

(1989) 08 AHC CK 0044
In the Allahabad High Court
Case No : Writ Petition No. 4607 of 1989 (HC)

Uma Shanker Verma

APPELLANT

Vs

Superintendent, Central Jail and Others

RESPONDENT

Date of Decision : 04-08-1989

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 3(2)
Constitution of India, 1950 — Article 22, 22(5), 22(6), 226
Customs Act, 1962 — Section 104, 135

Citation : (1990) CriLJ 2114

Hon'ble Judges : Virendra Kumar, J;S. Saghir Ahmad, J

Bench : Division Bench

Advocate : Daya Shanker Misra, for the Appellant; D.S. Randhava, Government Advocate and Mohd. Waseem, for the Respondent

Final Decision : Allowed

Judgement

S. Saghir Ahmad, J.—The petitioner by means of this petition filed under Article 226 of the Constitution has challenged the order dated 24th February, 1989 passed by the Central Government u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as COFEPOSA) under which the petitioner has been detained in the Central Jail, Naini, Allahabad. It may be stated that the petitioner was arrested at Lucknow by the Custom authorities on 18-1-1989 for an offence alleged to have been committed by him u/s 104/135 of the Customs Act.

2. He was produced before the Chief Judicial Magistrate on 19-1-89 who remanded him to Judicial Custody. While the petitioner was in jail, the impugned order of detention dated 24th February, 1989 was served on him on 29th February, 1989.

3. On 6th March, 1989 the petitioner made a representation through the Superintendent, Central Jail, Naini to the Central Government which was received

by the latter on 9th March, 1989. The same day, that is, on 9th March, 1989, the Central Government sent the representation to the sponsoring authority for his comments. This was received by the sponsoring authority on 29th March, 1989 while his comments were received by the Central Government on 5th April, 1989. The Central Government rejected the representation of the petitioner on 11th April, 1989 and confirmed the order on 18th May, 1989.

4. The first contention raised by the learned counsel for the petitioner is that certain relevant materials relating to the question of petitioner's detention, which would have affected the mind of the detaining authority, had they been placed before him, were not placed before that authority for his consideration with the result that the opinion, the formation of which is a condition precedent to the passing of the order of detention, cannot be said to have been formed in accordance with law. He has drawn our attention to paras 17, 18 and 19 of the writ petition in which it has been stated that the petitioner had made an application for bail before the Special Chief Judicial Magistrate, Allahabad which was rejected and thereafter he filed an application for bail before the Sessions Judge, Allahabad which also was rejected. Although the petitioner has, in these paras, set out to indicate what the contents of the bail application were, he has not given the date when the bail application was filed nor has he given the date on which it was rejected by the Sessions Judge, Allahabad.

5. He could have filed a copy of the bail application or, at least, mentioned the relevant dates. In the absence of the copies of the bail applications as also other relevant factors, namely, the date on which the bail application was rejected by the Special Chief Judicial Magistrate or by the Sessions Judge, Allahabad, it is not possible for us to hold that the copies of the bail applications or the orders rejecting them were relevant materials which ought to have been placed before the detaining authority for his consideration before passing the impugned order of detention. It was for the petitioner to establish that these documents were in existence on the date of making of the impugned order of detention and, therefore, they ought to have been, but were not, placed before the detaining authority. The law does not expect a physical impossibility from the detaining authority nor does it expect it to anticipate what the contents of document not in existence, would be when it comes into existence.

6. The next contention of the learned counsel for the petitioner is that the copy of the proposal submitted by the sponsoring authority for an order being passed against the petitioner u/s 3(2) of the COFEPOSA was not supplied to him which, seriously affected the right guaranteed to him under Article 22 of the Constitution for making an effective representation against the order of detention before the appropriate authority. It is contended that the lapse on the part of the opposite parties in not supplying the copies of the aforesaid document would vitiate the order.

7. The plea regarding non-supply of the copy of the proposal made by the sponsoring authority is contained in para 23 of the writ petition which reads as

