

(2001) 06 DEL CK 0020

In the Delhi High Court

Case No : Criminal Writ No. 338 of 2001

Mr. Gaurav Raswant

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 01-06-2001

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 3(3)
Constitution of India, 1950 — Article 22, 22(5)

Citation : (2001) 93 DLT 3 : (2001) 59 DRJ 586

Hon'ble Judges : Dr. Arijit Pasayat, C.J.; D.K. Jain, J

Bench : Division Bench

Advocate : Mr. Naveen Malhotra, Adv Ms. Mukta Gupta, for the Appellant;

Judgement

Arijit Pasayat, C.J.—Order of detention passed by the Joint Secretary to the Government of India u/s 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (in short "the Act") pursuant to which the petitioner Gaurav Raswant (hereinafter referred to as "detenu") is detained in the Central Jail, Tihar, New Delhi, is assailed in this habeas corpus petition.

2. Detention of the detenu was considered necessary by the Detaining Authority with a view to prevent him from smuggling goods in future. The grounds of detention dated 1.12.2000 were supplied to the detenu in both English and Hindi language. The detenu was made aware of his right to make representation against the detention to the Detaining Authority, Central Government as well as the Advisory Board. It was indicated that the representation meant for the Detaining Authority was to be addressed to the Joint Secretary, (COFEPOSA), Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau; the representation meant for the Central Government was to be addressed to the Secretary, Ministry of Finance, Department of Revenue, and the representation meant for the Advisory Board to be addressed to the Chairman,

Advisory Board (COFEPOSA), Delhi High Court. The grounds were communicated for the purpose of clause (5) of Article 22 of the Constitution of India, 1950 (in short, "the Constitution") and Section 3(3) of the Act. The detenu made representations to the Detaining Authority, the Central Government and the Advisory Board, but the prayer for revoking the detention did not find acceptance.

3. Three grounds have urged in support of the petitioner. It is submitted that the petitioner had sent a second representation after rejection of the first representation, but the respondents did not take any step(s) to constitute a fresh Advisory Board for consideration of the same. This according to the petitioner vitiated the detention. Strong reliance is placed on a decision of the Apex Court in *Makhan Lal Gokul Chand v. The Administrator, Union Territory of Delhi & Anr.* 2000 (67) ECC 425.

Secondly, it is submitted that when the order of detention was passed, no bail application was pending and the detenu was in jail. On the likelihood of filing of a bail application, the detention order could not have been passed. Reliance is placed on a decision of the Apex court in *Amritlal & Ors. V. Union Government through Secretary, Ministry of Finance & Ors.* JT 2000 Supp 3 SC 178.

Thirdly, it is submitted that the Lieutenant Governor did not apply his mind and merely approved orders passed by his subordinates. Reliance is placed on a decision of this Court in Criminal Writ Petition No. 1035 of 2000 disposed of on 14.05.2001 in the matter of *Lundup Tamang v. Union of India & Ors.*

4. Learned counsel for the respondent on the other hand, submitted that the factual position in the present case is entirely different and in fact none of the decisions, on which reliance has been placed by the petitioner, support his pleas and hence has no application to the facts of the case. It is submitted that the second representation did not contain anything new except the vague assertions, Therefore, there was no need for placing this representation before the Advisory Board. It is submitted that the order of detention was not passed merely because of the likelihood of filing of bail application, but in the context that in such cases, bail is normally granted. It is further submitted that the factual background involved in the present case stands on an entirely different footing from *Lundup Tamang's* case (*supra*) as decided by this court. Records were produced to show that the order was not merely approved, but order of detention was directed by the Lieutenant Governor himself.

5. Article 22 of the Constitution confers four fundamental rights on every person, except in two cases mention in clause (3), as essential requirements and safeguards to be followed when it is necessary to deprive any person, for any cause whatsoever and for, however brief a period, of high personal liberty by placing him under arrest or keeping him in detention. Those are : (i) to be informed, as soon as may be, of the grounds of such arrest; (ii) not to be denied the right to consult and to be defended by a legal practitioner of his choice; (iii) to be produced before the nearest Magistrate within a period of 24 hours of such

