

(1997) 07 BOM CK 0123

In the Bombay High Court

Case No : Criminal Writ Petition No. 399 of 1997, D/- 9/10-7-1997

Ms. Annie Kitty Creado

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 10-07-1997

Acts Referred:

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

Citation : (1998) BomCR(Cri) 195

Hon'ble Judges : S.S. Parkar, J; D.K. Trivedi, J

Bench : Division Bench

Advocate : M.G. Karmali and Smt. A.M.Z. Ansari, for the Appellant; D.G. Bagwe, APP, for the Respondent

Judgement

S.S. Parkar, J.—Heard Mr. M. G. Karmali for petitioner and Mr. D. G. Bagwe, APP for respondents.

2. This writ petition challenging the order of detention issued by respondent No. 2 under the COFEPOSA Act can be allowed on the short and the only ground taken up in this petition that the detenu was not apprised of his right to make representation to the detaining authority himself either at the time of the service of the order or even thereafter.

3. This petition has been filed by the friend of the detenu, the detenu being Rahim Haroon Manoria alias Afzal Haroon Batatawala. The order of detention was issued by the respondent No. 1 under the provisions of the COFEPOSA Act on 31st March, 1994 which was served on the detenu on 4th March, 1997. The order of detention is annexed as Annexure "A" to the petition while the grounds of detention have been annexed as Annexure "B" to the petition.

4. From the grounds of detention it appears that the detenu was arrested on 10th January, 1994 at Sahar International Airport on prior information when he was proceeding for security check to board the Cathay Pacific Flight No. CX-750

bound for Hongkong. On oral enquiry by the officers, as to whether he was carrying any foreign currency concealed in his baggage he did not reply satisfactorily and therefore on suspicion his baggage was recalled and checked by the officers. On the search of the black coloured shoulder bag and one "Samsonite" suitcase which was being carried by the detenu the officers noticed that the detenu was carrying among other things four bundles of foreign currency covered with cello tape containing 220 notes of US Dollars in the denomination of 100 and 45 notes of US Dollars in the denomination of 50 totalling US Dollars 24,250 equivalent to Indian currency of Rs. 8,00,250/- (M.V.) which were seized under the Customs Act. The said currency was found in the tins which the detenu was carrying in his baggage. The detenu was arrested and produced before the Chief Metropolitan Magistrate, Esplanade Court, Bombay and was remanded to judicial custody and thereafter he was granted bail on 13-1-94 in the sum of Rs. 1,75,000/- with one surety in the like amount or on cash deposit of Rs. 80,000/- plus PR for Rs. 1,25,000/- which bail order was availed by him on the same day. In view of the aforesaid facts the impugned detention, order was clamped on the detenu.

5. The only ground on which the detention order has been challenged is stated in paragraph 3(1) of the petition which states as follows :

"The detenu not being conversant with his constitutional rights, ought to have been apprised of his right to make a representation to the detaining authority himself at the time when he was served with the order, which was not so done. Even later on, he was not apprised of his said right within 15 days from the date of the service of the order, assuming that, in law, it could have been so done, thus the detenu could not and in fact has not made a representation to the detaining authority. The order is thus, violative of Art. 22(5) of the Constitution."

6. In reply to the above point raised in the petition, the Deputy Secretary to the Government of Maharashtra. Home Department, has filed affidavit dated 16th June, 1997. Paragraph 10 of the said affidavit deals with the said point in which it is admitted that the detenu was not apprised to his right to make a representation and the reason being that the order of detention dated 31st March, 1994, was passed before the right of the detenu to be apprised of his right to make a representation to the detaining authority was declared by the Full Bench of this Court in Criminal Writ Petition No. 284 of 1994 and that at the time of the passing of the detention order the law which prevailed was that the detenu had no right to make representation to the detaining authority and, therefore, the then detaining authority did not apprise the detenu of his right to make a representation to the detaining authority. It is further stated in the said paragraph as follows :

"..... I respectfully submit that in, view of the non-existence of such right, the question of apprising detenu about the right which is not in existence, does not arise and therefore, I respectfully submit that the order of detention and the grounds of detention, on the basis of the law prevailing on that day, was

absolutely legal, and therefore, it cannot be said that any default is committed in issuing such order and Grounds of Detention."

7. Mr. Karmali, the learned Counsel appearing on behalf of the petitioner has cited before us the decision of the Supreme Court in *Smt. Pushpa Vs. Union of India (UOI) and Others*, . In para 8 of the said judgment the Supreme Court has emphasised that the representation could and ought to be made to the detaining authority because it is he who has to apply his mind to the facts of the case and it is he who furnishes the grounds of detention on which he had acted and it is he who has to be convinced that the action taken by him is unjustified and requires reconsideration, it is further observed in the said paragraph that the initial representation that a detenu 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 detenu and which has to be persuaded to reconsider the same.

