.

2. The present writ petition was filed challenging the order of detention dated 23-12-1995 passed against Ms. ute Eva Shultz. After the order of detention was passed, the grounds of detention were served upon the detenu. The detenu was produced before the Advisory Board on 16-2-1996 and the State Government after considering the opinion of the Advisory Board which was to the effect that there were sufficient grounds for passing the order of detention, confirmed the order of detention on 24-2-1996 with effect from 26-12-1995 for a period of one year. The grounds of detention also advert to several documents based upon which the satisfaction of the detaining authority was arrived at for the purpose of passing the order of detention and copies of the documents have also been served upon the detenu.

3. It is contended by Sri Harjinder Singh, learned counsel for the petitioner, that the order of detention was vitiated due to reasons more than one. The representation made by the detenu to the detaining authority was not at all considered. No opportunity was given to the detenu's advocate Sri P.P. Reddy to meet her and obtain instructions. Before the Advisory Board, the detenu was denied of the right of effective representation; she is not conversant with English language and the only language known to her is Polish. The documents were not translated into Polish language nor any interpreter was provided to her with the result she could not make an effective representation about her case before the Advisory Board, she was also denied of the right to have the service of an advocate before the Advisory Board to represent her case. Only on one occasion, pursuant to an order passed by the Special Judge for Economic Offences, the detenu was permitted to meet her advocate and at that time, the officials of the Department were present with the result, she could not effectively give any instructions to her counsel with the consequence that her guaranteed constitutional right under Article 22(5) of the Constitution of India was violated. The learned counsel also relied upon the decision of the supreme Court in Francis Coralie v. Union territory of Delhi AIR 1981 SC 746 a last contention urged is that the detaining authority has not adverted to the aspect of criminal prosecution before arriving at the requisite satisfaction to detain the detenu under the Act.

4. In opposition to these contentions, it was urged by the learned Additional Advocate-General that the detenu was fully conversant with English language and she herself, in her own-hand-writing, submitted a representation in English dated 28-1-1996 to the Chief Secretary, Government of Andhra Pradesh, Hyderabad expressing her willingness to appear before the Advisory Board and seeking permission to have an interview with a lady advocate of her choice -Smt. Sesharajyam. Neither the counsel for the detenu nor any of her friends has at any time been denied permission to meet her and the communication sent by the Government to the detenu rejecting her request to have the services of a lawyer before the Advisory Board was only a reiteration of what is ordained by the

statute. She did not make any request to the Advisory Board about her alleged disability to follow the proceeding in English nor did she seek permission to engage a lawyer to represent her case.

5. The first aspect that falls for consideration is: whether the detenu was really disabled from making an effective representation because of her alleged claim that she was not conversant with English language? The record placed before us by the Government shows that on 28-1-1996, in her own hand-writing, the detenu addressed a letter to the State Government agreeing to appear before the Advisory Board and sought permission to have an interview with a lady advocate by name Smt. Sesharajyam. This is not the only piece of evidence which belies the claim of the detenu about her not being conversant with English language. In the grounds of detention, the detaining authority has adverted to the fact that the statement made by the detenu before the Assistant Director of the Directorate of Revenue Intelligence was reduced into writing and in that statement, she confirmed that she had fairly good knowledge of English. This statement was shown as Annexure-XXIII to the grounds of detention, a copy of which - it is not in dispute - was supplied to the detenu. In this statement the detenu has stated:

"I confirm that all the particulars in the dis-embarkation card shown to me have been filled in my own hand after fully understanding the questionnaire in the disembarkation card. I confirm once again that I have fairly good knowledge of English and I can easily understand and correspond in the same language that is English. In token of seeing the disembarkation card, I had appended my dated signature on them."

No attempt was made before us even to remotely suggest that what is stated in Annexure-XXIII to the grounds of detention is factually not correct. We, therefore, find it hard to accept the plea that the detenu was not conversant with English and, therefore, she could not effectively represent her case before the Advisory Board. Once it becomes clear that the detenu did not suffer from any disability on the score of language, as she is capable of understanding and corresponding in English, the related contention that she could not effectively plead her case before the Advisory Board without the assistance of an advocate does not merit acceptance. It is true that when she made a request to the State Government for permission to be represented by an advocate before the Advisory Board, the same was rejected by Memorandum No. 2368/L & O II/ 95-2 dated 6-2-1996; the State Government asked the Jail Superintendent to inform the detenu that "She is not entitled to have the assistance of any lawyer before the Advisory Board as per the provisions of the Act". What the State Government did was nothing more than reiteration of the existing statutory position. Section 8(e) of the Act lays down that the "detenu shall not be entitled to appear by any legal practitioner in any matter connected with the reference to the Advisory Board...." That a detenu has no right to appear through a legal practitioner before the Advisory Board received judicial assent long back. Interpreting clause

