
(1987) 11 BOM CK 0034

In the Bombay High Court

Case No : Criminal Writ Petition No. 745 of 1987

E.K. Anusapa

APPELLANT

Vs

D.N. Capoor and Others

RESPONDENT

Date of Decision : 09-11-1987

Acts Referred:

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

Citation : (1988) 1 BomCR 655

Hon'ble Judges : P.S. Shah, J;H.H. Kantharia, J

Bench : Division Bench

Advocate : Shirish Gupte, for the Appellant; J.A. Barday P.P. for respondent Nos. 1 to 4, V.M. Govilkar and K.C. Sidhwa for respondent Nos. 5 and 6, for the Respondent

Final Decision : Allowed

Judgement

P.S. Shah, J.—The Petitioner who is a National of Thailand has filed this petition under Article 226 of the Constitution of India challenging his detention by virtue of an order dated January 28, 1987, issued u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (hereinafter called "the Act") passed by Shri D.N. Capoor, Officer on Special Duty, who was specially empowered by the Government of Maharashtra. The order of detention shows that the Detaining Authority directed the detention of the petitioner with a view to preventing him from smuggling goods. It appears that the petitioners who was arrested in connection with the offence which forms the grounds of detention on August 22, 1986, and on the date of which the order of detention was served on him. viz. January 28, 1987, he was still in jail in connection with the said offence. He was granted bail by the Magistrate, but he did not avail of the same. Along with the order of detention the grounds of detention dated January 28, 1987, were also served on the petitioner. A declaration u/s 9(1) of the Act was also issued on February 27, 1987. The present petition has been

filed on July 20, 1987. The same day the petitioner also made a representation dated July 20, 1987, addressed to Shri Capoor who passed the order of detention. It appears that Shri Capoor who was the ex officio Secretary and Officer on Special Duty in the Home Department of the Government of Maharashtra at the time of passing of the order of detention was transferred. Our attention is also drawn to the order dated June 30, 1986, issued by the Government specially empowering Shri R.C. Iyer, Secretary (II) to the Government of Maharashtra, Home Department, for the purpose of section 3 of the Act. At the time of hearing of this petition Shri Barday appearing for the State produced before us the office note in this connection. In the office note it is stated that Shri D.N.Capoor who had been specially empowered u/s 3(1) of the Act for the purpose of section 3 thereof had been transferred to the Maharashtra Institute of Development Administration, Pune, and in his place Shri R.C.Iyer, Secretary to the Government of Maharashtra, has been posted and a proposal is made that in the above circumstances the appointment of Shri R.C. Iyer u/s 3 of the Act may be approved. This note is signed by Shri K.B.Dabholkar, Under Secretary, Home Department, and later on initialled by the Home Secretary, Addl. Chief Secretary and the Cabinet Minister for Home. Thus this note was approved and the aforesaid order dated June 30, 1987, was issued.

2. In the petition the petitioner has challenged his detention on various grounds by way of reply the respondents has filed the affidavits of Shri Capoor as well as of Shri R.C. Iyer amongst others. Although a number of grounds challenging the detention have been taken up in petition, it is not necessary for us to deal with all of them since we are satisfied that the order of detention is liable to be set aside on the single ground that the petitioner was not afforded the earliest opportunity of making a representation as envisaged by Article 22(5) of the Constitution.

3. Before we turn to the facts of this case as regards the contentions urged before us, it would be useful to bear in mind the well settled legal position regarding the rights of a detenu conferred under Article 22(5) of the Constitution. Article 22(5) of the Constitution provides two important safe guards from the point of view of the detenu. Firstly, when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and secondly he shall afford him the earliest opportunity of making a representation against his detention. Violation of any of these safeguards would obviously render the detention invalid and unconstitutional. In the present case it is not disputed that the first requirement of communication of the grounds on which the order has been made has been satisfied. The question, however, remains whether the detenu has been afforded the earliest opportunity of making a representation. When this constitutional requirement has different facets it must be complied with by the Detaining Authority. It is incumbent on the Detaining Authority to inform the detenu that he has a right to make a representation and also to

