(1998) 04 DEL CK 0013

In the Delhi High Court

Case No : Criminal Writ No. 590/97

Diljeet Singh APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 01-04-1998

Acts Referred:

Citation : (1998) 3 AD 53 : (1998) 73 DLT 6 : (1995) 45 DRJ 458

Hon'ble Judges : Mahinder Narain, Acting C.J.;S.K. Mahajan, J

Bench : Division Bench

Advocate : Ms. Sangita Bhayana, for the Appellant; Mr. Sarabjit Sharma and Mr. S.K. Aggarwal, for the Respondent

Judgement

S.K. Mahajan, J.—The petitioner having been detained pursuant to order of detention dated 25.6.1997 issued by the Lt. Governor of National Capital Territory of Delhi u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short referred to as COFEPOSA Act) has challenged the same mainly on the ground that the report u/s 3(2) of COFEPOSA Act sent by the State Government to the Central Government was not considered by the Secretary (Revenue) in the Ministry of Finance and the continued detention of the petitioner, Therefore, is illegal.

2. It is not in dispute that the detention order in this case was passed by the Lt.Governor of the National Capital Territory of Delhi and, Therefore, u/s 3(2) of the COFEPOSA Act the State Government was required within 10 days of making the detention order to forward to the Central Government, a report in respect of the detention. The short question before us is whether this report was required to be considered by the Secretary (Revenue) in the Ministry of Finance for and on behalf of the Central Government, or it could even be considered by a Joint Secretary, as has been done in the present case.

3. The learned counsel for the respondents have relied upon a notification dated 26.4.1991 issued by Minister of Finance, Government of India, directing that the

powers vested in the Central Government under the COFEPOSA Act shall be exercised by the officers in the Ministry of Finance, Government of India as mentioned in the said notification, namely the Secretary or Special Secretary or Additional Secretary or Joint Secretary in the Ministry of Finance, Department of Revenue upon whom the powers u/s 5, Section 7(1), Section 8(f), Section 10, Section 11 and Section 12(1) were conferred. It is, Therefore, the contention of the respondents that as the report u/s 3(2) has been considered by the Joint Secretary in the Ministry of Finance who has been vested with powers by notification dated 26.4.1991 u/s 11 of the COFEPOSA Act, no fault can be found with the same.

4. Learned counsel for the petitioner has, however, relied upon an office order dated 20.1.1993 whereby the Finance Minister had allocated work between himself and the Minister of State in the Ministry of Finance. In such allocation, while the work of parole and transfer of prisoners under COFEPOSA Act was to be dealt with by the Minister of State, representations for revocation and confirmation of detention period under COFEPOSA Act as well as all matters of Department of Revenue not specifically assigned to Minister of State for Finance were to be dealt with by the Minister of Finance. It is, Therefore, submitted by the learned counsel for the petitioner that it was only the Minister of Finance who could deal with the report u/s 3(2) of the COFEPOSA Act after it had been made by the State Government to the Central Government. The alternative contention of the petitioner is that on 25.7.1996 by office order No.160/96 the Finance Minister had delegated the powers to Secretary (Revenue) in respect of disposal of the files concerning representations from COFEPOSA deter as well as applications for parole. It is, Therefore, contended that the notification dated 26.4.1991 stood superseded and the Joint Secretary in the Ministry of Finance could not deal with the report u/s 3(2) of the COFEPOSA Act.

5. Mr.S.K. Aggarwal, learned counsel appearing on behalf of respondent Nos.2 and 4 has contended that while under the notification dated 26.4.1991, a power has been specifically given u/s 11 to the Joint Secretary, the office order dated 25.7.1996 does not mention conferring powers u/s 11 and it only mentions about the disposal of representations by the Secretary (Revenue). It is, Therefore, submitted by him that by a harmonious construction both the notifications can co-exist and it cannot be said that the notification dated 26.4.1991 has been superseded by the office order dated 25.7.1996. It is also submitted by him that even assuming that the notification dated 26.4.1991 stood superseded by office order dated 25.7.1996 as no specific powers have been given to the Secretary (Revenue) to deal with the report u/s 3(2) of the COFEPOSA Act, any officer starting from the Under Secretary in the Ministry had the power to deal with the said representation and the detention cannot be said to be vitiated merely because the same has not been considered by the Secretary (Revenue). For this he has placed reliance upon the judgment of an Hon''ble Single Judge of this High Court reported as Labh Singh Atma Singh Vs. Union of India and Others, .

