

(1992) 05 MP CK 0011

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 668/92V

Omprakash Neema

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 18-05-1992

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 21, 22, 22(5)
Customs Act, 1962 — Section 111, 123, 135
Maintenance of Internal Security Act, 1971 — Section 7

Citation : (1992) 61 ELT 65 : (1993) 1 MPJR 270

Hon'ble Judges : S.D. Jha, J;A.G. Qureshi, J

Bench : Division Bench

Advocate : J.P. Gupta, for the Appellant; B.C. Neema, A.H. Khan and Kutumbala, for the Respondent

Judgement

A.G. Qureshi, J.

This order shall govern the disposal of Misc. Pet. Nis. 517 of 92 (Prahlad Das Neema v. Union of India and Anr.), 621 of 92 (Ramesh Chandra Shah v. Union of India and two Ors.), 666 of 92 (Hardayal Singh Dhillon v. Union of India and two Ors.), 667 of 92 (Amrik Singh alias Satnam Singh v. Union of India and two Ors.), 668 of 92 (Omprakash Neema v. Union of India and two Ors.) and 669 of 92 (Nitin Kumar Soni v. Union of India and two Ors.). Wherein identical points have been raised by the detenus, who have been detained under the provisions of the Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter called the Act).

The facts leading to these petitions, in short, are that on receipt of some reliable information, the Customs and Central Excise officers of Indore Headquarters searched the premises No. 42A, 43C, Sector-5, Sanwar Road, Industrial Area, Indore in the presence of panchas, in the early hours of 27-2-1992. When the search party reached the aforesaid premises they saw that one truck was parked

in the premises from which some goods were being unloaded. One Canter Vehicle, two Maruti vans, One Scooter, one Motor Cycle were also found parked in the premises and some people were found remaining here and there. One of the petitioners Nitin Kumar Soni told that the premises belongs to him. One Truck No. OR-04-3735 was parked there in which three persons Amrik Singh, Kalvinder Singh and Ramsingh were sitting. Amrik Singh disclosed that he was the owner of that truck. Two other persons Aman Soni and Shashipal Mishra were unloading silver slabs, having foreign markings, from the truck. Then the search party found a pit and in that pit also some silver slabs were being dumped. On that spot one Omprakash Neema was found standing. There was false cavity in truck No. PR-04-5735 from where silver slabs bearing foreign marking were being unloaded. From the truck 9 silver slabs bearing foreign markings were also recovered. From a pit made in a shed of the premises 71 slabs of silver having foreign markings were recovered.

When the search party entered the factory they found that there was a furnace and in the furnace there were six slabs of silver. There also, two persons Madhusudan Mishra and Suresh Chandra were found standing. When the silver slabs were taken out from the furnace it was found that slabs bore foreign markings. Nere the furnace there were more slabs of silver. Various implements and dyes used for melting the silver and making slabs were also found on the spot. The ownership of the vehicle standing there was verified and it was also found that vehicle No. M.P. 09-A-7592 and MP-09-A5450 had false cavities. Similarly under the Canter also a false cavity for keeping goods was found. The officers also found that those vehicles were being used for transporting the contraband silver. None of the persons on the spot had any document in their possession authorising them to import that silver. As such 90 silver slabs weighing 3041.439 Kgs. were recovered. All the contraband items alongwith the vehicles used for transporting the contraband silver were seized and a Panchnama was prepared. Various persons, including the present detenus were arrested and offences under the Customs Act, 1962 were registered against them. The statements of all the accused persons were recorded u/s 108 of the Customs Act, 1962 and they were also taken on record.

Thereafter the present detenus were produced before the Court of Judicial Magistrate, First Class, Indore by the Officers of the Central Excise Department and they were remanded to judicial custody. The present detenus are yet to be tried for the offences under Sections 111, 123 and 135 of the Customs Act alleged to have been committed by them by the Competent Court. Meanwhile in exercise of the powers given u/s 3(1) of the Act the Joint Secretary, Government of India in the Ministry of Finance, Deptt. of Revenue has directed the detention of the present detenus under the provisions of the Act. Hence these petitions.

From the order of detention and the grounds of detention supplied to the detenus by the Government of India, it appears, that the detention order has been passed by the Detaining Authority on arriving at a conclusion that the detention

order detaining the present detenus is necessary for preventing them from the activities of dealing, concealing and transporting etc. of the smuggled goods.

