

(1989) 11 AHC CK 0064

In the Allahabad High Court

Case No : Civil Miscellaneous Habeas Corpus Petition No. 6654 of 1989

Daya Shankar Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 03-11-1989

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 22(5), 22(6)
Customs Act, 1962 — Section 108

Citation : (1990) CriLJ 1647

Hon'ble Judges : Giridhar Malaviya, J;B.P. Singh, J

Bench : Division Bench

Advocate : C.K. Parekh and A.D. Giri, for the Appellant; Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Giridhar Malaviya, J.—Petitioner Daya Shanker Singh was detained u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (hereinafter referred to as COFEPOSA") by an order dated 22nd February, 1989 of the State of U.P. The allegations against the petitioner in the grounds stated were that on the commercial establishment of the petitioner being searched, from the godown of the petitioner which was adjacent to the shop, several open cartons were found concealed behind the bags of spices. From these cartons 7 V.C.Ps. "Pye" Brand made in Japan as also 24 bags of foreign made polyester yarn were recovered. As no papers could be produced by the petitioner for keeping these foreign V.C.Ps. and polyester yarn, the custom authorities seized the same and prepared its recovery memo. The value of the seized articles was assessed at Rs. 2,14,000/-. It was alleged in the grounds that in the voluntary statement made by the petitioner before the custom officials on 29-12-1988 he accepted the recovery of these items and had said that these items belonged to one Ganesh Prasad of Mughalsarai, who had put it there before 4 or 5 days of the

incident. He admitted his business terms with Ganesh Prasad for the last 5-6 years.

2. The order of detention further stated that at the time of passing of the detention order, the petitioner was in Central Jail, Naini in pursuance of the order of remand by a competent Court but since the petitioner was constantly making efforts to be released on bail and as there was apprehension that if released on bail the petitioner would again indulge in the similar activities, hence the detention order was being passed against the petitioner on the ground that he was engaged in concealing and storing the smuggled goods, which he could repeat and for which it was necessary to prevent him by passing the alleged detention order.

3. The above mentioned order was served on the detenu on 23-2-1989. So far as" the formalities required by COFEPOSA in the matter of detention are concerned, they have not been challenged by the learned counsel for the petitioner in this case. However, Sri A. D. Giri, learned counsel appearing for the petitioner contended that the detention of the petitioner is bad as the copy of the proposal which was made by the custom officials to the government for considering the case of the petitioner for his detention under COFEPOSA, had not been supplied to him, with the result Article 22(5) of the Constitution was violated as the said proposal had been relied upon by the detaining authority while passing the order of detention. The second contention of Shri A.D. Giri was that the petitioner by his representation dated 13-3-1989, which has been annexed as Annexure III to the petition, had categorically demanded certain papers stating that those documents and particulars were required by him to make an effective representation. However, neither these documents were supplied to the petitioner nor was the petitioner informed why those documents which were the required material not furnished to him. The contention of the learned counsel for the petitioner is that he could not make an effective representation in the absence of those papers and material and, consequently, the petitioner have been deprived of his valuable right to make an effective representation against his order of detention, his continued detention is bad in the eye of law. Although some other points were also taken in the petition and Sri Giri had initially formulated those points to be developed later on, yet, subsequently he confined his submissions only on these two points but reserved his right to address the court if he subsequently deemed necessary to press the petition on those points also.

4. In this connection, it would be relevant to refer to paragraphs Nos. 8 and 10 of the petition. In paragraph No. 8 of the petition, the petitioner has asserted that the custom officials of Varanasi must have forwarded the proposal to the Government and since the copy of the said proposal had not been supplied to the petitioner along with the grounds of detention, the petitioner could not make an effective representation. It was also mentioned that the order of detention had been passed after considering some documents including the proposal and since

the petitioner was unable to know about those documents, he could not know whether the application of mind by the detaining authority on those material was justified or not. His contention was that despite specific requests for supply of those documents, the documents were not supplied and being unaware of the nature of those documents, the petitioner had been deprived of his right to make an effective representation. The learned counsel for the petitioner relied on paragraph 5 of the counter-affidavit filed by Dr. R. S. Asthana, Joint Secretary Home, which reads as follows:

".....It is respectfully submitted that the proposal which was made confidential was sent by Collector Custom Patna vide his covering letter dated 30-1-1989..... The proposal which was confidential contains the name of the petitioner and various other associates and also the modus operandi being adopted by him in keeping and concealing the smuggled goods. It was decided by the State Government that the disclosure of the aforesaid proposal would cause public injury as the petitioner's associates might go underground and they would have changed their modus operandi and no more watch and vigil could have been possible upon the activities of the petitioner and his associates. As such while exercising powers under Article 22(6) of the Constitution of India, the aforesaid documents was not furnished to the petitioner."

