
(1987) 12 BOM CK 0028

In the Bombay High Court

Case No : Criminal Writ Petition No. 63 of 1987

Moideen Baba Abdul Shefi

APPELLANT

Vs

D.N. Capoor and Others

RESPONDENT

Date of Decision : 16-12-1987

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 11, 3
Constitution of India, 1950 — Article 22(5)
General Clauses Act, 1897 — Section 21
National Security Act, 1980 — Section 8

Citation : (1988) 3 BomCR 323

Hon'ble Judges : M.M. Qazi, J;A.A. Desai, J

Bench : Division Bench

Advocate : Maqsood Khan, for the Appellant; Habibudin Ahmed, for the Respondent

Final Decision : Dismissed

Judgement

A.A. Desai, J.—The petitioner came to be detained by the impugned order dated 29th December, 1986, which purported to have been passed in exercise of power under sub-section (1) of section of section 3 of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the Act of 1974). It was communicated to the petitioner detainee in the grounds of detention that he has a right to make representation to the State Government and such representation be addressed to the Detaining Authority. Beside this, it was also informed that the detainee can make representations to the Advisory Board, as well to the Government of India.

2. Shri Maqsood Khan, the learned Counsel appearing for the petitioner detainee, urged that the detainee is entitled to make representation against the order of detention to the Detaining Authority. The Detaining Authority, however, omitted to inform accordingly. As such, according to Mr. Khan, the detainee has lost the valuable right to make representation to the Detaining Authority. Mr. Khan,

further urged that the order of detention and its continuation have, therefore, been vitiated. In support Mr. Maqsood Khan invited our attention to decision dated 23rd/24th July, 1987 of the Division Bench of this Court in Criminal Writ Petition No. 356 of 1987 *Sushila Mafatlal Shah v. Union of India and others*, and supplied copy of the judgement.

3. The Division Bench, in para 16 considered the decision in case of *Santosh Anand v. Union of India*, (1981) 2 SCC 420 . The Supreme Court has held that under Article 22(5) of the Constitution of India as also u/s 11 of the Act of 1974, it is clear that representation should be considered by the Detaining Authority and on rejection it is open for the detainee to approach to the State Government.

The Division Bench then in para 7 considered another decision in case of *Smt. Pushpa Vs. Union of India (UOI) and Others*, . The Supreme Court has observed that it would be open to the detainee to make representation u/s 11 either to the State or Central Government to revoke the order of detention. But the initial representation that a detainee has a right to make on receipt of the grounds of detention would ordinarily be addressed to the Detaining Authority because it is that authority which has taken a decision adverse to the detainee and is to be persuaded to reconsider the same.

The Division Bench has observed in para 18 of their judgment that Article 22(5) of the Constitution does not specifically lay down that the initial representation should be made by the detainee to the Detaining Authority. However, reading section 21 of the General Clauses Act, and Article 22(5), it can be stated that Article 22(5) of the Constitution by implication lays down that the representation should be made by the detainee to the Detaining Authority. The Division Bench further observed in para 21 that the detainee had a right to make representation initially to the Detaining Authority.

4. We have perused the authorities relied upon by the Division Bench with due precaution. However, according to us, it does not follow therefrom that the width of a right of a detainee to make representation to the Detaining Authority comprehends further entitlement to know from the Authority of such right.

5. Mr. Maqsood Khan then pressed into service the ruling laid down in case of *Wasiuddin Ahmed Vs. District Magistrate, Aligarh, U.P. and Others*, . The Supreme Court while Considering a case of detention under National Security Act, 1980 (hereinafter referred to as the Act of 1980) has observed that, : " It is expected of a Detaining Authority while serving an order of detention, as a rule to mention in the grounds of detention, that the detainee has a right to make a representation against the order of detention and also a right to be heard by the Advisory Board". The Supreme Court further observed that it is, therefore, imperative that the Detaining Authority must "apprise" a detainee of his constitutional right under Article 22(5) to make a representation against the order of detention and of his right to be heard before the Advisory Board. The failure to comply with this requirement, however, does not have the effect of

vitiating the impugned order of detention or render the continued detention of the detainee illegal in this case for the reason that the detainee is an enlightened person.

6. Mr. Khan after repeated questioning by us ultimately disclosed that the detainee on 21st April, 1987 made a representation to the State and Central Government and also to the Advisory Board. The petitioner, i.e. the detainee in the petition, though it was necessary and relevant has not disclosed regarding his making of representation to these functionaries. Moreover, there is no explanation from the Counsel for omitting to aver this fact in the petition. The petition, as a normal rule deserves to be rejected for suppression of this material and relevant fact, summarily. As the matter was concerned with personal liberty, we proposed to indulge. Mr. Khan, however, ultimately placed before us copy of the said representation.

