
(1986) 11 DEL CK 0026

In the Delhi High Court

Case No : Criminal Writ Appeal No. 165 of 1986

Prakash Kumar Karel

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 13-11-1986

Acts Referred:

Citation : (1987) CriLJ 238 : (1986) 2 ILR Delhi 264

Hon'ble Judges : Jagdish Chandra, J

Bench : Single Bench

Advocate : Harjinder Singh, B.P.S. Mangat and Madan Lokur, for the Appellant;

Judgement

Jagdish Chandra, J.

(1) The petitioner Prakash Kumar Karel has filed this criminal writ petition under Article 226 of the Constitution of India for quashing the order of detention dated 7th February 1986 pertaining to him and passed by Shri M. L. Wadhawan, Additional Secretary to the Govt. of India, specially empowered u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974" (as amended), after being satisfied with the necessity of making the same with a view to preventing him from smuggling and abetting the smuggling of goods, and in pursuance of which order he was detained and kept in custody in the presidency Jail, Calcutta, and for a writ of habeas corpus or any other appropriate writ. order or direction for his immediate release from detention.

(2) The first contention urged by Shri Harjinder Singh "earned counsel for the petitioner was that the petitioner" appeared before the Advisory Board on 7th April. 1986 at Calcutta and that in order to prove his innocence he informed the Advisory Board that his witnesses Satyanarayan Soni and Pokhar Mal Soni were present and that their statements be recorded but it was not done by the Advisory Board and that the Advisory Board should have recorded the statements of the witnesses and for that omission the detention of the petitioner

was rendered illegal and bad and vocative of Article 22(4) and 22(5) of the Constitution of India. This was so stated in para No. 14 of the writ petition. In ground No. 5 of para 16 of the writ petition it was asserted that besides the aforesaid two witnesses, two other witnesses namely Gajanand and Chetan Prakash Verma were also present outside the Board room but were not examined even though the petitioner specifically requested the Advisory Board to record that evidence but the Advisory Board refused his request on the ground that they had no power to record the same. In the counter-affidavit deposed to by Shri S. K. Chowdhry, Under Secretary to the Government of India, Ministry of Finance, Department of Revenue filed by the respondents, this ground and contention were controverted by raising up the plea that the correct fact had been deliberately suppressed by the petitioner and his counsel and that the correct facts were that petitioner's counsel Shri Herjinder Singh, Advocate made oral submissions before the Advisory Board to have certain defense witnesses examined and the Advisory Board told him to file an application in that behalf and the hearing was adjourned to the post lunch session to enable him, inter alia, to move an application but no such application for examination of any defense witnesses was filed. Reliance for this purpose was placed on the Advisory Board's Report. The Advisory Board's Report was brought by the respondents in court for my confidential perusal and the perusal thereof by me supported the aforesaid assertion of the respondents in the counter-affidavit. In the rejoinder-affidavit of the petitioner it was denied that the Advisory Board had asked the petitioner to file an application in this behalf for the purpose of examining the witnesses, with an assertion to the contrary that one bail application was moved on 6th February, 1986 by the petitioner and another bail application by Chetan Prakash and Gajanand Verma and the order dated 6th February, 1986 showed that two applications had been moved, for which reason it was submitted by the petitioner's counsel before the Advisory Board that the two persons viz. Gajanand Verma and Chetan Prakash Verma had also submitted the application for bail which, was not placed before the Advisory Board and it was for that reason that the case was again taken up after lunch by the Advisory Board to see whether that other application had been moved or not, but as the application of Chetan Prakash and Gajanand Verma was not available, the same could not be placed before the Advisory Board. Mr. Herjinder Singh Advocate has deposed to an affidavit dated 11th September, 1986 in support of this plea and this affidavit would go to show that the application desired to be produced by the petitioner on that day was a bail application of Gajanand Verma and Chetan Prakash Verma wherein they had retracted the statements made by them and that application was relevant and not placed before the Detaining Authority and the Advisory Board asked turn copy of that application which was not with the counsel of the petitioner, turn which reason it was requested that the same would be got from the Chief Metropolitan Magistrate and time was taken for the production thereof and so the proceedings before the Advisory Board were adjourned to post lunch session when it was stated that the said application was not traceable. To my mind the aforesaid position taking up by the petitioner and also deposed to by

