

(1991) 03 P&H CK 0064

In the Punjab And Haryana At Chandigarh

Case No : Criminal Writ Petition No. 2368 of 1990

Balvinder Singh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 04-03-1991

Acts Referred:

Citation : (1991) 1 AICLR 968 : (1991) 1 CurLJ 681 : (1991) 2 RCR(Criminal) 40

Hon'ble Judges : Jai Singh Sekhon, J

Advocate : G.S. Sodhi, A.S. Sandhu, Advocates for appearing Parties

Judgement

J.S. Sekhon, J.(Oral)

1. The detention order against the petitioner under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA Act") was passed by the Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue on 30.4.1989. This order was served upon the petitioner on 27.1.1990 along with the grounds of detention and he was detained. Balwinder Singh petitioner questioned the legality of that order in Cr. W.P. No. 606 of 1990 which was dismissed by this Court on 3.9.1990.

2. The petitioner has again invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India on the sole ground that he has been debarred of his fundamental right to file representation under Article 22(5) of the Constitution of India due to lack of any express direction in the declaration dated 15.2.1990 under section 9 of the Cofeposa Act extending his period of detention from one year to two years by the concerned authority.

3. In the return filed by the detaining authority in the shape of affidavit it is admitted in answer to para 5 that as the right of making a representation was apprised to the detenu in the grounds of detention, it was not considered necessary to write the same again while making declaration. Thus, the sole controversy involved in this writ petition pertains to the effect of not apprising

the detenu that he had right to file representation against the declaration made under section 9 of the Act.

4. The learned counsel for the respondent contended that as the petitioner had not taken up this objection in the earlier writ petition or during the pendency of the same, he was restrained by the principle of constructive res judicata to urge this again. There is no force in this contention, especially when the Apex Court in *Abdul Sattar Abdul Kadar Shaikh v. Union of India and others*, 1990(1) Recent Criminal Reports 396 : JT 1990(1) S.C. 75 had settled this controversy by holding that neither the principle of res judicata nor constructive res judicata applicable in a detention matter.

5. The controversy involved in this case is squarely covered by the decision of the Apex Court in *Jagprit Singh v. Union of India and others*, 1990(3) Recent Criminal Reports 331 : 1990(2) C.C. Cases 66 (SC) . In that case, it was held that making the detenu aware after one month and 13 days of his right to file representation against the declaration under section 9 of the Cofeposa Act had resulted in debarring the right to file an effective representation by considering this delay unreasonable and inconsistent with the provisions of Article 22(5) of the Constitution of India. Herein the detaining authority had admitted that the detenu was not made aware of the right of representation against the declaration on the misconception because there was no necessity to do so as he was made aware of filing representation in the original grounds of detention. This explanation of the detaining authority is certainly not acceptable as the petitioner was detained on 27.1.1990 and the grounds of detention had been served upon him on the same day whereas the declaration was made extending the period of detention from one year to two years on 15.2.1990, i.e., much after the serving of ground of detention. Thus, it cannot be said by any stretch of imagination that the petitioner was made aware of his right to file the representation against the abovereferred declaration. If that is so, then the right of the petitioner to file representation against such declaration to the declaring authority or the Central Government or the Advisory Board constituted under the Cofeposa Act has been taken away which, in turn, had resulted in negating the mandate contained in Article 22(5) of the Constitution of India.

6. Consequently, for the reasons recorded above, the continued detention of the petitioner having become illegal is hereby quashed by accepting this petition. The petitioner is ordered to be released forthwith, if not required in any other case.