The detention order has been challenged by the detenus on multi-pronged pleas, but the emphasis of the learned counsel for all the detenus is that there is violation of Article 22 of the Constitution of India in view of the fact that the earliest opportunity for making an effective representation was not afforded to the petitioners. The second ground on which emphasis is laid, is that the representation of the detenus made against the detention order to the Detaining Authority was not considered and decided by the said Authority. The third ground is that the photostat copies of the documents supplied to the petitioners are mostly illegible and, therefore, the supply of the illegible copies would amount to non-supply of the material documents to the petitioners. There is variance between the English and Hindi version of the detention order and that shows that the Detaining Authority has not applied its mind to the record while passing the detention order. Another ground is that the document at Sl. No. 108 was despatched to the Detaining Authority on 13th and strangely enough the detention order has also been passed on itself and the Union of India has failed to explain as to how the detention order could be passed on 13th when the document itself was sent on 13th from Indore.

On the other hand it has been argued by the learned counsel for the Union of India that an opportunity was afforded to the petitioners to make an effective representation, vide order of the Joint Secretary dated 21-4-1992 and, therefore, it cannot be said that opportunity to make an effective representation was not afforded. The petitioners have not availed of that opportunity and have rushed to this Court. As regards the decision on the representation it has been argued that the decision was not taken in view of the pendency of the writ petitions because the representation was made on 6-4-1992 itself which was received on 8-4-1992 and on 6-4-1992 the present writ petition was filed. As regards the legibility of the documents it has been argued that the documents are legible and the authorities have taken care to get the documents photostat on the best possible machine and therefore this grievance also has no force. As regards document No. 108 it is stated that it was actually sent on 12th and not on 13th and, therefore, it reached Delhi on 13th and the Detaining Authority has passed the order after going through all the documents.

As regards the decision on representation, it is not disputed before us that all the petitioners had made representations on 6-4-1992 to the Detaining Authority stating therein that as the interview with their lawyer was not allowed by the Jail Authorities, they have been deprived of an opportunity to make an effective representation and, therefore, they be released from detention on this ground alone the language of the representation says that the representation made be considered at the earliest and the decision be conveyed to the petitioners as to enable them to approach higher authorities i.e. the Central Government. The petitioners were not able to make any representation since the Advocate was not

allowed to have legal interview with them, therefore, they be released from illegal detention. The reply to the aforesaid representation made by the detenus has been given by the Ministry of Finance vide memo dated 23rd April 1992 signed by Senior Technical Officer of the Ministry, which says that legal interview with the lawyer and meeting with the family members of the detenus may be permitted within the parameters of the existing Jail rules and other relevant instructions. It has further been stated that the Detaining Authority has no objection to the detenus having legal interview with their lawyer if the memo is permitted under the existing Jail Rules and other relevant instructions. But no order has been passed till this date on the prayer of the detenus making representations for their release from illegal detention.

It has been argued that the main prayer of the detenus was for seeking legal interview and, therefore, it was not necessary for the Detaining Authority to pass any order on the prayer of the detenus for their release. Furthermore this was not considered necessary in view of the pendency of the writ petitions. In our opinion, the law on the aforesaid subject is clear and has been laid down by the apex Court in unequivocal terms. As back as in the year 1975 in the case of *Sk. Sekawat Vs. The State of West Bengal*, the Supreme Court has said that the language of Section 7 of the Maintenance of Internal Security Act and of Article 22(5) of the Constitution of India makes obligatory on the State Government to consider the representation made by the detenu as soon as it is received by it. The opinion of the Advisory Board is no substitute for the consideration of the representation by Government. The State Government in that case was held not entitled to confirm the detention order without considering the representation of the detenu and in not considering the representation of the detenu the State had violated the provisions of Article 22(5) of the Constitution and, therefore, the order was invalid. The subsequent consideration and rejection of the representation could not cure such invalidity of the confirmation of the order of detention and consequently the detention was illegal and void.