under:--

^^23- ;g fd iz"kuxr fu:f? fufe?k fujks/kd vf/kdkjh ds le{k izLrkod vf/kdkjh @lhek "kqYd foHkkx }kjk izLrkouk izf"kr dh xbZ Fkh tks fd fujks/kd vf/kdkjh }kjk iw.kZr;k fopkfjr dh xbZ lFk gh mDr izLrkouk dk fujks/kd vf/kdkjh us ifj"khyu v/;;u fopkkj.kk ijh{k.k djs ds lFk gh lFk vk/kkfjr Hkh fd;k ftldh izfrfyfi ;kph ds vk/kkj ds lFk gh iznku fd;k tkuk fujk/kd vf/kdkjh x.k m?kjoknhx.k dk fof/kd ,oa oS/kkfud nkf;Ro jgk gSA os fufoZgu djs ds loZFkk vIQy jgs gSaA bl izdkj Hkkjrh; lafo/ku vuqPNsn 22?5? dk Li"V mYya?ku fd;k x;k gSA ;gka ;g Hkh fof"k"V :i ls mYys[kuh; gS fd laxr izeq[k vk/kfjr fopkfjr vfHkys[kksa dks ;kph dks u iznku fd;s tkus ds QyLo:i ;kph viuk izHkko"kkjh ,oa iw.kZ izxfrosnu izsf"kr djs esa vleFkZ ,oa vIQy jgk gSA**

8. This paragraph of the writ petition has been dealt with in para 25 of the counter-affidavit of Sri A. K. Batabyal, Joint Secretary to Government of India, Ministry of Finance, Department of Revenue, New Delhi, which reads as under:--

"25. That para 23 of the writ petition is incorrect. The proposal itself was not relied upon for passing the order of detention against the petitioner, as such it was not relevant document to be supplied to the petitioner. Moreover, it is a secret document, cannot be supplied to the detenu."

9. In view of the above pleadings, the question which crops up for consideration is whether or not the proposal submitted by the sponsoring (custom) authority was a relevant document and whether or not it was considered by the detaining authority for being subjectively satisfied that the making of the order of detention was necessary to be passed against the petitioner for preventing him from carrying out the objectionable activities.

10. The question whether the proposal submitted by the sponsoring authority is a relevant document has already been considered and decided in several writ petitioner.

11. This Court in (HC) Writ Petn. No. 9139 of 1988, Amar Nath v. Union of India decided on 15-3-1989 has already held the proposal submitted by the sponsoring authority to be a relevant document the non-supply of which would vitiate the order of detention as it would deny the detenu the right of making an effective representation guaranteed to him under Article 22 of the Constitution.

12. The Division Bench, which decided Amar Nath's case (supra), relied upon two earlier decisions of this Court in Jagdish v. State of U.P. (HC) Writ Petn. No. 1607 of 1987 decided on 8-7-1987 and Harish Gandhi v. State of U.P. (HC) Writ Petn. No. 16562 of 1988 D/-25-1-1989 (All).

13. We had the occasion to consider the above decisions in (HC) Writ Petn. No. 3453 of 1989 Aswani Kumar v. Supdt. Central Jail, Naini, Allahabad decided on 28-7-1989 and we were also of the opinion that the proposal submitted by the sponsoring authority was a relevant document and that it was necessary, according to the constitutional mandate, to supply a copy of that document to

the person against whom the detention order was passed.

14. It is contended by the learned counsel for the opposite parties that the proposal submitted by the sponsoring authority having not been relied upon by the detaining authority, was not a relevant document and that it was not incumbent upon the detaining authority to supply a copy of this document to the petitioner.

15. It is, no doubt, mentioned in the counter-affidavit that the proposal itself was not relied upon while passing the order of detention against the petitioner but it is not possible for us to place reliance on this plea for the reasons which are herein below mentioned.

16. The entire machinery under the COFEPOSA was moved by the sponsoring (custom) authority by making a proposal to the Central Government that an order of detention may be passed against the petitioner. The proposal with which were annexed the documents in support of the facts set out therein, was, admittedly, placed before the detaining authority, which, it is difficult to believe, would have considered only the documents annexed with the proposal and not the proposal itself. The proposal as also the documents were placed before the detaining authority for his subjective satisfaction that an order of detention was necessary to be passed against the petitioner. It would be against human habit or human psychology to say, assert, plead, argue, or, for that matter, to hold that the proposal was not considered or read and that only the documents annexed thereto were read by the detaining authority who, we are constrained to observe, would come to know of the facts only after going through the narrative or the statement of facts set out in the proposal with which were annexed the documents to show for his satisfaction that the allegations made against the petitioner were prima facie correct.

17. It will be seen that Sri A. K. Batabyal does not say in the counter-affidavit that the proposal was not placed before him. In these circumstances it is difficult for us to hold that the proposal was not relied upon by him.

18. Since the copy of the proposal, admittedly, was not supplied to the petitioner, the right guaranteed to him under Article 22(5) of the Constitution for making an effective representation against the order of detention was infringed resulting in the order of detention being vitiated.

