
(2001) 10 BOM CK 0092

In the Bombay High Court

Case No : Criminal Writ Petition No. 1039 of 2001

Suresh Vishnu

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 15-10-2001

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3
Constitution of India, 1950 — Article 22, 226

Citation : (2002) 82 ECC 274

Hon'ble Judges : Vishnu Sahai, J;Rajiv Mohite, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Vishnu Sahai, J.—Through this writ petition preferred under Article 226 of the Constitution of India, the petitioner who describes himself as the brother-in-law. of the detenu Shrivankumar Vaishnav @ Kailash has challenged the order dated 17.10.1998 passed by the 2nd Respondent Mr. G.S. Sandhu, Secretary to the Government of Maharashtra, Home Department, (Preventive Detention) Mantralaya, Mumbai-32, detaining the detenu u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974).

The detention order alongwith the grounds of detention, which are also dated 17.10.1998, was served on the detenu on 19.6.2000 and their true copies are annexed as Annexures "A" and "B" respectively to this petition.

2. The prejudicial activities of the detenu prompting the 2nd respondent to issue the impugned order are contained in the grounds of detention (Annexure "B").

Since in our judgment a reference to them is not necessary for the adjudication of ground 5(x) pleaded in the petition, on which ground alone in our judgment this petition deserves to succeed, we are not adverting to them.

3. We have heard learned Counsel for the parties. Although in this writ petition

Ms. A.N.Z. Ansari, learned Counsel for the petitioner has pleaded a large number of grounds, numbered as grounds 5(1) to 5(x) but since, as mentioned earlier, this petition deserves to succeed on ground 5(x) we are not adverting to them.

4. Ground No. 5(x) in short is as under:

On 21.7.2001 the detenu submitted copies of representation through the Superintendent of Nasik Road Central Prison to the Hon"ble Advisory Board, the State Government and the Detaining Authority.

The first facet of ground 5(x), which is under caption (a) is: that the detenu's representation was considered by the State Government on 18.8.2001. Annexure "F" to the petition is the copy of the rejection letter sent by the State Government. The State Government should disclose to this Court as to when it called for comments; when the comments were furnished to the State Government; when the representation was considered by the State Government: and whether the representation was considered by the State Government independently, uninfluenced by the report of the Advisory Board. If the State Government fails to satisfy this Court on any of the counts then the impugned order of detention will be vitiated on that count.

The second facet of ground 5(x), which is under caption (b), is: The detenu submitted his representation, addressed to the Detaining Authority on 21.7.2001, through the Superintendent of Prison and till date he has not received any communication from the Detaining Authority. The Detaining Authority should disclose to this Court whether the detenu's representation was in fact considered by the Detaining Authority and whether it communicated its decision to the detenu. The Detaining Authority should also disclose to this Court whether the consideration by it was independent and uninfluenced of the report of the Advisory Board. If the Detaining Authority fails to satisfy this Court on any of the aforesaid grounds the impugned order will be vitiated on that count.

5. Ground 5(x) has been replied to in para 2 of the return, dated 6.10.2001, of Mr. R.D. Shinde, Deputy Secretary to the Government of Maharashtra, Home Department (Special), Mantralaya, Mumbai. The said affidavit, in the contention of Mr. D.S. Mhaispurkar learned Counsel for the respondents, was necessitated because the Detaining Authority had been transferred and was not available for swearing of the affidavit.

6. In para 2 Mr. R.D. Shinde, in short has stated as under:

A. The detenu's representation addressed to the Detaining Authority, Government of Maharashtra and Chairman, Advisory Board was submitted through the jail authority on 22.7.2001 at about 5.00 p.m. and since 22.7.2001 was a holiday it was forwarded vide letter dated 23.7.2001, which was received by the State Government on 26.7.2001 Thereafter the same was put up before the Additional Chief Secretary on 26.7.2001 and was marked to the Secretary (P.D.). The Secretary (P.D.) received it on 27.7.2001 and forwarded the same to

the concerned Deputy Secretary for sending it to the Sponsoring Authority for para-wise comments which were called vide letter dated 31.7.2001; 28.7.2001 and 28.7.2001 being holidays. The Sponsoring Authority vide letter dated 6.8.2001 sent the para-wise comments which were received by the Secretary on the same day and thereafter the proposal was put up by the concerned Assistant before the Desk Officer on 14.8.2001 who forwarded the same to the Deputy Secretary on the said date itself and thereafter the Deputy Secretary considered the same and forwarded it to the Principal Secretary (Appeal and Security) on 16.8.2001, 15.3,2001 being holiday. Thereafter the Principal Secretary (Appeal and Security) considered the same and forwarded it to the Additional Secretary (Home) on 17.8.2001 and the latter considered and rejected it on behalf of the State Government on the said date itself and the communication was sent to the detenu vide letter dated 18.8.2001, through the Superintendent of Nasik Central Prison, Nasik; 11.8.2001 and 12.8.2001 being holidays. It has been averred in para 2 that the subordinate officers who were required to scrutinize the proposal were also seized with other 66 other proposals which pertained to detentions under COFEPOSA Act and PITNDPS Act. It has also been averred in para 2 that the detenu's representation addressed to the State Government was considered expeditiously. It was further been averred therein that it was considered by the Advisory Board on 26.8.2001.

