

(2000) 11 KAR CK 0076
In the Karnataka High Court
Case No : Writ Petition (HC) No. 41 of 2000

Venkateshan S.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 02-11-2000

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
(COFEPOSA) — Section 3 (1) (iii)
Constitution of India, 1950 — Article 22 (5)

Citation : (2001) 73 ECC 387

Hon'ble Judges : V.G. Sabhahit, J; R.V. Raveendran, J

Bench : Division Bench

Judgement

1. On 8.2.2000, the Joint Secretary to Government of India, Ministry of Finance, Department of Revenue, New Delhi, issued a detention order (Annexure-A) u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 [for short, COFEPOSA, Act], being satisfied that it was necessary to make such an order, directing that one B. Sankar, s/o late Balakrishnan, No. 14, 1 Main, 5th Cross, Balajinagar, DRC Post, Bangalore-560 029 be detained and kept in custody in the Central Prison, Bangalore, with a view to prevent him from acting in any manner prejudicial to the augmentation of foreign exchange. The said B. Sankar (hereinafter referred to as the "Detenu") was served with the said order on 15.2.2000 along with the grounds of detention dated 8.2.2000 and copies of documents with list, relied upon by the Detaining Authority for issuing the said order of detention. Tamil Translations of the detention order, Grounds of detention and the documents with list were also served along with the Detention Order. On service of said detention order, the detenu was taken into custody.

2. The detenu addressed a representation dated 23.3.2000 to (i) Chairman, COFEPOSA Advisory Board; (ii) Detaining Authority; and (iii) the Central Government, Secretary to Government of India, Ministry of Finance, Department of Revenue, requesting that he may be released from detention. The

representation was rejected by the Detaining Authority and the Central Government by two independent orders dated 10.5.2000 and a memo dated 11.5.2000 was served on the detenu informing him of such rejection.

3. Thereafter, petitioner has filed the present writ petition seeking a writ of habeas corpus, declaring that the detention of detenu under the Order dated 8.2.2000, as illegal and ab initio void. In the petition, the petitioner is described as the wife of the Detenu. This is apparently a mistake. Apparently the petitioner is the brother-in-law of the detenu. It is stated that petitioner is interested in the life, welfare and personal liberty of the detenu.

4. The petitioner has urged the following grounds in support of the petition.

(i) To enable the detenu to make an effective representation against the detention order, translations of the detention order and the grounds of detention should be supplied to the detenu, in the language known to him. In this case, as the detenu was not familiar with the language in which the order was passed i.e. English, Tamil translations of the detention order and the grounds of detention was furnished to him. But the translations do not convey the true and proper purport of the order of detention or grounds of detention. And on account of confusion created as a consequence of such defective translations, the constitutional right of detenu to make an effective representation at the earliest has been affected and therefore, the order of detention is vitiated.

(ii) Petitioner submitted a representation dated 23/24.3.2000 addressed to the Chairman, COFEPOSA Advisory Board, the Detaining Authority and the Central Government. The law requires that such representation should be disposed of without delay. It was disposed of by the Detaining Authority and the Central Government only on 10.5.2000. The inordinate delay has not been satisfactorily explained and as a consequence, the detention is liable to be quashed.

The writ petition was subsequently amended to include the following additional grounds:

(iii) The detention order has been passed to prevent the petitioner from acting in any manner prejudicial to the augmentation of foreign exchange. Thus, the basis of the order is that if the petitioner was at large, he was likely to commit violation of the provisions of the Foreign Exchange Regulation Act, 1973 [for short, FERA], detrimental to the augmentation of foreign exchange. After the filing of this petition, FERA was repealed and replaced by Foreign Exchange Management Act, 1999 [for short, FEMA] which has been brought into effect on 1.6.2000. Various acts which are considered as offences under FERA are" no longer offences under FEMA. Violations and contraventions of provisions of FERA which were punishable as criminal offences, are civil offences under FEMA and are no longer considered as criminal offences. No one can be arrested and remanded to custody nor prosecuted for violations of FEMA. In the circumstances, the very basis of the order of detention has disappeared and consequently, the detention cannot be continued.

RE: GROUND (I):

5. The first submission is that the Tamil translations of the order of detention and the grounds of detention do not convey the correct meaning of the order and the grounds the original of which are in English. The petitioner relied on the decision of the Supreme Court in Vijay Kumar Dharna alias Koka Vs. Union of India and others, , an unreported decision of this Court in Smt. Manju Jain v. State of Karnataka, WP No. 49 (HC) of 1987, decided on 27.8.1987 and a decision of the Delhi High Court in Chhiba Vallabhabhai Tandel Order Union of India 1984(2) Crimes 904.

