

(1995) 03 DEL CK 0068

In the Delhi High Court

Case No : Criminal Writ Appeal No. 735 of 1994

Narinder Bahal

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 28-03-1995

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1)

Citation : (1995) 2 AD 60 : (1995) 58 DLT 229

Hon'ble Judges : Mohd. Shamim, J

Bench : Single Bench

Advocate : Ashutosh, M.D. Taneja, Madan Lokur, Ramachandran, Alapana Poddar and P.S. Sharma, for the Appellant;

Judgement

Mohd. Sharnim, J.

(1) The petitioner through the present writ petition has challenged the detention Order No. F.5/19/94/H(P-11) dated 13/07/1994 passed u/s 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the Act for the sake of convenience)by Lt. Governor of Delhi, and Declaration No. 14/94 dated 16/08/1994 u/s 9 of the said Act issued by Additional Secretary to the Government of India.

(2) Brief facts for the proper appreciation of the points involved herein are enumerated as under: that one package bearing the name of the petitioner containing 1470 spectacle frames and 5000 integrated circuits concealed in refrigerator and washing machine, was intercepted by the Preventive Officers of the Air Cargo Unit .Yet another consignment landed at the Airport on 24/03/1994 from Singapore bearing the same address and passport number but in the name of a different consignee. A scrutiny of the same resulted in the recovery of the U-matic V.C.R. & Cordless Telephones of foreign origin hidden in the refrigerator and music system. The petitioner is alleged to have claimed the said consignment as belonging to him vide his statement recorded u/s 108 of the

Customs Act .

(3) The petitioner is innocent. He has been falsely implicated in the instant case. He was forced to make the statement u/s 108 of the Customs Act. However ,he retracted the same at the first available opportunity before the Trial Court .The impugned order of detention is illegal and invalid inasmuch as the alleged occurrence is dated 23/03/1994 yet no order of detention was passed till 13/07/1994. The long and undue delay in passing the impugned order has snapped the nexus in between the alleged activity and the activity sought to be curbed by passing the impugned order: The petitioner has not been supplied some of the documents which were relied upon by the Detaining Authority. Non/supply of the documents mentioned in para 3(ii) of the petition has vitiated the impugned order .The petitioner was thus deprived of an opportunity to make an effective and purposeful representation under Art. 22(5) of the Constitution of India.

(4) Some of the documents supplied to the petitioner are illegible which is tantamount to the non supply of the documents. It is thus vocative of Art. 22(5) of the Constitution. There has been long and undue delay in consideration of the representation of the petitioner dated 27/07/1994 inasmuch as the same was rejected vide order dated 8/08/1994 without application of the mind. The casual and mechanical consideration of the representation of the petitioner is vocative of Art. 22(5) of the Constitution. The Detaining Authority failed to take into consideration the adjudication proceedings and thereby vitiated the detention order .The impugned detention of the petitioner is based on a solitary incident. It thus cannot be deduced there from that the petitioner was likely to indulge in suchlike alleged activities in future. The subjective satisfaction of the Detaining Authority is thus vitiated. The Detaining Authority took into consideration certain irrelevant and extraneous material which has no concern, whatsoever, with the alleged prejudicial activities and thereby rendered the impugned order illegal and invalid. The Sponsoring Authority failed to apprise the Detaining Authority of the fact that the alleged offence was at the most punishable with imprisonment which may extend to three years or fine or with both. Non consideration of this aspect has rendered the impugned order illegal. The declaring authority did not take into consideration certain very material and relevant documents e.g. recharge evidence and the reply dated 5/08/1994 to the application for cancellation of bail. It has thus rendered the continued detention of the petitioner illegal.

(5) The respondents through their counter affidavit have controverted each and every assertion made by the petitioner in his petition.

(6) Learned Counsel for the petitioner Mr. Ashutosh has contended with great zeal and fervour that the declaration dated August 16,1994 u/s 9 of the Act is illegal and invalid and as such is liable to be quashed for the simple reason that the declaring authority i.e. the Government of India failed to take into consideration very relevant and material documents such as: (a) Counter

affidavit dated 5/08/1994 to CrI. M. (M) No. 1390/94 moved by the Customs Department for the cancellation of the bail granted to the petitioner vide order dated 28/04/1994 passed by the Additional Sessions Judge, Delhi; (b) the pre-charge evidence recorded by the learned Additional Chief Metropolitan Magistrate in the form of the statement dated 5/08/1994 of Shri Rakesh Handa, Aco (Law) and (e) they also did not take into consideration the representation dated 27/07/1994 made by the petitioner against the detention order dated 13/07/1994 while making the declaration dated 16/08/1994. All the above said documents came into existence after the passing of the detention order and before making the declaration. Thus a duty was cast on the shoulders of the Detaining Authority to take into consideration the said documents as the said documents could have swayed the subjective satisfaction of the declaring authority in either way. According to the learned Counsel "relevant document" is a document which is likely to affect the mind of the declaring authority in either way.

