
(1988) 04 DEL CK 0002

In the Delhi High Court

Case No : Criminal Writ Appeal No. 602 of 1987

Vinod Kumar Vohra

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 19-04-1988

Acts Referred:

Citation : (1988) 35 DLT 145

Hon'ble Judges : M. Sharief-ud-din, J

Bench : Single Bench

Advocate : Harjinder Singh, Naveen Malhotra and U.L. Watwani, for the Appellant;

Judgement

Malik Sarief-Ud-Din, J.

(1) The petitioner has challenged the detention order dated 24th of March 1987 as also the validity of the declaration passed on 21st April 1987 u/s 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The detention order was passed u/s 3(1) of the Cofeposa Act on 24th March 1987 by the Joint Secretary to the Government of India Mr. Tarun Roy and was with a view to preventing the petitioner from smuggling goods. This followed an incident dated 16th of February 1987 when the detenu while traveling from Hongkong to Calcutta via Bangkok was found in possession of foreign made smuggled gold. It may be made clear at this stage that the petitioner has already undergone the period of detention u/s 3(1) of the COFEPOSA. Act though he continues to be in detention by virtue of declaration u/s 9(1) of the said Act. It is in these circumstances that Mr. Herjinder Singh, learned counsel for the petitioner, did not argue or urge the contentions raised by him against the detention u/s 3(1) and he mainly confined himself to the validity of the declaration passed u/s 9(1) of the Cofeposa Act.

(2) Now before I advert to the contentions and the counter contentions, I feel it necessary to refer to certain dates which on the facts and circumstances of this

case do assume importance. The detenu after the incident dated 16th of February 1987 was taken into custody and was produced before a Magistrate who remanded him to custody. On 18th of March 1987 his bail application was rejected by the Chief Judicial Magistrate, Barasat, West Bengal. The petitioner thereafter approached the High Court of Calcutta and he was granted bail in the sum of Rs. 1,00,000.00 with two sureties of Rs.50,000/. each. one of whom to be a local to the satisfaction of the Chief Judicial Magistrate, Barasat on the condition that he shall meet the investigating officer twice a week, that is, on Mondays and Thursdays between 1 and 2 p.m. until further orders. The High Court of Calcutta further directed that the passport of the detenu shall not be returned to him without the orders of the court. On 24th of March 1987 the detention order was passed and it was served upon the detenu on 31st March 1987. The detenu made a representation against the order of detention on 16th April 1987. But before that on 13th of April 1987 he filed a writ petition challenging the order of detention before the High Court of Calcutta which admittedly was dismissed on 30th of July 1987. The detenu was informed that the Advisory Board will meet on 23rd of April 1987 while the declaration u/s 9(1) of the Cofeposa Act passed on 21st April 1987 was admittedly served upon him on 22nd April 1987. Thereafter, after the recommendation of the Advisory Board the order of detention was confirmed by an order dated 11th May 1987.

(3) The first objection to the maintainability of the writ petition is that the detenu had already challenged the validity of the detention and that writ petition having been dismissed by the Calcutta High Court the present writ " petition is not maintainable. Mr. Herjinder Singh states that the principle of constructive res-judicata which is based on public policy is no bar to the maintainability of this writ petition, as according to him he is pressing the present writ petition on a ground which on the date when the writ petition was filed was neither available to him nor raised in the writ petition. This contention is consistent with his stand that he is only interested in challenging the validity of section 9(1) declaration which on 13th of April 1987 when the earlier writ petition was filed was not in existence. Support to the contention is sought from *Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others*, wherein it has been clearly laid down that a fresh writ petition of habeas corpus would lie on a fresh ground. That will settle the first and the preliminary objection.

(4) Mr. Herjinder Singh, learned counsel for the petitioner (detenu) has challenged the validity of the declaration u/s 9(1) of the Cofeposa Act on two grounds : in the first place his contention is that the petitioner had a right to make a representation against the declaration u/s 9(1) both before the Advisory Board as also before the Central Government and the exercise of this right in an effective and purposeful manner had to be facilitated by the authority making the declaration by supplying him the material forming the basis for the declaration and also by providing him sufficient time to prepare a representation and submit the same. That the detenu has a right to make an effective and purposeful representation against the declaration u/s 9(1) of the Cofeposa Act, has been