6. In Vijaya kumar Dharna's case, the Gurumukhi version of the detention order was found to be not a correct translation. While the grounds of detention stated that "with a view to prevent you from concealing, transporting smuggled goods as well as dealing in smuggled goods", which was a ground for detention under Clauses (iii) and (iv) of Section 3(1) of COFEPOSA Act, the Gurumukhi version stated that the detention was necessary "with a view to preventing him from smuggling goods and from abetting the smuggling of goods", which are grounds of detention under Clause (i) and (ii) of Section 3(1) of the Act. The Supreme Court therefore held that the translation left the detenu confused whether he should represent against the grounds in the detention order or the satisfaction recorded in the grounds of detention, and on account of variance, the detenu was unable to make an effective representation against his detention and was thereby denied his Constitutional right under Article 22(5) of the Constitution of India. Therefore the detention order was quashed.

7. In Manju Jain's case, it was found that while the order of detention was u/s 3(1)(iii) of COFEPOSA Act i.e. to prevent the detenu from engaging in keeping smuggled goods, the Hindi version of the detention order, stated that he was detained for keeping smuggled goods. This Court held that under the COFEPOSA Act, keeping smuggled goods did not fall within the purview of Section 3(1)(iii), and as the words "engaging in" which were relevant did not find place in the Hindi version, the detention order was liable to be quashed.

8. In Tanders case considered by the Delhi High Court, the Gujarati translation of the grounds of detention was found to be materially different from the original and was a distorted version, which did not convey the grounds of detention stated in English. It was held that Article 22(5) has two facets i.e. (a) that the grounds on which the detaining authority has made the order of detention must, as soon as may be, communicated to the detenu; and (b) that the detenu shall be afforded an earliest opportunity for making a representation against the order of detention. It was further held that Gujarati version was so different and distorted, from the original, that it amounted to non-communication of the grounds, which prevailed in the mind of the Detaining Authority while making his decision to detain the detenu. Hence, the detention order was quashed.

9. Learned Counsel for respondents 1 and 2 did not dispute the said principles.

He contended that the translation is neither distorted nor different from the original. We will now consider whether the translations do not truly represent what is stated in the originals.

10. The first grievance is in regard to the translation of the following portion of the detention order giving the reason for detention:

with a view to preventing him from acting in any manner prejudicial to the augmentation of foreign exchange.

According to petitioner, the Tamil translation of said portion reads as follows:

According to petitioner, the meaning of the Tamil Translation (when translated again into English) is as follows:

in future, he should not do anything detrimental in regard to foreign exchange and smuggling Act.

11. It is contended that the meaning of the word "augmentation" is not properly conveyed. The dictionary meaning of the word "augmentation" is to make greater in size, number strength. amount etc. The translation of the words "prejudicial to augmentation" as in Tamil reflects the true and proper meaning having regard to the context.

12. The second grievance is that Tamil translation of the Detention order refers to "smuggling", as a ground for detention, even though the original order does not refer to "smuggling". We have gone through the Tamil version. It does not refer to "smuggling" as a ground for detention.

13. Having gone through the normal order in English and Tamil translation thereof, we are satisfied that the translation is a true and proper translation of the detention order and it does not cause any confusion in regard to the reason for detention. A word to word translation from English to an Indian language is next to impossible. Nuances of language do not permit such literal translation. What is therefore required is a true free translation, which conveys the true and correct purport and effect of the order. The intension of providing such translation is to see that the Constitutional right of the detenu to make a representation against the order of detention is not taken away or curtailed, and nothing more.

14. The next grievance is that paras 12 and 13 of the grounds of detention are not properly translated into Tamil. Paras 12 and 13 of the original grounds of detention in English are extracted below:

On careful consideration of the material pleaded before me, I have no hesitation in arriving at the conclusion that you have been engaging yourself in activity prejudicial to augmentation of foreign exchange. I am satisfied that unless detained you are likely to continue to engage in aforesaid prejudicial activities in future also and, therefore, it is necessary to detain you under the Conversation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 with a

view to preventing you in future from acting in any manner prejudicial to the augmentation of country's foreign exchange resources. I am aware that you are on bail at present. Considering the nature and gravity of the offence, your role and involvement therein and the well-organized manner in which you have been indulging in such prejudicial activities--which taken together clearly reflect your high propensity and potentiality to carry on such prejudicial activities in future, I am satisfied that you are likely to continue to indulge in such prejudicial activities in future and therefore, your detention under the COFEPOSA Act, 1974 is essential. For the same reasons and further having regard to the chronological sequence of events in this case, I am satisfied that the nexus between the date of incident and passing of this detention order as well as the object of your detention has been maintained.