further inform him as to the authority to whom he could make such a representation. It is not only the State Government and the Central Government to whom powers have been conferred under the Act to revoke the order of detention or the authorities to whom the detenu can make a representation, but having regard to the provisions of section 21 of the General Clauses Act, the representation can also be addressed to the Detaining Authority itself. As a matter of fact, the officer who has been specially empowered to exercise the powers of detention u/s 3(1) of the Act would be in a better position to consider and apply his mind to the representation of the detenu. In view of this position, the detenu has a valuable right to have his representation considered by the Detaining Authority, such Detaining Authority being in the present case the officer who was specially empowered u/s 3(1) of the Act. If this be so then it is incumbent on the Detaining Authority to inform the detenu about his right to make a representation to the Detaining Authority himself. While conceding that in law it is the duty of the Detaining Authority to inform the detenu as to the authorities to whom he can make the representation, the learned Counsel appearing for the respondent submitted that non-observance of this safeguard should not be considered in isolation and in a pedantic manner. It is submitted that the Court should further address itself to the question whether any prejudice have been really caused to the detenu by reason of the Detaining Authority's failure to communicate the detenu of his right to make a representation to Detaining Authority himself. On the other hand it was contended by Shri Gupte, the learned Counsel appearing for the detenu, that any infringement of Article 22(5) of the Constitution should be viewed strictly and violation thereof must necessarily have the effect of invalidating the order of detention. The learned Counsel relied on a recent decision of the Supreme Court in *Mrs. Tsering Dolkar Vs. Administrator, Union Territory of Delhi and Others*, . Particular reliance was placed on the observation of the Supreme Court in para-12 of the judgment to the effect that the law as laid down by the Supreme Court clearly indicates that in the matter of preventive detention, the test is not one of prejudice but one of strict compliance with the provisions of the Act and when there is a failure to comply with those requirements it becomes difficult to sustain the order. We are conscious that minor infractions in the matter of compliance of the Constitutional safeguards need not necessarily lead to invalidating the order in each case, provided no prejudice is shown to have been caused to the detenu by reasons of such infractions. For instance, the Supreme Court in the case of *State of Rajasthan and Another Vs. Shamsheer Singh*, , held that in facts of the case no prejudice being caused, the order was not liable to be set aside merely on account of the delay of a day beyond the statutory period in placing the representation before the Advisory Board in as much as the Advisory Board had caused the matter to be heard on the 10th September, 1984 and before the appointed date the representation was before the Board. This is what the Supreme Court has observed in the case of *State of Rajasthan v. Shamsheer Singh*.

"We agree with the principal indicated above and in our opinion, in the fact of the present case, it cannot be said there has been any negligence or remissness on the part of the State Government in dealing with the representation of the detenu or in the matter causing the Advisory Board. We are impressed by the fact that no prejudice has been caused to the detenu on account of the delay of a day beyond the statutory period in placing the representation before the Advisory Board in as much as the Advisory Board had caused the matter to be heard on the 10th September, 1984, and before the appointed date the representation was before the Board. The first ground on which the High Court came to be hold that the detention was invalid has, therefore, to be negatived."

4. The above observations of the Supreme Court in Shamsheer Singh's case have been referred to in a recent decision of the Supreme Court in State of U.P. Vs. Hari Singh Thakur, . After quoting the above observations the Supreme Court pointed out that---

"there is no particular virtue in quashing an order for in a given case a detention order may be fully justified and absolutely necessary for the protection of the society. The approach has to be an objective approach taking into account all the relevant circumstances and considerations in order to strike a balance between the need to protect the community on the one hand and the need to preserve the liberty of a citizen."

5. Now, turning to the facts of the present case, in para IV of the grounds of detention it has been stated---

"You are further informed that you have a right to make representation to the State Government against the order of detention and that you shall be afforded the earliest opportunity to make such representation. Should you wish to make such a representation. You should addressed it to the undersigned, through the Superintendent of the jail where you have been detained."

In para V it is further stated---"You are also hereby further informed that if you wish to make any---representation to the Advisory Board against the detention order you may do so and address it to the Chairman, Advisory Board constituted under the COFEPOSA Act, 1974, and submit it through Superintendent of jail where you are detained."

6. It is thus clear from the above passage in the grounds of detention furnished to the detenu that the detenu has been informed of his right to make representation to (1) The State Government and (2) The Advisory Board. He is also told that he shall be afforded the earliest opportunity to make his representation to the State. The detenu, however, has not been informed that he had a right to make a representation to the Detaining Authority himself. Para-IV of the grounds of detention is worded in such a manner as to totally mislead the detenu in the sense that the representation should be addressed to the Officer on Special Duty only for the purpose of consideration thereof by the State Government. This also shows that the Detaining Authority himself is unaware of

his duty to consider the representation, if made to him by the detenu. Be that as it is crystal clear that whereas the detenu is informed of his right to make the representation to the State Government and the Advisory Board, he has not been told of his right to make representation to the Detaining Authority. In *Santosh Anand v. Union of India*, (1981) 2 SCC 420, the Supreme Court pointed out that:---

"Under Article 22(5) as also u/s 11 COFEPOSA Act, a representation should be considered by the Detaining Authority a consideration thereof can revoke the detention order and if the representation is rejected by Detaining Authority it is open to the detenu to approach the State Government for revocation of the order and failing that it is open to him to approach the Central Government to get the detention order revoked."

