

(1995) 07 DEL CK 0028

In the Delhi High Court

Case No : Criminal Writ Petitioner No. 897 of 1994

Charanjit Singh, Gaba

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 10-07-1995

Acts Referred:

Citation : (1996) CriLJ 205

Hon'ble Judges : Dr. M.K. Sharma, J; D.P. Wadhwa, J

Bench : Division Bench

Advocate : Ashutosh, for the Appellant; Ms. Meera Bhatia and P.S. Sharma, for the Respondent

Judgement

D.P. Wadhwa, J.

Rule D.B.

1. In this petition under Article 226 of the Constitution the petitioner has challenged his detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short the Act) and seeks a writ of habeas corpus or any other appropriate writ, order or direction for his release.

2. The petitioner was detained in pursuance to order dated 1 August, 1994 of the Lt. Governor of the National Capital Territory in Delhi passed u/s 3(1) of the Act on his satisfaction that it was necessary to detain the petitioner with a view to preventing him from smuggling goods and also preventing him from engaging in transporting, concealing and keeping smuggled goods. The petitioner was served with the grounds of detention as required under sub-section (3) of Section 3 of the Act for the purpose of clause (5) of Article 22 of the Constitution. The petitioner was told that if he desired to make a representation against his detention to the Lt. Governor and to the Central Government, he could do so by addressing the same to the Lt. Governor at the address given or to the Secretary to the Government of India, Ministry of Finance, Department of Revenue, and again as per the address given. It was stated that he could forward the

representation through the Superintendent, Central Jail, Tihar, New Delhi, wherein he has been lodged. Similarly, the detenu was also told that he could represent to the Advisory Board constituted u/s 8 of the Act addressing the same to the Chairman, Advisory Board, High Court, New Delhi, and could forward it through the Superintendent, Central Jail, Tihar. Thereafter, Mr. B. Sankaran, Additional Secretary to the Government of India, issued a declaration dated 30 August, 1994 u/s 9(1) of the Act on his satisfaction that the detenu was likely to engage in smuggling goods into and through the I.G.I. Airport, New Delhi, which was an area highly vulnerable to smuggling as defined in Explanation I to Section 9(1) of the Act. The effect of the declaration issued u/s 9 of the Act would be that the detenu could be detained for a maximum period of two years whereas otherwise he would have been detained for a maximum period of one year. The detenu was told that he had a right to be represented to the Central Government as well as to the Advisory Board against the declaration in the manner specified in the grounds of detention. That would mean that if the detenu had to represent to the Central Government against the declaration u/s 9 of the Act, he should address the same to the Secretary to the Government of India, Ministry of Finance, Department of Revenue, Sixth Floor, IOC Bhawan, Janpath, New Delhi, and for the Advisory Board addressed to the Chairman, Advisory Board, COFEPOSA State, High Court of Delhi, Sher Shah Road, New Delhi. Of course, both the representations could be forwarded through the Superintendent, Central Jail Tihar, New Delhi. The detenu was not told that he could represent against the declaration to the declaring authority as well who, as noted above, is the Additional Secretary to the Government of India.

3. The principal contention of Mr. Ashutosh, learned counsel for the petitioner, has been that constitutional right of the petitioner as conferred upon him under clause (5) of Article 22 of the Constitution has been violated inasmuch as the petitioner has not been informed that he could represent against the declaration to the declaring authority as well who had to independently examine the representation. Before we examine this submission we may as well note in brief the grounds of detention which are in the narrative form.

4. The petitioner, an Indian National, arrived at the Indira Gandhi International Airport on 30 June, 1994 by Kuwait Airway flight from Dubai. He reported at the red channel and declared that he was having dutiable goods worth Rs. 3,790/- He was, however, intercepted at the exit gate of the arrival hall by the Customs Officers. He was subjected to search as per law. This resulted in recovery of two packets wrapped with black adhesive tape from the specially designed front inner pocket of the pant worn by the petitioner. On opening the same, 23 gold biscuits of foreign marking were recovered. The gold weighed 2.596 kgs., was of 24 carat purity and valued at over Rs. 12 lakhs. In his statement recorded u/s 108 of the Customs Act, 1962, the petitioner admitted the recovery of the gold from him and said that he had got the pockets of his pant specially tailored for concealing gold. He further stated that he had gone to Dubai on 28 June 1994 and had carried US dollars with him which he handed over to one Man Mohan Singh in