In para 19 of a recent judgment of the Supreme Court in the case of *State of Punjab Vs. Sukhpal Singh*, it has been held as under :

"In the instant case we are satisfied that after receipt of the xerox copy from the Central Government, the State Government took only 13 days including 4 holidays in disposing of the representation. Considering the situation prevailing and the consultation needed in the matter, the State Government could not have been unmindful of urgency in the matter. But the facts remain that it took more than two months from the date of the submission of the representation to the date of informing the detenu of the result of his representation. Eight days were taken after disposal of the representation by the State Government. The result is that the detenu's constitutional right to prompt disposal of his representation was denied and the legal consequences must follow."

In view of the aforesaid decisions of the Supreme Court when once the representation is made it should be decided expeditiously and a delay of two

months from the date of submission of the representation to the date of informing the detenu of the result of his representation was treated as fatal to the detention order.

Now, as regards the prayer made by the detenus on 6-4-1992, it is true that the grievance is two fold - one is that the petitioners have not been afforded an opportunity to have an interview with their lawyer and secondly that they be released in view of the fact that their detention is illegal. In the aforesaid circumstances, the question which arises for determination is whether such a prayer made in the application can be treated as a representation against detention by the detenu. In this respect the learned counsel for the petitioners Shri J.P. Gupta has drawn our attention to the Supreme Court cases wherein the Supreme Court has held that in absence of any particular form having been prescribed for making representation, any prayer for release by a detenu to the Government irrespective of the law of pleadings has to be treated as a representation. In Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, the Supreme Court has held that in a writ of habeas corpus the strict rules of pleadings are not to be followed and no undue emphasis should be placed 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 activate the Court into examining the legality of detention. This authority of course is pertaining to the invoking of the writ jurisdiction of the court, but the principle laid down in the aforesaid judgment is that once a complaint about illegal detention is made it is for the Detaining Authority to satisfy the Court that the procedure prescribed by the law has been followed while detaining the detenu.

The case of Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others, directly deals with the form of representation, wherein it has been held that the representation has not to be made in any prescribed form so long as it contains a demand or request for the release of detenu, in whatever form or language couched and a ground or a reason is mentioned or suggested for such release, there is no option but to consider and deal with it as a representation for the purpose of Article 22(5) of the Constitution. It was further held that when the detenu alleges in his representation that the grounds of detention were vague, irrelevant and non-existent, and, therefore, he was unable to make any representation as he had not been given copies of the statements and documents, then the mere request for copies of documents to enable the detenu to make a further representation on merits as well as on other grounds in the event of the detaining authority not agreeing to revoke the order of detention would not divest the communication of its character as a representation. As such, the representations made by the detenu seeking their release on the ground of their inability to make an effective representation because of the refusal by the authorities to meet their lawyer would amount to a representation as envisaged under Article 22(5) of the Constitution.

The effect of not deciding the representation of the detenu was considered by the

Supreme Court in the case of Harish Pahwa Vs. State of U. P. and Others, where in it was held that the fact of not deciding the presentation made by the petitioner within a reasonable time is of such importance that even if the point is not raised in the writ petition the point can be considered by the Court on the material available in the record.

Now, in the instant case till this date the representations of the detenus have not been decided because the letter dated 23-4-1992 sent by the Ministry of Finance in reply to the representation dated 6-4-1992 making a prayer for their release does not say anything about the representation of the petitioners for their release. The order of the detaining authority communicated by the Finance Ministry simply says that the petitioners are permitted to have interview with their lawyer but it does not say anything about the prayer of the detenus about their release from illegal detention. As such it is manifest that the State has failed to take a decision on the representation made by the petitioners and in the light of the aforementioned discussion the petitions deserve to be allowed on this ground alone.

The second ground is about the grievance of the petitioners refusing them the opportunity to meet their lawyer at the earliest. It is true that the detenus have a right to have interview with a legal adviser of their choice. In the case of Francis Coralie Mullin v. The Administrator, Union Territory of Delhi - AIR 1981 SC 746 the Supreme Court considered the right of the detenu to have interview with lawyer and family members and also considered the restrictions imposed by the Delhi Administration in various clauses of the order regulating the right of detenu to have interview with lawyer and family members. Dealing with the aforesaid regulations the Supreme Court has held that our Constitution recognises the existence of power of preventive detention but is hedged-in by various safeguards set out in Articles 21 and 22. Article 21 requires that no one shall be deprived of his life or personal liberty except by procedure established by law and this procedure must be reasonable, fair and just and not arbitrary. Therefore the law of preventive detention to pass the test not only of Article 22, but also of Article 21 and if any law is challenged for depriving a person of his personal liberty the Court has to see whether the law is reasonable, fair and just. Therefore, the right to live with human dignity embraces within its ambit the right of the detenu to have interview with his family and friends and no such law putting restriction on such right can be held valid unless it is reasonable, fair and just.

