Deepak Kumar and Dinesh Kumar Vs. Union of India Etc.

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Court : Delhi

Decided On : Nov-28-1983

Reported in : 25(1984)DLT77

Judge : Prakash Narain and; Charanjit Talwar, JJ.

Acts : Constitution of India - Article 22(5); Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - Sections 3(1); Customs Act, 1962 - Sections 108

Appeal No. : Criminal Writ Appeal Nos. 84 and 77 of 1983

Appellant : Deepak Kumar and Dinesh Kumar

Respondent : Union of India Etc.

Advocate for Def. : Mr. Bagai

Advocate for Pet/Ap. : Kapil Sibal,; U.K. Sharma,; Urmila Khanna and;

Judgement :

Charanjit Talwar, J.

(1) This judgment disposes of two petitions, viz., Criminal Writ No. 84 of 1983 and Criminal Writ No 77 of 1983 filed by Deepak Kumar and Dinesh Kumar respectively for issuance of a writ of habeas corpus and seeking quashing of the impugned orders of detention passed on 22nd April, 1983, under section 3(1) read

with section 2(f) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (hereinafter called 'the Act'), by the Administrator of the Union Territory of Delhi.

(2) The impugned two orders of detention are practically identical. While against Deepak Kumar the order has been passed, inter alia, with a view to preventing him from smuggling goods ; the one against Dinesh Kumar has been passed with a view to preventing him from abetting smuggling of goods.

(3) The grounds of detention are also practically identical in both the Cases. A few facts brought out in the grounds of detention, which have a bearing on the decision of the petitions, may be noticed.

(4) In the early hours of 1st November, 1982, one Mr. Leon White, holder of a U.S. diplomatic passport, and his wife Mrs. Erlinda H.Wight, holder of a Phillipine passport, arrived at the Delhi Airport from Hongkong by a Lufthansa flight. While they were walking through the green channel they were intercepted near the exist gate and were asked to declare the contents of their baggage which was stacked on the hand trollies. Mr. White refused to declare the contents of the suit cases on the ground that he was a holder of a diplomatic passport. That passport on scrutiny revealed that he had made frequent visits of short duration to Hongkong in the last one and a half years. His wife's passport showed that she had also visited Hongkong on the same dates. The baggage was detained by the Customs authorities as the contents were not declared.

(5) On 3rd November, 1982, Mr. White attended the Air Customs office at Delhi Airport and stated in the presence of Counsel of U.S. Embassy in India and the Protocol Officer in the Ministry of External Affairs that the said suit-cases contained contraband goods. The suit cases were seized under section 110 of the Customs Act, 1961. In his statement recorded under section 108 of the Customs Act, 1961, Mr. White admitted that they had gone to Hongkong on the asking of one Mr. Kumar for bringing contraband goods which were delivered to them in their hotel by the petitioner, Deepak Kumar, who is son of that Mr. Kumar. As per the arrangement the petitioner had come to their room at Sheraton Hotel Hongkong with those goods which were packed in the seized suit cases. Mr. White

further admitted that he had made various trips to Hongkong earlier on the asking of Mr. Kumar for this very purpose.

(6) In a further statement made on the next day Mr. and Mrs. White identified the petitioner as the 'son of Y.P. Kumar'. Apparently the identification was made by them on being shown a photograph. Mr. Sibal, learned cousel for the petitioners, urged that it was incumbent on the authority to have supplied a copy of the photograph to Deepak Kumar as it was relied upon. The allegation regarding identification is contained in paragraph 6 of the grounds of detention. That paragraph is relevant and, thereforee, may be quoted:

'6.In their further joint statement dated 4-11-82 (Annexure VIII) Mr. Leon White and Mrs. Erlinda H. Wight identified your photograph as son of Y.P. Kumar referred to in their statements. They also produced two photographs one showing Y.P. Kumar with Mr. Leon Wight and other showing Mrs. Kumar with Mrs. Erlinda Wight.'

(7) According to the counsel a bare reading of the above paragraph shows that the photograph by which the petitioner was identified by Mr. White was the basis of the case against Deepak Kumar. A copy of the same was not supplied to him although a specific request was made by the petitioner. According to Mr. Sibal a duty was cast upon the Administrator to have supplied the same at least at that stage, if not earlier. Admittedly, the request for supply of documents has been rejected by the authorities.

(8) Mr. Bagai, learned counsel for the respondents, initially submitted there was no request made by the petitioner for supply of documents. Latter in view of the copy of letter dated 2nd June, 1983, written by the Advocate for the petitioner (Annexure 'Y' to the writ petition) where in it is clearly mentioned that although a letter for supply of documents on behalf of Sarvshri Y.Kumar, Deepak Kumar and Dinesh Kumar had already been submitted so as 'to enable them to make a detailed, effective and meaningful, representation against their detention', yet no reply had been received so far. The prayer was that copies be arranged to be sent at an early date to enable him to file 'representation within the meaning of Article 22(5) of the Constitution of India'. By a memorandum dated 24th June, 1983, addressed to ShriR.K. Khanna, the said Advocate, the request made on behalf of

Y. Kumar, Deepak Kumar and Dinesh Kumar was rejected, and a copy of the said memorandum was sent to each of the three detenus, (Annexure 'Z'). Mr. Bagai after checking from his record informed us that in fact with the letter of 2nd June, 1983, a copy of the earlier letter seeking copies of documents had been received by the respondents. The photograph is listed as item no. X, in that letter.