Dubai whom he knew for the last four years. He said it was Man Mohan Singh who had met him on 26 June, 1994 and paid him the ticket expense and had told the petitioner that he would meet him in Dubai and would give him gold to bring the same to India. The petitioner said for this job he was to get Rs. 10,000/-. Petitioner, however, said that he did not know the address of Man Mohan Singh. He admitted he had gone to Dubai five times earlier and while going he used to take pulses and spices which he said he would sell in hotels in Dubai on profit and on return he used to bring some articles to sell them in the market. He said earlier he never paid any customs duty and came out of the green channel at the customs arrival hall. The petitioner was arrested, gold and other articles seized and investigation conducted. At the time the petitioner was produced before the Metropolitan Magistrate his personal search was effected at the police lock up (as he was remanded to judicial custody) which resulted in the recovery of one gold coin from the right shoe worn by the petitioner. This gold coin weighed eight gram and of 22 carat purity valuing Rs. 3,440/-. Examination of the passport of the petitioner revealed that from February to June 1994 the petitioner had visited Dubai five times, the details of which are as under :-

Arrival	Country	No.	Departure	S. Date of	Date of
				visited	
18-2-1994	Dubai	2.	19-3-1994	23-3-1994	Dubai
Dubai	4.	12-5-1994	14-5-1994	Dubai	5.

5. It is not necessary for us to give any further details as to the conduct of the investigation as stated in the grounds of detention.

6. We are told that reference was made to the Advisory Board u/s 8 of the Act and that Advisory Board had given its opinion that there was sufficient cause for the continued detention of the petitioner.

7. On the question, thus, raised by the petitioner that the declaration u/s 9(1) of the Act did not inform him that he could file representation to the declaring authority as well, Mr. Sharma, learned counsel for the second respondent had nothing to say as the issue concerned the first respondent. In answer to this plea, the first respondent has filed an affidavit of Mr. A. K. Sinha, Under Secretary (Cofeposa). He has stated that the petitioner had availed his right to represent as he had sent a representation dated 22 March, 1995 against detention order dated 8 August, 1994 and declaration dated 30 August, 1994 addressed to the Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi. He further stated that that "the declaring authority itself has considered the representation of the petitioner & agreed to the recommendation that there was no merit in the representation and the same deserves to be rejected." As to how the representation of the petitioner addressed to the Secretary to the Government of India was dealt with, Mr. Sinha stated in para 3(ii) of the reply, which is as under :-

"The representation dated 22-3-1995 (not of 14-3-1995 as alleged) was sent by the petitioner vide his letter dated 22-3-1995, forwarded by the Supdt. Central Jail Tihar & the same was received in the Cofeposa Unit on 22-3-1995. Immediately on receipt of the representation, the same was placed before the considering authority who directed to call for the comments of the Sponsoring authority. The comments of the Sponsoring authority were called for on 23-3-1995, which the sponsoring authority furnished vide their letter dated 30-3-1995 received in the Cofeposa Unit on 3-4-1995. The case was processed and submitted to the Joint Secretary (Cofeposa) on 3-4-1995 who after going through the representation and the comments of the sponsoring authority thereon, rejected the representation on 3-4-1995. Since the representation was addressed to Secretary, Ministry of Finance, the case file was put up to Additional Secretary (the declaring authority) who agreed with the recommendations of the Joint Secretary to reject the representation. It was done on 4-4-1995 and he further submitted it to Secretary (Revenue). The Secretary (R) was on tour. Hence the file was cleared by Minister of State (Revenue & Expenditure) on 12-4-1995 and submitted it to the Finance Minister. The Finance Minister rejected the representation on 18-4-1995. The file was received back in the section on 20-4-1995. A memo intimating the petitioner about rejection of his representation was also issued on 20-4-1995."

It was then submitted that "the declaring authority as well as the detaining authority have duly considered the representation dated 22-3-1995 and 13-9-1994 respectively and rejected the same" and that, thus, no prejudice had been caused to the petitioner.

8. It could not, however, be disputed that the petitioner should have been informed that he could represent to the declaring authority against the declaration made u/s 9(1) of the Act. This issue has been settled by the Constitution Bench of the Supreme Court in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, of the judgment may be quoted :-

"Having regard to the provisions of Art. 22(5) of the Constitution and the provisions of the COFEPOSA Act and the PIT NDPS Act the question posed is thus answered : Where the detention order has been made under S. 3 of the COFEPOSA Act and the PIT NDPS Act by an officer specially empowered for that purpose either by the Central Government or the State Government the person detained has a right to make a representation to the said officer and the said officer is obliged to consider the said representation against the order of detention. This right of the detenu is in addition to his right to make the representation to the State Government and the Central Government where the detention order has been made by an officer specially authorised by a State Government and the Central Government where the detention order has been made by an officer specially empowered by the Central Government, and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a

representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation."