It has further been held that on the same reasoning the condition of the detention order that a detenu can have interview with a legal adviser only after obtaining the prior permission of the District Magistrate and that the interview has to take place in the presence of an officer of Customs/Central Excise/Enforcement to be nominated by the local Collector of Customs/Central Excise is also invalid because the right of the detenu to consult the legal adviser of his choice for any purpose is not necessarily limited to defence in a criminal

proceeding, but also for securing release from preventive detention. Therefore, this right of the detenu cannot be interfered with except in accordance with the reasonable, fair and just procedure established by a valid law. No law has been brought to our notice wherein the permission to seek legal interview is dependent upon the permission of the Detaining Authority for seeking that interview.

It is undisputed before us that in the instant case the counsel for the petitioners wanted an interview with the petitioners, but he was refused the interview on 30-3-1992 by the Jail Authorities, whereupon the petitioners made a representation to the Detaining Authority seeking relief of their release on this very ground. The permission was of course accorded on 23-4-1992, but the question still remains whether a detenu's right to seek a legal interview and make an effective representation expeditious-ly has been infringed or not. It is true that the Detaining Authority has explained the cause of the delay in communicating the accord of sanction for giving the interview according to the Jail Rules, but in absence of any Rule to this effect having been brought to our notice, in our opinion, the action of the authorities who refused interview was arbitrary and unjust and has deprived the petitioners to make a representation for 25 days, whereas the petitioners should be provided with the facilities to make a representation against their detention as soon as possible. Therefore, in our opinion, there is force in this argument also of the detenus that they were deprived of a precious opportunity of making effective a representation against their detention as soon as possible.

As regards the supply of photostat copies of some documents being illegible, we find that most of the copies are legible, but in copy at page 46, some words are missing copy at page 50 is of a notice which is very faint; copy at page 69 is legible, but can be read with some effort; copy at page 76 is legible except a few words and same is the case with copy at page 77. Copy at page 130 can be read with effort; copy at page 208 is not legible. Copy at page 222 is legible; copy at page 289 is also legible and can be read only with some effort; copy at page 290 is legible; copy at page 313 also is legible, copy at page 332 is legible. As such we find no force in this argument that the petitioners were not supplied with legible copies.

An argument has also been raised that the document at page 287 of the record is dated 13-3-1992 and it was despatched on that date to the Detaining Authority, but strangely enough it finds place in the documents placed before the Detaining Authority on 13th itself. It has been strongly pleaded by the learned counsel . for the petitioners that no document could reach Delhi from Indore on the same day along with the other documents and document M.P. 108 is a document consisting of 397 pages. This creates a dent on the question of the application of the mind by the Detaining Authority. It should have been explained as to how the Detaining Authority could get the document on 13-3-1992 itself and how he applied his mind on the same day for passing the detention order on

13-3-1992. No satisfactory explanation has been given about this fact before us except that the document is dated 12th and sent on 12th, but the original record has not been placed before us to ascertain this fact. This fact of course remains unexplained and puts a dent on the detention order, but in absence of the original record before us we refrain to give any finding on the basis of this document in view of the fact that on the first two points we have already held that the detention order is illegal.

In the result we hold that although the present detenus have been charged with serious offences for which they shall stand the trial, but the present detention order passed by the Detaining Authority against the petitioners cannot be allowed to be sustained in view of the non-compliance of the procedure prescribed under Article 22(5) of the Constitution of India and the law laid down by the Supreme Court in that behalf. Consequently the detention orders passed against the detenus in all the six petitions are quashed. The detenus shall be set at liberty if not required for any other offence.

S.D. Jha, J.

I agree. As would be seen from paras 7 to 13 of the foregoing order, the petition is mainly being allowed for failure of the detaining authority to decide that part of the representation dated 6-4-1992 challenging the detention on the ground that detenus were denied legal interviews with their lawyers and to communicate the decision on the representation. This makes it necessary to make certain observations in the matter of interviews of such detenus by jail authorities because it appears that all is not well in this regard in the jail administration and evolving suitable guidelines or giving instructions appear necessary.

