
(1990) 07 DEL CK 0006

In the Delhi High Court

Case No : Criminal Writ Appeal No. 59 of 1990

Ganesh Saha

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 30-07-1990

Acts Referred:

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

Citation : (1990) 42 DLT 351

Hon'ble Judges : M.K. Chawla, J

Bench : Single Bench

Advocate : J.K. Srivastava, H.S. Phoolka and S. Nandrajog, for the Appellant;

Judgement

M.K. Chawla, J.

(1) In exercise of the powers conferred u/s 3(1) of the Conservation of Foreign Exchange, and Prevention of Smuggling "Activities Act, 1974, (in short, Cofeposa Act) the Joint Secretary , the Government of India, Ministry of Finance, Department of Revenue, vide orders dated 4.10.89, directed the detention of the petitioner with a view to preventing him from smuggling goods. Pursuant to the said order, the petitioner was detained on 7.10.89. The order of declaration u/s 9(1) of the Act was made by the Addl. Secretary to the Government of India on 19.10.89. The said order was confirmed by the Central Government in exercise of the powers u/s 8(f) read with Section 9(2) of the aforesaid Act, for a period of 2 years from the date of detention of the petitioner i.e. from 7.10.89.

(2) By way this writ petition, the petitioner has challenged the order of his detention dated 4.10.89 and that of continued detention dated 19.10.89 on various grounds but at the time of hearing arguments, learned counsel for the petitioner has confined his submissions to only one of them, namely, that the declaring authority issuing the declaration u/s 9(1) of the Cofeposa Act has not informed the detenu that he has a right to make representation against the said

declaration also. The petitioner being an illiterate and uneducated person, was not aware of his constitutional right of making such a representation.

(3) The case of the respondent is that the petitioner even though was not informed of his right to make the representation against the order of declaration, has in fact filed his representation on 23.11.89 for not only quashing the order of his detention u/s 3(1) but also against the orders of his continued detention u/s 9(1) of the Cofeposa Act. The petitioner has thus availed of his right to make the representation against the declaration also.

(4) That may be so, but the fact remains that the petitioner made this representation after a lapse of more than one month and 15 days of his detention. Can this delay be said to be fatal, is the question that requires an answer. The Supreme Court in case reported as Jagpreet Singh v. Union of India & Ors. Crl. A. 23 of 1990, decided on March 23, 1990 quashed the order of declaration on the short ground that there was a delay of about a month and 13 days before the detenu was made aware of his rights under the Constitution to make an effective representation against the order of his declaration. That delay was considered to be unreasonable and inconsistent with the provisions of Article 22(5) of the Constitution of India.

(5) Learned counsel for the respondent tried to distinguish the present case from Jagpreet Singh's case (supra) by alleging that the petitioner submitted his representation much before his case was considered by the Advisory Board and the date of confirmation of his detention. There was no question of making him aware of his right as in fact he did avail of his right to make the representation against the order of declaration.

(6) I am afraid, the distinction sought to be made from Jagpreet Singh's case (supra) is not a valid one. From the representation of the petitioner referred to above, at best it can be said that the petitioner became aware of his constitutional right to make the representation on 23.11.89 i.e. after the delay of one month and 15 days like the one in Jagpreet Singh's case.

(7) This aspect can also be looked into from another angle. Sub- section (3) of Section 3 of the Cofeposa Act lays down :

"FOR the purposes of Article 22(5) of the Constitution, the communication, to a person detained in pursuance" of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention but ordinarily not later than 5 days and in exceptional circumstances for reasons to be recorded in writing, not later than 15 days from the date of detention."

(8) This provision is mandatory in character. It is obligatory on the part of the detaining authority to serve the grounds of detention within 15 days and informing him of his right to make a representation. Any delay beyond the prescribed period has been held to be violative of the constitutional right of the petitioner to make a representation. Even though no period of limitation is

prescribed u/s 9(1) of the Cofeposa Act but it is obligatory on the part of the declaring authority to make the detenu aware of his right to make the representation as soon as it may be possible. It should not be unreasonably delayed as his period of detention is being extended from one year to two years. In my opinion, the rigour of clause (3) of Section 3 will also be applicable to the cases where the order of declaration is sought to be made applicable.

(9) The ground of challenge urged by the petitioner, in my opinion, is otherwise squarely covered by Jagpreet Singh's case (*supra*) and accordingly the order of declaration is liable to be set aside.

(10) Once the declaration u/s 9(1) of the Cofeposa Act dated 19.10.89 is held to be bad, the order of confirmation dated 12.2.90 for a period of 2 years from 7.10.89 ipso facto becomes invalid inasmuch as the continued detention of the petitioner was made consequent upon the order of declaration.

(11) In the result, I accept the petition and make the Rule absolute. The order of detention dated 4.10,89 and that of continued detention dated 19.10.89 of the petitioner is quashed. The petitioner is directed to be set at liberty forthwith if not required to be detained in any other case.