

(1988) 04 DEL CK 0018

In the Delhi High Court

Case No : Criminal Writ Petition 524 of 1987

Parakadavathu Mohamed Kunji

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 12-04-1988

Acts Referred:

Citation : (1988) 35 DLT 157 : (1988) 15 DRJ 85 : (1988) 36 ELT 403 : (1988) RLR 304

Hon'ble Judges : M. Sharief-ud-din, J

Bench : Single Bench

Judgement

1. The petitioner who himself is a detenu came to be detained pursuant to a detention order passed u/s 3(1)(i), 3(1)(ii) and 3(1)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act of 1974 by the Government of Kerala with a view to preventing him from smuggling goods, abetting the smuggling of goods and engaging in transporting smuggled goods.

2. This detention order was passed pursuant to an investigation into an incident dated 15th September 1983 when two truck loads of contraband foreign goods were caught by the Customs authorities and on investigation some persons were found involved in the acts of smuggling, one of which is the detenu petitioner who immediately after the incident fled the country and went abroad. The petitioner was, however, arrested pursuant to this detention order on 20th August 1987 when he was taken into detention. The detention order actually was passed on completion of the investigation on 15th June 1984, it appears that the State Government followed the procedure laid down by Section 7 of the COFEPOSA Act, and the petitioner detenu came back to India under that pressure and before surrendering filed a writ petition in the High Court of Kerala which was dismissed on the ground that the detention order was not enclosed with the writ the writ petition. Obviously, the writ petition had to be dismissed as the detenu was not in wrongful confinement at that stage.

3. The continued detention of the petitioner detenu has been challenged on

various grounds. But since one of the points appeals to me and I find that the detention order cannot be sustained I would like to decide the petition on that point alone without going into the merits or otherwise of the other contentions raised in the writ petition. Before I proceed in the matter I would at this stage like to dispose of the preliminary objections of Mr. G. Prakash learned counsel for the State of Kerala, that the writ petition is not maintainable as similar writ petition has been dismissed by the High Court of Kerala. I do not subscribe to the view taken by Mr. G. Prakash as none of the grounds raised in the writ petition was considered by the High Court and the writ petition was dismissed in limine for the simple reason that the petitioner was not in confinement much-less in illegal confinement and, Therefore, the petition for habeas corpus could not be entertained. Now, the petitioner is, in fact in confinement pursuant to a detention order and what is under challenge before this court is the validity of the detention order. Earlier even though the validity of the detention order was also challenged in that writ petition, there is no finding in respect of the same. The preliminary objection, Therefore, is over-ruled.

4. The next objection of the counsel for the respondents is that this court has no jurisdiction. This is so said on the ground that the detention order has been passed by the State of Kerala. Without wasting any further time reference may be made to *Harish Taneja v. Union of India and Others*, 24 (1983) Del LT 276, a Division Bench judgment of this court, which I am bound to follow. In this judgment the court held in respect of a detenu regarding whom detention order was passed in the State of Maharashtra that both Bombay as well as Delhi High Court have the jurisdiction. This was based on the fact that the detenu had made a representation to the Central Government challenging the continued detention which was rejected at Delhi. The court, Therefore, held that the jurisdiction of this court is not ousted. Similar is the position in the present case as the detenu has admittedly made a representation also to the Central Government which was decided at Delhi. The objection as such cannot be sustained.

5. Before I take up the third objection raised by Mr. Prakash, I may make reference to the contention raised by Mr. Herjinder Singh, learned counsel for the petitioner, as the last objection is closely connected with the contention raised by them. The contention is that the detenu has been deprived of making an effective and purposeful representation for the reason that he was supplied large number of documents in English, a language which he does not understand. As is borne out from the representation of the detenu, his consistent stand has been that he only knows Malayalam language. The detenu made a representation to the detaining authority on 10th September 1987 wherein he represented to the detaining authority that a large number of documents given to him are in English and he has not been given a Malayalam version of these documents, the language he understands. This representation was rejected on 29th of September 1987 and since in the background of the request made in the representation the contents of this order assumes importance, I may refer to its contents, and I quote, it states :

"Reference your representation dated 10th September 1987, I am to invite your attention to the reference cited and to inform you that your request has been carefully considered by government but it is regretted that, the same has been rejected."