7. Similarly, in *Smt. Pushpa Vs. Union of India (UOI) and Others*, , it has been observed:---

"There is nothing in the scheme of Article 22 or the provisions of the COFEPOSA which requires that the initial representation made by the detenu on communication of grounds of detention ought always to be considered by the appropriate Government notwithstanding the fact that the order of detention has been made by an Officer specially empowered in that behalf. Undoubtedly, the power to revoke the detention order u/s 11 is conferred on the State Government and the Central Government whenever an order of detention is made by an officer of the State Government but that does not imply that the initial representation which a detenu has a right to make after the grounds of detention are furnished to him, must of necessity be made to and considered by the State Government. In fact, the representation can and ought to be made to the Detaining Authority because it is he who has to apply his mind to the facts of the case that it is he who had furnished the grounds of detention on which he has acted and it is he who has to be convinced that the action taken by him is unjustified and requires reconsideration. After all, the purpose of a representation is to convince the authority to reconsider its decision which has resulted in the detention of the detenu. The representation is not in the form of an appeal to the higher authority and, therefore, ipso facto it must go to the State Government. Undoubtedly, it would be open to the detenu to make a representation u/s 11 requesting either the State Government or the Central Government, as the case may be, to revoke the order of detention. But the initial representation that a detenu has a right to make on receipt of the grounds of detention would ordinarily be addressed to the Detaining Authority because it is that authority which has taken decision adverse to the detenu and which has to be persuaded to reconsider the same. Therefore, if the detenu made the representation to the Detaining Authority who had passed the detention order it would be open to that authority to consider the same and after applying his mind to accept or reject the same."

8. After considering the various decisions of the Supreme Court including those

referred to by as above, a Division Bench of this Court in Criminal Writ Petition No. 336 of 1987 decided on July 23/24, 1987, while dealing with similar contention observed :-

"In the instant case, the Detaining Authority, who had issued the order of detention in his capacity as an officer specially empowered under sub-section (1) of section 3 of the COFEPOSA Act had communicated to the detenu that he had a right to make a representation to the State Government as also to the Central Government. He had not communicated to the detenu that he had also a right to make a representation to the Detaining Authority himself. This, in our opinion, would violate the provisions of Article 22(5) of the Constitution since it would deprive the detenu of his right to make a representative to the Detaining Authority in the first instance and if his representation was rejected. then make another representation to the State Government and the Central Government. In view of the fact that the provisions of Article 22(5) of the Constitution have been breached by the Detaining Authority, we must come to the conclusion that the order of detention in the instant case stands vitiated."

9. It is, therefore, too late in the day to suggest that the non-communication to the detenu of his right to make a representation to the Detaining Authority would not be fatal to the case of the respondents. As pointed out above, not merely the grounds of detention in the present case do not indicate that the detenu was informed of his right to make his representation to the Detaining Authority, but on the other hand he was told that in case he makes his representation he should forward the same to the Detaining Authority to enable the latter to reforward it to the State Government. Having regard to the legal position indicated above, it would be clear that the detenu's right to be afforded with the earliest opportunity of making a representation had been violated in the present case. The learned Counsel for the respondents, however, insisted that in the facts of the present case by reason of non-communication by the Detaining Authority to the detenu of his right to make a representation to the Detaining Authority himself, no prejudice has been caused to him and as such the order of detention is not rendered invalid. This contention is based on the fact that the detenu did make a representation dated July 20, 1987 to the Detaining Authority. In the first place, this representation has been made after almost six months from the date of the order of detention. Merely because after a lapse of several months the detenu possibly on the advice of someone makes a representation to the Detaining Authority cannot remove the prejudice caused to the detenu by reason of the Detaining Authority's failure to communicate to the detenu of his right to make a representation at the time of the service of the order of detention on him. What is required is that the Detaining Authority must afford the earliest opportunity to the detenu to make a representation. This requirement cannot be said to be fulfilled merely because after several months the detenu did make a representation. The fact remains that the detenu was not given the "earliest" opportunity to make a representation and this could have been done only by informing him his right to make a representation. On the question of prejudice

one could have said that no prejudice is caused if the detenu had made a representation soon after or within a few days from the service of the grounds on him. Such is not the case here and, therefore, the respondents cannot avail of the representation, made by the detenu. Though it is not specifically stated in the petition the facts clearly show that the representation is made on his availing of legal advice. This is demonstrated by the fact that the petition has been filed on July 20, 1987, and the representation is of the same date. Under the circumstances, the argument made before us that the very fact that the detenu did make a representation dated July 20, 1987, would indicate that the detenu was aware of his right to make a representation from the very beginning cannot be accepted.

