
(1995) 06 BOM CK 0018

In the Bombay High Court

Case No : Writ Petition No. 1001 of 1994

Suresh Rajkumar Seth

APPELLANT

Vs

The Union of India and Another

RESPONDENT

Date of Decision : 13-06-1995

Acts Referred:

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

Citation : (1996) 1 BomCR 18 : (1995) CriLJ 3703 : (1995) 2 MhLj 747

Hon'ble Judges : A.S.V. Moorthy, J;A.C. Agarwal, J

Bench : Division Bench

Advocate : Karmali and Mrs. A.M.Z. Ansari, for the Appellant; R.M. Agrawal, for the Respondent

Judgement

1. The petitioner who is the son of the detenue seeks to impugn an order of detention passed by Shri Mahendra Prasad, Joint Secretary to the Government of India in his capacity as an officer specially empowered under S. 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the "Act"), bearing No. F. No. 673/91/94-CUS. VIII dated 1st June 1994. The said order was served on the detenue of 28th of June 1994 and the grounds of detention were served on the detenue pari passu with the order of detention. The order of detention and the consequent detention of the detenue is impugned in the present petition.

2. Shri Karmali, learned counsel appearing in support of the petition has agitated only one ground viz., the ground which he has taken up by way of additional ground of challenge being ground No. 12, which has been permitted to be taken by virtue of petition being permitted to amended. It has been submitted in the said ground as under :-

(xii) The petitioner says and submits that on or about 18-7-1994 the detenue had submitted a representation against the impugned order of detention which was addressed to the Advisory Board. The petitioner says and submits that by a

reply dated 23rd September 1994 the detainee was informed that his representation was considered and rejected by the Central Government. Hereto annexed and marked Annexure "L" is a copy of the said reply. The petitioner says and submits that it was incumbent upon the detaining authority to have independently considered and decided the said representation and if it was so considered and decided, it was further incumbent upon the detaining authority to have communicated to the detainee the decision if any, arrived at by the detaining authority. The petitioner says and submits that if the detaining authority had failed to have considered and decided independently the said representation, and even if the detaining authority had independently considered and decided the representation, the detaining authority having failed to have communicated to the detainee his decision arrived at thereof, the detention of the detainee stands vitiated."

3. In substance, it is the contention of Mr. Karmali that the representation of the detainee has not been considered by the detaining authority and this has resulted in the infraction of his right guaranteed under Art. 22(5) of the Constitution of India.

4. Shri Agrawal, the learned counsel appearing on behalf of the respondents has placed for, re-perusal the concerned file in respect of the representation made by the detainee, to the advisory board. It appears that after the advisory board rejected the representation and opined that there is sufficient cause for detaining the detainee, the file was passed on to the detaining authority and thereafter to the Finance Minister. As far as the detaining authority is concerned it has made the following remarks :-

"The representation should be rejected. The Advisory board has found sufficient cause for the detention of Shri Rajkumar Seth. The detention order may be confirmed".

5. A question that arises for consideration is whether the detaining authority is enjoined with an obligation to consider a representation addressed by a detainee and whether non-consideration of the same results in denial of the constitutional safe-guards of Art. 22(5) of the Constitution of India. A further question that arises for re-consideration is whether the noting made by the detaining authority "representation should be rejected" can satisfy the requirement of consideration of the representation by the detaining authority so as to fulfill the requirement of Art. 22(5) of the Constitution of India.