6. The aforesaid order clearly creates an impression on the mind that possibly the representation has not even been read by the detaining authority and it has been mechanically rejected treating it as a representation against the detention. I say so because had the detaining authority cared to read the representation the order rejecting the representation would definitely have said something about this important request of the detenu that he has not been supplied large number of documents in the language which he understands. That shows how scant respect has been shown to the representation of the detenu and that by itself may be a ground for quashing the detention order. Any way, in this case I am concerned with a more important issue as to whether the failure on the part of the detaining authority to supply the documents relied upon in arriving at subjective satisfaction to the detenu in the language which he understands will invalidate the detention order or not. The requirement of Article 22(5) of the Constitution is that the grounds of detention together with the documents relied upon shall be delivered to the detenu within 4 days or in exceptional circumstances within 15 days from the date of detention. This is the constitutional requirement to ensure that the detenu must be provided an opportunity of making a representation against his detention at the earliest possible occasion and if this constitutional and procedural requirement is not followed the detention order becomes unsustainable.

7. In its return, the State of Kerala has taken a stand that the petitioner was not deprived of making an effective and purposeful representation, thereby suggesting that the non-supply of these documents in the language which the detenu understands has caused no prejudice to him. It is nowhere suggested that no such demand was made by the detenu or that these documents were not relied upon by the detaining authority in arriving at his subjective satisfaction nor is it suggested that the detenu does understand a language other than Malayalam. In fact, there is no duty cast upon the detenu to demand documents from the detaining authority. These are to be supplied to him by the detaining authority even without asking for it. This is a constitutional obligation which the detaining authority has to discharge. In the present case, even after the detenu makes a grievance that large number of documents given to him are in the language which he does not understand, the detaining authority ignores the request and does not tell him anything about the documents but in three sentences rejects the application. This, apart from being non-consideration of the representation, does amount to depriving the detenu of his constitutional right to make effective and purposeful representation. Normally, a proper representation can only be made by the detenu if he knows and understands the case against him but if he is deprived of that understanding of the case against him, how can he be expected to make a proper representation ? In the matters of detention,

the stress is on absolute adherence to the procedural safeguards and if the fundamental right of a detenu under Article 22(5) of the Constitution is infringed and any procedural safeguard is violated, the detention will automatically stand vitiated and the question of prejudice having been caused is a matter which is irrelevant. The learned counsel for the State of Kerala suggests that in dealing with constitutional matters, the common sense cannot be put in cold storage and that a reading of the representation by the detenu would show that he has made a detailed and effective representation and since no prejudice has been caused to him the detention is valid. Reliance in this regard is placed on *Prakash Chandra Mehta v. Commissioner and Secretary, Government of Kerala & Others*, 1985 (3) S.C.R. 679. This case was taken notice of in another writ petition No. 670 of 1986 (28) ELT 188 *Mrs. Tsering Dolkar v. The Administrator, Union Territory of Delhi & Others*, decided on February 18, 1987 by the Supreme Court. The Supreme Court after reviewing the entire law laid down by it on this question held as under :

"We must make it clear that the law as laid down by this Court clearly indicates that in the matter of preventive detention, the test is not one of prejudice but one of strict compliance with the provisions of the Act and when there is a failure to comply with those requirements it becomes difficult to sustain the order."

8. In that view of the matter, Therefore, I find no force in the last contention about no prejudice having been caused to the petitioner. In fact, I would like to go to the extent that the detaining authority is no judge of the fact as to whether prejudice has been caused to the detenu or not and the detenu can only say whether he was handicapped in making the proper representation or not. The detenu is given documents in a language which he does not understand and still it is surprisingly urged that no prejudice has been caused to the detenu. On this ground alone, Therefore, I find that there has been violation of the constitutional requirement in not delivering to the detenu copies of the documents in the language which he understands within the maximum period of 15 days as required by Article 22(5) of the Constitution. That by itself is sufficient to vitiate the detention order. The petition for the reasons is allowed. The continued detention of the petitioner is quashed. He shall be released forthwith unless otherwise required.