

(1986) 03 DEL CK 0055

In the Delhi High Court

Case No : Criminal Writ Appeal No. 299 of 1985

Parmender Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 14-03-1986

Acts Referred:

Citation : (1986) 2 Crimes 27 : (1986) 11 DRJ 68 : (1986) 2 RCR(Criminal) 547

Hon'ble Judges : Sunanda Bhandare, J;Charanjit Talwar, J

Bench : Division Bench

Advocate : Harjinder Singh and S.K. Mishra, for the Appellant;

Judgement

Charanjit Talwar, J.

(1) By this petition for a writ of habeas corpus, the petitioner. Parminder Singh. seeks quashing of the order of detention passed on 16th September 1981 by Shri V. B. Gujral, Additional Secretary to the Government of India, the officer who was specially empowered under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (hereinafter referred to as "COFEPOSA"). The order was passed u/s 3 of the Act with a view to preventing the petitioner from smuggling goods. A copy of the same has been annexed as Annexure "A" The petitioner, however, was detained on 3rd September 1985 i.e., after about four years of passing of the order and is at present lodged in presidency jail, Calcutta. The petitioner has taken various grounds to challenge the legality and validity of the order of detention and also his continued detention, but it is not necessary for us to deal with all of them as in our opinion the petition must succeed on the first ground urged by Mr. Harjinder Singh. learned counsel for the petitioner. That plea which has been raised throughout i.e. in the petition and before the Single Judge, who has noticed it in a reference order and also during arguments before us, is that as the Advisory Board refused to record the evidence of the petitioner's wife and further refused to take on record the documents which she had in her possession and were shown to the Board on the 4th November 1985, the date on

which it met to consider the case of the petitioner, his continued detention is vitted.

(2) To appreciate this contention few facts may be noticed. The petitioner was apprehended at Dumdum Air Port on 11th May 1981, when he arrived at Calcutta from Thailand by Thai Airways Flight No. To 311. The intelligence report received earlier by the customs officers had indicated that he had been smuggling watches from Bangkok in connivance with some Thai Diplomats at Calcutta. It appears that certain smuggled goods were recovered from the baggage of one Mrs. B. Chand Shobhe who had also travelled by the same flight. The petitioner was produced before the Judicial Magistrate on 12th September 1981 who remanded him to judicial custody till 19th May 1981. He was, however, released on bail on 16th May 1981. The order of detention was passed on 16th September 1981. The petitioner moved the Calcutta High Court for a writ of mandamus seeking quashing of the detention order. It appears that ad-interim order staying the operation of the order, copy annexure "A", was passed on 18th December, 1981. This order was, however, vacated on 15th June 1982. But the petitioner, as noted above, was detained only on 3rd September 1985. His case is that by not detaining him earlier it has to be held that the subjective satisfaction arrived at by the detaining authority in passing the detention order on 16th September 1981 was "neither real nor genuine". It is urged that the petitioner was available during the period at Calcutta where he is doing business. In his representation made on 4th November 1985 to the Advisory Board, he had sought permission to get the statements of three witnesses including the statement of his wife who was present on that day and who had brought documentary evidence in support of the petitioner's contention, berecorded.

(3) In the counter affidavit filed by the Central Government the presence of the petitioner's wife on the day the Advisory Board met was not admitted. In reply to paragraphs 13 to 18 of the petition wherein the pleas, which have been summarised above, have been raised it was submitted as under:

"13,14,15,16,17 and 18. The contentions of the petitioner are denied. It is particularly denied that the orders of detention against the petitioner were issued to subvert or that the normal legal proceedings pending against him as contended or at all. The representation made by the petitioner to the Central Government and the Advisory Board were duly considered and rejected. The petitioner is put to strict proof about the presence of his witnesses at the time of the hearing of his case by the Advisory Board, and the necessity of their examination by the Board. The Hon'ble Court may like to peruse proceedings of the Advisory Board. The petitioner was provided with all the necessary documents and material for his representation and no prejudice has been caused to him on that account"