(5) of Article 22 of the Constitution, a Constitution Bench of the Supreme Court in A.K. Roy and Others Vs. Union of India (UOI) and Others, observed:

"To read the right of legal representation in Article 22(5) is straining the language of that Article. Clause (5) confers upon the detenu the right to be informed of the grounds of detention and the right to be afforded the earliest opportunity of making a representation against the order of detention. That right has undoubtedly to be effective, but it does not carry with it the right to be represented by a legal practitioner before the Advisory Board."

Absence of a legal right enabling the detenu to be represented by an advocate before the Advisory Board is not a factor divesting the Board of its power, in exercise of its discretion, to permit a detenu to be represented by a lawyer. But the record in this case shows that the detenu did not make any such request before the Advisory Board. We, therefore, do not find any merit in the contention that instead of leaving the discretion to the Advisory Board regarding granting of permission to the detenu to be represented by a lawyer, the State Government themselves acted illegally in rejecting the request of the detenu.

6. The contention that the advocate for the detenu was denied permission to have an interview with the detenu in jail hardly merits acceptance. In the counter-affidavit filed by the Superintendent, State Jail for Women, Hyderabad - where the detenu is lodged - it is categorically averred:

"In reply to para 10 of the affidavit, I submit that a cover sent through speed post was received in my office on 27-2-1996 from Andrew C/o Sri Harjender Singh, Advocate, C-58, Neethi Bagh, New Delhi - 110 049, addressed to the Superintendent, Central Prison, Chenchalguda, Hyderabad containing letter dated 26-2-1996 enclosing representation in English language and purported to be translation in Polish Language. Both the representations were given to the detenu on 27-2-1996. She returned the same stating that she will sign the representation only after consulting her advocate, Sri P.P. Reddy. Accordingly, I have sent letter No. HJW/348/96 dated 2-3-1996 to Sri P.P.Reddy, Advocate, fixing interview at 4-00 P.M. on 06-03-1996. But the said P.P.Reddy did not turn up till date. Hence the representation could not be forwarded to the Government."

We have verified the Jail Register - In-and-Out Register - to ascertain the correctness of the statement and we are fully satisfied that the above averment reflects the correct position. On two earlier occasions i.e., 13-2-1996 and 14-2-1996, when Sri P.P. Reddy, Advocate visited the jail and had an interview with the detenu, the same was noted in the register, which we have verified. The learned counsel in question has not chosen to file any affidavit in proof of the allegation that he was denied permission by the jail authorities to interview the detenu in the jail. We, therefore, do not accept the contention now advanced before us that Sri P.P. Reddy went to the jail on 25-1-1996 with a certified copy of the order of the Special Court for Economic Offences granting him permission to interview the detenu but the jail authorities refused to accord him the

permission.

7. Section 5 of the Act confers power on the appropriate Government to regulate the places and conditions of detention including "conditions as to maintenance, interviews or communications with others...." In exercise of this power, the State Government issued an order called the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Regulation of Places and Conditions) Order, 1974 by G.O.Ms.No. 826 dated 17-12-1974, Paragraph 6 (1) of the Order says that no one shall be permitted to interview the detenu unless specially ordered by the State Government. Sub-paragraph (2) lays down that the interview shall be in the presence and within the hearing of an officer of the Customs or the Central Excise and other departments specified therein. This position has been reiterated by the Government in Memorandum No. 2368/L & O-II/95-10 dated 31-1-1996 addressed to the Superintendent of the Jail marking a copy to the detenu permitting the Jail Superintendent "to arrange a legal interview to Ms. Ute Eva Schulz with her advocates vis., Sri P.P. Reddy and Sri Umamaheswara Rao in the Jail premises only and in the presence of and within the hearing distance of an officer of the office of the Assistant Director, Directorate of Revenue Intelligence...." There is no allegation that any officer was present on 14-2-1996 when Sri P.P. Reddy, advocate, had interviewed the detenu. The contention based upon the ruling of the Supreme Court in Francis Coralie (2 Supra) that a prison regulation requiring that the interview must take place within the hearing distance of an officer deputed by the Customs or Enforcement Directorate is an unreasonable procedural requirement, although the presence of an officer by itself cannot be faulted, assumes academic importance in the fact situation of this case.

