

(1997) 10 DEL CK 0044

In the Delhi High Court

Case No : Criminal Miscellaneous Appeal No's. 293 and 3312 of 1997

Li Galina

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-10-1997

Acts Referred:

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

Government of India (Transaction of Business) Rules, 1961 — Rule 3

Citation : (1997) 6 AD 717 : (1997) 70 DLT 464 : (1997) 43 DRJ 522 : (1998) 1 RCR(Criminal) 274

Hon'ble Judges : Y.K. Sabharwal, J;A.K. Srivastava, J

Bench : Division Bench

Advocate : Harjinder Singh, H.S.Bhullar, Sarabjeet Sharma, B.S. Saini, S.K. Agarwal and L.R. Luthra, for the Appellant;

Judgement

Y.K. Sabharwal, J.

(1) This petition has been filed by three petitioners, namely, Ms. Li Galina, Ms. Sakirova Elmira and Ms. Ismailova Gulbahar challenging their preventive detention under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short 'the Act'). Briefly, the facts are these:

(2) The Lt.Governor of the National Capital Territory of Delhi, in exercise of the powers conferred by Section 3(1) of the Act, in terms of the order of detention dated 8th November, 1996 directed the detention of the petitioners with a view to prevent them from smuggling goods. The facts and material on the basis of which the detention order was made have been noticed in detail in the grounds on which the detention order has been made and for the present purposes, it is not necessary to notice the said facts. Suffice it to say that on the basis of the material placed on record the Lt.Governor arrived at a subjective satisfaction that the petitioners have the inclination and propensity for indulging in smuggling

activities in an organized and clandestine manner and unless prevented they are likely to indulge in the smuggling activities in future. After noticing that the prosecution proceedings under the Customs Act, 1962 have been initiated against them and adjudication proceedings are likely to be initiated and they are still in judicial custody and their passports are with the Customs Department, on facts, the Lt.Governor has come to the conclusion that they are likely to travel abroad clandestinely for the purpose of smuggling and, Therefore, the Lt.Governor, on being satisfied that it is necessary to detain them under the provisions of the Act with a view to preventing them from smuggling goods in future, has made the detention order in respect of each of the petitioners. In respect of each of the petitioners, a Declaration u/s 9(1) of the Act has also been made on 11th December, 1996 by the Additional Secretary to the Government of India. The order of detention and declaration u/s 9(1) are being challenged by the petitioners.

(3) It has come to light that petitioners No. 1 Ms. Li Galina after the expiry of parole period has not surrendered and is absconding. Mr. Herjinder Singh states that he has no instructions from Ms.Li Galina. In this view, the petition insofar as it concerns Li Galina is dismissed.

(4) Reverting now to the challenge urged on behalf of petitioners 2 and 3, Mr.Singh submits that their representation dated 10th January, 1997 handed over to the State Advisory Board has not been decided by the appropriate person on behalf of the Central Government. The said representation is Annexure-H. That representation prays that the detention order u/s 3(1) and continued detention u/s 9(1) of the Act be revoked. The opinion of the Advisory Board was communicated to the petitioners in terms of letter of Dy. Secretary (Home) of Government of Nct of Delhi dated 7th February, 1997 stating that in the opinion of the Advisory Board there is sufficient cause for their continued detention. Mr.Herjinder Singh, however, vehemently contends that the representation addressed to the Advisory Board was also required to be considered in accordance with the law by the Central Government. In support, reliance was placed by learned counsel on decision of the Supreme Court in Smt. Gracy Vs. State of Kerala and another, holding that the representation addressed to the Advisory Board is also required to be considered by the Central Government. Failure to consider the representation, would be violative of constitutional right of detenu to make an effective representation under Article 22(5) of the Constitution of India. In this case, we, however, find that the representation has been considered by the Central Government and by communication dated 20th February, 1997 sent by Under Secretary to the Government of India to the petitioners, they were informed that the representation has been carefully considered by the Secretary (COFEPOSA) on behalf of the Central Government and the same has been rejected.

(5) The contention urged on behalf of the petitioners is that the Joint Secretary to the Government of India is not empowered to decide representations on

behalf of the Central Government. On behalf of the Central Government Mr.Bhupinder Singh has relied upon an Office Order dated 26th April, 1991 issued under Rule 3 of the Government of India (Transaction of Business) Rules, 1961 to contend that the Joint Secretary in the Ministry of Finance has been delegated power to decide the representation on behalf of the Central Government. The said office order is Annexure-II to the affidavit of Mr.N.K.Singh, Secretary (Revenue). Ministry of Finance dated 16th October, 1997. The Office Order dated 25th July, 1996 has also been annexed to the said affidavit of Mr.N.K.Singh. According to 1996 Office Order, as per the delegation of power by the Finance Ministry, the power concerning representations addressed to the Government of India, has been delegated to Secretary (Revenue). According to Mr.Singh the Joint Secretary was empowered to consider the representations in exercise of powers delegated by the Finance Ministry in terms of the Office Order dated 26th April, 1991. A Division Bench of this Court in D.Rana. @ Dharmesh Prill @ Dharmesh Rana Vs. Union of India & Others Criminal Writ Petition No. 17 of 1997 dated 15th September, 1997 has held that 1991 Notification stands superseded. In view of 1996 Notification the Bench has held that "Having considered the matter we are clearly of the opinion that 1996 Notification makes no room of doubt that 1991 Notification stands superseded, if not earlier to which we are not considering herein". The Bench has further held that the disposal of representation by the Joint Secretary, was without jurisdiction and as representation of the petitioners has not been decided by the authority empowered, the continued detention of the petitioners is illegal. After the said decision was cited before us, we granted to the Government various opportunities to place on record further material, if it is so advised, to show how Joint Secretary could decide representation on behalf of the Central Government after 1996 Office Order. Apart from filing of the Affidavit of Mr.N.K.Singh, as noticed above, and filing therewith Notifications dealt with above, the Government has not been able to place on record to show how the Office Order of 1991 would still continue after the issue of Office Order dated 25th July, 1996.

(6) The representation dated 10th January, 1997 having admittedly considered only by the Joint Secretary, we are constrained to hold that the valuable right of the petitioners 2 and 3 to make an effective representation stands violated and, Therefore, their continued detention cannot be sustained. In this view, we make the Rule absolute and direct the respondents to release petitioners 2 and 3 forthwith, if not required, in any other case. The parties are left to bear their own costs.