I am aware that adjudication proceedings and prosecution proceedings under the FERA 1973 are likely to be initiated against you in due course by the appropriate authority separately to decide your penal liability, which are punitive in nature. Considering your past activities and your "propensity to indulge" in such activities in the future, I am satisfied that your detention under the COFEPOSA Act, 1974 is the only remedy at this state

We find the Tamil version represents a true and correct free translation of the said paragraphs and do not convey any meaning different from the original grounds of detention in English, nor omits or adds anything to it.

15. It is contended that original order in English refers to detenu's high propensity and potentially to carry on such prejudicial activities in future", while Tamil version refers to the detenu's "courage and determination to carry on prejudicial activities". The word "propensity" means inclination of mind or disposition or tendency to move in a certain direction. "Potentiality" means the existing possibility. It is very difficult to have an exact and correct Tamil translation of said words. Tamil translation used the words.

We find that the words used, contextually and effectively bring out the meaning of the words "propensity" and "potentiality" to the best extent possible. The Tamil translation, does not mean "courage" and "determination" as contended by the petitioner. We find that the right of the detenu to give an effective representation at the earliest, to the order of detention and grounds of detention, is in no way affected by the Tamil translations furnished to the detenu. Hence the first ground is rejected.

RE: GROUND (II):

16. The grievance of the petitioner that is the representation of the detenu dated 23/ 24.3.2000, was not disposed of till 10.5.2000 and the inordinate delay is not properly explained by respondents 1 and 2. Respondents have explained the delay in the statement of objections, in the following manner:

The respondents herein submit that although the representation is dated

24.3.2000 and addressed to (1), the Chairman, COFEPOSA Advisory Board, (2) Joint Secretary to the Government of India and (3) Central Government; Secretary to the Government of India, the same was received in the COFEPOSA wing of the Ministry for the first time on 1.5.2000 as an enclosure to the Report of the Hon''ble Advisory in the case of the detenu. Comments were called by the Ministry from the Deputy Director, Enforcement Directorate, Bangalore, vide its letter dated 5.5.2000 and received in the Ministry on the 9th May, 2000. On 9.5.2000, itself the said representation along with the comments were submitted to the Deputy Secretary (COFEPOSA), who in turn, submitted the same to the Detaining Authority on the 10th of May, 2000. After careful consideration of the representation along with the comments thereon, the Detaining Authority rejected the representation on the 10th May, 2000 and a memo intimating the detenu about the rejection of his representation was issued on the 11th of May, 2000. As regards the representation of the detenu addressed to the Central Government, the same was also considered simultaneously and independently and rejected by the Central Government on 10.5.2000. Accordingly, the memo of rejection was issued to the detenu on the 11th of May, 2000. The respondents herein submit that the representation dated 24.3.2000 from the detenu was not received by the Detaining Authority or the Central Government at any time before the Hon''ble Advisory Board forwarded the same to the Ministry alongwith its letter dated 1.5.2000 and thereafter the same was promptly and independently considered & disposed of by both the Authorities.

Learned counsel of the petitioner admitted that time spent between 1.5.2000 and 10.5.2000 was properly explained, but claimed that there is no explanation for the period 24.3.2000 to 1.5.2000. He, therefore, contended on the ground of inordinate delay in considering the representation, the order of detention should be quashed. In this behalf reliance is placed on the decisions of the Supreme Court in Jayanarayan Sukul Vs. State of West Bengal, , Harish Pahwa Vs. State of U. P. and Others, , Jai Prakash Vs. District Magistrate, Bulandshahar, U.P. and others, , Shyam Ambalal Siroya Vs. Union of India (UOI) and Others, and a decision of this Court in Abdul Razack v. State of Karnataka WP No. 68 of 1999 decided on 28.7.1989.

