
(1988) 01 DEL CK 0048

In the Delhi High Court

Case No : Criminal Writ Appeal No. 513 of 1987

Kuldeep Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 19-01-1988

Acts Referred:

Citation : (1988) 35 DLT 153

Hon'ble Judges : M. Sharief-ud-din, J

Bench : Single Bench

Advocate : Herjinder Singh, Rohit Kochhar, U.L. Watwani and P.R. Ramesh, for the Appellant;

Judgement

Malik, J.

(1) The petitioner has challenged the validity of the declaration u/s 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 passed on 12th January 1987 by Shri M. L. Wadhawan, Additional Secretary to the Government of India. Before I proceed to examine the grounds of detention I must take notice of certain facts and objections raised by the respondents.

(2) The petitioner in pursuance of a detention order dated 9th of December 1986 passed u/s 3(1)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 by the Government of Karnataka came to be detained. The detention order was passed with a view to preventing the petitioner from engaging in concealing and transporting smuggled goods. This followed an incident dated 14th October 1986 when it is alleged that huge quantity of silver was recovered from a truck Usw 7438 which was owned by the petitioner and was on the date of the incident being plied by the petitioner and one Bhupinder Singh was the conductor. After his arrest the petitioner, it seems, preferred bail application before the Magistrate which was rejected. This was followed by rejection of another application, for bail made to the Sessions Court.

The petitioner thereafter moved another bail application on 2nd of December, 1986 before the High Court of Karnataka. which was allowed on 10th of December, 1986 and the petitioner was directed to be released on bail. The admitted case of the parties as per the pleadings of the petitioner as also the respondents is that neither the application for bail moved before the High Court of Karnataka nor the order of bail passed by the High Court of Karnataka was placed before the authority making declaration u/s 9 of the Cofeposa Act at the time when the declaration was made on 12th January, 1987. Whereas the case of respondents -No. 1 and 3 as is evidenced by their counter affidavit is that the declaration is only to prolong the period of detention and the prognosis as to whether the detenu will indulge in his prejudicial activities if he is not detained is one based on the facts and circumstances as it existed on the date of detention. It has, however, not been denied by respondents No. 1 and 3 that the decision to issue a declaration u/s 9(1) of the Cofeposa Act is not an independent decision. Similarly, the stand taken by the Government of Karnataka in the counter affidavit is that this material referred to in ground No. 2 is not vital material and hence non-placing the same before the declaring authority would in no way vitiate the detention order. This is so far the factual position as it subsists at this point of time is concerned.

(3) Mr. Watwani, however, contends that this petition is not maintainable as the petitioner had earlier moved a Criminal Writ No. 56 of 1987 decided by Mr. M. K. Chawla, J. on 1st of June 1987 in which apart from other grounds challenge to section 9(1) declaration was also thrown by the petitioner. In this regard Mr. Watwani has taken ins through the contentions raised in that petition. In the present petition section 9 declaration is being challenged on the ground that the most relevant and important material which could have affected the mind of the authority making declaration either of the ways was withheld from the declaring authority whereas in the earlier petition the challenge was thrown to section 9 declaration on the ground of non-application of mind by the declaring authority. In any case, it seems, that this point was not argued nor did the court record any finding about it. Mr. Herjinder Singh has taken me through the judgment of Mr. M. K. Chawla, J. in which it is clear that the writ petition was dismissed mainly after dealing with the three-fold contentions. In that writ petition, the first contention that has been dealt with by the court is that the statements recorded u/s 108 of the Customs Act could not have been made the basis for the detention. The second contention in that writ petition raised was that the representation of the detenu was not dealt with in accordance with the law and the third contention was that the detention should not have been based on a solitary incident. The court, it seems, dealt with all the three contentions and repelled the arguments of the petitioner. Mr. Herjinder Singh, Therefore, relying on Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others, contends that the doctrine of constructive res judicata is only confined to civil actions and civil proceedings and this principle/policy is entirely inapplicable to illegal detentions and does not bar a subsequent petition for a writ of habeas corpus on

fresh grounds which were not taken up in the earlier petition. In that view of the matter I do not find much of merit in the contention that the present petition is not maintainable. The state of law, as it is, sufficiently is in favor of the petitioner and the present petition is maintainable.

(4) Now advertent to the main contention of Mr. Herjinder Singh I must at once state that there is sufficient force in the argument that had not the State of Karnataka withheld the most relevant material before the authority making declaration u/s 9(1) one does not know in what way he would have reacted to the request for passing a declaration u/s 9(1). As already stated, the position is that the High Court order in particular, granting bail to the petitioner, was not placed before the authority making declaration and had this order been placed before the authority making declaration and had the authority concerned applied its mind to the observations of the High Court, it is possible that it might have refrained from making the declaration. When I say so I presume that the authority vested with power to make declaration u/s 9(1) is a competent reasonable authority and before passing a declaration u/s 9(1) it would take into account the consequences thereof. It cannot be said much less argued that the authority making declaration is to function as a rubber stamp and need not apply his mind independently to the facts of each case. In fact, the position at law is that the authority making declaration u/s 9(1) has to function independently and has to apply his mind to the material and then if satisfied pass declaration u/s 9(1) of the Act. There is a very strong and powerful reason for this course of action as the declaration u/s 9(1) of the Cofeposa Act does lead to certain consequences which are in the first place the period of making reference to the Advisory Board, and the period of detention etc. stand extended. That by itself is a very strong reason in support of the fact that the authority making declaration has to apply his mind to the material. In other words, if the relevant material which would have affected the mind of the authority concerned is withheld deliberately or inadvertently from the authority making declaration stands vitiated.

(5) In the order allowing bail to the petitioner the High Court of Karnataka had observed as under :

" THE. contention that the petitioners are involved in so many smuggling activities is too vague to be accepted. No other incident of their involvement is stated or pointed out. The apprehension of the Superintendent Customs that the petitioners are likely to jump bail can be met if the movements of the petitioners are restricted to stay at Mangalore."

The High Court further granted bail on the condition that the petitioner shall stay at Mangalore and give their attendance in the office of the Superintendent of Customs (special preventive) Mangalore twice a week, that is, on Monday and Thursday between 2 p.m. and 5 p.m. They shall also furnish Mangalore address before they are released by the court below on bail and also furnish the same to the Superintendent of Customs.

(6) Now considering the quality of the order passed by the High Court, it is sufficiently clear that the High Court had placed sufficient restrictions on the movement of the petitioner and in the circumstances, there was no scope for the petitioner to indulge in any other prejudicial activities. The High Court had further disbelieved the ipse dixit of the concerned authority that " the petitioner was a chronic or habitual smuggler. In the circumstances of this case, Therefore, it is obvious that the declaration passed u/s 9(1) is punitive in nature and virtually has imposed a punishment on the petitioner. Had the judgment of the Karnataka High Court been placed before the declaring authority it would have been in all likelihood on proper application of mind prevented the authority to pass the declaration. As in my view the declaration passed u/s 9(1) of the Cofeposa Act is on the facts and circumstances of this case sufficiently vitiated and invalidated, the petition is allowed and the declaration u/s 9(1) is quashed. The continued detention of the petitioner shall also stand quashed. He shall be released forthwith unless required in some other case.