(4) As per the offer made we perused the proceedings of the Advisory Board. It appears that the wife of the petitioner was present. She was called by the Advisory Board. The documents produced by her showing that the petitioner was

present in Calcutta during the period after vacation of the stay granted by the Calcutta High Court were, it seems, perused by the Board. Thereafter, certain clarifications were sought by it from the representative of the department whose contention was that the petitioner had in fact absconded he had firstly ran away to Nepal and from there to Bangla Desh. The Advisory Board was of the view that neither the statement of the wife of the petitioner was required to be recorded nor were the documents produced by her to be placed on record as she was not being produced, to "rebut anything in the grounds of detention, but for showing. that the detenu was always available in his shop". We may note here that learned counsel for the respondent Mr. S.K. Misra, did not dispute the proposition of Mr. Harjinder Singh that it was the duty of the Advisory Board to determine not only that there was sufficient cause for detention of the detenu on the date the order was made but also to find out whether there was sufficient cause for the detention of that person on the date of its report. In fact Mr. Mishra says that the Advisory Board acted entirely as per the ratio laid by the Supreme Court in A.K. Roy and Others Vs. Union of India (UOI) and Others, , the case on which counsel for the petitioner is relying, in the said case, their Lordships have held that :the question to which the Advisory Board has to apply its mind is whether on the date of its report there is sufficient cause for the detention of the person. That inquiry necessarily involves the consideration of the question as to whether there was sufficient cause for the detention of the person when the order of detention was passed, but we see no justification for extending the jurisdiction of the Advisory Board to the consideration of the question as to whether it is necessary to continue the detention of the person beyond the date on which it submits its report or beyond the period of three months after the date of detention. The question as to whether there are any circumstances on the basis on which the detenu should be kept in detention after the Advisory Board submits its report and how long, is for the detaining authority to decide and not for the Board." Mishra's submission is that it was not necessary for the purpose of inquiry which the Advisory Board had to conduct to record the statement of the petitioner's wife. The gist of her statement has been noticed in its report. Out of the rival versions, Mr. Misra argues, the Board has accepted the version of the department. He submits that it was not at all necessary or required to have taken on record by the Board the documents which were admittedly produced before the Advisory Board. We may notice that from the report it appears that the Board did not consider those documents to be authentic. Mr. Harjinder Singh points out and rightly so that the history of the personal liberty was largely the history of the procedural safeguards. The requirement of observations of procedural safeguards in cases like the present is of prime importance This principle is well settled. One of the safeguards provided in the Act is that the Advisory Board has to submit its report to the appropriate Government. As per Sub-section (f) of Section 8 of the Cofeposa in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order. Thus, the opinion of the Advisory Board in such a case is not binding on the appropriate

Government. That Government has necessarily to apply its mind to the material on record. In the case like the present the record must have contained the document which were produced by the wife of the petitioner and were perused by the Board, although not considered by it, to prove that the petitioner "was always available at his shop at Calcutta. Mr. Harjinder Singh in support of his plea it was the duty of the Advisory Board to place on record atleast the said documents relies on Nand Lal Bajaj Vs. State of Punjab and Another, . In paragraph Ii of the said judgment it has been held that :

"We were informed that the Advisory Board did not forward the record of its proceedings to the State Government. If that be so, then the procedure adopted was not in consonance with the procedure established by law. The State Government while confirming the detention order u/s 12 of the Act has not only to peruse the report of the Advisory Board but also to apply its mind to the material on record. If the record itself was not before the State Government, it follows that the order passed by the State Government u/s 12 of the Act was without due application of mind. This is a serious infirmity in the case which makes the continued detention of the detenu illegal."

Following the law laid down by the Supreme Court, we are of the opinion that non placing of the document on the record by the Advisory Board has prevented the appropriate government from applying its mind to the material on record as required under the provisions of the Act which in turn has resulted in an infirmity which vitiates the continued detention of the petitioner

(5) The result is that the continued detention of the petitioner has to be held bad. Accordingly, we hold that the detention order annexure "A" is illegal and is to be quashed. We order accordingly.

(6) We allow the petition and made the rule absolute. The petitioner be released forthwith, if not required to be detained by an order of the Court or of Competent Authority.