19. It is contended by the counsel for the Union of India that in view of the averments made in para 25 of the counter-affidavit that the proposal submitted by the sponsoring authority was a secret document, it was not necessary for the opposite parties to supply a copy of that document to the petitioner and non-supply of that copy would neither infringe the provisions of Article 22(5) nor would it vitiate the order of detention. The contention cannot be accepted.

20. The sentence of the counter-affidavit relied upon by the counsel for the opposite parties reads "Moreover, it is a secret document, cannot be supplied to

the detenu."

21. This averment falls short of the requirement indicated in Article 22(6) of the Constitution which reads as under:--

"22(6). Nothing in Clause (5) shall require the authority making any such order as is referred to in the clause to disclose facts which such authority considers to be against the public interest to disclose."

22. The requirement in Article 22(6) is that the authority making an order of detention shall not be required to disclose the facts which such authority considers to be against the "public interest" to disclose. It will be noticed that this clause is an exception to Clause (5) of Article 22 under which the authority making an order of detention is required to communicate to the person against whom an order of detention is passed, the grounds on which the order has been passed.

23. In order to invoke the applicability of Clause (6) of Article 22, it is necessary for the authority making an order of detention to say that it would not be in the "public interest" to disclose the contents of a particular document to the person against whom the order of detention is passed.

24. In the instant case what is stated in the counter-affidavit is that the proposal submitted by the sponsoring authority was a secret document of which copy cannot be supplied to the detenu. The detaining authority makes no reference to "public interest" and does not say that the disclosure of the contents of this document would be detrimental to the "public interest" contemplated by Article 22(6) of the Constitution. To say that a document is a "secret document" is entirely different from saying that the disclosure of its contents would not be in "public interest".

25. For the reasons set out above we are clearly of the opinion that the non-supply to the petitioner of a proposal submitted by the sponsoring authority to the Government for making an order of detention against the petitioner, has resulted in gross violation of the right of the petitioner in making an effective representation against the order of detention guaranteed to him under Article 22(5) of the Constitution and the impugned order cannot be sustained.

26. We would not leave without considering another question raised by the counsel for the petitioner relating to the delay in the disposal of the representation made by the petitioner against the order of detention.

27. Admittedly, a representation was made by the petitioner through the jail authorities to the Central Government against the order of detention on 6th March, 1989 which was received by the Central Government on 9th March, 1989. The Central Government on that very day, i.e. on 9th March, 1989, sent the representation to the sponsoring authority for its comments which was received by the Central Government on 5-4-1989. The comments are dated 29th March, 1989. The Central Government after receipt of the comments, disposed of the

representation on 11th April, 1989.

28. The objection raised by the counsel for the petitioner is that although the comments were called for by the Central Government on 9th March, 1980, they were submitted by the sponsoring authority on 29th March, 1989. It is asserted that there was a long gap of 20 days in supplying the comments by the sponsoring authority to the Central Government. It is not indicated anywhere in the counter-affidavit as to when the communication made by the Central Government requiring the sponsoring authority to submit his comments was received by the sponsoring authority. Assuming that it was received by the sponsoring authority after two or three days, there was still a long period of time between the receipt of the communication from the Central Government and the making of the comments by the sponsoring authority. There is no explanation offered in the counter-affidavit as to how the communication dated 9th March, 1989 was dealt with by the sponsoring authority. There is no counter-affidavit filed on behalf of the sponsoring authority to explain the delay in making comments on the representation submitted by the petitioner against the order of detention.

29. Article 22(5), which contemplates that the authority making an order of detention shall afford to the detenu "earliest to opportunity of making representation" against the order of detention also postulates that if a representation is made by the detenu, it shall be disposed of by the authority making the order at the earliest so that the person against whom the detention order was passed and who has been deprived of his liberty, may get his case considered by the appropriate authority in the light of the facts disclosed by him in his representation. The object of providing an opportunity to the detenu for making representation against the order of detention is that if the facts set out in the representation indicate to the authority making an order of detention that the detention was not necessary, the deprivation of liberty may not be for even a second longer than necessary.

30. In the absence of any explanation indicated in the counter-affidavit of Sri A. K. Batabyal and in the absence of counter-affidavit of the sponsoring authority, it is difficult for us to hold that the representation of the petitioner was dealt with expeditiously.

31. For the reasons stated above the writ petition is allowed and the impugned order dated 24-2-89 (contained in Annexure-1 read with Annexure-2) passed by the opposite party No. 2 is hereby quashed with the direction to the opposite parties that the petitioner shall be set at liberty forthwith unless his detention is required in connection with some other case.