
(1990) 02 P&H CK 0039

In the Punjab And Haryana At Chandigarh

Case No : Criminal Writ Petition No. 2996 of 1989

Subhash Chander Gulati

APPELLANT

Vs

Union of India and ors.

RESPONDENT

Date of Decision : 27-02-1990

Acts Referred:

Citation : (1990) 1 AICLR 950 : (1990) 3 RCR(Criminal) 355

Hon'ble Judges : Jai Singh Sekhon, J

Advocate : Ramanjit Singh, Jaishree Anand, Sukhbir Singh, H.S. Mattewal,
Advocates for appearing Parties

Judgement

Jai Singh Sekhon. J.

1. Subhash Chander Gulati, the detenupetitioner has filed this petition for a writ of habeas corpus under Articles 226/227 of the Constitution of India challenging the validity of the detention order dated 781989 Annexure P3 passed by the Joint Secretary to Government of India, Ministry of Finance, Department of Revenue, under Sec. 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (as amended) (hereinafter referred to as the COFEPOSA Act).

2. The facts relevant for the disposal of this petition are that the detaining authority passed the order of detention dated August 7, 1989 under section 3(1) of the COFEPOSA Act directing the detention of the petitioner with a view to preventing him from acting in any manner prejudicial to the augmentation of foreign exchange. It appears that the petitioner was not available and this detention order was served upon the petitioner on 2981989 and the grounds of detention Annexure P4 were supplied to him on that very date. The grounds of detention reveal that on 251989, the officers of the Punjab Police searched the business premises of M/s Golden Silk Store, Rainak Bazar, Jalandhar, and recovered the following documents, foreign currency and Indian currency,:

(i) Indian currency of Rs. 57,590/ from the business premises of M/s Golden Silk

Store.

(ii) US dollars 2.000 and Can. dollars 200 in the form of International Money JUDGMENTS and Travellers Cheques and documents from the person of Shri Rakesh Kumar Arora.

(iii) A slip of paper from the person of Shri Raj Paul, employee of M/s Golden Silk Store, Jalandhar, with certain accounts written thereon;

(iv) Documents from the person of Shri Avinash Chander, partner, M/s Golden Silk Store."

On information, the Zonal Office of the Enforcement Directorate, Jalandhar, took over the seized currency, documents etc. from the Punjab Police and Sarv Shri Avinash Chander Gulati, Rakesh Kumar Arora, Raj Paul and one Ramesh Kumar Mittal son of Shri Kewal Krishan Mittal, resident of Hoshiarpur, who were present at the time of seizure of the above referred articles from the premises of M/s Golden Silk Store, Jalandhar, were summoned under section 40 of the Foreign Exchange Regulation Act, 1973. It is noteworthy that the petitioner along with his brother Avinash Chander Gulati aforesaid are partners of the firm M/s Golden Silk Store, Jalandhar, while S/Shri Raj Paul and Rakesh Kumar Arora are their servants. During enquiry by the Enforcement Staff, Shri Avinash Chander Gulati brother of the detenu admitted that he along with the detenu are dealing in the sale and purchase of foreign currency and in that connection several persons used to visit their business concern. It was further found that accounts regarding sale and purchase of foreign currencies are maintained by Raj Paul servant of the petitioner in code words depicting US dollar as RSR. Pound & Sterling as M. & S.C. etc. etc. During the personal search of Raj Paul, the servant of the detenu, the police recovered one paper containing accounts in the code words on 251989. It is further averred in the grounds of detention that Rakesh Kumar Mittal, who happened to be present at the business premises of the detenu at the time of said raid, also admitted having indulged in sale of foreign currency to the business concern of the detenu, at the instance of Ramesh Gupta @ Meshi and that on 251979 he had purchased foreign exchange from different villagers visiting India from abroad and had delivered the same at the business concern of the detenu when the police came into action and seized the foreign currency, Indian currency and other documents. The grounds of detention also reveal the names of certain persons of Hoshiarpur and some persons of Delhi wherefrom the business concern of the detenu through aforesaid Rakesh Kumar Mittal used to purchase the foreign currency and sell it to different persons or concerns at Delhi.

3. The detenu also filed representation to the concerned authorities against the detention order and the same was rejected on 391989 and the order of rejection was conveyed to the detenu vide memo dated 3101989.

4. On notice, in the counter affidavit filed by the Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, the

allegations of the petitioner have been controverted.