17. In Jayanarayan Sukul's case, nine copies of representation addressed to the Home Secretary were submitted by the detenu to the Jail Superintendent. They were not addressed either to the State Government or Central Government. The Jail Superintendent, therefore, sent all the copies of representation to Home Secretary of the State Government and did not send any copy to the Central Government. The Supreme Court held that the failure to forward the representation to Central Government by the Superintendent is fatal and therefore the detention was to be quashed. The Supreme Court stated four principles to be followed in regard to representation of the detenu. They are extracted below:

First, the appropriate authority is bound to give an opportunity to the detenu to

make a representation and to consider the representation of the detenu as early as possible. Secondly, the consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the representation of the detenu by the Advisory Board. Thirdly, there should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to the measure of time taken by the appropriate authority for consideration but it has to be remembered that the Government has to be vigilant in the governance of the citizens. A citizen's right raises a correlative duty of the State. Fourthly, the appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detenu's representation to the Advisory Board. If the appropriate Government will release the detenu the Government will not send matter to the Advisory Board. If however the Government will not release the detenu the Government will send the case along with the detenu's representation to the Advisory Board. If thereafter the Advisory Board will express an opinion in favour of release of the detenu the Government will release the detenu. If the Advisory Board will express any opinion against the release of detenu the Government may still exercise the power to release the detenu.

The aforesaid principles are reiterated in other cases and it is held that any delay in considering the disposal of the representation will render the detention invalid.

18. Learned Counsel for the respondents contended that where the delay is properly explained, detention is not vitiated relying on two decisions of the Supreme Court. The first is the decision *Raisuddin alias Babu Tamchi Vs. State of Uttar Pradesh and Another*, wherein Supreme Court clarified the position thus:

In this context we consider it necessary to emphasize that the question whether the representation submitted by a detenu has been dealt with all reasonable promptness and diligence is to be decided not by the application of any rigid or inflexible rule or set formula nor by a mere arithmetical counting of dates, but by a careful scrutiny of the facts and circumstances of each case?. if the Court is satisfied that the delay was occasioned not by any lack or diligence or promptness of attention on the part of the party concerned, but due to unavoidable circumstances or reasons entirely beyond his control, such delay will not be treated as furnishing a ground for the grant of relief to the detenu against his continued detention....

(emphasis supplied)

He next relied on the following observations in *Kantilal Hirji Shah v. State of TamilNadu*, WP (Criminal) 3 of 2000, decided by the Supreme Court on 26.4.2000 : 2000 (71) ECC 19 (SC):

A detenu under Article 22(5) has a right that the representation should be considered by the appropriate authority as expeditiously as possible and there should be no unexplained delay in the matter of disposal of the representation.

In our view, therefore, the fact that on receipt of the representation, the Joint Secretary of the department called for the comments of the sponsoring authority immediately and on receipt of the same had forwarded to the higher authority which was dealt with by the appropriate authority, would not constitute any infringement of the constitutional right of the detenu under Article 22(5) nor it can be said that the representation has been dealt with mechanically without application of mind:

(emphasis supplied)

19. It is no doubt true that the period 24.3.2000 to 1.5.2000 is a considerable long period. But, we find that the said delay has occurred not due to any laches or lack of diligence on the part of respondents, but for reasons beyond their control. The petitioner addressed the representation to the Chairman, COFEPOSA Advisory Board, the Detaining Authority and the Central Government, and sent all the copies to the Senior Superintendent under cover of letter dated 23/24.3.2000, which reads as follows:

Enclosed herewith find representation to the Advisory Board, Delhi High Court, New Delhi. Kindly forward the same.

The detenu, thus, clearly instructed the Senior Superintendent, Central Prison, Bangalore, to send all representations to the Advisory Board, Delhi High Court, and not to the Detaining Authority or to the Central Government. The Senior Superintendent therefore forwarded all the copies of the representation to the COFEPOSA Advisory Board, Delhi High Court. In fact, third respondent has filed a statement of objections in this case stating that he received five sets of representations and as per the request of the detenu, he sent all the five sets of representation to the Chairman, COFEPOSA Advisory Board, New Delhi. The third respondent has also stated that as third respondent was not entitled to look into the contents of the representation, he did not peruse the contents and sent the five sets of representation without any delay i.e. on 25.3.2000 itself to the Advisory Board, as instructed by the petitioner. The representation had remained with the COFEPOSA Advisory Board, Delhi High Court and only when the Advisory Board sent it to the Ministry on 1.5.2000, the Detaining Authority and the Central Government became aware of the said representation and immediately thereafter, necessary action was taken to deal with and dispose of the same. As the delay has occurred on account of the specific act of the detenu himself, in requesting the Senior Superintendent of Central Prison, Bangalore, to send all the copies of representation to the COFEPOSA Advisory Board, Delhi High Court, neither the Central Government nor the Detaining Authority can be found fault for the delay between 25.3.2000 and 1.5.2000. The period from the date of representation to the Jail authority till 1.5.2000 is, thus, satisfactorily explained, as being on account of the mistake on the part of the detenu himself. The period from 1.5.2000 to 10.5.2000 has been satisfactorily explained and in fact the learned Counsel for petitioner fairly conceded that period between 1.5.2000 and 10.5.2000 has been explained satisfactorily. The second contention is also