(7) Learned Counsel for the Union of India, Mr. Madan Lokur, has countervailed the above argument advanced by the learned Counsel for the petitioner. According to him, the declaring authority was under no obligation to consider the aforementioned documents inasmuch as a detention order u/s 3 of the Act is altogether different from a declaration made u/s 9 of the Act. According to the learned Counsel Section 3 of the Act is wider in its ambit and scope whereas Section 9 of the said Act, where under a declaration is made is much narrower in its sweep. The learned Counsel thus contends that the petitioner does not have the same right which are available to him to make a representation u/s 3 of the Act as against the declaration u/s 9 of the Act. The learned Counsel in order to substantiate his argument has dwelled at length on the distinguishing features of the aforesaid two Sections. According to him, keeping in view the said distinction the petitioner has got no constitutional right to make a representation against the order of declaration. The right to make a representation, if any, is only a statutory right. In view of the above if the said documents are not considered it would not render nugatory the order of declaration.

(8) The next limb of the argument put forward by the learned Counsel is that the said documents are not relevant and material and thus need not have been taken into consideration.

(9) The contention of the learned Counsel for the respondents is devoid of any force .

(10) The effect of a declaration u/s 9 of the Act is to extend the period of detention of a person for a period of two years. Thus the order of detention and order of declaration both deal with the liberty of a citizen. The order of declaration is thus nothing but the continuation of the earlier detention order passed against a citizen .It would be inconceivable to visualise the existence of one in the absence of another .They are just like twin sisters and they both go hand in hand.

(11) I am reminded here of the oft quoted and oft repeated illustrious observation of Thomas Jefferson, former President of United States of America, Summary view of Rights:"The God who gave us life, gave us liberty at the same time". Hence it would be puerile to argue that a person would have no constitutional right to make a representation against an order of declaration. A mere glance at Article 21 of the Constitution which grants protection of life and personal liberty to an individual would reveal that the arguments of the learned Counsel cannot be sustained by any stretch of imagination. Article 21 provides " No person shall be deprived of his life or personal liberty except according to procedure established by law". Article 22(5) further comes to the rescue of a person in case of deprivation of his life and liberty. It envisages " When a person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order". The effect of the declaration as I have already observed above would be the deprivation of the liberty of an individual. Thus he would have a right to make a representation under Article 22(5) of the Constitution of India. It would thus be a constitutional right and not a statutory right .

(12) I am supported in my above view by the observations of their Lordships of the Hon"ble Supreme Court in Union of India and Another v. Shantaram Gajanan Kanekar and Another 1994 S C C (Cri) 1496"The respondent was served with an order of detention made u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act,1974 (hereinafter "the Act"). The detenu, it is not disputed did not know English and was conversant with Marathi language only. Marathi version of the grounds of detention was furnished to the detenu. The respondent was also served with a copy of the declaration made u/s 9(1) of the Act together with the Marathi version of the declaration. The detenu questioned the order of detention as also the declaration issued u/s 9(1) of the Act on various grounds. The principal objection raised on behalf of the detenu before the High Court was that the Marathi version of the declaration u/s 9(1) of the Act did not tally with its counterpart in English and due to that defect, the detenu was prevented from making an effective representation under Article 22(5) of the Constitution. The High Court, on facts, found that the two versions of the declaration did not tally with each other. The High Court found that the translated version of the declaration u/s 9(1) of the Act was defective and opined that it was not possible for the detenu to make an effective representation. The order of detention was Therefore quashed.

(13) In the facts and circumstances of the case, the view taken by the High Court is unexceptionable and we do not find any reason to interfere. The appeal is dismissed .

(14) To the same effect are the observations of a Division Bench of this Court as reported in Joga Singh v. Union of India & Another 1992 Jcc 195.

