
(2000) 11 DEL CK 0050
In the Delhi High Court
Case No : Criminal W. No. 203 of 2000

Kapil Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 15-11-2000

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1)
Customs Act, 1962 — Section 132, 135(1)

Citation : (2001) CriLJ 1154 : (2001) 75 ECC 510 : (2001) 2 RCR(Criminal)
599 : (2001) 2 RCR(Criminal) 132

Hon'ble Judges : Usha Mehra, J;K. Ramamoorthy, J

Bench : Division Bench

Advocate : Naveen Malhotra, for the Appellant; Mukta Gupta, for the Respondent

Final Decision : Allowed

Judgement

Usha Mehra, J.—Mr. Naveen Malhotra, Counsel for the petitioner says that though in the writ number of grounds have been raised but he is restricting his arguments to only one ground namely, if the detenu at the hearing of the Advisory Board makes a request in writing seeking permission to examine his witnesses, who are waiting outside, in rebuttal to the grounds raised in the detention order, then can the Advisory Board reject such a request without assigning any reason.

2. According to Mr. Naveen Malhotra, Counsel for the petitioner, a request was made by the petitioner by way of representation dated 27th January, 2000 to the Advisory Board. It was personally handed over to the Advisory Board seeking permission to examine his witness who was standing outside. But the Advisory Board rejected the same vide order dated 5th February, 2000. In order to appreciate the challenge raised by Mr. Naveen Malhotra, lets in brief go through the facts of this case. In brief the case of the respondent was that the petitioner arrived at IGI Airport from Hongkong by Air India Flight No. AI-319. He was

carrying two checked in baggage beside one Hongkong duty-free polythene bag as cabin baggage. He walked through the green channel and was asked by the Customs Officer whether he was carrying any dutiable item or gold or silver to which he replied in negative. However, on being checked by Customs Preventive Officer search was conducted and from the baggage which the petitioner was carrying, mobile phones and mobile phone adapters. The market value of the same was assessed as Rs. 11,31,390/-. The articles were seized and confiscated. Statement of the petitioner was recorded u/s 108 of the Customs Act, 1962. The petitioner was arrested and produced before the Duty Magistrate. Complaint under Sections 132 and 135(1)(a) of the Customs Act, 1962 was filed. Order of detention was passed on 26th November, 1999 u/s 3(1) of the COFEPOSA and the same was served on the petitioner on 27th November, 1999. The petitioner represented against the same on 475th January, 2000. The representation made on 5th January, 2000 to the Lt. Governor, Government of NCT of Delhi was rejected on 12th January, 2000. The petitioner appeared before the Advisory Board Along with his Counsel on 27th January, 2000 and made a representation seeking permission to examine his witness who was standing outside. Another representation reiterating the same was made by the petitioner on 31st January, 2000. He was informed on 5-2-2000 that his representation dated 27th January, 2000 had been rejected by the Advisory Board. The petitioner was also informed on 10th February, 2000 that his representation addressed to the Advisory Board had been considered and rejected by the Lt. Governor. On 14-2-2000 petitioner was informed that Special Secetary-cum-Director General CEIB on behalf of the Central Govt. and rejected his representation. The petitioner was again informed on 16-2-2000 that his detention order had been confirmed for a period of one year from the date of his detention i.e., 27-11-1999.

3. On being served, the Detaining Authority as well as the Union of India a filed their respective counter affidavits. On behalf of the Detaining Authority plea was taken that the detention order was passed on the basis of the material available on record, and that the detention order was in the nature of preventive measure. To the same effect is the plea raised by the Union of India.

4. Admittedly petitioner made representation dated 27th January, 2000 seeking permission from the Advisory Board to examine his witness namely, Ram Kumar Vohra, who was standing outside, in rebuttal to the allegations made in the grounds of detention. It is also a fact on record that the same was not exceeded to by the Advisory Board. Therefore, the question for consideration is whether the Advisory Board could reject petitioner's representation seeking permission to examine his witness, who was waiting outside, without assigning any reason. Similar question came up before the Supreme Court in the case of Surinder Kumar Arora v. Union of India, Criminal Appeal No. 55/86, decided on 14th January, 1986 while deciding that petition the Apex Court observed that "the detenu has a right to examine witnesses to rebut the allegations made against him". While arriving at this conclusion the Apex Court relied upon its earlier judgment in the case of A.K. Roy and Others Vs. Union of India (UOI) and

Others, . From the perusal of the record it is apparent that request to examine the witnesses in rebuttal was made in writing on 27th January, 2000. The same was presented by the detenu to the Advisory Board at the time of hearing. In that representation he gave the name of the witness, who was waiting outside. Why this request was declined for that no reasons have been assigned either by the Advisory Board or the Detaining Authority or the Central Government. Rejection of such a request made by the detenu without any reason amounts to violation of his fundamental right. In the case of *Vijay Kumar v. Union of India*, 1982 (2) SCC 57, the Apex Court while considering the right of a detenu came to the conclusion that when the petitioner makes a specific prayer to permit him to examine his witnesses in rebuttal to the grounds of detention and also indicate that his witnesses standing outside, when such a request is made then the Advisory Board has to give him opportunity. It is only when the petitioner does not choose to make a specific prayer before the Advisory Board that the Advisory Board may not take cognizance of the same. But in the present case, written request was made to the Advisory Board which had been rejected without assigning any reason. This act of denial of his right to adduce his evidence in rebuttal infringed his legal right. It amounted to violation of the fundamental right of the detenu as granted by the Constitution of India. Non-examination of such a witness did cause prejudice to the detenu in presenting his case effectively. To arrive at this conclusion, aid can be taken of the decision of the Supreme Court in the case of *Sharda Devi Khemka Vs. State of U.P. and Ors*, , wherein in similar circumstances Apex Court observed as under :

"Detenu has a right to examine defense witnesses in rebuttal of allegations against him if the witnesses are present and willing. In absence of any statutory prohibition in this regard, this right must be read into the Statue. Any contrary procedural regulation of the Board would be invalid. The Board erred in denying this right to the detenu."

5. To the same effect are the observations of the Division Bench of this Court in the case of *Jatinder Singh Dohan v. Union of India and Ors.*, Criminal Writ No. 618/88 decided on 1st August, 1989, reported in 1988 91 CCC 329 (Supp.), where this Court held that if inspire of detenu's representation the Advisory Board did not examine his witness, the detention order stood vitiated. The same has to be quashed. To the same effect is the observation of this Court in the ease of *Tankeshwar Singh Nimbekar v. Union of India*, Criminal Writ Petition No. 1224/99, decided on 6th July, 2000. Since in this case petitioner had been denied his right to lead rebuttal evidence though witness was waiting outside and was willing to be examined, hence in these circumstances order of detention cannot stand.

6. For the reasons stated above, we allow this" petition by holding that detention order stood vitiated. We further direct the petitioner to be set at liberty forthwith, if not required in any other case. We are not touching any other grounds pleaded by the petitioner on merits.

7. With these observations, the petition stands disposed but with no order as to costs.

8. The order be communicated to the petitioner through the Superintendent, Central Jail, Tihar.