
(1990) 05 DEL CK 0037

In the Delhi High Court

Case No : Criminal Writ Appeal No. 785 of 1989

Ramesh Gupta

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 25-05-1990

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)

Citation : (1990) CriLJ 2494 : (1990) 42 DLT 346 : (1990) 19 DRJ 193 : (1990) ILR Delhi 590 : (1990) 3 RCR(Criminal) 343

Hon'ble Judges : Y.K. Sabharwal, J

Bench : Single Bench

Advocate : N.C. Chawla, Rekha Agarwal and Sangeeta Nanchaha, for the Appellant;

Judgement

Y.K. Sabharwal, J.

(1) By order of detention dated 29th August, 1989 made by the Joint Secretary to the Government of India, Ministry of Finance (Department of Revenue) in exercise of powers conferred by Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (for short "the Act") petitioner has been ordered to be detained with a view to preventing him from acting in any manner prejudicial to the augmentation of foreign exchange. Briefly the facts emerging from grounds of detention are these :-

(2) On 2nd May, 1989 the officers of Punjab Police searched the business premises of M/s. Golden Silk Stores, Jullundur. As a result of the search, documents, foreign currency and Indian currency, as Mentioned in the grounds of detention, were recovered and seized, immediately, the officers of the Punjab Police informed about the said seizure to Jullundur Zonal office of Enforcement Directorate and as a follow up, the seized Indian currency foreign currencies and documents were taken over from Punjab Police and S/Shri Avinash Chander, Rakesh Kumar, Raj Pal and Ramesh Kumar who were present at the time of

seizure in the premises of M/s. Golden Silk Store were summoned u/s 40 of the Foreign Exchange Regulation Act, 1973. In statement dated 2nd May 1989 Sh. Ramesh Kumar Mutal. inter- alia, stated that for last six months he has been working on the monthly salary of Rs. 550.00 at detenu's shop M/s. Durga General Store. Goshala Bazar, Hoshiarpur; that detenu has been doing the business of foreign currency for many years and some years ago detenu was earlier detained under Cofeposa ; that as per detenu's instructions he goes from village to village and purchases foreign exchange from those people who visit India from abroad and that the Indian currency is provided to him by detenu and the foreign currency so purchased is handed over to the detenu. The particulars of certain villages and persons from whom the foreign currency was purchased were also given in the statement of Sh. Ramesh Kumar Mittal.

(3) The statement of the detenu was also recorded u/s 40 of the Foreign Exchange Regulation Act, 1973. In view of the facts mentioned in the grounds of detention the detaining authority arrived at the conclusion that the petitioner has been indulging in authorised transaction in foreign exchange in violation of the provisions of the Foreign Exchange Regulation Act, 1973 and that unauthorised transactions indulged by the petitioner have affected the foreign exchange resources of the country adversely. The validity of the order of detention is in the present petition.

(4) Learned counsel for the respondents raised a preliminary objection to the maintainability of the petition pointing out that the petitioner had earlier filed criminal writ petition No. 3248/89 in the High Court of Punjab and Haryana which was dismissed by the said court on September 26, 1989. Counsel submits that in view of dismissal of earlier writ petition the present petition is barred. The fact of the filing of the earlier petition has been mentioned in the present petition and a copy of the said petition has also been annexed. A certified copy of the order dated 26th September. 1989 was produced by the petitioner during the course of bearing of arguments. The writ petition was dismissed by the Punjab and Haryana High Court primarily on the ground that the petitioner's defense could not be looked into by the court. It has been observed in the judgment that the petitioner did not permit the matter to be placed before the Advisory Board as provided for u/s 8 of the Act and moved the court for quashing the detention order on the ground that the allegations contained in the grounds of detention are vague. After setting out ground No. 6 of the grounds of detention the operative portion of the judgment reads as under :-

"IT is too difficult to hold that the facts enumerated in this ground are vague calling for interference of this court at this stage. The petitioner's defense cannot be looked into by this court. The petitioner has got a remedy available under the Act which ought to have been availed of and the instant attempt appears to be only to prevent the authorities under the Act to proceed according to law, This petition is dismissed."