therefore rejected.

20. In the writ petition, petitioner has referred to another delay. It is contended that the investigation was effectively completed on 14.10.1999, whereas the detention order was issued on 8.2.2000 and the inordinate delay in issuing the detention order vitiates the detention. However, learned Counsel for the petitioner did not pursue the said ground. We also find no merit in the said contention.

RE: GROUND (III):

21. We however find considerable force in the third contention. The ground on which the detenu is detained is with a view to prevent the detenu from acting in any manner, prejudicial to the augmentation of foreign exchange, which is a specific ground of detention u/s 3 of COFEPOSA Act. One of the objects of COFEPOSA Act is to provide for preventive detention for the purpose of conservation and augmentation of foreign exchange by effectively reducing violation of foreign exchange regulations. When the detention order was passed, foreign exchange was regulated by FERA. It provides for restrictions in dealing in foreign exchange, restrictions on import, export of currency etc. Para-12 and 13 of the grounds of detention make it clear that the reason for detention was that the detenu was likely to continue to indulge in prejudicial activities in future.

22. As rightly contended by the petitioner, what were considered to be criminal violations of FERA, have ceased to be criminal violations on the repeal of FERA and enactment of FEMA. When the detention is on the basis that the detenu is likely to act in a manner which is prejudicial to augmentation of foreign exchange (that is violate the provisions of FERA) and when such acts/violations have ceased to be criminal offences, having regard to repeal of FERA, the very basis of preventive detention has disappeared. FEMA has provided for fine in place of imprisonment. Even if the fine or penalty levied under FEMA is not paid, the person committing violation is only liable to civil imprisonment. Further, the offences are compoundable. The regulations and provisions relating to foreign exchange have undergone a complete change. In the circumstances the detention order passed when FERA was in force has ceased to have legal sanctity.

23. In the circumstances, there is a need for the detaining authority to consider whether the detention is to be continued at all. In the changed circumstances, the detenu gave a representation dated 31.7.2000, contending that the detention cannot be continued after 1.6.2000, when FERA was repealed and FEMA was enacted. That contention has been rejected by the authority on 9.8.2000. The reason given by respondents 1 and 2 in the written argument is that Section 3 of COFEPOSA Act is purely an activity based provision and does not refer to FERA and therefore, replacement of FERA by FEMA with effect from 1.6.2000 does not in any way affect the detentions. It is also contended that the offences committed prior to 1.6.2000 when FERA was in force, continue to be governed by the provisions of FERA till expiry of two years from 1.6.2000.

24. The order of detention is to prevent the detenu from committing certain acts which were likely to be prejudicial to the augmentation of foreign exchange, that is violation of foreign exchange regulations under FERA. That Act has been repealed. The Act that replaced FERA, that is FEMA is completely different and what were criminal offences under FERA are no longer criminal offences. The contention of the respondents that Section 3 of COFEPOSA Act does not refer to FERA and therefore repeal of FERA has no effect on the preventive detention of the detenu, is not tenable. The very object of COFEPOSA Act in so far as conservation of foreign exchange is concerned, is to prevent violation of foreign exchange which was governed by FERA. Detention of detenu is also to prevent violation of foreign exchange regulations, as contained in FERA. When FERA has been repealed, naturally violations contemplated under FERA are no longer in existence. Therefore, the detention order passed when FERA was in force cannot be sustained.

25. While it is open to the authority concerned to consider afresh the matter with reference to the provisions of FEMA, read with provisions of COFEPOSA Act, the detention made earlier can no longer be continued. On this limited ground, the order of detention is liable to be interfered with.

26. In the result, we allow this petition and the detention order dated 8.2.2000 (Annexure-A) is quashed, directing that the detenu be set free forthwith, if he is not required in any other case.