
(1990) 07 DEL CK 0034

In the Delhi High Court

Case No : Criminal Writ Appeal No. 2 of 1990

Kalliyathu Kittapan Chandresekharan

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 11-07-1990

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 281

Hon'ble Judges : Y.K. Sabharwal, J

Bench : Single Bench

Advocate : Rohit Kochhar, Rajiv Nayar and G. Prakash, for the Appellant;

Judgement

Y.K. Sabharwal, J.

(1) The challenge in this petition is to the order of detention dated 6th September, 1989 made by the Government of Kerala in exercise of powers conferred by Section 3(l)(i) and 3(l)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 directing the detention of the petitioner with a view to preventing him from smuggling of gold and engaging in transporting or concealing or keeping smuggled gold. The challenge is also to the validity of the order of Declaration dated 10th October, 1989, which has the effect of extending the period of detention of the petitioner.

(2) The main ground put forth in support of the petition is that the petitioner was not informed about his constitutional rights under Article 22(5) to make a representation against the order of declaration which, learned counsel, submits not only invalidates the declaration order but has also the effect of invalidating the order of detention as the confirmation was made by the order dated 27th February, 1990 i.e. beyond the period three months from the date of the order of detention. In support of the contention Mr. Kochhar, learned counsel for the petitioner, places reliance on a recent decision of Supreme Court in Jagprit Singh

v. Union of India & Ors, Crl.A. 23/1990, decided on 28th March, 1990 and decision of this Court in Crl.W. No. 811/89, Minesh Bhai Nagin Bhai Patel v. Union of India & Ors, decided on 17th May, 1990.

(3) In Jag Prit Singh's case, the order of detention was made on 2nd September, 1988 and the declaration u/s 9 of the Act had been made on 4th October, 1988. After noticing that the detenu had not been made aware, either in the order of declaration or within a reasonable time thereafter, that he had a right to make a representation against the declaration to the appropriate authorities, until he wrote to the declaring authority on 10th November, 1981 seeking clarification as to whether he had a right of representation against the declaration and, if so, to which authority and the clarification was furnished to him on 17th November, 1988, the Supreme Court held that there was a delay of about one month and thirteen days before the detenu was made aware of his rights under the Constitution to make an effective representation. That delay in the opinion of the Supreme Court was quite unreasonable and inconsistent with the provisions of Article 22(5) of the Constitution of India and the detention of the detenu beyond the original period of one year was held to be unjustified.

(4) Learned counsel for the petitioner has contended that in the present case also the petitioner has not been made aware about his right to make representation against the order of declaration either in the order of declaration or at any time thereafter. On this aspect, there is no controversy. However, Mr. Rajiv Nayyar, learned counsel for the respondents, has sought to distinguish the decision in Jag Prit Singh's case and submitted that the Supreme Court has not laid down any inflexible "rule that in every case where the detenu is not informed of such a right it will invalidate the order of declaration. Counsel contends that on facts it is apparent that the detenu was aware of such a right and, Therefore, the fact that he was not intimated about this right either in the order of declaration or thereafter is of no consequence. Counsel places strong reliance on the decision of Supreme Court in Wasiuddin Ahmed Vs. District Magistrate, Aligarh, U.P. and Others, . In the said case, on facts the Supreme Court had held" that the order of detention was not invalid. It was also held that the right of detenu to make a representation under Article 22(5), in many cases, would be of little avail if the detenu is not informed of this right. As the petitioner had been given a copy of the Constitution at his own request, and the petitioner was an enlightened person and in active politics, the Supreme Court held that the petitioner was fully cognizant of- his right to make a representation under Article 22(5) of the Constitution and Section 8 of the Act. It was further noticed by the Supreme Court that the petitioner had appeared before the Advisory Board, and filed a representation against the order of detention and was personally heard by the Advisory Board. On these facts it was held that order of detention was not invalid. Insofar as the present case is concerned, it is not the case of the respondents that the petitioner had made any representation against the order of declaration. It is contended that the petitioner in the present case also was an enlightened person and was fully aware about his right to make a representation

against the order of declaration. Support is sought to be derived from the contents of the representation dated 16th October, 1989 filed by the petitioner against the order of detention wherein he has made a reference to his rights to make a representation against the order of detention under Article 22(5) of the Constitution, and also to the averments made in para 3 of the said representation where he states that he is a goldsmith, to contend that he is aware of his right to make a representation against the order of declaration. I am afraid it is not possible to accept any of the submissions made by Mr. Nayyar. It is not possible for this Court to come to the conclusion that the petitioner was an enlightened person and was aware of his rights under Article 22(5) of the Constitution to make a representation against the order of declaration merely from the fact that he is a Goldsmith. It would also be useful to notice that the petitioner has averred in para 8 of the petition that he is not an educated person as he has only studied up to IVth class and that Malayalam is the petitioner's mother tongue and that is the only language he can read, write and understand. This averment has not been controverted in the counter-affidavit filed on behalf of the State Government. With regard to the reference of Article 25(5) of the Constitution in the representation of the petitioner dated 16th October, 1989 against the order of detention it has to be kept in view that in the order of detention the petitioner was made aware of his right to make a representation against the order of detention. Reference in the order of detention has also been made to Article 22(5) of the Constitution while stating that the grounds were being communicated to him pursuant to the said provision. This explains the reference of Article 22(5) in the representation dated 16th October, 1989. Though it is correct that in Jagpreet Singh's case no inflexible rule was laid down but on the facts of the present case, it is not possible to hold that the petitioner was aware of his right to make a representation against the order of declaration. This Court had the occasion to deal with similar argument in Patel's case referred to above where an argument was pressed on behalf of the Government that the petitioner was aware of his constitutional right because of his having passed S.S.C. examination. In that case also the decision of the Supreme Court in Wasjuddin Ahmed's case was considered and it was held that on the peculiar facts of the case, before the Supreme Court it was held that the detenu was aware of his right to make a representation. In view of the above it cannot be held that the petitioner was aware of his right under Article 22(5) to make a representation against the order of declaration.

(5) As noticed earlier, neither in the order of declaration nor at any time thereafter, the petitioner was made aware that he has a right to make a representation and, on the facts and circumstances of the present case this illegality invalidates the order of declaration. The order of declaration having been held to be invalid, the confirmation order had to be made within a period of three months from the passing of the detention. Admittedly, the confirmation was made beyond a period of three months and thus the order of detention is also liable to be set aside. . "

(6) In view of the foregoing, the rule is made -absolute, the writ petition is allowed and the order of detention as also the order of declaration are set aside. The petitioner be released forthwith in other case.