5. Mr. H. S. Mattewal, the learned Senior Advocate appearing on behalf of the petitioner, has challenged the validity of the order of detention mainly on two grounds, the first being that due to withholding of basic facts and material in the grounds of detention supplied to the detenu, his right to file effective representation under Article 22(5) of the Constitution of India has been denied. While elaborating the argument he has stated that the recovery of some foreign currency notes from the business concern of the detenu on 21/11/1988 as well as the purchase of gold of foreign origin by Ashwani Kumar on 19/7/1989 figuring in para 2(i) & (ii) in the counter affidavit of the Joint Secretary were not disclosed in the copy of grounds of detention although this material had influenced the detaining authority in coming to the subjective satisfaction that the detention of the petitioner was called for under section 3 of the COFEPOSA Act in order to preventing him from augmentation of the supply of foreign exchange etc. Mrs. Jaishree Anand, the learned counsel for the respondent, on the other hand maintained that this material was of no consequence to invalidate the order of detention as although it was on the concerned file but the detaining authority had not used it for subjective satisfaction while passing the detention order.

6. The above referred controversy had repeatedly attracted the attention of the apex Court in different cases. Suffice it to refer here the observations of the Supreme Court in *Khudiram Das v. The State of West Bengal and others*, AIR 1975 Supreme Court 550. In that case in the grounds of detention the detenu was shown involved in three cases of theft although the history sheet of the detenu maintained at the Police Station was with the District Magistrate when he made the order of detention under section 3 of the Maintenance of Internal Security Act, 1971.

7. The apex Court has dealt with the controversy as under :

"The answer to these questions does not present any serious difficulty if only we consider the reason why the grounds are required to be communicated to the detenu as soon as may be after the detention. Obviously, the reason is twofold. In the first place, the requirement of communication of grounds of detention acts as a check against arbitrary and capricious exercise of power. The detaining authority cannot whisk away a person and put him behind bars at its own sweet will. It must have grounds for doing so and those grounds must be communicated to the detenu, so that, not only the detenu may know what are the facts and materials before the detaining authority on the basis of which he is being deprived of his personal liberty, but he can also invoke the power of judicial review, howsoever limited and peripheral it may be. Secondly, the detenu has to be afforded an opportunity of making a representation against the order of detention. But if the grounds of detention are not communicated to him, how can he make an effective representation ? The opportunity of making a representation would be rendered illusory. The communication of the grounds of detention is, therefore, also intended to subserve the purpose of enabling the

detenu to make an effective representation. If this be the true reason for providing that the grounds on which the order of detention is made should be communicated to the detenu, it is obvious that the grounds mean all the basic facts and materials which have been taken into account by the detaining authority in making the order of detention and on which, therefore, the order of detention is based. To quote the words of one of us (Sarkaria, J.) in *Golam alias Golam Mallick v. The State of West Bengal*, W.P. No. 270 of 1974, DJ 1291974 (SC)

..in the context, grounds does not merely mean a recital or reproduction of a ground of satisfaction of the authority in the language of Section 3 of the Act; nor is its connotation restricted to a bare statement of conclusions of fact. It means something more. That something is the factual constituent of the grounds on which the subjective satisfaction of the authority is based. The basic facts and material particulars, therefore, which are the foundation of the order of detention, will also be covered by grounds within the contemplation of Article 22(5) and Section 8 and are required to be communicated to the detenu unless their disclosure is considered by the authority to be against the public interest."

This has always been the view consistently taken by this Court in a series of decisions. It is not necessary to burden this judgment with citation of all these decisions., It would be sufficient if we quote the following observations of Patanjali Sastri, C. J., in *Dr. Ram Krishan Bhardwaj v. The State of Delhi*, 1953 SCR 708 : AIR 1953 SC 318.

"... the petitioner has the right under Article 22(5), as interpreted by this Court by a majority, to be furnished with particulars of the grounds of his detention sufficient to enable him to make a representation which on being considered may give relief to him. We are of the opinion that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained."

Venkatarama Ayyar, J., also pointed out in *Shamrao Vishnu Parulekar v. The District Magistrate, Thana*, 1956 SCR 644 : AIR 1957 SC 23 that construing the words grounds on which the order has been made in their natural and ordinary sense:

"they would include any information or material on which the order was based. The Oxford Concise Dictionary gives the following meanings to the word ground `Base, foundation, motive, valid reason. On this definition, the materials on which the District Magistrate considered that an order of detention should be made could properly be described as grounds therefor."

It is, therefore, clear that nothing less than all the basic facts and materials which influenced the detaining authority in making the order of detention must be communicated to the detenu. That is the plain requirement of the first safeguard of Article 22(5). The second safeguard in Article 22(5) requires that the detenu shall be afforded the earliest opportunity of making a representation

against the order of detention. No avoidable delay, no shortfall in the materials communicated shall stand in the way of the detenu in making an early, yet comprehensive and effective representation in regard to all basic facts and materials which may have influenced the detaining authority in making the order of detention depriving him of his freedom. These are the legal bulwarks enacted by the constitutionmakers against arbitrary or improper exercise of the vast powers of preventive detention which may be vested in the executive by a law of preventive detention such as the Maintenance of Internal Security Act, 1971."