8. One of the points on which considerable stress was laid by the counsel for the petitioner is that the impugned order of detention is afflicted with a serious infirmity in that while passing the order, the detaining authority has not taken into account the criminal prosecution but passed the order mechanically. We find no merit in this contention. The detaining authority has specifically stated in the grounds of detention.

"I am aware that you are at present under judicial custody as a remand prisoner in the State Jail for Women, Chenchalguda, Hyderabad, Andhra Pradesh, India, in Connection with this case. I am also aware that the bail petition filed before the Court of Special Judge for Economic Offences and also I am of the firm view that there is every possibility of your coming out on bail in the remand case and your being released from the detention in the above case and since you are a person who have been indulging in prejudicial activities as shown above and I am convinced that action under normal law will not have the desired effect of deterring you from indulging in prejudicial activities as referred to."

Factually, two days after the order of detention was passed, the bail application filed by the detenu was dismissed by the learned Special Judge for Economic Offences. The legal position on this aspect admits of no doubt. In Kanchanlal

Maneklal Chokshi Vs. State of Gujarat and Others, it was held:

".... the mere circumstance that a detenu was liable to be prosecuted was not by itself a bar to the making of an order of detention. It does not follow therefrom that failure to consider the possibility of a prosecution being launched cannot ever lead to the conclusion that the detaining authority never applied its mind and the order of detention was, therefore, bad."

Considering a similar contention, a Division Bench of this Court speaking through one of us (M.N.Rao, J) in N. Balaiah Vs. Chief Secretary, Government of Andhra Pradesh and Others, interpreting the decision of the Supreme Court in Kanchanlal Maneklal Chokshi Vs. State of Gujarat and Others, observed:

"The possibility of launching criminal prosecution is not an absolute bar to an order of preventive detention and if such possibility is not present, the order is not vitiated was the view expressed in Kanchanlal's case. It was only when an allegation was made that the order was issued in a mechanical manner without considering the question whether it was necessary to make the order of detention when an ordinary criminal prosecution could serve the purpose, then it would be incumbent on the detaining authority to satisfy the Court that the question too was borne in mind before the order of detention was made."

The detaining authority in the present case has considered the question whether action under normal law will have the desired effect of deterring the detenu from indulging in prejudicial activities forbidden under the Act. The detaining authority has, in clear terms, said that "there is every possibility of the detenu coming out on bail", which shows that considerable thought was bestowed on the aspect of criminal prosecution. A reasonable belief entertained by the detaining authority on the basis of the existing fact situation was that there was every possibility of the detenu being enlarged on bail and., therefore, the order of detention was passed. We do not find any justifiable ground to hold that in a mechanical manner, the order was passed by the detaining authority without application of mind. Reliance upon an unreported judgment of this Court in W.P.No. 604 of 1992 is of no assistance to the petitioner.

9. One more contention urged is that the petitioner wrote a letter to the Superintendent, State Jail for Women, enclosing a representation in Polish language together with an English version to be forwarded to the detaining authority and this representation was received by her from Delhi by speed Post and it was incumbent upon the Jail authorities to satisfy this Court that the representation was sent to the concerned authorities. In the counter-affidavit filed by the Jail Superintendent, adverting to this aspect, it is stated mat the detenu wanted to sign the representation only after consulting her advocate, Sri P.P. Reddy and inasmuch as Sri P.P.Reddy did not turn up, the representation remained unsigned. As the representation was not signed by the detenu and as her advocate did not turn up, very rightly, the same could not be forwarded to the concerned authorities by the Jail Superintendent. An unsigned representation

can never be considered to be a valid representation in the eye of the law and therefore failure to forward such a representation to the concerned authorities cannot be construed to be an illegal act with the consequence of vitiating the order of detention. The fact that the detenu refused to sign the representation is not in dispute.

10. For these reasons, the writ petition fails and accordingly it is dismissed.

11. However, we make it clear that the dismissal of this writ petition will not disentitle the detenu from making a representation to the Secretary to the Government, (Political) General Administration Department, Government of Andhra Pradesh or the Chief Secretary to the Government of Andhra Pradesh, or to the Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi through the Superintendent, State Jail for Women Hyderabad and if such a representation is made, the same shall be forwarded forthwith to the concerned authorities by the Jail Superintendent and the authorities shall consider and pass appropriate orders on such representation as expeditiously as possible.