recognised in *Smt. Veronica Calteninho D'Souza v. The Union of India and others*, Crl. Writ Petition No. 14 of 1985 decided on 27th November 1985 by the High Court of Bombay, subsequently, finding favor with the Division Bench of this court in *Vijay Kumar Gujral v. Union of India and others*. Criminal Writ Petition No. 65 of 1986 decided on 27th May 1987. This is in harmony with the contention of Mr. Herjinder Singh that procedural safeguards against the detention as conferred by Article 22(4) and (5) of the Constitution will stand extended in cases where the detention is prolonged by a further period of one year by virtue of the declaration u/s 9(1). In any case, there seems to be general consensus on the point that since section 9(1) declaration does result in drastic consequences the detenu has a right to make a representation against the same. If a detenu has a right to make a representation then he is entitled to ask as to the material on which the order is passed. In fact, the law does not require him to ask for the material but it has to be supplied to him by the authority passing the order. In the present case, the declaration u/s 9(1) which was delivered to the detenu on 22nd April 1987 mentions that the authority making the declaration has relied upon the same material which has been delivered to the petitioner. Obviously, there was no need to supply a duplicate set of copies of the same material to the detenu as the entire material has been earlier supplied to him pursuant to the detention order. That, however, does not solve the problem. In order to enable the detenu to make an effective and purposeful representation, it is not the supply of the material alone which is important but the time factor also matters. He must be allowed a reasonable time to ponder over the matter, seek assistance if he so desires, draft a proper representation and submit it to the concerned authority. He has to prepare himself also for presentation of the case to the Advisory Board in his own ways. In this case, the representation against the declaration was submitted to the Central Government as, according to Mr. Herjinder Singh, the detenu had sufficient time to make that representation. His grievance is that he has been deprived of making an effective and purposeful representation to the Advisory Board against the declaration u/s 9(1) as he was provided no time to do the needful. To repeat, the declaration was passed on 21st April 1987, it was delivered to the detenu on 22nd April and he was to appear before the Advisory Board on 23rd April 1987. Obviously, there was no time left to the detenu to make a representation to the Advisory Board against the declaration u/s 9(1). On that ground indeed the continued detention of the petitioner stands vitiated.

(5) Mr. Herjinder Singh has, however, raised another point which also, in my view, appears to be important. The contention is that even though the petitioner-detenu was granted bail by the High Court of Calcutta on 20th of March 1987 but the order was so couched that it became difficult for the detenu to furnish bail and seek release. It is stated that up to the date the detenu has not been able to fetch bail. Mr. Herjinder Singh states that in particular the detenu would not comply with the direction of the High Court of Calcutta to furnish a local surety. Be that what it is, the fact of the matter is that apart from asking for furnishing

sureties, the High Court directed the detenu to report during the particular hours twice a week to the concerned authorities and also directed that the passport shall not be returned to the detenu-petitioner without the orders of the court. These are matters which were sufficiently relevant to be considered by the authority making the declaration before arriving at its subjective satisfaction. One does not know how these conditions imposed by the Calcutta High Court would have affected the mind of the concerned authority. It is possible that he may have in the light of these conditions refrained from making a declaration u/s 9(1) prolonging the detention by one more year. It may have been otherwise also. But in that case the court would have been in a position to know how the mind of the concerned authority was affected and this would be reflected in the declaration itself. It cannot be said that the consideration of this most important and relevant material by the declaring authority was not necessary. In fact, in all fairness this bail order of the Calcutta High Court ought to have been placed before the declaring authority and should not have been suppressed. What is reflected by the declaration u/s 9(1) is that this fresh material and the most relevant circumstance was not placed before the authority making the declaration. On this account also, states Mr. Herjinder Singh, the declaration u/s 9(1) is invalid.

(6) In reply to the contentions raised in the writ petition it is nowhere stated that this new circumstance and this particular material was not relevant for the purpose of passing a declaration u/s 9(1). All that is stated is that the bail order was passed on 19th June 1987 while the declaration u/s 9(1) was passed on 21st April 1987 when the bail order was not in existence and that it could not have been produced before the declaring authority. This contention of the authority making the declaration in his return took us by surprise, and I asked Mr. Watwani to find out the facts. After going through the entire sequence of events and various documents I find that the bail order, in fact, has been passed on 20th March 1987 and it was in existence on the date when the declaration u/s 9(1) was passed. The sponsoring authority, however, failed to pass on this material for the consideration of the authority making declaration u/s 9(1). Having failed to produce this fresh circumstance and the most relevant material before the authority making the declaration u/s 9(1) it cannot be said that the declaration was passed after due and proper application of mind. On that account also the declaration u/s 9(1) stands vitiated.

(7) On these short grounds, Therefore, I allow this petition and quash the declaration u/s 9(1) as also the continued detention of the petitioner. The petition is accordingly allowed and it is directed that the petitioner shall be released forthwith unless required in some other case.