During hearing it was given out that applications for interview if denied are returned to counsel or applicants with endorsement to that effect implying thereby that no corresponding record in the jail as regards the applications or refusals of interviews is kept. What is the sanction or authority behind such obnoxious practice was not indicated during the hearing. To say the least such procedure is arbitrary and requires modification and improvement. The application for interview even if it is refused must be kept in jail for proper record and refusal should be communicated separately or the applications should be taken into duplicate and refusal endorsed both on the application kept in jail with suitable endorsement to that effect on the duplicate remaining with the applicants or the counsel. Corresponding record of the application and refusal should be kept in jail to avoid situation like the one arising from the affidavit of Jailor Shri S.P. Jain, sworn on behalf of the respondent No. 3, Superintendent of Jail. According to this affidavit on 30-3-1992 no application for interviews was filed on behalf of the petitioner-detenus by Mr. Ansar Hussain, Advocate and the application declining interview does not bear Jailor's endorsement in writing and it also does not bear his signature. Affidavit further goes on to say that somebody has misused the seal of Jailor, Central Jail, Indore. The application bears the stamp "Jailor" in Hindi. The explanation is, however, to be found in

affidavit of Ranjit Singh Bhati, Assistant Jailor discussed later.

In *Francis Coralle Mullin v. The Administrator, Union Territory of Delhi and Ors.* AIR 1981 SC 746 on which Shri Gupta for the petitioner placed strong reliance it was inter alia observed that appointment for interviews to counsel should be given by the Superintendent of the Jail without any avoidable delay. In the instant case application for interview by Shri Ansar Hussain, Advocate, was, no doubt, addressed to the Superintendent of the Jail but according to the Affidavits of Shri Ansar Hussain, Advocate and detenu's relative Manoj S/o Shri Bhanmal handed over to Shri Ranjit Singh Bhati outside the jail and he took application inside the jail, Ranjit Singh Bhati's affidavit does not make it clear as to how and when exactly did he receive the application. His affidavit, no doubt, admits receipt of the application and then goes on to say that at that time the Superintendent being on leave and the Jailor being away and there being no order of the Government, he asked his subordinate interview warder "Kulkat Prahari" to make an endorsement and he further asked the interview warder to put his signature (Warder's signature) on the endorsement and return the application to Advocate Shri Ansar Hussain. It is not clear as to why Ranjit Singh Bhati was in such a haste to dispose of the application. The application was not addressed to him but to the Superintendent of the Jail; it was not even placed before the Superintendent. Could he not have waited in disposing of the application till he placed the same before the Superintendent and obtained his order. All this would have been clear if the Superintendent himself had come forward with his return but unfortunately the Superintendent for reasons best known to himself has not come forward with this return. Affidavit filed on his behalf by Shri S.P. Jain makes things more confused as would be seen from the discussion of the same above. R.S. Bhati though asks the warder to use jailor's seal does not inform his superior - the Jailor of his having refused interview and returned the application to Ansar Hussain. The Jailor does not know what his assistant has done. Everyone appears to be a cut unto himself. The procedure to say the least is most unsatisfactory and casual approach like this in a serious matter of detention should not be allowed or encouraged. Besides, in the foregoing circumstances the Jailor's seal ought not to have been permitted to be used by the warder who signed the application in a serious matter of detention and approach like the present one can undo as it has done, a decision of preventive detention taken at a fairly high level in the hierarchy of the Government.

It is not clear whether at the time the order of detention was passed any instructions or guidelines were given to the Superintendent of Jail in the matter of interview detenus as the same has not been placed before us. It is also unfortunate that the respondent No. 3 Superintendent Jail has himself not filed return in the matter leading to confusion as seen in the affidavit of Jailor Shri S.P. Jain and Assistant Jailor Ranjit Singh Bhati. The State Government and the Union Government would do well to evolve suitable guidelines or give instructions to Jail authorities to that such a lapse whether due to ignorance,

negligence or otherwise is avoided and if necessary responsibility fixed.

A copy of this part of the order be forwarded to the Chief Secretary, Govt. of M.P. and Secretary of Jail, M.P. Govt., Bhopal, for such further action as they may consider necessary in the matter.

With the observation as aforesaid, I agree that the detention orders passed against detenus be quashed.