
(1989) 04 DEL CK 0044

In the Delhi High Court

Case No : Criminal Writ Petition No. 505 of 1988

Shyam Khanna

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 07-04-1989

Acts Referred:

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

Citation : (1989) ILR Delhi 617(2)

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

Bench : Single Bench

Advocate : Rohit Kochhar, J.C. Verma, S.L. Verma, A.C. Jain and P.R. Ramesh,
for the Appellant;

Judgement

P.K. Bahri, J.

(1) In this writ petition filed under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, the petitioner has challenged the detention order dated May 11, 1988, passed u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and a declaration dated June 1, 1988, passed u/s 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA Act").

(2) Thirteen grounds have been raised in this writ petition for challenging the impugned orders but Mr. Rohit Kochhar, the learned counsel appearing for the petitioner, confined the challenge only to four grounds and has given up all other grounds.

(3) The first ground of challenge is that the representation made to the Central Government by the detenu which is dated May 30, 1988, came to be rejected only on July 20, 1988, hence, there has occurred unexplained and undue delay in disposal of the said representation which has the effect of vitiating the continued

detention of the petitioner.

(4) In the counter-affidavit filed by Shri C. Rajan, Under Secretary, on behalf of the Central Government, in paragraphs 7 & 8 by typographical mistake reference has been made to the representation dated May 13, 1988, instead of May 30, 1988. It is not the case of the detenu that any representation dated May 13, 1988, was made. So, nothing turns on this typographical mistake made in the said affidavit regarding the date of the representation. It has been explained in this affidavit that the aforesaid representation of the, detenu had reached Cofeposa Section on June 6, 1988 and a perusal of the representation disclosed that certain averments and allegations made in the representation required the comments of the sponsoring authority and thus, on the same day it was directed that the comments be obtained and copy was received by the Collector of Customs, Bangalore on June 10, 1988. as the sponsoring ;authority was based at that place and after getting the translation of the representation in English on June 13, 1988. while earlier two days were holidays, the copy was sent to the Field Officer at Mangalore who received the same on June 17, 1988 and his comments were dispatched to the Central Government on June 20, 1988. while earlier two days were holidays and the Cofeposa Section on June 21, 1988. had put up the same to the Joint Secretary on the following day and the Joint Secretary forwarded the same to the Minister of State on the next day and the Minister of State forwarded the same to Minister of Finance and the Minister of Finance perused the file and asked for clarification on certain points and file was received through Minister of State by the Additional Secretary on June 30, 1988 and telex message was sent to the sponsoring authority followed by a letter to the detenu in order to collect proof of any maltreatment meted out to the detenu as alleged by him in the reprehend representation and the Collector of Customs Bangalore in turn sent the message to the Collector of Customs, Mangalore on July 1, 1988 and a Superintendent was detuned who contacted the detenu in the Central Prison, Bangalore and the detenu failed to submit any proof regarding his allegations and after getting the comments of the Additional Collector of Customs, Bangalore. Along with medical reports, the detailed report was sent to the Central Government on July 5, 1988, which was received in Cofeposa Section on July 11, 1988 and the file was processed and was put up before the Joint Secretary who forwarded the same to the Minister of State, who in turn sent the file to the Minister of Finance and on July 18, 1988, the representation was rejected and the file was received back in COFEPOSA" Section on July 20, 1988. So, it is pleaded that there has taken place no undue and unexplained delay in dealing with the representation. I agree with the contention raised on behalf of the authorities in this connection. Sufficient details have been given in the affidavit as to how the representation, was being dealt with promptly. The representation did require comments of the sponsoring authority and thus, the authorities were justified in sending the copy of the representation to the sponsoring authority without even putting up the same at first before the Minister concerned and after the comments were received, the Minister had

applied his mind and thought it fit to seek more clarifications and thus the matter was again dealt with promptly at all levels and thus it cannot be said that there has taken place any undue and unexplained delay in dealing with the representation of the petitioner. It depends on facts of a particular case in order to see as to whether a particular representation has been dealt with due promptitude or whether any unexplained delay has occurred in dealing with the representation. In the present case. I am of the firm view that no such undue and unexplained delay has occurred which could have the effect of vitiating the impugned orders. I negative this particular ground.

(5) The second challenge raised is to the declaration on the ground that a bail order had been passed by the court on May 11, 1988. still copy of the said order had not been brought to the notice of the declaring authority. -Reference has been made by the learned counsel for the petitioner to Harbhaian Singh v. Union of India 1989(1) DI 118 (I) where it has been laid down that an order granting or refusing bail is a material document which is required to be placed before the declaring authority as well. However, in the present case I have been shown the file which was put up before the declaring authority in which the order of declaration was made and I find that copy of the said bail order had been placed before the declaring authority. So. there is no merit in this particular challenge as well.

(6) The third ground pleaded by the learned" counsel for the petitioner is that in the representation made to the Advisory Board the detenu has prayed that he may be permitted to examine his co-detents in rebuttal to the allegations made against him but still his request was not acceded to and hence, the impugned orders stand vitiated as the petitioner has not been afforded reasonable opportunity of substantiating his defense before the Advisory Board.