8. In the instant case, written reply filed by Shri A.K. Satabyal, Joint Secretary, reads as under :

"1. I say that I have read the petition and on the basis of the informations gathered from the files lying in my office with regard to the subject matter of the petition, I am able to depose to the facts of the case. I am filing this affidavit in reply to the position on behalf of the respondent.

I should not be deemed to have admitted anything save and except from what is stated hereinbelow.

Para 1. No comments.

Para 2. The averments made in this para are not true. The facts are that the detenu has been continuously engaged in sale/purchase of foreign currencies. Further it is not correct to suggest that the detenu has no concern with the recovery of U.S. dollar 2,000/ Can. dollar 200/ from the person of Shri Rakesh Kumar Arora. The facts are that Shri Rakesh Kumar Arora is an employee of the detenu and Shri Rakesh Kumar Arora has been purchasing foreign currencies at the instance of the detenu and Shri Avinash Chander Gulati (brother of the detenu). It may be stated that the detenu has come to the adverse notice of the department a number of times and the brief facts in this regard are as under :

(i) On 21.11.88 US dollar 1800/ and Rs. 50, 000/ were seized from the business premises of M/s Golden Silk Store by the officers of D.R.I., Amritsar and the detenu in his statement dated 26.11.88 admitted the recovery of said foreign currency and Indian currency and the said case is pending adjudication before the Deputy Director of Enforcement Directorate, Jalandhar.

(ii) Sh. Ashwani Kumar who has also been detained under COFEPOSA on 29.7.89 in his statement dated 19.7.89 inter alia stated that he has been purchasing foreign marked gold biscuits from the detenu."

9. A perusal of the above portion of the reply of the Joint Secretary clearly shows that this information was gathered by him from the files lying in the office with regard to the subject matter of the petition. If that is so, simply because the order of detention Annexure P3 was passed by Shri Mohinder Parshad, the then Joint Secretary to the Government of India, is of no consequence. This material being available on the file had influenced the mind of the detaining authority in passing the order of detention of the detenu with a view to prevent him from

acting in any manner prejudicial to the augmentation of foreign exchange. There is thus no force in the contention of Mrs. Jaishree Anand that the detaining authority had passed the detention order on the grounds of detention only and not on this information. Thus the withholding of this material information from the detenu in the grounds of detention supplied to him had debarred him from his fundamental right of making an effective and comprehensive representation against the detention order envisaged under Article 22(5) of the Constitution of India. The apex Court in *Mohd. Dhana Ali Khan v. State of West Bengal*, AIR 1976 Supreme Court 734 had dealt with similar controversy in para No. 6 of the judgment as under :

"We are satisfied that the District Magistrate before passing the order of detention had other materials also before him. It cannot be said to what extent the District Magistrate was influenced by the other materials and not by the material which is mentioned in the ground of detention. Thus the order of detention suffers from a very serious infirmity which goes to the root of the matter. The liberty of the subject being an extremely precious right, where any infraction of such a right is involved the court must act as a watchdog and sentinel on the quievive to see that every benefit of the lacunae goes to the detenu."

10. Under these circumstances, there is no escape but to conclude that the detention order is vitiated on this ground alone.

11. The next contention of the learned counsel for the detenupetitioner pertains to nondisposal of his representation promptly by the Central Government. In this regard in para No. 13(i) of the counter affidavit of the Joint Secretary, it is averred as under

"Representation dated 3989 signed by the detenu on 6989 was received in the COFEPOSA Section of the Ministry on 11989 under cover of letter dated 6989 of Superintendent, Central Jail, Jalandhar. As it required certain clarifications from sponsoring authority the same was sent to Dy. Director of Enforcement, Jalandhar, on the same day i.e. 1989. Comments of Dy. Director of Enforcement, Jalandhar were received on 26989 under cover of his letter dated 18989. Between 11989 and 26989 besides time taken in transit from Delhi to Jalandhar and back there were four holidays on 16989, 17989, 23989 and 24989. The representation and comments thereon were analysed and put up by the Under Secretary on 28989 to Joint Secretary who perused the file and marked it to MOS (R) on 29989. MOS (R) considered the representation and rejected it on 30989 but directed for supply of certain additional documents. The file was received back on 31089 and rejection memo was issued on the same day i.e. 31089 (30989, 11089 and 21089 were holidays)."

