
(1990) 02 GUJ CK 0012
In the Gujarat High Court

Praful Keshavji Thakkar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 20-02-1990

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 9(1), 9(1)
Constitution of India, 1950 — Article 22(5)

Citation : (1990) 2 GLR 1090

Hon'ble Judges : J.U. Mehta, J;G.T. Nanavati, J

Bench : Division Bench

Judgement

J.U. Mehta, J.—The petitioner has come before this Court challenging the order of detention dated 18-2-1989 under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, passed against him by the Additional Chief Secretary to Government, Home Department, Gandhinagar. The petitioner has also challenged the order dated 9-3-1989 issued u/s 9(1) of the COFEPOSA Act by Shri B.V. Kumar, Additional Secretary to the Government of India, Ministry of Finance Department of Revenue, specially empowered in this behalf by the Central Government.

2. From the allegations made in the grounds of detention, it reveals that on 10-1-1989 the detenu was apprehended along with others while the smuggled gold was being transported in truck bearing No. GQC 7280.

3. The learned Advocate appearing for the petitioner submitted that in the grounds of detention it is mentioned that if the detenu wished to avail his right to make representation, he may submit his representation through the Jail authorities in the manner indicated therein. It is stated in the grounds of detention that the representation meant for the detaining authority will be addressed to the undersigned i.e., R. Balkrishnan, Additional Chief Secretary to Government, Home Department, Gandhinagar. It is also stated that the representation meant for the State Government should be sent to the address of

the Deputy Secretary, Government of Gujarat, Home Department (Special), Sachivalaya, Gandhinagar. It is also stated that if the representation is meant for the Central Government, he should submit the same through the Joint Secretary (COFEPOSA), Government of India, Ministry of Finance, Department of Revenue and if the representation is meant for the Advisory Board, it should be addressed to the Chairman, COFEPOSA Advisory Board. The learned Advocate appearing for the petitioner submits that thus the detenu is misled and he made a representation to the detaining authority on 22-7-1989 as per the guidance given in the grounds of detention and the detaining authority by its communication dated 28-7-1989 communicated that it is rejected by the detaining authority. Thus, it is submitted by the petitioner that the detaining authority had misled the petitioner in his valuable right and an obligation is cast on the detaining authority to afford an earliest opportunity to make a representation to the State Government and thus he violated the provisions of Article 22(5) of the Constitution. The learned Counsel for the petitioner also submitted that his representation has been considered by the authority who had no power to consider the representation. According to the learned Counsel for the petitioner, the order of detention is thus null and void.

4. In this case, it is seen from the grounds of detention that the petitioner was informed that he could make a representation against the order of detention to the detaining authority. If the detenu would have been informed that the representation could be made to the State Government and not to the detaining authority, he would have made the representation to the State Government.

4.1. The correct position of law, as held by the Supreme Court in the case of State of Maharashtra and Another Vs. Sushila Mafatlal Shah and Others, is that the detenu under the COFEPOSA Act has a right to make representation to the State Government and not to the detaining authority. It, therefore, clearly appears that the petitioner was misled regarding his right to make a representation by what was stated in the grounds. Under these circumstances, the detenu addressed the representation to the detaining authority and Shri R. Balkrishnan, who received the representation considered the representation and rejected it. Shri R. Balkrishnan ought to have forwarded it to the State Government for its consideration. Instead of doing so, he considered the representation and rejected the same. He did so in the capacity as the detaining authority. It is not disputed that the said representation was not forwarded to the State Government and the State Government has not dealt with the same. In view of the facts of this case, it must be regarded as a violation of the petitioner's right under Article 22(5) of the Constitution and for this reason, the continued detention of the detenu has become illegal. The impugned order of detention, therefore, deserves to be quashed and set aside. The same view is taken by this High Court in Special Criminal Application No. 990 of 1988, decided on 29-12-1989 (Coram : G. T. Nanavati & N. B. Patel, JJ.). The Delhi High Court has also taken the same view in the case of Moh. Mian Vs. State, .

5. In the result, this petition is allowed. The impugned order of detention is quashed and set aside. Consequently, the declaration u/s 9(1), dated 9-3-1989 is also set aside. The petitioner is directed to be released forthwith unless his presence is required in Jail in connection with some other case. Rule is made absolute with no order as to costs.