5. On the basis of the above mentioned assertion the learned counsel for the petitioner contends that the State Government in its counter-affidavit has almost conceded that it relied upon the proposal sent to the Government by the custom officials and since the proposal which had been relied upon had not been furnished to the detenus, the order of detention should be treated as illegal. Sri A. D. Giri relied upon the judgment of this Court in the case of Jagdish v. State of U. P. (Habeas Corpus Petn. No. 1607 of 1987) which has accepted the view canvassed by the petitioner to the extent that if such a proposal, which has been relied upon, has not been furnished to detenu then the continued detention of the petitioner is rendered illegal in spite of the plea of Article 22(6).

6. The learned counsel also relied upon yet another judgment of this Court in Habeas Corpus Petn. No. 16562 of 1988 Harish Gandhi v. Supdt., Central Jail, Naini, in which the same proposition as canvassed by him had been accepted.

7. Sri Prem Prakash, learned Additional Government Advocate, however, challenged the correctness of the aforesaid two Division Bench cases of this Court as according to him these judgments were against the judgment of the Supreme Court and few Division Bench judgments of the High Court. Sri Prem Prakash relied upon the judgment of the Supreme Court in the case of The State of Bombay Vs. Atma Ram Sridhar Vaidya, , Lakhmir Singh Vs. Union of India (UOI) and Others, , State of Rajasthan and Another Vs. Shamsher Singh, as also Lawrence Joachim Joseph D'souza Vs. The State of Bombay, and urged that in view of these judgments of the Supreme Court we may refer this case to a larger Bench to decide whether the opinion expressed by the two Division Benches of the High Court in the case of Jagdish and Harish Gandhi (supra) are correct or

not. However, since we think that this case can be disposed of on the second point, we do not consider it necessary to consider the submissions of Sri Prem Prakash relating to the correctness of the two Division Bench judgments of this Court mentioned above.

8. It is not disputed by the State that the petitioner in his representation dated 13-3-89 had very clearly stated that he wanted the documents and particulars enumerated by him in the representation to make an effective representation. The documents demanded were (1) the proposal/recommendation of the custom department (2) copy of the statement of the petitioner's mother Dhanraj Devi (3) copy of the letter sent by Custom Commissioner Patna forwarding the proposal (4) copy of the memo of arrest to know about the time/date shown therein, (5) copy of the original order passed by the detaining authority as the petitioner did not know when the original order had been made, (6) copy of the statement of the brother of the petitioner Sri Ravi Shanker Singh recorded u/s 108 of the Customs Act involving the petitioner, (7) copy of the bail application by Ravi Shankar Singh to know about the stand taken by Ravi Shankar Singh, (8) report submitted before the Screening Committee, (9) copies of the documents and particulars collected during investigation against Ganesh Prasad by the Custom Officials as the petitioner thought " that on the strength of those papers he would demonstrate that he was not involved in the alleged episode and (10) name of the authority who had actually passed the order of detention.

9. So far as the item No. 1 is concerned, the counter-affidavit filed on behalf of the State has claimed privilege for it under Article 22(6) of the Constitution of India. The question whether the privilege could be claimed in this matter by the State when the matter has come before the High Court or whether it should have been claimed earlier by informing the petitioner after he had demanded these documents was agitated before us. However, as the demand was not confined to the proposal made by the Custom Department we did not consider it necessary to go into that aspect of the matter. Similarly, we feel that the information demanded at S. Np. 5 and 10 viz. as to who had passed the original order of detention and what was irrelevant, inasmuch as the order supplied to the petitioner clearly stated that the order was passed under the order of His Excellency the Governor. It is, therefore, to be seen as to what is the effect of the non-supply of other documents which were demanded by the petitioner by means of his representation made to the Government on 13-3-89, by which the petitioner claims that those documents were required by him to make an effective representation.

