
(1992) 02 RAJ CK 0003

In the Rajasthan High Court

Case No : Habeas Corpus Petition No. 5939 of 1991

Om Singh

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 05-02-1992

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 8

Constitution of India, 1950 — Article 22, 226

Citation : (1992) 1 RLW 62 : (1992) 1 WLN 88

Hon'ble Judges : Milap Chandra Jain, J;B.R. Arora, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Milap Chandra Jain, J.—This petition has been filed under Article 226 of the Constitution of India for quashing the order of detention dated July 4, 1991 (Annexure 1) and confirmation order dated October 22, 1991 (Annexure 4) passed by the Government of India in the Ministry of Finance, Department of Revenue, New Delhi and for directing the respondents to release the petitioner forthwith.

2. In short, it has been averred in the writ petition that an order of detention (Annexure 1) has been passed on July 4, 1991 against him under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short, the Act), he was served with it on July 23, 1991, subsequently grounds (Annexure 2) were given to him, this representation (Annexure 3) was received by the Superintendent, Central Jail, Jodhpur on August 23, 1991, his detention has been confirmed for a period of one year by the Central Government by its order (Annexure 4) dated October 22, 1991 without considering his representation (Annexure 3).

3. In reply to the writ petition, almost all these averments are admitted except that the representation (Annexure 3) was not considered. It has further been

averred that the representation (Annexure 3) was duly considered by the Advisory Board and also by the respondent at the time of passing the confirmation order (Annexure 4).

4. It has been contended by the learned Counsel for the petitioner that the petitioner's representation (Annexure 3) has not been considered independently by the respondent and on this ground alone his detention is illegal. He relied upon *Smt. Gracy v. State of Kerala* 1991 Cri.L.J. 248 . He also contended that the petitioner has not been communicated the decision taken on his representation (Annexure 3) and on this ground also his detention is illegal. He relied upon *Harish Pahwa Vs. State of U. P. and Others*,

5. In reply, it has been contended by the learned Standing Counsel for the Union of India that it is clearly mentioned in para No. 3 of the confirmation order Annexure 4 that the Central Government has fully considered the report of the Advisory Board and the materials on record. He further contended that the petitioner's representation (Annexure 3) was a part of the record.

6. There is a great force in the writ petition. The Constitution Bench of the Supreme Court has observed in *K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others*, as follows:

It is now beyond the pale of controversy that the constitutional right to make representation under Clause (5) of Article 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. Secondly, the obligation of the Government to afford to the detenu an opportunity to make representation and to consider such representation is distinct from the Government's obligation to refer the case of detenu along with the representation to the Advisory Board to enable it to form its opinion and send a report of the Government. It is implicit in Clauses (4) and (5) of Article 22 that the Government while discharging its duty to consider the representation, cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. The obligation of the Government to consider the representation is different from the obligation of the Board to consider the representation at the time of hearing the references. The Government considers the representation to ascertain essentially whether the order is in conformity with the power under the law. The Board, on the other hand, considers the representation and the case of the detenu to examine whether there is sufficient case for detention. The consideration by the Board is an additional safeguard and not a substitute for consideration of the representation by the Government. The right to have the representation considered by the Government, is safeguarded by Clause (5) of Article 22 and it is independent of the consideration of the detenu's case and his representation by the Advisory Board under Clause (4) of Article 22 read with Section 8(c) of the Act. (see: *Sk. Abdul Karim and Others Vs. State of West Bengal*, , *Pankaj Kumar Chakrabarty and Others Vs. The State of West Bengal*, , *Shyamal*

Chakraborty Vs. The Commissioner of Police, Calcutta and Another, , B. Sundar Rao and Others Vs. State of Orissa, , John Martin Vs. State of West Bengal, , Sk. Sekawat Vs. The State of West Bengal, and Haradhan Saha Vs. The State of West Bengal and Others,

7. It has been observed in Smt. Gracy v. State of Kerala 1991 Cr. L.J. 248 , as under:

It is thus clear that the obligation of the Government to consider the representation is different and in addition to the obligation of the Board to consider it at the time of hearing the reference before giving its opinion to the Government. Consideration of the representation by the Government has to be uninfluenced by the view of the Advisory Board. In short, the detenu's right to have the representation considered by the Government under Article 22(5) is independent of the consideration of the detenu's case and his representation by the Advisory Board. This position in law is also not disputed before us.

8. These two decisions of the Hon"ble Supreme Court clearly lay down that there should be independent consideration of the representation of the detenu by the Government. It has further been held in Harish Pahwa Vs. State of U. P. and Others, that the representation of a detenu must be considered as soon as it is received and its decision should be communicated to him. There is nothing on the record to indicate that the decision taken by the Government on the representation (Annexure 3) of the petitioner was communicated to him. The case of the respondent is that representation was duly considered along with the report of the Advisory Board and the confirmation order (Annexure 4) was passed. It has not been averred in the reply that the representation was independently considered by the Government. Thus there is violation of requirement of Article 22(5) of the Constitution of India and the order of confirmation (Annexure 4) cannot be sustained.

9. In the result, the writ petition is allowed. The detention order dated July 4, 1991 (Annexure 1) and confirmation order dated October 22, 1991 (Annexure 4) passed by the Government of India, Ministry of Finance, Department of Revenue, New Delhi are quashed. The petitioner Om Singh will be released forthwith if not required in any other case. This shall, however, not effect petitioner's prosecution under the Act and it shall also not be considered as a direction to release him in case he is in custody as a result of refusal of bail.