
(1990) 11 DEL CK 0042

In the Delhi High Court

Case No : Criminal Writ Appeal No. 112 of 1990

Balvinder Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 09-11-1990

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 9(1)

Citation : (1992) CriLJ 93 : (1992) 1 RCR(Criminal) 567

Hon'ble Judges : V.B. Bansal, J

Bench : Single Bench

Advocate : M.D. Taneja and H.S. Phoolka, for the Appellant;

Judgement

Bansal, J.

(1) Balvinder Singh has filed this writ petition under Article 226 & 227 of the Constitution of India read with Section 482 Criminal Procedure Code . for the issuance of an appropriate writ, order or direction for the immediate release of the petitioner-detenu with prayers: (1) to quash the -impugned order of detention and (2) to quash the declaration.

(2) On 6th February, 1990 Shri Mahinder Prasad. Joint Secretary, Government of India, an officer specially empowered u/s 3(1) of the Conservation of Foreign exchange & Prevention of Smuggling Activities Act. 1974 (hereinafter called the ACT) ordered for the detention of" the petitioner with a view to preventing the petitioner from smuggling goods and dealing in smuggled goods otherwise than by engaging in transporting, concealing and keeping smuggled goods. After the passing of this order a reference was made to the Advisory Board in pursuance of which the Board met on 30th- April, 1990. The Board gave its advice dated 2nd June, 1990 in pursuance thereof the confirmation order about the detention of the petitioner was passed on 12th June. 1990.

(3) The Central Government passed a declaration in pursuance of Section 9(1)

of the Act for the detention of the petitioner on 12th February ,1990.

(4) After the filing of this petition the petitioner filed additional grounds for challenging the detention. A number of ground have been taken by the petitioner in this writ petition. However learned counsel for the petitioner has restricted his submissions only on one ground i.e. not making (he petitioner aware of his right of making a representation against the declaration and thus resulting in violation of provisions contained in Article 22(5) of the Constitution. It has been submitted by the learned counsel for the petitioner that the declaration dated 12th February. 1990 (Copy Annexure-C to the writ petition) does not give any intimation to the petitioner than (he has a right of making a representation against this declaration He has further submitted that even otherwise the petitioner was not made aware of his right of representation against this declaration by the respondent. A specific plea in this regard has been taken in para-14, relevant portion of which reads as under :- ""The petitioner submits that the declaration u/s 9(1) of the Cofeposa "74 no where advises the detenu that he has the right" to represent against the same since on the making of the declaration, the order under .Seotion-3(I) merges in the declaration u/s 9(1) of the Cofeposa which declaration becomes an order for continued detention. Accordingly, the right of representation under Article 22(5) of the Constitution as available against detention order u/s 3(1) of the Cofeposa "74 and as intimated in the grounds of detention, is also available against the declaration under Section- 9(1) of the Cofeposa Act, 1974 which has not been advised to the detenu in the declaration it self as has been done in the grounds of detention in respect of the order u/s 3(1) of the Cofeposa Act, 1974." The reply to this para in the counter-affidavit filed by Shri Mahinder Prasad, Joint Secretary ,to the Government of India read as follows :- Contents of para-14 as stated are wrong and denied. It is humbly submitted that it is not .incumbent on the part of the declaring authority to declare on the body of the declaration that the detenu has got a right to make representation against the said declaration. It is further submitted that the declaration u/s 9(1) of the Cofeposa Act is the part and parcel of the order of detention and grounds of detention passed against him. The declaration u/s 9(1) of the Cofeposa Act merely increase the period of detention from one year to two years without effecting any material change in the grounds of detention or in the detention order. In the grounds of detention it has been specifically mentioned that the detenu has a right to make a representation against his order of detention to the detaining authority. Central Government as well as the Central Advisory Board which is equally applicable "in the case of declaration also. Hence the allegation that the mandatory provisions of Article 22(5) of the Constitution has been violated is wrong and denied.

(5) A perusal of the pleadings referred to above clearly indicates that the petitioner was not mad" aware by the respondents about his right of representation.

(6) Learned counsel for the respondents submits that in fact. the petitioner was

aware of his right to making a representation against his declaration as he has" made a mention of this fact in his writ petition, filed on 28th February, 1990. He has thus submitted that there was no prejudice to the petitioner and he cannot take any benefit merely on account of his not being informed about it by the respondents. Reference has also been made to the representation dated 2nd May, 1990 of the petitioner addressed to Shri Mahinder Prasad, Joint Secretary to the Government of India, Ministry of Finance. A copy of this representation in fact reveals, that a quarry was put by the petitioner to enquire if the petitioner had a right to make a representation to the authority passing order of declaration to which reply dated 11th May, 1990 was sent giving intimation that his petition has been considered and rejected. It clearly indicates non-application of mind inasmuch as instead of answering this quarry the reply is that the representation stands rejected. The law is well settled that the authority issuing the declaration order has to make the detenu aware of his right of making representation against the detention. In the instant case the detenu has not been made aware of this right and he has not been able to challenge the declaration by way of filing representation. Case- *Jagjit Singh v. Union of India*, Judgment Today 1990 3 S.C 293 is a clear authority to the effect that a detenu has a right to make a representation against declaration made to the appropriate authority and if no such "information is given or if there is unreasonable delay in making him aware of such a right the detention would be inconsistent with the provisions of Art. 22(5) of the Constitution. This Judgment has been followed, in many cases by this Court. Reference can also be made to the case of *Gurmit Singh v. Union of India* 1990(3) DL 221(2). It is, thus, clear that on this account alone, the declaration is liable to be quashed.

(7) Learned counsel for the petitioner submits that the petitioner was defamed on 6th February, 1990 in pursuance of the detention order dated 6th February 1990. He has also submitted that the Advisory Board gave its opinion dated 2nd May, 1990 and order of confirmation was passed on 12th June, 1990 i.e. beyond a period of three months from the date of detention which fact is not controverted by the learned counsel for the respondents. In view of this delay this order of confirmation cannot be sustained.

(8) As a result of the above the writ petition allowed. The rule is made absolute. The order of detention dated 6th February, 1990, order of confirmation dated 12th June, 1990 and the order of declaration dated 12th February 1990 in respect of the petitioner stand quashed. The petitioner shall be released forthwith, if not required in any other case.