
(1989) 04 DEL CK 0045

In the Delhi High Court

Case No : Criminal Writ Petition No. 506 of 1988

Hyder

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 07-04-1989

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)

Citation : (1989) 39 DLT 159 : (1989) 2 ILR Delhi 369

Hon'ble Judges : P.K. Bahri, J

Bench : Single Bench

Advocate : Rohit Kochhar, S.L. Watel, A.C. Jain and P.R. Ramesh, for the Appellant;

Judgement

P.K. Bahri, J.

(1) In this writ petition filed under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, the petitioner has challenged the detention order dated 11/05/1988, passed u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA Act") and a declaration dated 1/06/1988, passed u/s 9(1) of Cofeposa Act.

(2) 13 grounds have been raised in this writ petition for challenging the impugned orders but Mr. Rohit Kochhar, the learned counsel appearing for the petitioner, confined the challenge only to four grounds and has given up all other grounds.

(3) The first ground raised is that the representation dated 18/07/1988, made by the detenu to the Central Government was not dealt with due promptitude. In the counter-affidavit filed by Shri C. Rajan, Under Secretary, on behalf of the Central Government, it has been mentioned that the said representation was received in Cofeposa Section on 3/08/1988. As the representation was in

Kannada language, a copy of the same was forwarded to the sponsoring authority turn comments and its English translation and the same was received at Bangalore on 8/08/1988 and its English translation was obtained and after obtaining the comments, the same were sent to the Central Government on 12/08/1988 and after they were received on 17/08/1988, in the Central Government and "after due consideration the representation was rejected on 19/08/1988. So, there is no delay made in considering the said representation.

(4) Then there is a reference to representation dated June I, which was received on 9/06/1988, by the Coflposection and was sent to the sponsoring authority for comments, which was received by sponsoring authority on - 13/06/1988 and a? certain allegations had been made in the representation that the petitioner had been maltreated by the concerned officers, the representation was sent to the Additional Collector of Customs on 14/06/1988 and the comments dated 16/06/1988, were received on the next date and the following two days were holidays and the comments and the English translation were sent to the Central Government on 20/06/1988 "and the said representation was put up before the Joint Secretary to the Government of India, who in turn put up before the Minister of State for Revenue and the same was forwarded to the Finance Minister and it came to be considered on 28/06/1988. It is mentioned that the Finance Minister had sought certain clarifications and thus a telex message was issued to the sponsoring authority and the sponsoring authority at Bangalore sent the message to the Additional Collector of Customs.. Mangalore and the comments were received through Special Messenger at Bangalore on 4/07/1988 and were sent to the Central Government where they were received on 11/07/1988 and the representation was rejected by the Finance Minister on 18/07/1988. In between the Minister of State was on tour and only on his return from the tour the matter was put up before the Finance Minister. So, it is evident from the facts given in the affidavit that the representation had been dealt with promptly at all level sand the delay, if any, has been made in considering the representation the same stands well explained. So. I negative this particular ground.

(5) The next ground urged is that an order of bail had been made by the court and the same had not been placed before the declaring authority. Reliance is placed by the learned counsel for the petitioner on Harbhajan Singh v. Union of India 1989(1)DL 118, (1) where it has been laid down that an order granting or refusing bail is a material document which is required to be placed before the declaring authority as well. However, in the present case I have been shown the original record and I find that copy of the bail order had been placed before the declaring authority. So, nothing turns on this ground on merits.

(6) The third ground pleaded by the learned counsel for the petitioner is that in the representation made to the Advisory Board the detenu has prayed that he may be permitted to examine his co-detenus in rebuttal to the allegations made against him but still his request was not acceded to and hence, the impugned

orders stand vitiated as the petitioner has not been afforded reasonable opportunity of substantiating his defense before the Advisory Board.

(7) It is true that in the representation made to the Advisory Board the petitioner had pleaded that his co-detenu may be examined as witnesses, in rebuttal to the allegations made against him. Shri G. Venkataiah, Secretary to the Advisory Board, has filed the affidavit in which it is mentioned that detenu had made a request to the Advisory Board to permit the petitioner to cross-examine the co-detenu in rebuttal of allegations made in the grounds of detention and the Board thought it fit; not to accede to such request of the petitioner. It is, hence, evident that the petitioner had modified his request to the Advisory Board when he was granted personal hearing by requesting that he may be permitted to cross-examine the co-detenu. There is no such right conferred on the detenu that he could cross examine the witnesses on whose statements reliance has been placed by the detaining authority for coming to subjective satisfaction that the detention order should be made against a particular petitioner. The detenu has a right to examine witnesses in defense if he causes the witnesses to be present on the day the personal hearing is granted to the detenu.