12. A bare perusal of the abovereferred reply leaves no doubt that the Superintendent, Jail, Jalandhar, had forwarded the representation of the detenu dated 391989 and signed by the detenu on 691989 under cover of letter dated

691989 but this representation was received in the COFEPOSA section of the Ministry on 1191989. The letter will hardly take two days in reaching Delhi from Jalandhar. Thus it appears that either the Superintendent, Central Jail, Jalandhar, was remiss in dispatching this letter by three days because had it been despatched on 691989, it would have reached the COFEPOSA section of the Ministry on 891989. Strange enough no explanation has been given by the respondents for condoning this three days delay. The matter does not rest here as the representation was sent to the sponsoring authority i.e. Deputy Director of Enforcement, Jalandhar, on 1191989 itself but the comments of the Directorate of Enforcement were received on 2691989 under cover of his letter dated 1891989. Here also the representation at the most would have been received by the Deputy Director, COFEPOSA section, Jalandhar, on 1391999, but strange enough he had sat over this representation for full five days if it is taken that the comments were despatched to the COFEPOSA branch of the Ministry of Revenue on 1891989 as alleged but it appears that these were despatched much later as these were received in the concerned Ministry at Delhi on 2691989. No doubt, 16, 17, 23 and 2491989 happened to be holidays yet all the same this undue delay in framing comments by the Deputy Director, Enforcement, and dispatching the same to the COFEPOSA Section of the Ministry in Delhi being not explained on the record is not acceptable. Thus under the circumstances of this case it appears that the representation of the detenu was not promptly disposed of by the concerned authorities. In *Aslam, Ahmed Zaire Ahmed Shaik v. Union of India & others*, 1989(1) Recent Criminal Reports 486 : 1989 CAR 210 (SC) , the apex Court had held the undue and unexplained delay of seven days on the part of the Jail Superintendent in dispatching the representation to the concerned authority having resulted in rendering continued detention of the detenu illegal and quashed the same by holding that it infringed the mandate of Article 22(5) of the Constitution of India.

13. Again in *Smt. Shalini Soni and others v. Union of India and others*, 1980(4) SCC 544, the apex Court has emphasised the constitutional obligation on the part of the authorities concerned in dealing with the representation of a detenu as follows :

"Quite obviously, the obligation imposed on the detaining authority, by Article 22(5) of the Constitution, to afford to the detenu the earliest opportunity of making a representation carries with it the imperative implication that the representation shall be considered at the earliest opportunity. Since all the constitutional protection that a detenu can claim is the little that is afforded by the procedural safeguards prescribed by Article 22(5) read with Article 19, the Courts have a duty to rigidly insist that preventive detention procedures be fair and strictly observed. A breach of the procedural imperil must lead to the release of the detenu."

The above referred view was reiterated by the Supreme Court in *Rama Dhondurao Borade v. Shri V.K. Saraf, Commissioner of Police and ors.*, 1989(2) Recent

14. Mr. Jaishree Anand by relying upon the observations of the Supreme Court in *Madan Lal Anand v. Union of India and others*, 1990(2) RCR(CrL.) 58 (SC) : AIR 1990 Supreme Court 176 , contended that the delay in disposing of the representation is of no consequence as in that case, the representation was sent to the Chief Commissioner of Excise, Chandigarh, for comments on 1911989 and the comments of the Collector were received by the COFEPOSA unit of the Ministry on 1821999 under cover of Collector's letter dated 9.2.1989. There appears to be no force in the contention of Mrs. Anand as in para No. 37 of the judgment, the delay in offering, comments by the Collector of Central Excise and Customs was explained on the ground of there being a number of holidays intervening the receipt of representation and those comments. The matter was dealt as under in para No. 37 :

"At the hearing of this appeal, the learned counsel for the respondents handed over to us a list of dates showing that a number of holidays intervened between one date and another and hence the apparent delay. It appears that the Collector of Central Excise and Customs received the representation for his comments on 2311980 and handed over the same to the dealing officer for comments on 2411989 and the Collector's comment was made on 921989. Between 2511989 and 8.2.1989 a number of holidays intervened, namely, 2611989 (Republic Day), 2811989 and 2911999 (Saturday and Sunday), and 421089 and 521989 (Saturday and Sunday). On 921989, it was sent to the Ministry of Finance (COFEPOSA Cell), New Delhi, and was received by that Ministry on 1021989. 1121989 and 1221989 being Saturday and Sunday were holidays. On 1321989, it was put up before the Joint Secretary, COFEPOSA, and was sent to the Minister of State (Revenue). The file was received back after the rejection of the representation and such rejection was communicated to the detenu on 2021989. The two intervening dates, namely, 1821989 and 1921989 being Saturday and Sunday were holidays."

15. For the foregoing reasons, there is no option but to accept this petition and hold that the order or detention of the petitioner Annexure P3 is liable to be quashed being violative of the mandate of Article 22(5) of the Constitution of India. It is ordered accordingly. The petitioner be set forth at liberty if not required in any other case.

Revision accepted.