6. In case of Smt. Gracy Vs. State of Kerala and another, , the Supreme Court has observed :

"The nature of duty imposed on the detaining authority under Art. 22(5) in the context of the extraordinary power of preventive detention is sufficient to indicate that strict compliance is necessary to justify interference with personal liberty. It is more so since the liberty involved is of a person in detention and not a free agent. Art. 22(5) casts an important duty on the detaining authority to

communicate the grounds of detention to the detenu at the earliest to afford him earliest opportunity of making a representation against the detention order which implied the duty to consider and decide the representation when made, as soon as possible. Art. 22(5) speaks of the detenu's "representation against the order", and imposes the obligation on the detaining authority. Thus any representation of the detenu against the order of his detention has to be considered and decided by the detaining authority, the requirement of its separate consideration by the Advisory Board being an additional requirement implied by reading together clauses (4) and (5) of Art. 22, even though express mention in Art. 22(5) is only of the detaining authority. Moreover, the order of detention is by the detaining authority and so also the order of its revocation if the representation is accepted, the Advisory Board's role being merely advisory in nature without the power to make any order itself. It is not as if there are two separate and distinct provisions for representation to two different authority viz., the detaining authority and the Advisory Board, both having independent power to act on its own.

"It being settled that the aforesaid dual obligation of consideration of the detenu's representation by the Advisory Board and independently by the detaining authority flows from Art. 22(5) when only one representation is made addressed to the detaining authority, there is no reason to hold that the detaining authority is relieved of his obligation merely because the representation is addressed to the Advisory Board instead of the detaining authority and submitted to the Advisory Board during pendency of the reference before it. It is difficult to spell out such an inference from the contentions of Art. 22(5) in support of the contention of the learned Solicitor General. The contents of Art. 22(5) as well as the nature of duty imposed thereby on the detaining authority support the view that so long as there is a representation made by the detenu against the order of detention, the aforesaid dual obligation under Art. 22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the Advisory Board or to both. The mode of address is only a matter of form which cannot whittle down the requirement of the Constitutional mandate in Art. 22(5) enacted as one of the safeguards provided to the detenu in case of preventive detention."

7. In the above case the detenu was informed that he had a right to make representation to the detaining authority Central Government and Central Advisory Board against the detention order. The detenu's case was referred by the Central Government to the Central Advisory Board. During the pendency of the reference before the Advisory Board, the detenu made his representation to the Advisory Board. The Advisory Board considered the reference relating to the detenu made by the Central Government and also the detenu's representation submitted to it. The Advisory Board gave an opinion that there was sufficient cause to justify his preventive detention. The Central Government then made an order dated 24th April 1990 confirming his detention and directed that the detenu be detained. The Advisory Board had considered the detenu's

representation before sending its opinion to the Central Government along with the entire record including the representation submitted by the detenu. The Central Government thereafter made an order of confirmation of arrest of the detenu on the basis of the opinion of the Advisory Board. But there was no independent consideration of the detenu's representation by the Central Government at any time. It was on these facts that the Supreme Court has made the above observations and has found that, that was a case of infraction of the guaranteed right under Art. 22(5) of the Constitution on account of the Central Government's omission, to consider the detenu's representation independent of its consideration by the Advisory Board.

8. The Supreme Court has found that the power of preventive detention is an extra-ordinary power and hence before interference with personal liberty can be justified, strict compliance of Art. 22(5) is necessary. It has emphasised that Art. 22(5) casts an important duty on the detaining authority to communicate the grounds of detention to the detenu at the earliest in order to offer him the earliest opportunity of making representation against the detention order. Implicit in its obligation is the obligation to consider and decide the representation when made, as expeditiously as possible. The requirement of consideration of the representation by the detaining authority is independent of the requirement of its separate consideration by the Advisory Board. The consideration of the representation by the Advisory Board does not relieve the obligation of the consideration of the representative by the detaining authority. The order of detention is passed by the detaining authority. Hence on a representation being made it is the duty of the detaining authority to consider the same and if the representation is accepted there lies the obligation on the part of the detaining authority to revoke the order of detention. It has further been clarified that merely because the representation is made only to the Advisory Board the same does not relieve the detaining authority from considering the same. The contents of the Art. 22(5) as well as the nature of duty imposed thereby on the detaining authority shows that so long as there is a representation made by the detenu an obligation is cast both on the detaining authority as also on the Advisory Board to consider the same independently. In the case of *Santosh Anand v. Union of India*, (1981) 2 SCC 420 , a representation was made by the detenu to the Chief Secretary being the detaining authority and the said authority forwarded the same to the Administrator, i.e. the State Government with the endorsement "the representation may be rejected". It was contended that there was non-consideration of the representation and rejection by the detaining authority which resulted in denial of the constitutional safeguard under Art 22(5) of the Constitution of India. The said contention was accepted by the Supreme Court by observing.