(8) The last and the final ground raised by the learned counsel for the petitioner is that the petitioner had in his representation to the detaining authority as well as to the Central Government made a request for supply of certain documents but the request was not complied with and, hence, the petitioner has been deprived of making an effective and purposeful representation against the impugned orders. The petitioner had asked for copies of documents relating to search conducted at various premises of his co-detenu including search conducted at Kudlu, Kasargod (Kerala) on 7/04/1988 and at the Bombay address found in the driving license of the petitioner. The detaining authority in its letter dated 8/08/1988, informed the petitioner that all documents, which are relied upon and stand mentioned in the list at Serial Nos. 1 to 23 annexed with the grounds of detention, have been supplied to the detenu. Along with the order of detention and in respect of the other documents it was pleaded that the request of the petitioner to supply the said documents cannot be acceded to as these documents did not concern the detention of the petitioner. In para 9 of the writ petition, the petitioner has mentioned about the said documents and non-supply of the same by the authorities in spite of the detenu making a demand for the supply of said documents. In paras 16 & 17 of the counter-affidavit filed by Shri Cecil Noronha, Commissioner and Secretary to the Government, State of Karnataka, it has been pleaded that all documents which were relied upon in the grounds of detention have been supplied while the documents, of which copies were asked for by the detenu, were not relied upon and they had nothing to do with the detention order of the petitioner. Hence, it was not incumbent upon the authorities to supply copies of the said documents. It was mentioned that in spite of the search carried out at Kudlu, Kasargod (Kerala) and at the Bombay address found in the driving license of the petitioner, the documents pertaining to the same were not relied upon for the purpose of detention of the petitioner while

other documents were neither relied upon or referred to in the grounds of detention. In the grounds of detention only a passing reference has been made to the search conducted at Kudlu, -Kasargod (Kerala) and at the Bombay address found in the driving license of the petitioner, from where nothing was recovered. So, there is no reference made even byway passing or casually in the grounds of detention to any other documents except to the documents pertaining to the search carried out at the aforesaid premises.

(9) The crucial question which arises for decision in the present case is whether any legal duty was cast on the detaining authority to supply copies of documents pertaining to the said searches conducted at the aforesaid places on demand being made by the detenu inasmuch as there has been made reference to such documents of search in the grounds of detention. As far as law on the subject is concerned, there is conflict of judgments brought to my notice. However, as far as Delhi High Court is concerned, the law has been made clear in *Vinod Kumar Arora @ Vinod Kumar v. Administrator, Union Territory of Delhi & Others* (1984) 1 Delhi 497. (2) In the said case, in the grounds of detention a passing reference had been made to some air-tickets and the detenu had sought supply of copies of said air-tickets. The copies were not supplied. The contention was raised by the authorities before the High Court that the said documents were not relied upon by the detaining authority in the grounds of detention and thus, there is no obligation cast on the respondents to supply copies thereof and that the documents were not relevant and thus, the detaining authority had rightly declined the request of the petitioner for supply of their copies. The Division Bench of this Court while dealing with such a point held that the documents to which a reference is made by the detaining authority although not relied upon yet they ought to supply to the detenu when he makes a specific request for supply of the same so as to enable him to make an effective representation. Reliance was placed for this ratio on the judgment given by Bombay High Court in *Mohd. Hussain Vs. Secretary, Govt. of Maharashtra, Home Department, Mantralaya, Bombay and others*, It was also held that it is for the detenu to decide whether such a document is relevant to his defense or not and the question of relevance was not to be decided by the court. The case of *Mst. L.M.S. Ummu Saleema Vs. Shri B.B. Gujaral and Anr*, was relied upon by the authorities but the same was distinguished. It was held that in case request is made by the detenu seeking copies of documents to which reference has been made, the failure of the detaining authority to supply copies of such documents would amount to infringement of the provisions of Article 22(5) of the Constitution of India. This judgment has been followed by another Division Bench of this Court in Criminal writ Petition No. 357/88, *N. Abdul Rasheed v. Union of India & Others*, decided on February 15, 1989. (5) The learned counsel for the respondents has vehemently argued that the ratio given in *Mst. L.M.S. Ummu Saleema* (supra) has not been properly understood and if the observations made by the Supreme Court in para 5 of the judgment are taken notice of the court could come to the conclusion that the Supreme Court has laid down the law that

