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Court : Delhi

Decided On : Jan-03-1995

Reported in : 1994IVAD(Delhi)1056; 1995CriLJ1422

Judge : Vijender Jain, J.

Acts : Constitution of India - Articles 21 and 22(5); COFEPOSA Act - Sections 3(1), 7, 7(1) and 11

Appeal No. : Criminal Writ No. 4880 of 1994

Appellant : Surinder Kumar

Respondent : Union of India and Others

Advocate for Def. : V.K. Shali, Adv.

Advocate for Pet/Ap. : Ms. Sangita Nanchahal, Adv

Judgement :
ORDER

1. This is a petition filed by the petitioner-detenu for quashing the order of detention dated 2-9-1993 passed by the respondent under Sec. 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the 'COFEPOSA Act') passed by the Joint Secretary of respondent No. 1.

2. Ms. Sangita Nanchahal, learned counsel for the petitioner, has argued that the irrelevant material was considered by the detaining authority and consideration of irrelevant material by the detaining authority shows non-application of mind by the respondent. She has argued that as per their own averments the respondent has considered certain documents such as application dated 5-5-1993 for grant of 'B' class jail and Court's Order thereon filed by John Anthony Zmak, co-accused of the petitioner, application dated 5-5-93 for medical examination and reports and statement of Harsh Talwar of M/s York International dated 1-6-1993. On the basis of these materials learned counsel for the petitioner has argued that all these letters would show that they were not all relevant for passing the detention order and detaining authority while taking into consideration all such documents has acted in a mechanical manner thereby not applying its mind and on this ground alone the order of detention be quashed. In support of her arguments she has cited Vishwanath alias Pappu v. Union of India : 49(1993)DLT409 , Gurdas Seal v. Union of India 1994 (2) A D 21 and Criminal Writ 207/89 (Reported in .) titled as Jagdish Mitr v. UOI decided by P. K. Bahri J. the case of Smt. Shalini Soni v. Union of India, : 1980 CriLJ1487 in which the Supreme Court laid down the law on this aspect (at pp. 1490, 1491 of Cri LJ) :-

'It is an unwritten rule of the law, constitutional and administrative, that, whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functions, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote .....

Where there is further an express statutory obligation to communicate not merely the decision but the grounds on which the decision is founded, it is a necessary corollary that the grounds communicated, that is, the grounds so made known, should be seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went into make up the mind of the statutory functionary and not merely the inferential.'

3. On the basis of these authorities learned counsel for the detenu has argued that in the present case also the order of detention is vitiated on account of irrelevant material being relied upon by the detaining authority for arriving at the subjective

satisfaction for passing the detention order which shows, in fact, non-application of mind.

4. Another argument advanced by learned counsel for the petitioner is the translation of the detention order as communicated to the petitioner in Hindi language was different than what was communicated in English thereby depriving the petitioner from making effective representation in this regard. The order dated 2-9-93 in English reads as follows :-

'..... with a view to preventing him from dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods in future, it is necessary to make the following order :'

Where the Hindi translation supplied to the petitioner is to the following effect :-

'KI USE VASTUON KI TASKARI KARNE SE ROKNE KE LIYA TATHA BHAVISHYA MAIN TASKARI KE SAMAAN KO CHHUPANE, PARIVAHAN VA RAKHNE SE ROKNE KE LIYE, NIMNLIKHIT AADESH JARI KARNE JARURI HAI.'

5. To substantiate her arguments learned counsel for the petitioner cited Vijay Kumar Dharna alias Koka v. Union of India, : 1990 CriLJ1187 in which the Supreme Court held (at p. 1188 Cri LJ) :-

'This satisfaction clearly reflects the grounds contained in clauses (iii) and (iv) of S. 3(1) of the Act. The above satisfaction does not speak of smuggling of goods or abetting the smuggling of goods which are the grounds found in the Gurmukhi version of the detention order. There is, thereforee, considerable force in the contention urged by the learned counsel for the appellant that on account of this variance the detenu was not able to effectively represent his case before the concerned authorities. In fact according to him the appellant was confused whether he should represent against his detention for smuggling of goods or for engaging in transporting and concealing smuggled goods and/or dealing in smuggled goods. Besides, the English version of the detention order was only for abetting the smuggling of goods. The satisfaction recorded in the Gurmukhi

version of the grounds for detention is not consistent with the purpose for the detention found in the detention order. It left the detenu confused whether he should represent against the grounds in the detention order or the satisfaction recorded in the grounds of detention. We are, thereforee, of the opinion that because of this variance the detenu was unable to make an effective representation against his detention and was thereby denied his right under Art. 22(5) of the Constitution.'