10. The contention of the learned counsel for the State is that since these other documents had not been relied upon by the State while passing the order of detention, it was not necessary to supply those documents to the petitioner. It is contended by the learned Government Advocate that the petitioner, in fact, was not in any manner deprived of his right to make a representation in the absence of these documents and that these documents were just demanded by him

without any valid reason.

11. The question to be considered is whether in case the petitioner demands some documents stating therein that those documents should be furnished to him, then whether those documents should be furnished to him or not, and if those documents are not furnished to him, then whether it can be said that the petitioner had not been provided with the minimum safeguards which should be provided to a detenu under any of the Preventive Detention Laws.

12. It will be relevant to refer to the following passage of the judgment of the Supreme Court in the case of Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another, . The relevant passage occurring at page 545 in the first column is reproduced below:

"We agree with the learned counsel for the petitioner that in order to make a representation against the order of detention and thus to exercise the fundamental right guaranteed by Article 22(5) of the Constitution, a detenu is entitled to be furnished with all essential particulars forming the basis of the grounds of detention. So it is that where insufficient particulars are mentioned in the grounds the detenu is entitled to call for better particulars. That is a right which flows from the constitutional right to be afforded a reasonable opportunity to make representation. Of course where the grounds are vague, no question would arise of the detenu asking for better particulars. But the present case is not a case of vague ground. The ground is specific enough. If the detenu wanted any more particulars such as the same of the intelligence officer or other information he could have well asked for the particulars before making his representation. That he never did. It was not as if any privilege had been claimed by the Government in respect of the intelligence reports. In fact, we find that the intelligence reports were produced before the learned Judges of the High Court at the hearing of the writ petition there. There was no complaint before us that the detenu or his counsel wanted to peruse the reports and were denied the opportunity of doing so. We do not think that the detenu could be said to have been denied a reasonable opportunity of making a representation merely because particulars which he never desired in respect of a ground which was not vague were not furnished to him."

Although in this case of the Supreme Court, it was found by their Lordships of the Supreme Court that the detenu was not denied the reasonable opportunity of making representation, a perusal of this passage clearly indicates that if the detenu wanted any more particulars, then those particulars ought to have been supplied to him. Similarly in the case of Lawrence Joachim Joseph D'souza Vs. The State of Bombay, first column it was observed :

"The necessity for such a communication would arise only if the detenu, feeling the grounds to be vague, asks for particulars. An obligation to communicate the decision not to disclose facts considered prejudicial to public interest may well be implied in such a situation. But in the absence of any such request by the

detenu, the non-communication of the decision cannot be held to have hampered his constitutional right of representation under obligation to communicate be implied in these circumstances."

"In the represent case, there is no merit in the contention. If the appellant had exercised his right to ask for particulars at the time, from the detaining authority there can be no doubt that he would have been furnished then the very information which he has been supplied in paragraph 12 of the under Secretary's affidavit in answer to para 15(g) of the appellant's petition both of which have been already set out above."

13. All these observations were made with reference to the privilege which could be claimed by the State under Article 22(6) of the Constitution but it also implies that the Supreme Court was clearly of the view that if a detenu asks for some particulars, then an obligation is cast on the detaining authority to inform the detenu whether such material is being supplied to him and if not, then on what ground. Admittedly in the present case, no information was addressed to the petitioner by the detaining authority as it appears that his request for the documents being furnished to him had not been considered. Shri Prem Prakash, learned Additional Government Advocate contended that the statement made by the petitioner's brother Ravi Shankar Singh and his mother were in respect of the recoveries relating to Ravi Shanker Singh alone, and it has no nexus with the recovery of the petitioner. Be that as it may, the fact that, the detaining authority was under obligation to inform the petitioner in this regard and in any case, since the Government was not claiming privilege under Article 22(6) of the Constitution that it was not in the public interest to have furnished those documents to the petitioner, it will have to be held that the petitioner could not have the satisfaction of making an effective representation. This was the minimum guarantee which was guaranteed to a person under Article 22(5) of our Constitution. This was admittedly denied to the petitioner. Consequently, the continued detention of the petitioner in this case is rendered illegal.

14. This petition is accordingly allowed. The petitioner Daya Shankar shall be released forthwith unless he is wanted in any other case.