his counsel Shri Herjinder Singh Advocate in his aforesaid affidavit appears to be correct because the filing of the copy of the bail application of the co-detenu Gajanand Verma and Chetan (Prakash Verma wherein they had retracted their confessional statements allegedly made by them before the Customs Authorities, had relevance and as the same was not available with the petitioner's counsel, time must have been sought by the petitioner's counsel for the production of the same after lunch before the Advisory Board which held its meeting on that day at Calcutta, after obtaining the same from the court of the Chief Metropolitan Magistrate, Calcutta. This position looks quite natural and genuine because the matter of retraction of the confessional statements on the part of a detenu and his co-detenu is very relevant for consideration by the Advisory Board, while on the other hand, when the defense witnesses were present outside the Board Room and request was made by the petitioner and his counsel Shri Harjinder Singh to the Advisory Board for examining them, where was the necessity or even desirability for calling upon the petitioner and his counsel to make an application for that purpose after lunch and so the position taken up by the respondent and also finding mention in the report of the Advisory Board does not inspire confidence and may be the result of forgetfulness on the part of the members of the Advisory Board. In this view of the matter, by not examining the witnesses of the petitioner who were present for their statements outside the Board Room the petitioner was deprived of his right to produce evidence in rebuttal to prove his innocence.

(3) It was thus contended that on account of this omission on the part of the Advisory Board the detenu had not been given reasonable opportunity as envisaged under Article 22(4) of the Constitution of India and u/s 8 to the Cofeposa Act and thereby the detenu was deprived of his valuable right of rebutting the allegations made in the grounds of detention, which rendered his detention and continued detention illegal. In *A.K. Roy and Others Vs. Union of India (UOI) and Others*, :-

"The last of the three rights for which Shri Jethmalani contends is the right of the detenu to lead evidence in rebuttal before the Advisory Board. We do not see any objection to this right being granted to the detenu. Neither the Constitution nor the National Security Act contains any provision denying to the detenu the right to present his own evidence in rebuttal of the allegations made against him. The detenu may therefore offer oral and documentary evidence before the Advisory Board in order to rebut the allegations which are made against him..."

(4) Had the Advisory Board recorded the statements of the witnesses brought by the detenu on the date of hearing before the Advisory Board, the Advisory Board might have agreed with their statements and even if the Advisory Board were not to agree with their statements, it would have forwarded the entire record including the statements of those witnesses to the appropriate Government along with its own opinion regarding the order of detention, which on perusal of the opinion of the Advisory Board as also the entire record including the statements

of those witnesses, might have been induced to come to a finding favorable to the detenu and it rests in the discretion of the appropriate Government either to confirm or not to confirm the detention order even if the Advisory Board has reported that there is, in its opinion, sufficient cause for the detention of the detenu. This discretion has been vested in the appropriate Government u/s 8(f) of the Cofeposa Act which reads as follows :-

"(F)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 and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith."

(5) The perusal of this provision of law shows that when the Advisory Board opines no sufficient cause for the detention, the appropriate Government is bound to revoke the detention order and cause the detenu to be released forthwith, but when the Advisory Board favors the detention, that opinion is not binding on the appropriate Government which has been vested, on the other hand, with the discretion to confirm or not; to confirm the detention order. In this view of the matter even if the Advisory Board had opined in favor of the detention, the appropriate Government could have differed from the same on the basis of the evidence sought to be produced by the detenu before the Advisory Board on the date of hearing and who were also admittedly present on that day.

(6) A Division Bench decision of this Court pronounced on 21st February, 1986 in *Lakshman T. Advani v. Union of India and others*-Criminal Writ Petition No. 283 of 1985,(2) deals with this point. The perusal of this authority shows that the Advisory Board refused to examine the witnesses of the detenu as it felt that no useful purpose would be served in examining them even though those witnesses were sought to be produced by the detenu for proving that the recovered and seized amount of Rs. 1.75.000 was his lawful earning which could be accounted for and had nothing to do with the foreign exchange. It was held that by declining to examine the witnesses of the petitioner, which were present, the petitioner had been deprived of his valuable right of effectively- representing his case before the appropriate Government and the continued detention which thereby stood vitiated was quashed. Other points urged by Mr. Herjinder Singh need not be dealt with.

(7) So. in view of the above discussion, the detenu was deprived of his valuable right of effectively representing his case before the appropriate Government and this factor vitiates the continued detention of the detenu and so accept this writ petition the detention of the detenu hereafter is quashed and he shall be released forthwith.