6. She has further cited a Division Bench's decision of this Court of Chhiba Vallabhabhai Tandel (Detenu) through Hirabhai Chhiba Tandel v. The Union of India 1984 (2) Crimes 904. Another point which has been canvassed before me to challenge the impugned order of detention by the learned counsel for the petitioner is delay on the part of respondent in taking decision on the representation of the petitioner. It is the case of the petitioner that the petitioner represented to the respondent on 10-6-1994 and the respondent communicated the rejection of the said representation on 5-7-1994. Ms. Nanchahal has argued that no ground of delay has been given in the counter-affidavit filed by the respondent in this regard. Another argument of the learned counsel for the petitioner is that though the representation was given to the Joint Secretary of the respondent as well as to the Central Government and that representation was in terms of Sec. 11 of the COFEPOSA Act but from the language of the letter dated 5-7-94 it is not evident as to which representation of the petitioner has been disposed of by the respondent Ms. Nanchahal has also argued that on this ground alone the order of detention be quashed as the representation sent to the detaining authority as well as to the Central Government has not till date been disposed of by the respondent. In support of her submission she has cited Mahesh Kumar Chauhan alias Bante v. Union of India : 1990 CriLJ1507 in which Supreme Court referring to the dictum laid down in Smt. Shalini Soni's case : 1980 CriLJ1487 (supra) laid down the following proposition of law (at p. 1508 of Cri LJ) :-

'The detenu has an independent constitutional right to make his representation under Article 22(5) of the Constitution of India. Correspondingly, there is a constitutional mandate commanding the concerned authority to whom the detenu forwards his representation questioning the correctness of the detention order

clamped upon him and requesting for his release, to consider the said representation within reasonable dispatch and to dispose the same as expeditiously as possible. This constitutional requirement must be satisfied with respect but if this constitutional imperative is observed in breach, it would amount to negation of the constitutional obligation rendering the continued detention constitutionally impermissible and illegal, since such a breach, would defeat the very concept of liberty - the highly chershed right - which is enshrined in Article 21 of the Constitution.'

Mahesh Kumar Chauhan's case : 1990 CriLJ1187 (supra) noted Khairul Haque v. State of West Bengal, (Writ Petition No. 246 of 1969) decided on 10-9-69 (Reported in (1969) 2 SCWR 529.) and Jayanarayan Sukul v. State of West Bengal, : 1970 CriLJ743 , wherein the Constitution Bench of the Supreme Court laid down on this point as follows (at p. 1509 of Cri LJ) :-

'The reason for immediate consideration of the representation is too obvious to be stressed. The personal liberty of a person is at stake. Any delay would not only be an irresponsible act on the part of the appropriate authority but also unconstitutional because the Constitution enshrines the fundamental right of a detenu to have his representation considered and it is imperative that when the liberty of a person is in peril immediate action should be taken by the relevant authorities.'

7. thereforee, on the basis of these authorities learned counsel for the petitioner has argued that the representation of the petitioner ought to have been considered and disposed of as expeditiously as possible otherwise the continued detention will render itself impermissible as being vocative of the constitutional guarantees enshrined in Article 22(5) of the Constitution. Ms. Nanchahal has further argued the if any such delay has occurred such delay should be explained by the appropriate authority to the satisfaction of the court. In her support she has also cited Aslam Ahmed Zahire Ahmed Shaik v. Union of India : 1989 CriLJ1447 . Gazikhan alias Chotia v. State of Rajasthan : 1990 CriLJ1420 and Prof. Khaidem Ibocha Singh etc. v. State of Manipur, : [1972]1SCR1022 and a decision of this Court in Criminal Writ No. 30 of 1994 (P. H. Abdul Kareem v. Union of India)

decided on July 28, 1994 by Dalveer Bhandari, J. Another point which has been canvassed before me by the learned counsel for the petitioner is that there is inordinate delay in execution of the detention order. She has argued that the detention order was passed on 2-9-93 whereas the petitioner was arrested on 2-6-1994. Learned counsel for the petitioner has argued that after passing the detention order nothing substantial was done to arrest the petitioner though the petitioner was always available and the theory put up by the respondent that the petitioner was absconding is vague and lacks in material particulars. She has also pointed out that once the respondent has taken recourse to Sec. 7 of the COFEPOSA Act it was obligatory as well as mandatory on the part of the respondent to take recourse to the provisions of Sec. 7(1)(b) of the said Act and it was obligatory on the part of the respondent to notify in the official gazette as per the requirements laid therein. In support of her argument she has cited Narendra Punjabhai Shah v. Union of India 1994 (2) Scale 746. In this case the Supreme Court held :-

'When there is a considerable delay, particularly the delay of one year, naturally, the Court has to see whether the delay has been properly explained to judge whether the detaining authorities have the necessary satisfaction before serving the detention order and the ground of detention after such long unexplained delay.'

8. In the facts and circumstances of that case, court held that the Explanationn given by the respondent that accused did not attend the court on certain dates, thereforee, it must be presumed that he was absconding and to this Supreme Court answered as follows :-

'..... As a question of fact we find it difficult to accept this Explanationn to be plausible .....'