(5) The decisions relied upon by learned counsel for the respondent in support of

the contention that the present petition is not maintainable itself shows that the principles of res-judicata or constructive res-judicata are not applicable to the cases of detention Abdul Sattar Abdul Kadar Shaikh Vs. Union of India (UOI) and Others, & Smt. Kavita Vs. State of Maharashtra and Others, Relying on the observations made in Abdul Sattar's Case counsel contends that there should be some finality in these matters. In the said case the petitioner filed the petition before the .Supreme Court with a highly belated pica that some documents had not been supplied to him though he made a request The Supreme Court found that request for supply of documents was made after dismissal of the earlier writ petition and the justification put forth by the detenu that he was unaware of the existence of the said documents was false. It was found that the petitioner was aware of the documents and, accordingly, the pica was not considered bonafide by the Supreme Court, and under those circumstances while reiterating the principles of res-judicata or constructive res-judicata are not applicable, it was observed that there should be finality in these matters. The facts of the present case are entirely different. The grounds being considered by this court were not urged in the earlier petition which appears to have been dismissed on the ground that the petitioner has got a remedy available under the Act, namely, the making of the representation. The only ground considered in the judgment dated 26th September, 1989 is the vagueness of the grounds of detention. That ground has not been urged by learned counsel for the petitioner in support to the present petition. The principles of res judicata and constructive res-judicata being not applicable it cannot be held that the present petition is not maintainable and the preliminary objection is thus overruled.

(6) Adverting to the facts of the present case admittedly after the dismissal of the earlier writ petition a representation dated 30th September 1989 was filed by the petitioner. The said representation has been addressed to the detaining authority. In that representation, the detenu has, inter alia made a grievance that out of the documents supplied to him some documents are illegible, some are blank and some are unintelligible. The particulars of the documents, claimed to be illegible, blank and unintelligible, have been given in the representation The detenu requested the detaining authority to supply copies of those documents and also asked for being informed about the relevance of some of the documents. A request has also been made in the representation to supply copies of certain documents which have not been supplied to the detenu The detenu said that the information and documents were required for supplementing the representation and making effective representation to the Advisory Board The detenu further said that he would make further representation after supply of information and the documents. By memorandum dated 18th October 1989 the detenu was informed that the representation dated 30th September, 1989 has been carefully considered by the Central Government and the same has been rejected. The petitioner is also aggrieved of the fact that the Memorandum dated 18th October, 1989 was received by him on 26th October, 1989 and by his counsel on 23rd October, 1989 after the meeting of the Advisory Board which

was fixed for 23rd October, 1989. The main contention of Sh. Chawla, learned counsel for the petitioner, is that the aforesaid representation of the detenu was not properly considered and the Memorandum dated 18th October, 1989 shows that the authorities did not even bother to read the representation and apply their mind. Counsel argues that the consideration of the representation was only casual and cursory as in the Memorandum no mention has been made of various requests of the detenu for supply of certain documents and information and any reasonable person reading the Memorandum will think that request for recalling the detention was being rejected. Counsel vehemently canvassed that the casual consideration in this manner is no consideration in the eyes of law and thus has the effect of invalidating the order of detention. Reliance is placed by Mr. Chawla on decision of Malik Sharief-Ud-Din, J. in *Aziz Ahmed v. Union of India & Ors.* 1988 (2) DL 50. Justice Malik, in somewhat similar circumstances, held that the representation has been casually dealt with which vitiates the order of detention. In *Aziz Ahmed's* case to a request for supply of documents contained in a representation sent by the detenu a similar reply was sent. Commenting upon the reply sent to the representation, Justice Malik said "One is baffled to find the type of consideration the representation of the detenu has received. This is the earliest possible representation which the detenu could make and at the earliest possible occasion apart from asking for revocation of the detention order he has asked for certain important documents which, according to him, could enable him to make a further and proper representation to the Advisory Board."

(7) It seems that the representation has not at all been read by the authorities concerned or else there was no earthly reason for the appropriate authority not to notice the fact that the detenu had demanded something and they would have in that connection informed him that either the document does not exist or that it will be supplied to him or it may have been supplied to him. Along with the order of rejection of his representation, I am in complete agreement with opinion expressed in *Aziz Ahmed's* case. The aforesaid observations made by Justice Malik aptly apply to the present case. As noticed earlier the detenu had asked for legible copies of certain documents, he had also asked for the relevance of some documents, he had also said that some of the documents are unintelligible, he had demanded more documents as also certain other information with a view to enable him to make an effective representation. Like in *Aziz Ahmed's* case the reply sent is "the aforesaid representations have been carefully considered by the Central Government but it is regretted that same have been rejected." What will a detenu understand from such a reply. Instead of getting the information, documents and clarifications he is likely to get more confused. It is, of course, open to the detaining authority to say that either the documents are not available or the documents already supplied are legible or whatever other reply the detaining authority has to send to request for documents, information and clarification asked for in the representation but to all these the reply certainly cannot be "considered and rejected", which in fact, is the crux of the Memorandum dated 18th October, 1989. The detaining authority was