"It is thus clear to us that the representation could be said to have been considered by the Chief Secretary at the highest but he did not take the decision to reject the same himself and for that purpose the papers were submitted to the

Administrator who ultimately rejected the same. There is no affidavit filed by the Chief Secretary before us stating that he had rejected the representation. The representation was therefore not rejected by the detaining authority and as such the constitutional safe-guard under Art. 22(5) as interpreted by this Court, cannot be said to have been strictly observed or complied with."

10. In a recent case of Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, , the Supreme Court had occasion to consider an issue which arises for consideration in the present case. The case arose out of a decision of a full bench of this Court, reported in 1994 MLJ 1669. In the aforesaid case the full bench had raised the following question as one of the questions for its consideration.

Does failure to take independent decision on revocation of order of detention by the specially empowered officer under the COFEPOSA Act merely forwarding the same with recommendation to reject, result in non-compliance with constitutional safe-guards under Art. 22(5) of the Constitution ?

The aforesaid question was answered in the negative and it was held that the failure on the part of the officer making the order of detention to consider the representation made by the detenu was of no consequence because the representation of the detenu in fact in effect and in substance was considered by the Finance Minister who was an appropriate authority for the purpose of consideration of such representation. The aforesaid decision of this Court was challenged in the Supreme Court in the following terms :-

"the failure on the part of the officer who made the order of detention to consider the representation of the detenu results in denial of the right of the detenu to make a representation recognised by Art. 22(5) of the Constitution and the said denial renders the detention of the detenu illegal and without the authority of law."

After making reference to several cases rendered by it the Supreme Court has observed :-

"Having found that the representation of the person detained was not considered by the officer making the order of detention the High Court was in error in holding that the said failure on the part of the detaining authority to consider and decide the representation is not fatal to the order of detention. We are therefore unable to uphold the answer given by the Full Bench of question No. 3 and, in our view, the said question should be answered in the affirmative. On that basis it has to be held that since there was a denial of the Constitutional safe-guard provided to the detenu under Art. 22(5) of the Constitution on account of the failure on the part of the officer who had made the order of detention to independently consider the representation submitted by the detenu against his detention and to take a decision on the said representation the further detention of the detenu Ishwardas Bechardas Patel is rendered illegal. The appeals, therefore, deserve to be allowed."

11. In view of the aforesaid decisions of the Apex Court we have no hesitation in holding that the detaining authority owes an independent obligation to consider the representation of a detenu and non-consideration of the same results in denial of the constitutional safeguards of Art. 22(5) of the Constitution of India. We further hold that an endorsement or a noting made by the detaining authority to the effect that the representation may or should be rejected cannot and does not satisfy the requirement of consideration of the representation by the detaining authority so as to fulfill the requirement of Art. 22(5) of the Constitution of India. In the instant case there has been non-consideration of the representation by the detaining authority as the endorsement made by him does not amount to his either accepting or rejecting the representation. It does not amount to the detaining authority taking an independent decision on the representation. As a result there has been an infraction of the Constitutional obligation cast by Art. 22(5). This has rendered the continued detention of the detenu null and void.

12. For the foregoing reasons the petition succeeds. The impugned order of detention No. 673/91/94-CUS. VIII dated 1st June 1994 passed by Shri Mahendra Prasad, Joint Secretary to the Government of India is quashed and set aside. The detenu is directed to be set at liberty forthwith unless required in some other case.

The Rule is made absolute.

13. Petition allowed.