there is no duty cast upon the authority to supply copies of documents to which only passing or casual reference has been made in the grounds of detention while narrating the facts if those documents are not relied upon by the detaining authority in making the order of detention. In the aforesaid case the question posed before the Supreme Court was whether all documents to which passing reference has been made in the grounds of detention are liable to be supplied to the detenu or not. Along with the grounds of detention. The point whether such document sought or ought not to be supplied to the detenu on his making a demand for the same was not in issue in the said judgment. The Supreme Court had no occasion thus to pronounce on this particular legal point. It has been, no doubt, held in para 5 of the said judgment that mere non-supply of copies of documents, which are not relied upon by the detaining authority although reference has been made to the same in a casual or passing way in the grounds of detention, does not infringe the fundamental right conferred under Article 22(5) of the Constitution of India. It is quite clear that as a first facet of the safeguards enshrined in Article 22(5) of the Constitution the detenu is to be supplied only the material documents which are relied upon by the detaining authority for making the detention order. The documents to which only passing reference is made in the grounds of detention are not liable to be supplied to the detenu. Along with the grounds of detention if such documents are not relied upon and are not the basis of passing of detention order. The crucial question whether the detenu should or should not be supplied copies of such documents which are not relied upon but to which a casual reference has been made in the grounds of detention on such documents being demanded by the detenu never came up for consideration by the Supreme Court in this case. No other judgment of the Supreme Court has been cited where such a specific question had been considered. The reason why the detenu should be supplied copies of documents on demand to which only casual reference has been made in the grounds of detention is that the detenu has to be afforded a reasonable opportunity of making an effective and purposeful representation against his detention orders. It is for the detenu to make up his mind as to what help he can derive out of the said documents while making an effective or purposeful representation. The court or the detaining authority are not supposed to go into the question as to whether or not such documents could possibly furnish any material to the detenu for making an effective or purposeful representation. A duty lies on the detaining authority to comply with the demand of the detenu in this connection and it is for the detenu to see how he can make out any defense out of such documents in making an effective or purposeful representation against the detention order. It is true that while considering the procedural safeguards enshrined in Article 22 of the Constitution the court must construe the same in proper light and from a pragmatic commonsense point. (See *Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others*, .

(10) The learned counsel for the respondents has vehemently argued that in the present case nothing was recovered from the said places and thus, on the face of

it the search warrants and the panchnamas prepared regarding the searches could not have possibly furnished any sort of defense or material to the detenu for making any effective or purposeful representation. It has been argued that in the case of N. Abdul .Rasheed (supra) certain material was found in the searches carried out and thus, the detenu could utilise the documents of the search for making some defense in his representation but that is not the case here. However, the ratio has been laid down by a Division Bench of this Court that if a copy of the document, which is referred to in the grounds of detention although not relied upon, is demanded by the detenu then it is not for the detaining authority or the court to go into the question further as to whether such a document could furnish any material to the detenu for making a representation and it is for the detenu to decide as to how he can derive any benefit from such a document for making a purposeful representation. So, this ratio is binding on this court while sitting singly. The learned counsel for the respondents has also made reference to a case G. Pichaimahi v. State of Karnataka, Writ Petition Nos. 84 & 85 of 1986, decided on 25/07/1986 (7) by a Division Bench of the Karnataka High Court where the law laid down by this Court in the case of Vinod Kumar Arora(supra) and also by Bombay High Court in the case of Mohd.Hussain (supra) was not agreed upon. I have gone through this judgment and find that Karnataka High Court also, while referring to the different cases of the Supreme Court including the case of Mst. L. M. S. Ummu Saleema (supra), came to the conclusion that there is no judgment of the Supreme Court which deals with the aforesaid point and the High Court proceeded to decide the said point on first principles but still the High Court relied upon the observations made in the case of Mst. L. M. S.Ummu Saleema (supra) for coming to the conclusion that even on demand by the detenu the copies of the documents which are not relied upon but are referred to casually or in a passing way are not to be supplied to the detenu. It is not possible to, hence, countenance the view expressed by the Division Bench of the Karnataka High Court in preference to the law laid down by the two Division Benches of this Court. So, in view of the above discussion, I hold that continued detention of the petitioner stands vitiated on account of non-supply of copies of the documents pertaining to the search of the aforesaid places to which a reference has been made casually in the grounds of detention on demand being made by the detenu which had the effect of depriving the detenu from making an effective and purposeful representation.

(11) I allow the writ petition, make the rule absolute and quash the continued detention of the petitioner and direct that the petitioner be set at liberty forthwith if not required to be detained in any other case. The parties are left to bear their own costs.