9. She has further cited in support of her contention Narendra Punjabhai's case (supra), T. A. Abdul Rahman v. State of Kerala, : 1990 CriLJ578 , K. P. M. Basheer v. State of Karnataka : 1992 CriLJ1927 and a decision of this Court in Criminal Writ No. 111 of 1988 (Yogesh Chopra v. Administration of Delhi) decided on 19th April, 1988. (Reported in (1988) 2 R C R 156 : 1989 Cri LJ 48. On the basis of these submissions, the learned counsel for the petitioner has stated that

the impugned detention order dated 2-9-93 made by the respondent is illegal, unconstitutional and the same may be quashed.

10. Mr. V. K. Shali, learned counsel for the respondent vehemently opposed the contention of counsel for the petitioner dealing first that there was unexplained delay in disposing of the representation of the petitioner. Mr. Shali has contended that in the first instance it was a single representation which was sent by the petitioner through jail authorities and it was addressed to the Joint Secretary of respondent No. 1 and the second name on the said representation was, Secretary, Department of Revenue, Ministry of Finance, Government of India. Mr. Shali has contended that as a matter of fact it was in the knowledge of the petitioner as to who was the person designated to be the authority and if petitioner wanted to represent to the detaining authority then the petitioner ought to have given the name of said authority. Mr. Shali has argued that as a matter of fact and in substance the representation made by the petitioner was to the Central Government and Central Government considered the representation of the petitioner and rejected the representation vide its letter dated 5-7-1994. Repelling the contention of learned counsel for the petitioner Mr. Shali has argued that the respondent has taken the representation as made to the Central Government and, thereforee, the inherent fallacy in the argument of leaned counsel for the petitioner that his representation was still pending and the petitioner is not aware as to which representation has been disposed of the Central Government is without any basis. Adverting to the delay in disposing of the representation Mr. Shali has argued that the representation was received by the respondent on 13-6-1994, on the 17-6-94 the said representation was sent to the sponsoring authority. The same came back to the respondent on 28-6-94 and the rejection of the said representation dated 5-7-1994 was sent to the petition. Mr. Shali has also laid stress that the respondent has to work wherein various stages and officers are involved in taking decision and the delay was neither intentional nor unexplainable.

11. I need not go to the various contentions raised by learned counsel for the petitioner in this case as on the question of delay in disposing of the representation the court at this stage is not satisfied with the Explanationn given by the respondent. The representation if the detenu has to be dealt with abundant

care and great promptitude. These matters are not ordinary matters. When a citizen is deprived of its liberty by the State action special care has to be taken to see that the representation is disposed of expeditiously. The court cannot lay down any hard and fast rules for disposal of such representations. If the delay has been caused on account of bona fide and genuine reason the delay must be explained by the respondent. I do not find in the affidavit of Mr. K. L. Verma, Joint Secretary, who is the detaining authority concerned and who ought to have been familiar with the movement of the representation of the detenu, any such Explanationn, reply which does not explain the reason is not within the parameters of the guidelines laid down by the Supreme Court in this regard. The Supreme Court in the case of T. A. Abdul Rahman 1989 Cri LJ 578 (Supra) held that the right of representation under Article 22(5) is a valuable constitutional right and is not a mere formality. In Rashid S. K. v. State of West Bengal 1983 (3) SCC 476 (sic) Supreme Court held :-

'..... The ultimate objective of the provision can only be the most speedy consideration of this representation by the authorities concerned, for, without its expeditious consideration with a sense of urgency the basic purpose of affording earliest opportunity of making the representation is likely to be defeated. This right to represent and to have the representation considered at the earliest flows from the constitutional guarantee of the right to personal liberty - the right which is highly chershed in our Republic and its protection against arbitrary and unlawful invasion.'

12. What is 'reasonable expedition' has been explained in Sabir Ahmed v. UOI : [1980]3SCR738 which reads :-

'..... What is 'reasonable expedition' is a question depending on the circumstances of the particular case. No hard and fast rule as to the measure of reasonable time can be laid down. But it certainly does not cover the delay due to negligence, callous inaction, avoidable red-tapism and unduly protracts procrastination.'

13. The Explanationn given by the respondent in paragraph 7 of its counter is the representation dated 13-6-94 was received in sponsoring authority's office on 17-6-94 and the comments by the sponsoring authority were sent to the Ministry on

28-6-94. To my mind this is hardly an Explanationn given by the respondent who happens to be Joint Secretary of the respondent. The Supreme Court in a number of cases has decided that such representation has to be disposed of with promptitude and expeditiously. In case where a detenu is detained by virtue of the order passed under preventive detention laws, the detaining authority has to act with abundant care and speed. In my view, the detaining authority has failed to dispose of the representation of the petitioner with promptitude and has failed to give any cogent reasons for delay and on this ground alone, detention order passed on 2-9-1994 by the respondent is quashed. If the petitioner is not required in any other case, he be set at liberty forthwith.

14. Petition stands disposed of accordingly. Copy of this order be sent to the Superintendent, Central Jail, Tihar.

15. Order accordingly.

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