10. A strong reliance is also placed on behalf of the respondents on a Full Bench decision of this Court in (re Jayantilal Nathubai Parekh) AIR 1949 (Bom) 319 , in support of the contention that the defect of non-communication to the detenu of his right to make a representation is merely procedural and would not invalidate the order. In that case the Full Bench was dealing with a case of detention under Bombay Public Security Measures Act, 1947. Section 3 of the said Act inter alia provides that when an order of detention is made in respect of any person, the Provincial Government have among other things to tell the detenu that he has a right to make a representation to the Provincial Government and afford an earliest opportunity of doing so. The Full Bench did hold that where the order merely mentions that the detenu is entitled to make a representation against the order and that he should address it to the District Magistrate, there is failure to tell that the detenu has a right to make a representation to the Provincial Government and, therefore, there is no compliance with the mandatory provisions of section 3. Though the Court held that the failure to inform the detenu that he has a right to make a representation to the Provincial Government is violative of the mandatory provisions of section 3 of the Act, it further went on to hold that the defect in the procedure would not invalidate the statements in the grounds and particulars furnished by the Detaining Authority to the detenu. It being a decision of the Full Bench, we could normally be bound by the said decision. However, the decision of the Full Bench can longer be said to be good law, in view of what is held by the Supreme Court in Wasiuddin Ahmed Vs. District Magistrate, Aligarh, U.P. and Others, . In that case the question was whether it was imperative that the Detaining Authority must "apprise" a detenu of his constitutional right under Article 22(5) to make a representation against the order of detention and of his right to be heard before the Advisory Board. In para 18 of the judgment the Supreme Court observed :

".....It is expected of a Detaining Authority while serving an order of detention, as a rule to mention in the grounds of detention, that the detenu has a right to make a representation against the order of detention and also a right to be heard by the Advisory Board. In the present case, the grounds of detention served upon the detenu do not contain any such recital. It, however, appears that the detenu was furnished a copy of the Constitution on March 25, 1981 at

the Central Jail, Fatehgarh, presumably at his own request, for the purpose of making a representation against the order of detention. The Words "and shall afford" in Article 22(5) have a positive content in matters of personal liberty. The law insists upon the literal performance of a procedural requirements. The needs for observance of procedural safeguards, particularly in cases of deprivation of life and liberty is of prime importance to the body politic. It is, therefore, imperative that the Detaining Authority must "appraise" a detenu of his constitutional right under Article 22(5) to make a representation against the order of detention and his right to be heard before the Advisory Board. The right of the detenu to make a representation under Article 22(5) would be, in many cases, of little avail if the detenu is not informed of this right....."

However, the Supreme Court in that case held-

"The failure to comply with the requirement, however does not have the effect of vitiating the impugned order of detention or render the continued detention of the detenu illegal in this case for the reason that the detenu is an enlightened person and has been in active politics and was, therefore, fully cognisant of his right to make a representation under Article 22(5) of the Constitution u/s 8 of the Act. In fact, the detenu appeared before the Advisory Board and filed a representation against the order of detention and was also personally heard by the Advisory Board."

11. It is, therefore, clear that the Supreme Court has not held that the failure to inform the detenu of his right to make a representation is merely a procedural defect which does not go to the root of the matter. It was because of the facts of that case viz. that the detenu was an enlightened person and was in active politics and further that he had appeared before the Advisory Board and filed a representation that the Supreme Court held that the failure to comply with requirement would not have the effect of vitiating the order of detention. As far as the present case is concerned the petitioner is a National of a foreign country. It is not the case of the respondents that the detenu was aware of his right or that he was an enlightened person having knowledge of the constitutional provisions or his rights under the Constitution. If that was so, he would not have failed to make a representation within a few days after the order of detention was served on him. On the other hand it is only at the time of the filing of the petition he seems to have also made a representation to the Detaining Authority under legal advise. In our opinion, with respect, the view taken by the Full Bench of this Court is no longer good law, having regard to the decision of the Supreme Court in Wasi Uddin Ahmed's case and various other decisions of the Supreme Court which have consistently taken the view that the requirement of the provisions of Article 22(5) must be strictly complied with. It is only when it is demonstrated that the detenu was aware off his right or had in fact exercised his right effectively that the order can be sustained on the ground that no prejudice has been caused to the detenu.

12. We, therefore, held that the order of detention is liable to be set aside on the

ground that the petitioner was not afforded the earliest opportunity of making a representation. In the result, the petition is allowed. The impugned order of detention is set aside, the detenu is directed to be set at liberty forthwith, unless required in some other case.