arrest excluding the time necessary for journey from the place of arrest to the court of the Magistrate and (iv) not to be detained in custody beyond the said period of 24 hours without authority of a Magistrate. Clauses (1) and (2) contain the guarantee of the four fundamental rights enumerated above. Clause (3) contains two exceptions and provides that the constitutional guarantees do not apply to (a) enemy aliens and (b) persons arrested or detained under any law providing for preventive detention. Clause (4) to (7) are devoted to laying down certain fundamental principles as to preventive detention and guaranteeing certain fundamental rights to persons who are arrested under any law for preventive detention. The fundamental rights guaranteed by Clauses (4) to (7) to persons detained under any law for preventive detention relate to the maximum period of detention, the provisions for the Advisory Board to consider any report on the sufficiency of the cause for detention in certain cases, the right to be informed of the grounds of detention and the right to have the earliest opportunity of making a representation against the order of detention. Preventive detention is an anticipatory measure and does not relate to an offence while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the Executive is convinced that such detention is necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects, which are specified by the law. The action of Executive in detaining a person being only precautionary, the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of conduct, the failure to conform therewith should lead to detention. The satisfaction of the detaining authority, Therefore, is a purely subjective affair. The detaining authority may act on any material and on any information, which may merely afford basis for a sufficiently strong suspicion to take action but may not satisfy the test of legal proof on which alone a conviction for offence will be tenable. It is the Constitutional right of the detenu to get all the grounds on which the order has been made. As has been said by Benjamin Cordozo, "A Constitution states or ought to state not rules for the passing hour, but the principles for an expanding future". The concept of grounds used in the context of detention in Article 22(5) has to receive an interpretation, which will keep it meaningfully in tune with contemporary notions of the realities of the society and the purpose of the Act in the light of concepts of liberty and fundamental freedoms. While the expression "grounds" for that matter includes not only conclusion of fact but also all the "basic facts" on which those conclusions were founded, they are different from subsidiary or further particulars or the basic facts. The detenu is entitled to obtain particulars of the grounds, which will enable him to make an effective representation against the order of detention.

6. Coming to the facts of the case, it is to be noted that the background in *Makhan Lal Gokul Chand* (supra) did not lay down principle of universal application that whenever a second representation is filed, a fresh Advisory

Board has to be constituted. On the contrary, in paragraph 5 of the judgment with reference to the factual background of the case for consideration before it, the Apex Court observed as follows:-

"After perusing the record and hearing learned counsel for the parties, we are of the opinion that there is no merit in the submission made by the learned counsel for the detenu. As already noticed, the petitioner had three times earlier, challenged the order of detention and failed. In the representation filed by the petitioner on 7th May, 1983, we find that neither any fresh material was brought on record nor any subsequent events were pointed out which may have warranted a "fresh consideration of the representation made by the detenu". It was only change in the language of the representation. The Delhi Administration was, Therefore, justified in rejecting the representation dated 7th May, 1983 by the order communicated to the petitioner on 23rd May, 1983. Since, there were no "fresh grounds" nor any "fresh material" or "subsequent events" brought out in the representation dated 7th May, 1983, there was no obligation on the State to get the representation considered by a "fresh Advisory Board and, Therefore, the exercise of discretion by the State in rejecting the representation and not Constituting a "fresh Advisory Board cannot be faulted. The detenu had, as already noticed, unsuccessfully challenged the same order of detention thrice. Making of the representation on 7th May, 1983, without another writ petition. We cannot but disapprove this attitude of the detenu. There is no merit in this writ petition, which fails and is hereby dismissed."

Therefore, what is required for constitution of a fresh Advisory Board is fresh grounds or fresh material or subsequent events. On a perusal of the representation filed subsequently it is crystal clear that none of these conditions existed. Some vague assertions about some other persons have been made-who those persons are and how their facts are similar is also not borne out from the representation. The Authorities cannot be made to go on which haunt on the basis of unclear or vague assertions, no specific instance was in fact indicated. Therefore, the first plea is without any substance and is rejected.

Coming to the second plea, it is to be noted that the decision in *Amritlal's Case* (supra) has also no application factually. In that case, the Apex Court gave a distinction between likelihood of detenu moving bail application and likelihood of getting bail and in the case before the Apex Court, the detention order contained only a statement that there was likelihood of detenu moving bail application. In the case at hand, the detaining authority did not stay short and further noted that bail is normally granted in such cases and hence there is imminent possibility that he will come out on bail. This statement makes gauge of difference and, Therefore, the second plea is also without substance.

Coming to the third plea, we find that in *Lundup Tamang's case* (supra), the record had revealed that the draft grounds of detention and the detention order were approved. In one of the counter affidavit filed in that case, it had been accepted that the Lieutenant Governor had approved the grounds of detention

and the detention order. In the present case, however, the record reveals that the Lieutenant Governor categorically ordered the detention, which would make much of the difference contextually. Therefore, Lundup Tamang's case (*supra*) has no application to the facts of the case. The plea in that regard is also without substance. No other plea was pressed for re-consideration. In the background of what we have said, the writ petition is without any merit and is dismissed.