On going through the representation, what is revealed to us is that the detainee is a English knowing man. He was serving in foreign country for about four years before his detention. According to him, he brought gold to India worth Rs. 1,33,605/- in the local market for the ornaments of his marriageable sister. He did not indulge in smuggling activities and was not connected with any smuggling group. He purchased the gold out of his four year's savings at Saudi Arabia. He was released on bail on 30th June, 1986 by furnishing a Cash Security of Rs. 60,000/-.

It thus reveals that the detainee is an enlightened person and man with a considerable fortune. He says in his representation that our system of criminal jurisprudence is reformatory in character and not retributive. He further stated that the COFEPOSA and National Security Act are meant for smugglers, against their group, professional and hardened criminals and not for the individuals like me. This makes amply clear that the detainee is a person with a wide knowledge and well conversant with the legal system. He in the petition or representation did not plead ignorance of law prohibiting to carry the gold to India. The detainee is a citizen of this country. He cannot, according to us, honourably claim innocence about the law of the land, particularly those relating to detention and right he claim thereunder. As such non communication complained of has not virtually circumvented or prevented the petitioner from making representation to the Detaining Authority.

7. Mr. Khan further made a submission that want of communication has misguided the petitioner and, therefore, he could not avail the right to make a representation to the Detaining Authority. We find the submission devoid of substance. We have perused the representation dated 21st April, 1987 made by the detainee. The detainee has made a common representation to the Government of Maharashtra (Home Department) and also to the Advisory Board and Government of India. As per counter affidavit, the State Government duly considered the representation and rejected it. The detainee appeared before the Advisory Board and was also interviewed. It is pertinent to note that it was

specifically informed to the detenu that such representation to the State Government should be addressed to the undersigned Detaining Authority. However, the detenu has not guided himself as per the advice tendered by the Detaining Authority. The detenu instead addressed the representation to the Government of Maharashtra (Home Department). It is, therefore, clear that the detenu has permitted himself to be guided by the legal knowledge which he possessed or acquired. He did not depend solely on the advice tendered by the Detaining Authority. As such the submission that the detenu was misguided for want of communication is factually erroneous. As held by the Supreme Court in case of Wasi Uddin Ahmed cited supra the non-communication cannot always result in vitiating the order of detention. In the instant case before us the detenu being a knowledgeable person and who is well conversant with the worldly as well as legal affairs can not be said to have been deprived of his right for want of such communication.

The Supreme Court in case of Wasi Uddin cited supra relied upon by the learned Counsel examined the scheme of Act of 1980 which provides for constitution and reference to the Advisory Board. The Board is authorised to examine sufficiency of cause of continued detention of a detenu. Section 11 specifically provides for representation by the detenu and to be heard by the Board. The Detaining Authority as a rule, therefore, considered to be under obligation to inform the detenu of said statutory right. In the case before us, the detenu has been informed regarding the representation to be made to the Advisory Board. However, the Act of 1974 does not specifically or expressly provide for a representation to be made to the Detaining Authority. Such representation, which can at the most be said to be by implication with the said section 21 of the General Clauses Act, as observed by our Division Bench. As such the Detaining Authority does not owe any duty to inform the detenu to make such representation. In our opinion, therefore, ratio laid down in case of Wasi Uddin does not advance the ground as raised by Mr. Khan.

8. In case of Raj Kishore Prasad Vs. State of Bihar and Others, , the Supreme Court considering the scheme of the Act of 1980 has held that when the Parliament permitted the Central or State Government to permit exercise of power by their officers and thought it prudent to provide that even if the powers are exercised by such officers, the detenu has an opportunity to make representation to the Central or State Government as the case may be so that the functionary on whom Parliament chose to confer the power must apply its mind to the representation of the detenu. The Supreme Court has held that section 8 of the National Security Act which is a statutory recognition of the right provided by Article 22(5) of the Constitution of India, has made a statutory departure and provided for making representation to the appropriate Government. The Supreme Court repelling the contention that constitutionally speaking, a duty is cast on the Detaining Authority to consider a representation, approved the scheme laid down u/s 8 of the Act of 1980.

The Supreme Court considered the case of Santosh Anand v. Union of India, (1981) 2 SCC 420 relied upon by the Division Bench and recorded in para 7 :-

"However, in view of the specific provisions contained in section 8 which requires that the Detaining Authority shall afford earliest opportunity to make representation, not to the Detaining Authority, but to the appropriate Government, it follows as corollary that appropriate Government must consider it."

It follows from the ratio laid down in Rajkishore's case, as per the Legislative intention as made explicit u/s 8 of the Act of 1980, the Detaining Authority is not obliged to invite the representation from the detainee.