6. In Labh Singh Atma Singh Vs. Union of India & Others (supra) the facts were that the Chief Settlement Commissioner had u/s 24(1) of the Displaced Persons (Compensation and Rehabilitation) Act,1954 (in short referred to as the Act) dismissed a revision petition of the petitioners. This order was challenged by the petitioners before the Central Government. The Central Government, however, dismissed the application of the petitioners on the ground that it found no reasons to interfere with the order of the Chief Settlement Commissioner. This order rejecting the application of the petitioners was dismissed by a Deputy Secretary for and on behalf of the Central Government. It was contended by the petitioners that as the order which had been challenged before the Central Government had been passed by the Chief Settlement Commissioner, who was a Joint Secretary, the rejection of the application by a Deputy Secretary in the Central Government was not proper and moreover the Deputy Secretary was not authorised to deal with the application for and on behalf of the Central Government. Dealing with this contention of the petitioners the court held that:

Article 77(3) enables the President to make rules for the more convenient transaction of the business of the Government of India. These rules are called the Transaction of Business Rules. Under these Rules the business of the Government is authorised to be done by various officers on behalf of the Government. Unless a certain item of business is specified to be done by the Minister himself or by the Secretary himself, the rest of the business can be done by any of the officers of the usual hierarchy in the Ministry, starting at the bottom with the Under-Secretary and ending at the top with the Secretary. The Deputy Secretary is an Officer in this hierarchy. He is, Therefore, entitled to transact the business of the Government under the Transaction of Business Rules. It is not, Therefore, necessary for the Government to issue any separate authorisation to these officers for transaction of any particular business on behalf of the Government. In view of this established constitutional position, it was not necessary that the application of the petitioner u/s 33 of the Act should have been heard either by the President himself or by any particular officer. The decision of the Central Government is what may be called an ''institutional'' decision as distinct from a personal decision, as I had occasion to point out in an Article entitled, "The one who decides must hear", published in 2 Journal of the Indian Law Institute, pp.423-433 (1960). In such an institutional decision any authorised officer may deal with the business in question on behalf of the Government. The fact that a particular case was dealt with by him cannot be challenged on the ground that the decision under appeal dealt with by him was given by an Officer, who was higher in rank. For, every officer acting for the Government under the Rules of business is acting not for himself, but for the Government. The Government is the highest authority. It was higher than the Chief Settlement Commissioner, who was an officer of the status of a Joint Secretary. It is immaterial if a Deputy Secretary happened to decide this particular case on behalf of the Government. The decision is still of the Government and is, Therefore, by an authority which is superior to the Chief

Settlement Commissioner."

7. We are unable to agree with the observations of the learned Judge in Labh Singh Atma Singh Versus Union of India & Others (supra) as in our view an officer in the Central Government cannot exercise powers for and on behalf of the Central Government unless powers for dealing with a specific matter has been delegated to him by a general or special order.

8. Under Article 77 of the Constitution of India all executive actions of the Central Government shall be expressed in the name of the President and by virtue of Article 77(3) the President makes rules for transaction of business and for the allocation of business among Ministers. As it may not be possible for the Minister to do every business himself, he delegates powers to the officers of the Government for transacting such business. We fail to understand as to how an officer of the Government can transact any business for and on behalf of the Central Government without the powers to transact such business, being delegated to him by a general or special order.

9. In Vijay Malhotra & two others Versus Union of India & Others, Writ Petition (Criminal) No.768,796 and 808 of 1979 decided on 28.10.1979 where the representations made by the detenus were considered by the Minister of State (Home) of the Maharashtra Government and pursuant to his decision the representations were rejected, the Supreme Court held that unless the Minister of State had been authorised specifically to deal with the said representations under COFEPOSA Act it will have to be said that the representations had not been considered by a proper authority and the constitutional safeguards under Article 22(5) had not been strictly complied with.

10. Similarly, in Sanjeev Kumar Aggarwal Vs. Union of India & Others, Crl.W.Petition No.277/90 decided on 1.11.1990, relying upon the aforesaid Supreme Court judgment it was held by this Court that unless there was specific delegation of authority in favor of a particular person, the said person cannot deal with the representations under the COFEPOSA Act and consequently the safeguards as provided under Article 22(5) of the Constitution of India would be said to have been not complied with.

11. We are clearly of the opinion that in view of the judgment of the Supreme Court in Vijay Malhotra & two others Vs. Union of India & Others, (supra) Labh Singh Atma Singh Versus Union of India & Others (supra) is not good law.

12. It has been argued by the petitioner that as by office order dated 20.1.1993, the Minister for Finance had retained with himself all the powers under the COFEPOSA Act except the power to grant parole and transfer of prisoners, the 1991 notification delegating powers to certain officers was impliedly superseded. We, however, feel that it is not necessary for us to deal with this argument as the matter can be disposed of without making any reference to the 1993 office order.

13. It is admitted position that the report u/s 3(2) of the COFEPOSA Act was not

considered by the Secretary (Revenue) in the first instance and it was only after a representation was made by the petitioner that the said report Along with the representation was considered by the Secretary (Revenue) after a period of about six months. In the first instance, the report was considered by the Joint Secretary (Revenue). It is not disputed by the learned counsel for the parties before us that in case it is held by this Court that the Joint Secretary was not authorised to deal with the report u/s 3(2) of the COFEPOSA Act, then even assuming that the Secretary had the power to consider report u/s 3(2) of the Act, there is a considerable delay in consideration of the report by the Secretary (Revenue) and consequently this Court may have to set aside the order of detention for non-consideration of the report u/s 3(2) of the COFEPOSA Act by an authorised officer, only on the ground of delay.