In the said factual matrix it has been asserted that the consideration by the State Government of detenu's representation was uninfluenced by the report of the Advisory Board.

B. It has been averred that the detenu's representation addressed to the Detaining Authority was received in the Office of the Detaining Authority on 26.7.2001 and thereafter the same was forwarded to the Sponsoring Authority for para-wise comments which were received by the Detaining Authority on 6.8.2001. Since the Detaining Authority was on leave, the additional charge was given to the Principal Secretary (Appeal and Security) and therefore the said functionary in his capacity as the Detaining Authority considered the said representation the same day and rejected it on 17.8.2001 and the rejection order was communicated to the detenu vide common letter dated 18.8.2001. It is denied that there is any delay in considering the representation made by the detenu.

7. We have considered the averments made in ground 5(x) of the petition, those contained in para 2 of the return of Mr. R.D . Shinde, wherein the said ground has been replied to and heard learned Counsel for the parties. As observed earlier we find merit in ground 5(x).

Article 22(5) of the Constitution of India provides thus:

22. Protection against arrest and detention in certain cases.

(1) ...

(2) ...

(3) ...

(4) ...

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

A perusal of the said provision would show that the Detaining Authority shall as soon as may be, communicate to the detenu the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the detention order. The Supreme Court in a catena of decisions has held that in the detenu's fundamental right of making a representation at the earliest opportunity is implicit a corresponding obligation on the functionary to whom the representation has been made, to dispose of the same at the earliest opportunity and failure to do so would vitiate the detention order on the touchstone of Article 22(5) of the Constitution of India.

8. In the instant case a perusal of the return filed by Mr. R.D. Shinde would show that the comments were received by the Detaining Authority on 6.8.2001. It would also show that the Detaining Authority was on leave and his work was being looked after by the Principal Secretary (Appeal and Security) and he was acting as a Detaining Authority and in the said capacity he considered the detenu's representation the same day and rejected it on 17.8.2001.

In para 2 of the return of Mr. R.D. Shinde there is a ominous silence as to why the Principal Secretary (Appeal and Security) who was the Detaining Authority between 6.8.2001 and 17.8.2001, rejected the detenu's representation as late as 17.8.2001. After all the file pertaining to the detenu's representation, duly processed, as per the averments contained in Mr. Shinde's affidavit, had been received in the Office of the Detaining Authority on 6.8.2001. We are constrained to observe that no reason has been assigned in the said affidavit as to why it took the said functionary an agonizingly long time of 11 days to dispose of the detenu's representation.

9. It should be borne in mind that preventive detention is a draconian piece of legislation. The law may permit it on doctrine of necessity; warranting recourse to it where the prejudicial activities of a person cannot be curbed by the ordinary law of the land. But a detention order would only stand the scrutiny of this Court under Article 22(5) of the Constitution of India if the procedural safeguards guaranteed by Article 22(5) of the Constitution of India are not given a go-by, and where they have been, as in the instant case, this Court would have no compunction in quashing the detention order.

It should be borne in mind that eternal vigilance is the price, which the law

expects from the Detaining Authority and its officers if they want a preventive detention order to be sustained by this Court in its jurisdiction under Article 226 of the Constitution of India. In their laxity lies the liberty of the detenu. And lax indeed has been, the Principal Secretary (Appeal and Security) in sitting on the detenu's representation for full 11 days, i.e., between 6.8.2001 and 17.8.2001. On this ground alone in our judgment this petition deserves to succeed but matters do not end here.

10. The Supreme Court in the oft-quoted case of *Harish Pahwa Vs. State of U. P. and Others*, , has laid down the principle that not only a representation made by the detenu to a specified authority has to be disposed of by that authority with the utmost promptitude but its result has also to be communicated by it to the detenu with the same promptitude.

In the instant case, we find that the detenu has been communicated the fate of his representations by a common order dated 18.8.2001, sent by the Section Officer, Government of Maharashtra Home Department (Special), Mantralaya, Mumbai, a true copy of which has been annexed as Annexure "F" to the petition. A perusal of the said letter would show that the detenu has been communicated that his representation has been carefully considered by the Government, which has rejected the same. A perusal of the said letter makes it implicitly manifest that there is nothing to show that the detenu has been communicated that his representation has been rejected by the Detaining Authority. Since the mandate of law is that the authority enjoined in law to consider a representation has not only to consider it with the utmost promptitude but has to also to communicate its decision with the same promptitude and the detenu has not been communicated that his representation has been rejected by the Detaining Authority this is yet another ground as to why the impugned detention order would not stand the scrutiny of this Court.

11. In the result:-we allow this petition: quash and set aside the impugned order direct that the detenu Shravankumar Vaishnav @ Kailash be released forthwith unless wanted in some other case: and make the rule absolute.