9. The Scheme u/s 11 of the Act of 1974 appears to be similar to that laid down in section 8 of the Act of 1980. No doubt section 11 expressly made to operate without prejudice to section 21 of the General Clauses Act. However, according to us, that does not make any material difference. Section 11 thus does not prevent the Detaining Authority, being the originator of an action, to revoke or modify the order of detention, if so necessary. However, the Legislative Policy which is codified in section 8 of the Act of 1980 as approved by the Supreme Court in Rajkishore's case, similarly u/s 11 of the Act of 1974, caste duty on the Appropriate Government to revoke or modify the order of detention even it is passed by the Officer, specially authorised. The Detaining Authority is therefore, not obliged to invite a representation from a detainee. The detainee as such cannot claim a right to know about making of representation in from the Detaining Authority.

According to us, the common complained of does not violate guarantee under Article 22(5) of the Constitution.

10. Mr. Khan then made a submission that he was arrested on 21st June, 1986 for smuggling the gold. However, the impugned order of detention has been passed on 29th December, 1986. As such, according to Mr. Khan, there was inordinate delay of six months. Mr. Khan submitted the livelink between the activities of smuggling and order of detention which aims to prevent the detainee from indulging therein did not subsist.

11. Mr. Khan, therefore, submitted that inordinate and unexplained delay of six months has, therefore, rendered the order of detention illegal and void. Mr. Khan placed reliance on judgement dated 9th June, 1987 in Criminal Writ Petition No. 9 of 1987, wherein the Division Bench held the explanation for the delay occasioned in passing the order of detention is not reasonable and satisfactory and hence vitiated the order.

The respondent Government in their counter-affidavit denied the allegations of delay. According to the Government, there is sufficient jurisdiction for passing the order of detention after six months. It is averred that the petitioner was arrested on 21st June, 1986 and seizure and Government the investigation in the

matter was then in progress. The petitioner's subsequent statement was recorded on 4th of August, 1986. The matter was referred to the Screening Committee. The Screening Committee held its meeting on 11th November, 1986. The Assistant Collector, Customs, thereafter submitted the proposal alongwith others on 4th of December, 1986. The Detaining Authority after considering the proposals and relevant documents attached therewith, passed the impugned order on 29th December, 1986. It is apparent that the investigation and scrutiny by the Screening Committee consumed sufficient time of the Department. According to us, after taking into account the various stages and administrative exigencies and procedural niceties as averred in the counter affidavit, we are of the opinion that the respondent Government has satisfactorily explained the delay. Explanation appears to be reasonable. As such, we do not accept the submission that the delay caused in passing the order of detention is unexplained. The ground as put forth, therefore, must fail.

12. Mr. Khan lastly contended before us that there was also delay between the order of detention and its execution. According to Mr. Khan the order of detention dated 29th December, 1986 came to be served on the detainee on 29th March, 1987. As such, there is a delay of 81 days. Mr. Khan, therefore, submitted that this delay renders the detention order invalid. He placed reliance on decision dated 14th January, 1987 in Criminal Writ Petition No. 869 of 1986. We have perused the judgement. The view taken by the Division Bench is on the facts involved therein. It, therefore, does not render support to the submission of Mr. Khan. We have perused the counter affidavit of the Government. It is stated that the petitioner was released on bail on 30th of June, 1986 by the Criminal Court. The remand of the case was posted on 5th of February, 1987. However, the petitioner did not attend the Court of the Chief Metropolitan Magistrate. It is further stated that the complaint against the petitioner was filed on 18th March, 1987. The petitioner attended the Court on 19th February, 1987 and was apprehended and served with the order of detention. The detainee before us, beside the proceedings of detention was also subjected to the prosecution which was pending in the Court of Chief Metropolitan Magistrate, Bombay. He was released on bail. The detainee did not a resident of Bombay. It is quite natural for the Detaining Authority to serve him with the order of detention when he presents himself on the date of the proceedings where his presence was assured. As the detainee did not appeal on the 5th of February, 1987, the Detaining Authority served him on the next date, i.e. 19th of March, 1987. Mr. Khan tried to argue that the detainee was present in the Court on 5th February, 1987. However, we could not be pointed out any such averment in the petition. As such, we do not feel that the authorities acted negligently or there was no seriousness in detaining the petitioner. Furthermore, it cannot be said, as argued before us that the subjective satisfaction recorded by the Detaining Authority was not based on the genuine consideration.

Mr. Maqsood Khan submitted that the petitioner attended the Court of Chief Metropolitan Magistrate on 19th February, 1987. However, the Detaining

Authority has not served him with the order of detention. According to Mr. Khan, this fact has not been controverted or denied by the Detaining Authority in their affidavit. According to the affidavit filed by the respondent that after remand on 5th of February, 1987, the next date was only 19th March, 1987, when the detainee was served with the order of detention. We have no reason to doubt the statement of the authorities made on oath. Mr. Khan tried to seek time to file additional affidavit regarding posting of Case on 19th February, 1987 and appearance of detainee on that date. However, we are not inclined, as sufficient time was already granted and hearing was postponed from 7.12 to 8.12 and then to 14.12 and thereafter to 16-12-1987. this ground is without any force.

13. In the result, the petition is without any substance and we dismiss the same.