(9) As noticed above, the petitioner is being identified through that photograph produced by the Customs authorities as the person who had handed over the contraband goods to Whites at Hongkong in their hotel. Mr. Sibal took us through the statement of Dinesh Kumar, petitioner in Criminal Writ Petition No. 77 of 1983, which has been relied upon by the Administrator and a copy of which had been supplied to the petitioner Deepak , as well. A copy of English translation of that statement has been annexed as Annexure I wherein he has stated. 'The third black and white photograph which has been shown as the one of Shri Deepak Kumar son of Shri Y. Kumar. In this photograph Deepak is wearing a shirt and a pair of spectacles and had got a great resemblance with me. These photographs carry the signatures of Leon Wight dated 4-11-82. These also have the signatures of Erlinda H. Wight.' .

(10) A reading of grounds of detention reveals that the photograph said to be of the petitioner is the pivot around which the case against the petitioner revolves. It, thereforee, cannot be urged that the Administrator had not relied upon the same. It is axiomatic that a copy of the document on which reliance is placed has to be supplied to a detenu. Assuming for the sake of argument that the Administrator did not rely upon this photograph, the rejection of the request for supply of a copy of the same was, however, not valid. We have held in Vinod Kumar Arora @ Vinod Kumar v. Administration, Union Territory of Delhi and others. Criminal Writ No. 90 of 1983, decided on 14th October, 1983, that the failure of the detaining authority to supply copies of seized documents to which reference has been made in the grounds of detention amounts to an infringement of the provisions of Article 22(5) of the Constitution. In the instant case no reasons for rejection have been stated either in the memorandum dated the 24th June, 1983, nor were any urged before us. The said rejection was thus unwarranted. On this ground alone the continued detention of the petitioner is liable to be set aside.

(11) As noticed above, the application made for supply of documents was a common application on behalf of all the three detenus. The copies of the documents recovered from the residence of the petitioners and also from Y. Kumar, which have been referred to in the grounds of detention, were also requested to be supplied. At this stage it may be noticed that in paragraph 20 of the grounds of detention communicated to Dinesh Kumar, petitioner in Criminal Writ No. 77 of 1983, it is stated that on search of his residential premises conducted by the officers of the Customs and the Central Excise Department a number of loose papers, visiting cards and photographs were taken into possession. In paragraph 21 of grounds of detention it is sated that the detenu in his statement under section 108 of the Customs Act explained those documents. It appears that from those documents a close relationship of Y. Kumar and Dinesh Kumar in smuggling activities is being established. As noticed earlier, by memorandum of the 24th June, 1983, the joint request of the detenus for supply of copies of the documents was declined. According to Mr. Bagai these documents were not relied upon by the Administrator while passing the detention orders and, thereforee, not supplied to the petitioners. The documents admittedly were taken into possession by a Panchnama which is Annexure 13 to the grounds of detention. It is stated so in so many words in paragraph of the said grounds supplied to Dinesh Kumar. In view of the fact that the detune was closely examined with regard to those documents and his lengthy Explanationn noticed and acted upon, as is evident from the paragraph, it cannot be urged that those documents were not in fact relied upon by the Administrator while coming to the decision that the petitioner be preventively detained under the Act. The submission of Mr. Bagai cannot negative the apparent fact disclosed in the grounds of detention. At any rate, the detenu Dinesh Kumar did make a specific request for supply of copies of those documents recovered from his residence. It is so mentioned at item no. xix of the representation dated 23rd May, 1983 (copy Annexure W-1 with Criminal Writ No. 84 of 1983). A detenu is not required to disclose his reasons for seeking copies of documents. It is not open to the authority to decline the request for supply of copies of the documents which are available with it having been seized during investigations of that very case. The effective right of representation against the detention would be set at naught if the

copies of those documents by which the detenu can show his innocence or at least he feels he can do so, is denied to him.

(12) The petition of Dinesh Kumar (Criminal Writ No 77 of 1983) is also thus liable to be allowed on this ground.

(13) Mr. Sibal, learned counsel for the petitioners, further urged that the detention of the petitioners is also liable to be set aside on the following grounds:

(I)the procedure adopted by the Advisory Board in giving hearing to the representatives of the Customs Department was unwarranted ;

(II)the grounds of detention served on the petitioner Deepak Kumar running into 91 pages and that of Dinesh Kumar running into 92 pages, are not the ground as contemplated under section 3(3) of the Act but constitute statements of facts giving merely sequence of events; and

(III)the request of the petitioners to the Advisory Board seeking permission for being represented by a lawyer, was not considered.