(15) This brings me to the point as to whether the three documents adverted to above were relevant and material and thus a duty was cast on the shoulders of the declaring authority to take them into consideration. This is not in dispute that the said documents were not taken into consideration inasmuch as the respondents in their counter affidavit have stated that the said documents were not placed before the Competent Authority as the same were not forwarded by the Sponsoring Authority Along with the proposal. Admittedly, the Competent Authority while issuing the declaration took into consideration the application moved by the Customs Department for cancellation of the bail. If that was a relevant document for the purpose of consideration of the Competent Authority while issuing the declaration then this Court feels that the reply thereto should also have been placed before the declaring authority. The petitioner herein vide para 2 of the counter affidavit dated 5/08/1994 (Parawise reply) has very categorically stated that the second consignment did not belong to him. According to him, it was improbable that the same man would import two consignments in different names on the same date or on two consecutive dates. He further stated that the present case was a case where the goods are alleged to have been imported through air cargo. Incase of arrival of a consignment through the air cargo the goods would not be cleared without a thorough examination and scrutiny of the consignment. Thus the goods could not have been hidden and concealed. It was further stated therein (vide para4 of the counter affidavit) that the offence, if any, alleged to have been committed by the petitioner was punishable with imprisonment for a term which may extend to three years or fine or both.

(16) In view of the above I am of the view that the above said document was quite relevant and material and it could have swayed the mind of the declaring authority .

(17) This brings me to the pre-charge evidence. The pre-charge evidence was recorded on 5/08/1994. It is the statement of PW1 Rakesh Handa who filed the complaint PW1 /A against the petitioner. On being cross-examined he has admitted that he has simply filed the complaint in the instant case. He has no personal knowledge with regard to the facts of the present case. He further goes on to admit that in case of goods received through air cargo the same are not handed over to the consignee directly. In the above circumstances I feel that pre-charge evidence was also quite material and relevant.

(18) To the same effect is the opinion of a Single Judge of this Court as reported in Lynn A. Curtis Vs. Union of India and Others, "One of the prerequisites for passing the detention order is that all relevant material and facts must be placed before the Detaining Authority which may sway the mind of the Detaining Authority in coming to the conclusion whether he should pass the detention order or not and if any relevant material particularly which is exculpatory in nature is not placed before the Detaining Authority the detention order becomes bad in law inasmuch as the Detaining Authority in that respect has failed to apply his

mind to the relevant material. Therefore, where the pre-charge evidence has not been placed before the Detaining Authority which was a relevant material document the subjective satisfaction reached by the Detaining Authority in passing the detention order is vitiated."

(19) Admittedly, the representation dated 27/07/1994 addressed to the Detaining Authority was also not placed before the declaring authority. The learned Counsel thus contends that this vitiated the subjective satisfaction of the declaring authority and as such, rendered nugatory the impugned declaration.

(20) There is no gainsaying the fact that the representation is a very important and relevant document. It is through a representation that the petitioner puts forward his case and brings to the notice of the Competent Authority all the factors and documents which are exculpatory in nature. The above view was also government to by a Single Judge of this Court in P.C. Aggarwal v. Sh. M.L.Wadhawan &Ors., (Criminal Writ No. 49 of 1986, decided on 30/04/1986). I am tempted hereto cite a few lines from the said judgment to illustrate my point:"It is thus clear that it is incumbent on the specified authority to apply its mind afresh to conclude that not only is the detenu engaged in unlawful activities as provided under the Act which led to his detention but also that those activities are being carried out or likely to be carried out in vulnerable areas. The representation of the detenu challenging the detention order if received within time by the specified authority (in this case Sh. Wadhawan is the empowered authority for the purpose of passing the detention order and also for issuing the declaration) cannot be ignored from consideration. In my view it is incumbent on the authority concerned to consider that representation also."

(21) Learned Counsel for the respondents Mr. Lokur, on the other hand, has contended that since the petitioner did not raise the plea with regard to the no consideration of his representation dated 27/07/1994 hence he was debarred from raising this point before this Court. The contention of the learned Counsel is devoid of any force.

(22) It is well recognised principle of Criminal Jurisprudence that the rules of pleadings are not applicable in case of a writ petition. It is not expected of the litigants who are detained and apply for issue of a writ of habeas corpus to follow strict rules of pleadings. Even a postcard by a detenu is sufficient enough to bring into motion the process of the Court. To the same effect are the observations of their Lordships of the Supreme Court as reported in Smt. Ichu Devi Choraria Vs. Union of India (UOI) and Others, "In case of an application for a writ of habeas corpus, the practice evolved by Supreme Court is not to follow strict rules of pleading nor place undue emphasis on the question as to on whom the burden of proof lies. Even a postcard written by a detenu from jail has been sufficient to to activate the Court into examining the legality of detention. The Supreme Court has consistently shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention."

