

(1989) 05 DEL CK 0044

In the Delhi High Court

Case No : Criminal Writ Petition No. 573 of 1988

K. Mohd Kunhi

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 09-05-1989

Acts Referred:

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

Citation : (1989) 2 Crimes 529 : (1989) 38 DLT 333

Hon'ble Judges : B.N. Kirpal, J

Bench : Single Bench

Advocate : Harjinder Singh, Rohit Kochhar and A.C. Aggarwal, for the Appellant;

Judgement

B.N. Kirpal, J.

(1) The challenge in this petition is to the order of detention dated 7th November, 1988 passed by respondent No.3 under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1972 (hereinafter referred to as the "said Act"), as well as the declaration No. 282 of 1988 issued by the respondents on 5th October, 1988 u/s 9 (1) of the said Act.

(2) Briefly stated, the petitioner was ordered to be detained vide an order dated 7th November, 19⁸⁸ u/s 3(1) of the said Act with a view to preventing him from abetting the smuggling of goods and engaging in transportation of smuggled goods.

(3) The aforesaid order of detention was served on the petitioner long with the grounds on which the said order was made.

(4) On 27th September, 1988 a representation against the order of detention was filed by the petitioner. It is not necessary, for the view that I am taking, to refer to the contentions raised in the representation. On 5th October, 1988 the respondents passed an order u/s 9(1) of the said Act. Reference was made, in this order, to the earlier order passed u/s 3 (1) of the said Act and it was stated

that the Central Government had considered the grounds of detention and the material served on the detenu and also the additional material which was enclosed with the said declaration. It was further stated that the declaration u/s 9(1) of the said Act was being issued as the authority was satisfied that the petitioner was likely to abet the smuggling of goods into and through Customs airport of Delhi which was an area, which was highly vulnerable to smuggling. The petitioner was also served with Malayalam version of the aforesaid declaration. In the said Malayalam version reference was first made to the order having been passed u/s 3 (1) of the said Act and it was stated that the said order had been passed with a view to preventing him from engaging in smuggling goods and dealing in smuggled goods. It was further stated in Malayalam version that the declaration u/s 9 (1) of the said Act was being issued because the authority was satisfied that the petitioner was likely to engage in the smuggling of goods into and through the Customs airport of Delhi.

(5) In the writ petition a number of contentions have been raised challenging the detention order as well as the declaration. It is not necessary to refer to them because of the view that I am taking, namely that there was material discrepancy between the Malayalam version of the declaration which was served on the petitioner when compared with the English version.

(6) The perusal of the declaration made in the English and the Malayalam versions shows that whereas in the English version it is stated that the declaration u/s 9(1) is being issued because the petitioner "is likely to abet smuggling of goods....." in the Malayalam version it is stated that the petitioner "is likely to engage in the smuggling goods. , .". The material difference between the two documents is that whereas in the English versions the allegation is that the petitioner is likely to abet in smuggling, but in the Malayalam version the allegation is that the petitioner is likely to smuggle goods. It will be seen that Section 9 (1) of the said Act deals with three circumstances under which declaration can be issued. These are if a person smuggles or is likely to smuggle goods ; secondly, abets or is likely to abet smuggling of the goods, and thirdly, engages or is likely to engage in transportation or concealing or keeping of smuggled goods. Abetting the smuggling of goods is distinct from smuggling of goods as per Section 9 (1) of the said Act. In the present case, whereas in the English version the reason for passing the declaration is stated to be that the petitioner was likely to abet the smuggling of goods, but in the Malayalam version served on the petitioner the word "abet" is missing. The ground or reason for passing the order as contained in the Malayalam version becomes different from the one which is contained in the order issued in English. This discrepancy clearly is fatal to the case of the respondents as serious prejudice is caused to the petitioner by the supply of a wrong translation of the order which was passed in English.

(7) It is sought to be contended by the learned counsel for the respondents that the petitioner knew English. The respondents have referred in their counter

affidavit, to the statement of the petitioner which was recorded by the Customs officer. In the said statement it is alleged that the petitioner stated that he understood and knew English. It is no doubt true that in the statement such an averment has been made, but it will be seen that this Malayalam statement is not recorded in the hand of the petitioner, but it is admittedly in the handwriting of the Customs Officer. Interestingly enough, at the end of the statement it has been noted as follows :-

The above statement of K. Mohd. Kunhi has been translated in to Malayalam to Shri K. Mohd Kunhi and explained to him by me in Malayalam and accepted by him as truly and correctly recorded".

