

(1987) 05 DEL CK 0003
In the Delhi High Court

Sh. Parammal Siddik

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-05-1987

Acts Referred:

Citation : (1988) CriLJ 1139

Hon'ble Judges : M.K. Chawla, J

Bench : Single Bench

Judgement

M.K. Chawla, J.—On 12-8-85, one Shri Abdul Azeez, holder of an Indian passport arrived at Trivendrum Airport from Dubai by Air India flight. He was found carrying Indian currency of Rs. 1100/-, one gold biscuit bit of the value of Rs. 2915/- and 20 gold biscuits with foreign markings of 10 tolas each, of the value of Rs. 2,93,866/-. During the course of interrogation, Shri Azeez named, besides other persons, the present petitioner who was to receive a part of the Consignment. On the next day, the residence of the present petitioner was searched as a result of which one telegram dt. 23-11-84 addressed to Mr. Azeez was recovered. On interrogation the petitioner admitted, his involvement in the smuggling of gold. On the basis of the material concerning this case, the petitioner was taken into custody. He was produced before the Court of Chief Judicial Magistrate, (Economic " Offences), Ernakulam on 16-8-85 and remanded to judicial custody. Sometime later, he was granted bail on the condition that he would not change his residence and would also report before the Superintendent, Customs once a week. Subsequently, these conditions were waived by the Court.

2. The case was examined at the level of the State Government. Vide order dt. 18-1-86, Shri N. Kaleeswaran, Commissioner and Secretary (Home), Government of Kerala came to the conclusion that with a view to prevent the petitioner from abetting the smuggling of goods, it has become necessary to detain him. While exercising the powers conferred by Section 3(1) of the COFEPOSA Act, the Government of Kerala directed that the petitioner be detained and kept in custody. The order of detention was duly served on

22-1-86. On 24-1-86, he was supplied the grounds of detention along with the photostat copies of certain documents alleged to have been relied upon by the detaining authority.

3. On the same material, Shri M.L. Wadhawan, Additional Secretary to the Government of India, signed the declaration u/s 9(1) of the COFEPOSA Act recommending his detention for a period of 2 years from 22-1-86. The copy of this very declaration was served on the petitioner on 17-6-86. This very declaration is subject matter of attack in the present petition.

4. The contention is that it was obligatory on the part of the declaring authority to have immediately communicated the order purported to have been made on 20-2-86. It was received in jail itself on 16-6-86 at 9 P.M. and was delivered to the petitioner on the next day. There is thus a delay of about 4 months, for which there is no valid Explanation. Its non-service is fatal and will make the detention illegal being violative of Articles 22(4) and (5) of the Constitution.

5. In the counter, the stand of the respondent is that the declaration against the petitioner was issued on 20-2-86, a copy of which was sent to the Superintendent, Central Prisons, Trivendrum on the next day. As there was a reference from Collector of Customs, Cochin on 1-5-86 that the declaration was not received, its photo copies were sent to him for translation and its service on the detenu. Is this Explanation a valid and satisfactory one? Its answer will determine the fate of the present petition.

6. The scheme of Sections 3,8,9 and 10 of the COFEPOSA Act appears to be that while generally, the period for which a person may be preventively detained in connection with smuggling activities, may not exceed a period of one year, but in case of certain kinds of activities of smuggling into, out of or through any area highly vulnerable to smuggling, the period may exceed up to 2 years. In the latter event, a declaration is required to be made within 5 weeks of the detention of such person in the manner provided by Section 9(1) of the Act. that is not enough. In a case to which Section 9 applies, Section 8 stands suitably amended, inasmuch as a reference to the Advisory Board has to be made within 4 months and 2 weeks by the Government, and the Advisory Board is obliged to state its opinion within 5 months and 3 weeks from the date of order of detention, whether there is sufficient cause for the continued detention of the person concerned.

7. The two safeguards provided to the detenu against continued detention at this stage are; the application of mind by the specified authority before making a declaration u/s 9(1) and the consideration of the question by the Advisory Board.

8. In this background, the facts of the case can be looked into.

9. Admittedly, there is a delay of about 4 months in serving the copy of declaration on the petitioner. The Advisory Board meeting was fixed for 28th June, 1986. There were hardly 10 days with the petitioner to contact and consult

his Advocate and prepare the representation against his continued detention. Is this period sufficient enough for the detenu to prepare his representation or too short an interval for filing an effective representation? This is the question which is agitating the mind of this Court.

10. Broadly speaking, there are four principles which are normally followed in regard to the representations of the detenu. Firstly, the appropriate authority is bound to give an opportunity to the detenu to make a representation and consider the same as early as possible. Secondly, the consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board. Thirdly, there should not be any delay in the matter of consideration and lastly, the appropriate government is to exercise its option and judgment on the representation before sending the case along with the detenu's representation to the Advisory Board.

11. All these principles/rights of the detenu appear to have been completely frustrated in this case. The appropriate Government has not afforded a bare reasonable opportunity to the detenu to make the representation either to the Central Government, the declaring authority or the Advisory Board. Furthermore, without examining the objections to the order of continued detention, the detaining authority referred the case to the Advisory Board for its opinion. The continued detention order, prima facie, will stand vitiated if the declaration u/s 9(1) of the COFEPOSA Act is either not communicated to the detenu before the Advisory Board's meeting, before whom he has a right to make a representation, or, if communicated, there is no sufficient time left with the detenu to make an effective representation. In case reported as T.K. Mammu v. State of Maharashtra (1987) 1 Crimes 820 (Bom) the declaration was not communicated to the detenu before the meeting of the Advisory Board. The detention was held illegal and the detenu was directed to be released forthwith. The principles of the above case can easily be stretched to the facts of the present case. It is more or less a case where the order of declaration has not been served for reasons best known to the detaining authority. The right of the detenu to make a representation, is a right in the nature of constitutional safeguard embodied in Article 22(5) of the Constitution. If this right is denied to the detenu, the necessary consequences must follow.

12. I am not agreeable to the submission of the learned Counsel for the respondent that no prejudice has been caused to the petitioner in the late service of the order of declaration, inasmuch as, he had still 10 days' time to make the representation. This argument would have some substance provided he had adequate resources to reach his counsel. As is normally seen and observed, that in cases of detenus engaged in smuggling of precious metals, a very strict watch is kept on their movements even while confined in jail. Within this short period, he could not possibly, even with the help of jail staff, arrange a meeting "with his relations or sympathisers to instruct them to engage the services of competent counsel. Most probably the counsel will take some time to draft the

representations, after he is engaged and paid for the services. The detenu himself could not draft the representation as he is almost an illiterate person. He is read up to 8th standard. He would not know the intricacies of the order of detention and the implications of the declaration for his continued detention, and this is the ground on which such like orders can be challenged.

13. He was certainly not in a position to argue his case, in person before the Members of the Advisory board without the help of his Advocate or the next friend. It is just possible that with the legal advice he could have made out a case for the quashing of the order of declaration. He is under detention in this case for the last about 16 months. He may not have a case against the order of detention but certainly could make a fair and good representation against the order of declaration. In this way, his constitutional right under Article 22(5) of the Constitution of India has been frustrated. Due to the default of the detaining authority, he has been prevented from making a purposeful representation to the concerned authorities, Le., the Central Government and the Advisory Board. This lapse on the part of the respondent has proved fatal to the order of declaration recommending his continued detention for a period of 2 years from the date of his arrest in this case.

14. In the result, I accept the petition and quash the order of detention. The petitioner be set at liberty forthwith unless required to be detained under the orders of a competent court or authority.