(23) Furthermore, admittedly the law of preventive detention is a law which has got a bearing on the liberty of an individual. Thus the Courts are required to be on their tiptoe and guard and to be vigilant enough to see that the procedure required to be followed in cases of preventive detention is scrupulously followed. It was observed by a Division Bench of the Bombay High Court as reported in *Jethmal Kapurchand Kothari v. Union of India & Ors.* 1985(2) Crimes 960, Per Shah J., as his Lordship then was)....."It is to be borne in mind that the law of preventive detention encroaches upon the liberty of a person and unless it is established that the procedure prescribed the law is scrupulously followed, the order of detention cannot be sustained".

(24) It has next been urged for and on behalf of the petitioner that there is an inordinate delay in the disposal of the representation dated 22/08/1994 preferred by the detenu against the declaration. According to the learned Counsel the petitioner made a representation on 22/08/1994 against the declaration dated 16/08/1994. The said representation was disposed of within thirty one days .A perusal of para 3 of the counter affidavit sworn by Mr. J.L. Sawhney, Undersecretary ,Government of India, dated 23/01/1995 reveals that the said representation was received in the office on 30/08/1994. The comments were sent for from the Sponsoring Authority vide request dated 1/09/1994. The Sponsoring Authority furnished the comments on 15/09/1994 and the same were received in the Cofeposa Unit on 16/09/1994. On the same day the case was processed and placed before the Joint Secretary. The file after passing through the different hands was ultimately placed before the Minister of Finance and the representation was then rejected on 24/09/1994. It is thus manifest from above that the Government of India took near about 25 days after the receipt of the representation to dispose it off. No cogent and reasonable Explanation has been placed on record to explain this inordinate delay except this that the file was some time with this officer and some time with that officer. The Sponsoring Authority took near about 15 days to furnish the comments which, I feel, was long and inordinate delay in the submission of the comments. In the above circumstances, I am of the view that the delay in the consideration of the representation rendered illegal and invalid the impugned order.

(25) It is a well settled principle of law that a detenu has got a constitutional right to get his representation considered by the Detaining Authority at the earliest. The representation should be disposed of as expeditiously as possible. A sense of urgency should be attached to the same. Time and again the Hon''ble Supreme Court and the different High Courts have echoed their concern in a catena of authorities with regard to the consideration of a representation made by a detenu against his detention with all diligence and promptitude. I am tempted here to cite the observations of their Lordships of the Supreme Court as reported in *Jayanarayan Sukul Vs. State of West Bengal*, , cited with approval by the Hon''ble Supreme Court in *Rama Dhondu Borade Vs. V.K. Saraf, Commissioner of Police and Others*, ,....." It is established beyond any measure of doubt that the appropriate authority is bound to consider the representation of

the detenu as early as possible. The appropriate Government itself is bound to consider the representation as expeditiously as possible. The reason for immediate consideration of the representation is too obvious to be stressed. The personal liberty of a person is at stake. Any delay would not only be an irresponsible act on the part of the appropriate authority but also unconstitutional because the Constitution enshrines the aforementioned right of a detenu to have his representation considered and it is imperative that when the liberty of a person is in peril immediate action should be taken by the relevant authorities."

(26) It is manifest from the discussion above that the declaration order passed by the Government of India is illegal and invalid.

(27) Now the question which falls for consideration is: What is the effect of the illegality of the impugned declaration on the detention order dated 13/07/1994? It has been held time and again that in case the declaration cannot be sustained in the eye of law in that eventuality the detention order automatically evaporates in the air and it cannot be sustained and is liable to be flung to the winds. The simple reason is that a detention order is required to be confirmed within three months from the date of its issue in the absence of a declaration extending the period of detention by the appropriate Government. In the instant case the order of confirmation was passed on 19/01/1995 though the order of detention was passed on 13/07/1994.

(28) To the same effect is the view expressed by their Lordships of the Supreme Court as reported in *Nirmal Kumar Khandelwal Vs. Union of India (UOI) and Others, ...*"There is no reason to doubt the law enunciated by this Court in the aforesaid decisions. Respectfully following the ratio of those decisions, we hold that since no order of confirmation of the detention was made under Clause (f) of Sec. 8 within three months of the date of detention by the appropriate Government, further detention of the petitioner after the expiry of that period is without the authority of law". To the same effect is the view given vent to by a Single Judge of this Court as reported in *Pooran Singh v. Union of India 1990(3) D L 165*. Learned Counsel for the petitioner besides the points alluded to and dilated upon above raised quite a good number of other pleas. However, I need not dwell upon them in view of the above. In the circumstances stated above the petition is allowed. The detention order dated 13/07/1994 and the declaration dated 16/08/1994 u/s 9(1) of the Act are hereby quashed. Let the petitioner be set at liberty in case he is not required to be detained in any other case.