The Supreme Court in this case was considering four appeals which had come before it from Bombay and Madras High Courts. In the two appeals which resulted from Full Bench decision of the Bombay High Court, the High Court had answered the following question in the negative and in favor of the department :-

"Does failure to take independent decision on revocation 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 Art. 22(5) of the Constitution ?"

The Supreme Court held otherwise and observed that since it 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 was rendered illegal. Then the Supreme Court noted in the appeal which had been filed by the Union of India against the order of the High Court that in the grounds of detention the detenu was only informed that he could make a representation to the Central Government or the Advisory Board, and that the detenu was not informed that he could make a representation to the officer who had made the order of detention. As a result, the detenu could not make a representation to the officer who made the order of detention. The Madras High Court had allowed the Writ petitions filed by the detenus as it was of the view that the failure on the part of the detaining authority to inform the detenu that he had a right to make a representation to the detaining authority himself had resulted in denial of the constitutional guarantee under Art. 22(5) of the Constitution. The Supreme Court upheld this view and dismissed the appeals of the Union of India. In yet another matter one of the contentions which had been urged by the detenu before the Supreme Court was that he had addressed a joint representation to the detaining authority, the Central Government and the Advisory Board and the same was submitted through the Superintendent, Bombay Central Prison, and that the said representation was rejected by the Central Government and it was not considered and decided independently by the detaining authority himself. The Court observed that since the detenu had submitted a representation to the detaining authority, namely, the officer who was specially empowered to make an order of detention, and the said officer did not consider the representation there had been a denial of the constitutional safeguard guaranteed under Art. 22(5) of the Constitution and as such the detention was illegal.

9. Mr. Ashutosh submitted that right to be informed that representation against declaration could be made to the declaring authority as well was part of the

grounds of detention and was constitutional right of the petitioner and that the fact that the petitioner was not apprised of the fact that he could represent against the declaration to the declaring authority is fatal to his continued detention under the Act. But then we have to examine the contention of the first respondent that though the petitioner was not made aware of his constitutional right, he did not suffer any prejudice inasmuch as the representation made by him to the Central Government was also considered by the declaring authority who rejected the same. We do not think that the stand taken by the respondents is correct. If in spite of the fact that the petitioner had not been informed of his right to make a representation to the declaring authority yet he makes such a representation and the declaring authority considers the same independently, the petitioner may not be able to complain about the violation of his constitutional right. That is, however, not the case here and, as noted above, for, one, he was not told of his constitutional right to make a representation against the declaration to the declaring authority, and, two, the affidavit in reply of the first respondent does not show if the declaring authority itself independently considered the representation against the declaration though not addressed to it but addressed to the Central Government. It appears to us that when a representation was made to the Central Government and comments were called for from the sponsoring authority the matter came before the Joint Secretary who recommended rejection of the representation and since the matter was to go to the Minister of State (Revenue Expenditure) the file passed through the Additional Secretary, who happened to be the declaring authority, and the Secretary (Revenue). We have not been shown any independent order of the declaring authority wherein he independently considered the representation against the declaration. It is only that the Additional Secretary happened to be in the hierarchy of the set up that the recommendation of the Joint Secretary was placed before him. If the declaring authority himself had independently considered the representation of the petitioner he would certainly have informed the petitioner of the rejection of the representation. Admittedly no such communication came from the declaring authority. We have tried to put the case of the first respondent on as high pedestal as possible and we find that constitutional safeguards have been violated inasmuch as the petitioner has not been informed of his constitutional right to represent to the declaring authority against the declaration under S. 9 of the Act. We cannot accept the case of the respondents that though no such representation was addressed to the declaring authority he nevertheless considered the same and that no prejudice was caused to the petitioner on account of failure of the declaring authority to inform him of the aforesaid right. The question of any prejudice does not arise.

10. We, Therefore, hold that the continued detention of the petitioner is bad. This petition is, Therefore, allowed. Rule is made absolute. Petitioner be set at liberty forthwith.

11. Petition allowed.