8. Mr. Karmali also cited the judgment of the Constitution Bench of the Supreme Court in the case of *Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others*, . In para 38 at page 657 of the report of judgments today the Supreme Court observed as follows :

"Having regard to the provisions of Article 22(5) of the Constitution and the provisions of the COFEPOSA Act and the PIT NDPS Act the question posed is thus answered; where the detention order has been made u/s 3 of the COFEPOSA Act and the PIT NDPS Act by an officer specially empowered for that purpose either by the Central Government or the State Government the person detained has a right to make a representation to the said officer and the said officer is obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on the person detained to make a representation against the order of detention. This right of the detenu is in addition to his right to make the representation to the State Government and the Central Government where the detention order has been made by an officer specially authorised by a State Government and to the Central Government where the detention order has been made by an officer specially empowered by the Central Government, and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation."

9. In the above case the Supreme Court was dealing with a group of matters involving the common question of law including Criminal Appeal Nos. 850 and 915 of 1994. The facts of the above two appeals, as appearing in para 47 of the report, are similar to the facts in the present case. In the aforesaid Appeals the order of detention was made u/s 3 of the PIT NDPS Act by the officer specially empowered by the Central Government. In the grounds of detention the detenu

was only informed that he could make representation to the Central Government or the Advisory Board but he was not informed that he could make representation to the officer who had made the order of detention. The Madras High Court, therefore, allowed the writ petitions filed by the detenus and set aside the order of detention on the view that the failure on the part of the detaining authority to inform the detenu that he had a right to make representation to the detaining authority himself had resulted in denial of the constitutional right guaranteed under Article 22(5) of the Constitution. The Supreme Court upholding the said view dismissed the appeals.

10. The stand taken in the affidavit in reply filed by the Deputy Secretary to the Government of Maharashtra cannot sustain. Article 22(5) of the Constitution was in existence in its present form from the inception of the commencement of the Constitution. This Court or the Apex Court had only interpreted Article 22(5) of the Constitution and that interpretation cannot be said to have come into force or operation from the date of the judgment interpreting the said Article. Interpretation of a provision explains what the provision is or what it means and that it relates back to the time when the provision was made. Interpretation of a provision, therefore, cannot be said to have changed the existing provision or its meaning. Nor does the interpretation of a provision of law amount to a declaration of law as contended by the respondents. This is not a case where law was made or declared subsequent to the event and, therefore, it does not lie in the mouth of the detaining authority or the respondents to say that the law was declared subsequently after the issuance of the order.

11. The above stand taken by the Government cannot sustain for another reason; though the order of detention was passed in this case as far back as 31st March, 1994 the said order was executed as late as 4th March, 1997 i.e. much after the above interpretation of Article 22(5) of the Constitution by this Court or by the Supreme Court. It is pertinent to mention here that this very detaining authority i.e. respondent No. 2 had issued Addenda making addition to the grounds of detention issued to other detenus by inserting a paragraph to the grounds of detention informing the detenus that they had a right to make a representation to the detaining authority against the order of detention, in cases where there were omissions at initial stage as in this case. Mr. Karmali, the learned Counsel appearing on behalf of the petitioner has produced before us Xerox copy of such Addendum dated 20th August, 1996 issued by respondent No. 2 to the grounds of detention dated 18th September, 1992 pursuant to the interpretation of law made by the Supreme Court in Kamleshkumar's case to which we have made reference earlier. The said order was issued to one Nandkumar Babulal Soni alias Nandu. The Xerox copy of the said Addendum is taken on record and marked Exhibit "X" for identification .

12-13. Similarly Mr. Karmali has produced in this case the Addendum dated 12th September, 1995 issued by respondent No. 2 to one detenu by name Bhavesh Fatechand Shah alias Babulal adding to the grounds of detention dated 8th April,

1994 communicating to the detenu his right to make a representation to the detaining authority. The Xerox copy of the said Addendum together with the original grounds of detention is taken on record and marked Exhibit "Y" for identification. The fact that this practice is followed by the said detaining authority and other detaining authorities in such matters is fairly conceded by Shri Bagwe on behalf of the respondents. We are at a loss to understand as to why the same detaining authority did not issue such addendum in the matter in hand at the time of service of the order and the grounds of detention on the detenu on 4th March, 1997.

14. In view of the above facts and the law laid down by the Apex Court we have no alternative but to allow this petition and set aside the impugned order of detention.

15. Accordingly we hereby allow this petition, set aside the order of detention dated 31st March, 1994 detaining Rahim Haroon Manoria alias Afzal Haroon Batatawala and make the rule absolute. The detenu shall be released forthwith from his detention unless he is required in any other case.

16. Petition allowed.