not considering a representation for revocation of order of detention. .Learned counsel for the respondents tried to distinguish Abdul Aziz's case by pointing out that in the said case the detenu besides asking for certain documents had also challenged the truthfulness and relevance of the grounds of detention and submitted that parameters of Article 22(5) of the Constitution are applicable only when the representation is against the orders of detention and not when request is made for supply of documents. It is contended that to a representation containing only request for supply of documents parameters of Article 22(5) of the Constitution are not applicable. Assuming, in the present case, the representation did not ask for revocation of the order of detention at the first instance but only made a request for supply of documents with a view to enable him to make an effective representation against the order of detention, under Article 22(5) of the Constitution, earliest opportunity of making representation has to be afforded to the detenu. The representation or request for supply of relied upon or relevant documents etc., is a step in aid of detenu's constitutional right to make an effective representation against the detention order. It cannot be held that procedural safeguards will not apply to such a representation or request. In the representation the detenu has asked that he may be supplied with the documents, information and clarification with a view to enable him to make an effective representation. So long as such request is in respect of relied upon or relevant documents the procedural safeguards as applicable to representations seeking revocation of the detention order will equally apply, to such a request. In *The State of Bombay Vs. Atma Ram Sridhar Vaidya*, the Supreme Court almost four decades ago held :

"CLUSE(5) of Article 22 confers two rights on the detenu, namely. first, a right to be informed of the grounds on which the order of detention has been made. and secondly, to be afforded the earliest opportunity to make a representation against the order; and though these rights are linked together they are two distinct rights. If grounds which have a rational connection with the objects mentioned in Section 3 are supplied, the first condition is complied with. But the right to make a representation implies that the detenu should have information so as to enable him to make a representation, and if the grounds supplied are not sufficient to enable the detenu to make a representation he can rely on the second right. He may if he likes ask for further particulars which will enable him to make a representation. On an infringement of either of these two rights the detained person has a right to approach the court and even if an infringement of the second right under Article 22(5) is alone established he is entitled to be released."

(8) In view of the above, it is too late in the day to contend that parameters of Article 22(5) of the Constitution will not be applicable to request for supply of relied upon or relevant documents, information and clarification. The result of the aforesaid discussion is that the order of detention is liable to be quashed for want of proper consideration of the representation of the detenu.

(9) There is yet another ground which invalidates the order of detention. As noticed earlier, reference is made in the grounds of detention to the earlier detention of the petitioner under COFEPOSA. It is not disputed that the earlier order of detention had been revoked on the opinion of the Advisory Board. It is also not disputed by learned counsel for the respondent that the fact of revocation of the earlier order of detention was not placed before the detaining authority. Counsel for the respondent however, contends that reference to earlier detention of the petitioner in the grounds of detention is only casual and, Therefore, the non-placement of the revocation of earlier order of detention before the detaining authority has no effect on the validity of the present order of detention. Learned counsel for the petitioner, however, contends that the revocation of earlier detention order was most material and vital fact and the effect of withholding of the said material and vital fact from the detaining authority results in non-application of the mind of the detaining authority to the said fact which vitiates the detention order. It is well settled that if a material and vital fact which might influence the mind of the detaining authority one way or the other on the question whether to make or not to make the order of detention is not placed before the detaining authority it vitiates the order of detention. The detaining authority may come to the same conclusion even if the said fact is brought to its notice. But that does not relieve the obligation of the sponsoring authority to place such a vital fact before the detaining authority. If it had been brought to the notice of the detaining authority that earlier order of detention had been revoked by the government on the opinion of the Advisory Board, it might have acted differently or, it might have still keeping in view other facts, though it fit to make the present order of detention. Such a vital and material fact ought to have been placed before the detaining authority. It is not for this court to say as to which way the detaining authority may have been swayed. The impugned detention order stands vitiated also on account of suppression of the aforesaid material fact. In view of conclusions reached above, it is not necessary to decide other grounds of challenge urged by learned counsel.

(10) For the foregoing reasons the writ petition is allowed, the rule is made absolute, the order of detention and the continued detention of the petitioner is quashed. The petitioner is directed to be released forthwith, if not required in any other case.