

(1987) 09 DEL CK 0026

In the Delhi High Court

Case No : Criminal Writ Appeal No. 166 of 1987

Santosh Madhavan

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 24-09-1987

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 9

Constitution of India, 1950 — Article 22

Citation : (1987) ILR Delhi 518

Hon'ble Judges : P.K. Bahri, J

Bench : Single Bench

Advocate : Harjinder Singh, B.P.S. Mangat, Rajender Dutt, Ranjan Mukherjee and Dilip Pillai, for the Appellant;

Judgement

P.K. Bahn, J.

(1) This writ petition under Article 226 of the Constitution of India has been filed challenging the detention order dated the 4th November, 1985 passed by the Commissioner & Secretary, Home Department, Government of Kerala u/s 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as COFEPOSA) and also a declaration made u/s 9(1) of the said Act made by Shri M. L. Wadhwan, Additional Secretary, Government of India, respondent No. 2. It was the case of the detaining authority that on the 10th May, 1985, the Superintendent, Special Customs Preventive Unit, T

(2) The petitioner had challenged the detention order on various grounds which I need not reproduce because counsel for the petitioner had made a statement that now the petitioner does not challenge the detention order. Counsel for the petitioner has now confined the challenge only to the declaration made u/s 9(1) by respondent No. 2. The declaration which had been issued u/s 9(1) shows that the declaring authority had satisfied itself from the material bearing on the

matter in its possession. It is not disclosed in this declaration as to whether the declaring authority had considered only the material which was placed before the detaining authority when the detention order was passed or it had considered any additional material for being satisfied for making this declaration.

(3) Counsel for the petitioner had vehemently argued that it was the bounden duty of the declaring authority to have made it clear in this declaration as to what specific material it had considered before making this declaration. The Counsel for the Union of India has on the other hand contended that it should be presumed that the detaining authority must have considered only the material which was there before the detaining authority at the time the detention order was made and the said material was admittedly served on the detenu *pari passu* the grounds of detention. Shri S. K. Choudhry, who is working as Under Secretary in the Ministry of Finance, has filed counter affidavit on behalf of respondents I and 2 but he does not mention in his affidavit as to whether the declaring authority, respondent No. 2 had considered only the material which was already there with the detaining authority before passing the detention order or whether any other material had been considered by the declaring authority before making the declaration. No affidavit of respondent No. 2 in this connection has been filed.

(4) It has been held in Criminal Writ Petition No. 65 of 1986, *Vijaya Kumar Gujral Vs. Union of India*, decided on May 27, 1987 (1), by a Division Bench of this Court that a detenu has a statutory right of making a representation against the declaration made u/s 9(1) of the COFEPOSA. The scope of Section 9(1) of the Act is as follows :-

The consequence of a valid declaration u/s 9 is two fold viz. that it extends the period of detention for a longer period without obtaining the opinion of the Advisory Board and further that on confirmation of detention by the State Government it extends the period of detention from one year to two years.

It is now not disputed that no material was at all supplied to the detenu while serving the said order containing the declaration made u/s 9(1) of the Act. The material judgment on the subject has been given by the Bombay High Court in a Criminal Writ Petition No. .14 of 1985, *Smt. Veronica Calteninho D'Souza Vs. Union of India & Ors.*, decided on November 27, 1985 (2). It was opined in this judgment, after construing the declaration made in the similar language as in the present case, that from the said declaration it cannot be ascertained at all as to what material in fact has been considered by the declaring authority before making the declaration. It was held that any subsequent disclosure of the material to the detenu after making the declaration and serving the same on the detenu would not meet with the Constitutional requirement of Article 226 to enable the detenu to make an effective representation against the said declaration. It was not disputed that the detenu has a statutory and constitutional right or making a representation against the declaration made u/s 9(1) of the Act. It was held that even if no fresh material had been considered by

the declaring authority, even then it was the right of the detenu to know whether the declaration had been made on the material already supplied to the detenu by the detaining authority or not. It was also observed that it is not for the detenu to assume or imagine on his own that the declaration had been made on the material already supplied to him along with the grounds of detention. Hence it was held that the detenu had not been afforded a reasonable earliest opportunity of making a representation against the declaration and thus the declaration was completely void. I may also mention that this judgment had relied on a case decided by Supreme Court in Mohd. Zakir Vs. Delhi Administration and Others, , which has laid down that the constitutional mandate requires the detaining authority to give the documents relied on or referred to in the order of detention pari pasu the grounds of detention in order that the detenu may make as effective representation immediately instead of waiting for the documents to be supplied to him later on. It was also held that it is manifest that question of demanding the documents is wholly irrelevant. The infirmity in this regard is vocative of constitutional safeguard enshrined, in Article 22(5) of Constitution.

(5) The Bombay High Court held that the same principles would apply to the present case of a declaration which had the effect of continuing the detention. This judgment applies to the facts of the case on all fours. Same principles have been laid down by the Gujarat High Court in 1986 (2) Crimes 68, Abdulla Mohd. Mithani Vs. State of Gujarat (4). No judgment taking any contrary view has been brought to my notice by the learned counsel for the Union of India. A bare perusal of section 9(1) shows that the declaring authority has to be satisfied as to whether particular person against whom order of detention has been made is required to be continuously detained. In order to be satisfied in this respect it is not necessary that the declaring authority has to consider only the material which was available with the detaining authority when the detention order was made. There is no legal bar in the declaring authority considering any other material relevant and having a bearing on the point which may be placed before it. The declaration u/s 9(1) has to be made in respect of the limited grounds mentioned therein whereas a detention u/s 3 could be on more grounds. At first counsel for the respondents tried to contend that in law the declaring authority cannot consider any other material except the material which was already there before the detention order was passed. But on being told that if some more incriminatory material comes to the notice of. the declaring authority why the same cannot be considered by the declaring authority the argument was not further pursued. After all the declaring authority has to be satisfied for continued detention of the detenu hence there is no law which bars that the declaring authority should not take into consideration any additional material in this connection. So it was incumbent on the part of the declaring authority to make it clear in the order of detention as to whether the declaring authority has considered only the material which was considered by the detaining authority while passing the detention order or it has considered any other material in addition. In case any other material in addition had been considered by the

declaring authority the same was required to be served on the detenu pari pasu the order of declaration. At any rate the detenu has to be made aware at the time the order of declaration is served on him as to what material had been considered by the declaring authority to enable the detenu to make an effective representation against the order of declaration. In case the declaring authority had failed to disclose in the order of declaration as to what material had been considered by it, the order of declaration has to be held void.

Entirely agree with the ratio of law laid down by the Bombay and the Gujarat High Courts in the aforesaid judgments. I need not refer to other grounds taken up by the petitioner in challenging the said declaration. I make the rule absolute and allow the petition and quash the declaration in question and direct that the petitioner be set at liberty forthwith unless otherwise required to be detained by virtue of any other lawful order.