A similar endorsement is also made by the Customs Officer at the end of the statement of Moideen. If the petitioner knew English, that it would not have been necessary for the Customs Officer to have translated his statement which had recorded in English by the Customs Officer. The mere fact that the statement bears the signature of the petitioner does not indicate that he knew English This is the contention which has been raised by the petitioner in the rejoinder which has been filed in this Court and I am in agreement with the submission made therein.

(8) The aforesaid endorsement which has been made at the end of the statement of the petitioner clearly discloses that the Customs Officer was satisfied that the petitioner did not comprehend or understand English and that is why what had been recorded had to be translated.

(9) Learned counsel for the respondents has, however, relied upon the decision of the Supreme Court in the case of A. Alangarasamy Vs. State of Tamil Nadu and Another, and has sought to contend that merely because there was a discrepancy in the translation would not vitiate the order. In Alangarasamy's case there was a discrepancy in the order of detention passed u/s 3(1) of the said Act. The Tamil version of the order mentioned that the detention order was passed with a view to preventing the petitioner from transporting contraband goods, whereas the English version disclosed that the order was being passed for preventing him from indulging in smuggling activities. The submission made was that the English version would bring the ground u/s 3(I)(i) of the said Act, while the Tamil version would bring the ground under 3 (1) (iii) of the said Act. It was contended that the detenu only knew Tamil and, Therefore, this difference in versions caused serious prejudice to him in making a proper representation. This submission was rejected by the Supreme Court, who observed that the Tamil version had been accompanied with the grounds of detention which were correctly translated. The order of detention accompanied by the grounds, as held by the Supreme Court, clearly spelt out as to why the detenu was being detained and the difference between the two versions was not such as to cause any prejudice to the detenu.

(10) The aforesaid decision in Alangarasamy's case can be of no assistance in

the present Case. The declaration, which is sought to be challenged before me, was not accompanied by the grounds of detention. The declaration was issued by seeing the grounds of detention, the material already supplied, and this is important, additional documents accompanying the declaration. The declaration did not contain additional grounds which, if read together, in Malayalam version may have informed the petitioner that the ground for issuing the order u/s 9(1) of the said Act was abetting smuggling and not smuggling of goods. The Malayalam version was clearly different from the English version and this difference would have seriously prejudiced the right of the petitioner to make a proper representation. I might here note that it is not in dispute that a representation can be made against the declaration u/s 9(1) and if serious prejudice is caused to the petitioner in making such a representation, due to a lapse on the part of the respondents, then the declaration which is issued has to be quashed.

(11) For the aforesaid reasons, the declaration issued u/s 9 (1) of the said Act is hereby quashed.

(12) Ordinarily, the consequence of quashing a declaration u/s 9(1) would not amount to quashing the detention of a detenu u/s 3(1) of the Act, but the consequence of quashing the declaration in the present case must necessarily result in the continued detention being also quashed. The reason is that after an order u/s 3(1) is passed, the detention has to be reviewed by the Advisory Board and confirmed within 3 months. Reference in this respect has to be made by the Central Government within 5 weeks of the date of detention and the opinion of the Advisory Board has to be submitted within 11 weeks from the date of detention. By virtue of declaration issued u/s 9, sub-section (2) reference to the Advisory Board may be made within 4 months and 2 weeks instead of 5 weeks and the opinion of the Advisory Board should be given within 5 months and 3 weeks of detention instead of 11 weeks. In the present case, after the declaration u/s 9 had been made, the opinion of the Advisory Board was received after 5th January, 1989. This was a period of more than 11 weeks after the date of detention. The declaration u/s 9(1) having been quashed, the provisions of Section 8 of the said Act had to be complied with and it was mandatory that the Advisory Board's advice had been received within 11 weeks of the date of detention. This not having been done in the present case the continued detention of the petitioner u/s 3(1) of the said Act has to be quashed.

(13) As a result of the aforesaid discussion, the Rule nisi is made absolute and the respondents are directed to release the petitioner forthwith unless the petitioner is required to be detained in any other case or proceeding.

(14) Rule in is made absolute,