(7) It is true that in the representation made to the Advisory Board the petitioner had pleaded that his co-detents may be examined as witnesses in rebuttal to the allegations made against him. Shri G. Venkataiah. Secretary to the Advisory Board. has filed the affidavit in which it is mentioned that detenu had made a request to the Advisory Board to permit the petitioner to cross-examine the co-detents in rebuttal of allegations made in the grounds of detention and the Board thought it fit not to accede to such request of the petitioner. It is-, hence, evident that the petitioner had modified his request to the Advisory Board when he was granted personal hearing by requesting that he may be permitted to cross-examine the co-detents. There is no such right conferred on the detenu that he could cross-examine the witnesses on whose statements reliance has been placed by the detain in again g authority for coming to subjective satisfaction that the detention order should be made against a particular petitioner. The detenu has a right to examine witnesses in defense if he causes the witnesses to be present on the day the personal hearing is granted to the detenu by the Advisory Board. Such is not the case here. The detenu had made a prayer to the Advisory Board to permit him to cross-examine the co-detents and he had not

orally proved to the Advisory Board that he may be permitted to examine the co-detents as witnesses in his defense. So, it cannot be held that the petitioner has been deprived of his legal right to examine any witnesses in defense by the Advisory Board in any manner. I negate this particular ground as well.

(8) The last and the final ground raised by the learned counsel for the petitioning is that the petitioner had in his representation to the detaining authority as well as to the Central Government made a request for supply of certain documents but the request was not complied with and hence, the petitioner has been deprived of making an effective and purposeful representation against the impugned orders. The petitioner had asked for copies of documents relating to search conducted at various premises of his co-detents including search conducted at first floor of 18, Rameshwar Nagar, Azad Pur, Delhi, on April 8, 1988. The detaining authority in its letter dated July 28, 1988, informed the petitioner that all documents, which are relied upon and stand mentioned in the list at Serial Nos. 1 to 23 annexed with the grounds of detention, have been supplied to the detenu. Along with the order of detention and in respect of the other documents it was pleaded that the request of the petitioner to supply the said documents cannot be acceded to as those documents did not concern the detention of the petitioner. In para 9 of the writ petition, the petitioner has mentioned about the said documents and non-supply of the same by the authorities in spite of the detenu making a demand for the supply of said documents. In paras 15 & 16 of the counter-affidavit filed by Shri Cecil Noronha, Commissioner and Secretary to the Government, State of Karnataka, it has been pleaded that all documents which were relied upon in the grounds of detention have been supplied while the documents, of which copies were asked for by the detenu, were not relied upon and they had nothing to do with the detention order of the petitioner. Hence, it was not incumbent upon the authorities to supply copies of the said documents. It was mentioned that in spite of the search carried out at house No. 18, Rameshwar Nagar, Azadpur, Delhi, the documents pertaining to the same were not relied upon for the purpose of detention of the petitioner while other documents were neither relied upon nor referred to in the grounds of detention. In the grounds of detention only a passing reference has been made to the search conducted at house No. 18, Rameshwar Nagar, Azadpur, Delhi, from where nothing was recovered. So, there is no reference made even by way of passing or casually in the grounds of detention to any other documents except to the documents pertaining to the search carried out at the aforesaid house.

(9) The crucial question which arises for decision in the present case is whether any legal duty was cast on the detaining authority to supply copies of documents pertaining to the said search conducted at the aforesaid house on demand being made by the detenu inasmuch as there has been made reference to such documents of search in the grounds of detention. As far as law on the subject is concerned, there is conflict of judgments brought to my notice. However, as far as "Delhi High Court is concerned, the law has been made clear in Vinod

Kumar Arora @ Vinod Kumar v Administrator. Union Territory of Delhi & Others (1984) 1 Delhi 497. (2) In the said case, in the grounds of detention a passing reference had been made to some air-tickets and the detenu had sought supply of copies of said air-tickets. The copies were not supplied. The contention was raised by the authorities before the High Court that the said documents were not relied upon by the detaining authority in the grounds of detention and thus, there is no obligation cast on the respondents to supply copies thereof and that the documents were not relevant and thus, the detaining authority had rightly declined the request of the petitioner for supply of their copies. The Division Bench of this Court while dealing with such a point held that the documents to which a reference is made by the detaining authority although not relied upon yet they ought to supply to the detenu when he makes a specific request for supply of the same so as to enable him to make an effective representation. Reliance was placed for this ratio on the judgment given by Bombay High Court in Mohd. Hussain Vs. Secretary, Govt. of Maharashtra, Home Department, Mantralaya, Bombay and others, . It was also held that it is for the detenu to decide whether such a document is relevant to his defense or not and the question of relevance was not to be decided by the court. The case of Mst. L. M. S. Ummu Saleema v. B. B. Gujaral & Another Air 1981 Sc 119(4) was relied upon by the authorities but the same was distinguished. It was held that in case request is made by the detenu seeking copies of documents to which reference has been made, the failure of the detaining authority to supply copies of such documents would amount to infringement of the provisions of Article 22(5) of the Constitution of India. This judgment has been followed by another Division Bench of this Court in Criminal Writ Petition No. 357/ 88, N. Abdul Rasheed v. Union of India & Others, decided on February 15, 1989.(5) The learned counsel for the respondents has vehemently argued that the ratio given in Mst. L. M. S. Ummu Saleema (supra) has not been properly understood and if the observations made by the Supreme Court in para 5 of the judgment are taken notice of, the court could come to the conclusion that the Supreme Court has laid down the law that there is no duty cast upon the authority to supply copies of documents to which only passing or casual reference has been made in the grounds of detention while narrating the facts if those documents are not relied upon by the detaining authority in making the order of detention. In the aforesaid case the question posed before the Supreme Court was whether all documents to which passing reference has been made in the grounds of detention are liable to be supplied to the detenu or not. Along with the grounds of detention the point whether such documents ought or ought not to be supplied to the detenu on his making a demand thereon was not in issue in the said judgment. The Supreme Court had no occasion thus to pronounce on this particular legal point. It has been, no doubt, held in para 5 of the said judgment that mere non-supply of copies of documents, which are not relied upon by the detaining authority although reference has been made to the same in a casual or passing way in the grounds of detention, does not infringe the fundamental right conferred under Article 22(5) of the Constitution of India. It is quite clear that as a first facet of