14. The point for consideration before us, Therefore, is whether any of the two officers namely the Joint Secretary and the Secretary were empowered under the aforesaid notifications to deal with the report sent by the State Government u/s 3(2) of the Act. The notification dated 26.4.1991 delegating powers to certain officers was on the following terms :-

" In pursuance of rule 3 of the Government of India (Transaction of Business) Rules, 1961, I Yashwant Sinha, Minister in the Ministry of Finance, Government of India, hereby direct that the powers vested in the Central Government under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act,1974 (62 of 1974), shall be exercised by the officers in the Ministry of Finance (Department of Revenue), Government of India, as specified hereunder:

Provision of the Act Officers (a) Powers u/s 5 Secretary or sub-section (1) of Special section 7, clause (f) Secretary of section 8, section 10, or Joint section 11 and sub Secretary in section 11 and sub- the Ministry of section (1) of section Finance 12 (Department of Revenue) Government of India (b) Clause (b) of section 8 Deputy Secretary or Under Secretary or Senior Technical Officer in the Ministry of Finance, (Department of Revenue),Government of India. Sd/- (YASHWANT SINHA) MINISTER OF FINANCE 15. By this notification powers have been delegated to certain officers of the Ministry including the Joint Secretary and Secretary to exercise powers under certain sections of the Act. Section 11 empowers such officers to revoke or modify the orders of detention.

16. In view of the Supreme Court judgment in Sabir Ahmed Vs. Union of India (UOI), , power to revoke or modify the order of detention can be exercised either on receipt of representation under Article 22(5) of the Constitution of India or on receipt of report from the State Government, in cases of detention passed by the State Government, u/s 3(2) of the Act.

17. The powers having so been delegated to the Secretary by the 1991 notification, was it necessary to issue another notification authorising the Secretary again to deal with representations received from the detenus and to

decide the applications for parole? The notification dated 25.7.1996 in so far as the same relates to the consideration of representations and parole under COFEPOSA read as under :-

"The Finance Minister has delegated the powers to Secretary (Revenue)in respect of disposal of the following cases:-

(i) All files concerning representations from COFEPOSA/PIT NDPS Detenus addressed to Govt. of India.

(ii) Application for parole, except where the applications are addressed to the Minister in COFEPOSA/PIT NDPS cases."

18. By the 1996 notification what has been delegated to the Secretary in the Department of Revenue, Ministry of defense, is that he can deal with files concerning representations from COFEPOSA detenus addressed to the Government of India besides the applications for parole. This notification nowhere delegates powers to the Secretary (Revenue) to consider reports sent by the State Government u/s 3(2) of the COFEPOSA Act. Even the 1991 notification though gives power to the Secretary, Special Secretary, Additional Secretary or the Joint Secretary u/s 11 of the COFEPOSA Act, that in our view will also not enable the said officers to deal with the reports received u/s 3(2) of the COFEPOSA Act from the State Government. Moreover, in D.Rana @ Dharamesh Prill @ Dharmesh Rana Vs. Union of India & Others, (1997) 5 A.D. 880 and Ms.Galina & Others Vs. Union of India & Others, (1998) 1 J.C.C. 6; it was held by this Court that after the issue of notification dated 25.7.1996, the 1991 notification had been superseded.

19. It was held in these cases that if an interpretation was given that the notification dated 26.4.1991 co-exists with office order dated 25.7.1996, the same will make the office order dated 25.7.1996 superfluous as notification dated 26.4.1991 already refers to the Secretary as one of the officers who could deal with the matter and the Court was, Therefore, of the opinion that notification dated 26.4.1991 stood superseded by office order dated 25.7.1996.

20. It will, Therefore, not be of any assistance to the respondents to contend that by virtue of the powers delegated to the Joint Secretary u/s 11 of the COFEPOSA Act he will be impliedly empowered to deal even with the report u/s 3(2) of the COFEPOSA Act. As held by us above, it is only the Minister who can act for and on behalf of the Central Government unless powers have been specifically delegated by the Minister to an officer and we are of the considered opinion that unless powers to consider report u/s 3(2) of the COFEPOSA Act sent by the State Government to the Central Government are specifically delegated to an officer, such officer will not have the powers to deal with such reports.

21. In view of the above, we are of the opinion that neither the Joint Secretary nor the Secretary (Revenue) was empowered to deal with the report u/s 3(2) of the COFEPOSA Act and consequently the report u/s 3(2) of the COFEPOSA Act

having not been considered by an authorised officer for and on behalf of the Central Government, the safeguards provided under Article 22(5) of the Constitution of India have been clearly violated which will vitiate the order of detention.

22. For the foregoing reasons, we set aside the detention order dated 25.6.1997 and direct the petitioner to be released forthwith, if not required in any other case.