(14) The record of the Advisory Board which was placed before us shows that (1) the presence of the representative of the Customs Department was noted by it in the order sheet and (2) he was also heard. It further shows that the representation of the detenu was considered and he was also heard. According to Mr. Sibal the hearing given to the representatives of the department or of the appropriate Government is not contemplated in section 8(c) of the Act. It is appropriate to quote the said provision which lays down the manner in which a reference to the Advisory Board is to be dealt by it:

'(C)the Advisory Board to which a reference is made under clause (b) shall after considering the reference and the materials placed before it and after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if in any particular case, it considers it essential so to do or if the person concerned desires to be heard in person, after hearing him in person, prepare its report specifying in a separate paragraph there of its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned :'

(15) The argument is that the Board after considering the materials placed before it is entitled to call for such further information as it may consider necessary not only from the appropriate government but from any other person who can be called for that purpose through the appropriate government but no right of hearing is to be accorded. The hearing is to be given only to the 'person concerned' i.e., the detenu.

(16) The argument, although attractive, is devoid of any merit. The hearting contemplated in this provision is not a right of audience as understood in a judicial proceeding. The Advisory Board although constituted of three Judges of the High Court, yet it functions purely in an advisory capacity. It does not record evidence and/or hear arguments. Hearing to be given to a detenu when he seeks it or when the Advisory Board considers it essential to do so, means that in such an eventuality it is to listen to the detenue ; in other words, an opportunity is accorded to a detenu to explain his stand. As far as the appropriate government is concerned it has to place material before the Board at the first instance and it is further enjoined on it to give information when called for by the Board from it or from any other person called for that purpose through it. The appropriate government is an agency to collect further information and place it before the Board. The material placed earlier and any further information collected by it on the directions of the Board is to enable the Board to consider the reference made to it under sub-section (b) of section 8 of the Act. The information collected on the directions of the Board is to be placed before it in the presence of the detenu by a representative of the Government. The representative cannot be said to have argued the matter in case he has been asked either to explain the material collected earlier which is already before the Board or to give the required information as long as it is done in the presence of the detenu who thereafter must be given an opportunity to address the Board. We agree with Mr. Sibal that a representative of the appropriate government or of any department has no right of audience before the Board. However, the ministerial assistance given to the Board

is not open to question. We are satisfied from the record that in the present case of proceedings before the Board did not infringe the procedural safeguards provided in the Constitution.

(17) The next submission of Mr. Sibal has also no merit. It is true that the grounds of detention run into more than 90 pages and after narrating the sequence of events the grounds as such have not been specifically enumerated. In a case like the present the events preceding the interception of the contraband goods carried by whites and necessarily to be stated as disclosed by them in their lengthy statements recorded on 3rd and 4th November, 1982, under section 108 of the Customs Act. The investigations carried out resulting in seizure of various documents which further disclosed the activities and the association of the detenus and also to be stated to enable the detenus to make a representation as contemplated under Article 22(5) of the Constitution, It is well settled that 'grounds' mean the conclusions drawn by the authority from the facts or particulars which have led it to pass the order of detention. Under this Constitutional provision the authority is obliged to indicate the kind of prejudicial activity the detenu is engaged in and also to furnish sufficient facts or particulars regarding it to enable him to make a representation against the order of detention.

(18) In the present cases we satisfied that grounds of detention served on the detenus were not at all vague. It is apparent from their representations seeking inspection of documents and from copies of documents that the petitioners received that they were fully aware of the 'grounds' on which the detention orders had been passed.

(19) The last submission that the plea for permission to engage a lawyer to represent the detenus before the Advisory Board, was not considered by it, and, thereforee, the continued detention is vitiated, has also to be rejected. We find that no separate representation was made to this effects to the Board. The detenus in their representation challenging their detention did make a passing request for this purpose. It is not the case of the petitioners that their representations challenging the detention were not considered. In fact it is apparent from the record of the Advisory Board that their representations were considered and rejected by it. It

cannot, thereforee, be urged that the request contained in the representation for permission to engage a lawyer was not considered.

(20) Another submission of Mr. Sibal was that although by Constitution (Forty-fourth Amendment) Act, 1971, sub-article (4) of Article 22 of the Constitution has been proposed to be amended inasmuch as the period of preventive detention without the report of the Advisory Board has been reduced to two months, this amendment has yet not been brought into force by the Central Government. The argument is that in spite of the clear intention of the legislature the period during which the Advisory Board is to submit its report under section 8(c) of the Act continues to be 11 weeks from the date of detention. This according to the counsel is causing hardship to the detenus. Admittedly, as the proposed substitution of sub-article (4) of Article 22 has not yet been enforced and as such we are not called upon to deal with this submission.

(21) In view of the above discussion, the continued detention of the petitioners is illegal. The impugned detention orders are quashed. The rule is made absolute and the petitions are allowed.