the safeguards enshrined in Article 22(5) of the Constitution the detenu is to be supplied only the material documents which are relied upon by the detaining authority for making the detention order. The documents to which only passing reference is made in the grounds of detention are not liable to be supplied to the detenu. Along with the grounds of detention if such documents are not relied upon and are not the basis of passing of detention order. The crucial question whether the detenu should or should not be supplied copies of such documents which are not relied upon but to which a casual reference has been made in the grounds of detention, on such documents being demanded by the detenu, never came up for consideration by the Supreme Court in this case. No other judgment of the Supreme Court has been cited where such a specific question had been considered. The reason why the detenu should be supplied copies of documents on demand to which only casual reference has been made in the grounds of detention is that the detenu has to be afforded a reasonable opportunity of making an effective and purposeful representation against his detention orders. It is for the detenu to make up his mind as to what help he can derive out of the said documents while making an effective or purposeful representation. The court or the detaining authority are not supposed to go into the question as to whether in fact such documents could possibly furnish any material to the detenu for making an effective or purposeful representation. A duty lies on the detaining authority to comply with the demand of the detenu in this connection and it is for the detenu to see how he can make out any defense out of such documents in making an effective or purposeful representation against the detention order. It is true that while considering the procedural safeguards enshrined in Article 22 of the Constitution the court must construe the same in proper light and from pragmatic commonsense point. (See *Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others*,).

(10) The learned counsel for the respondents has vehemently argued that in the present case nothing was recovered from the said house and" thus, on the face of it the search warrants and the panchnama prepared regarding the search could not have possibly furnished any sort of defense or material to the detenu for making any effective or purposeful representation. It has been argued that in the case of *N. Abdul Resheed* (supra) certain material was found in the searches carried out and thus, the detenu could utilise the documents of the search for making some defense in his representation but that is not the case here. However, the ratio has been laid down by a Division Bench of this Court that if a copy of the document, which is referred to in the grounds of detention although not relied upon, is demanded by the detenu then it is not for the detaining authority or the court to go into the question further as to whether such a document could furnish any material to the detenu for making a representation and it is for the detenu to decide as to how he can derive any benefit from. such a document for making a purposeful representation. So, this ratio is binding on this court while sitting singly. The learned counsel for the respondents has also

made reference to a case; *G. Pichaimahi v. State of Karnataka*, Writ Petition Nos. 84 & 85 of 1986, (7) decided on July 25, 1986, by a Division Bench of the Karnataka High Court where the law laid down by this Court in the case of *Vinod Klimar Arora* (supra) and also by Bombay High Court in the case of *Mohd. Hussain* (Supra) was not agreed upon. I have gone through this judgment and find that Karnataka High Court also, while referring to the different cases of the Supreme Court including the case of *Mst. L. M. S. Ummu Saleema* (supra), came to the conclusion that there is no judgment of the Supreme Court which deals with the aforesaid point and the High Court proceeded to decide the said point on first principles but still the High Court relied upon the observations made in the case of *Mst. L. M. S. Ummu Saleema* (supra) for coming to the conclusion that even on demand by the detenu the copies of the documents which are not relied upon but are referred to casually or in a passing way are not to be supplied to the detenu. It is not possible to, hence, countenance the view expressed by the Division Bench of the Karnataka High Court in preference to the law laid down by the two Division Benches of this Court. So, in view of the above discussion I hold that continued detention of the petitioner stands vitiated on account of non-supply of copies of the documents pertaining to the search of the aforesaid house to which a reference has been made casually in the grounds of detention on demand being made by the detenu which had the effect of depriving the detenu from making an effective and purposeful representation.

(11) I allow the writ petition, make the rule absolute and quash the continued detention of the petitioner and direct that the petitioner be set at liberty forthwith if not required to be detained in any other case. The parties are left to bear their own costs.