

BadrudIn Bashar Khan Vs. Union of India (Uoi) and ors.

BadrudIn Bashar Khan Vs. Union of India (Uoi) and ors.

SooperKanoon Citation : sooperkanoon.com/713461

Court : Delhi

Decided On : May-24-2007

Reported in : 141(2007)DLT448; 2007(96)DRJ526

Judge : R.S. Sodhi and; H.R. Malhotra, JJ.

Acts : [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) - Sections 3(1), 7(1), 8 and 11(1); [Customs Act, 1962](#) - Sections 104; National Security Act; Preventive Detention Act, 1971 - Sections 9; [Constitution of India](#) - Article 22(5)

Appeal No. : Writ Petition (Criminal) No. 2502 of 2006

Appellant : BadrudIn Bashar Khan

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : Pankaj Batra, Adv.

Advocate for Pet/Ap. : Mukul Rohtgi and; Sandeep Sethi, Sr. Adv. and; Maqsood Kha

Disposition : Petition allowed

Judgement :

R.S. Sodhi, J.

1. Criminal Writ Petition No. 2502 of 2006 seeks to challenge the order of detention dated 2.5.2006 bearing No. F. No. 673/14/2005-CUS.VIII, issued by Sh. R.K. Gupta, Joint Secretary to the Government of India, specially empowered under Section 3(1) of the [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) (as amended) who was satisfied with respect to the person named as Sadruddin Basar Khan, S/o Shri Basar Lal Khan, R/o Parsik Hill, Sector 26, Plot No. 93, Navi Mumbai, that with a view to preventing him from abetting the smuggling of goods as well as dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods in future, it was necessary in exercise of the powers conferred by Section 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (as amended) to direct that the said Sadruddin Basar Khan be detained and kept in custody in the Mumbai Central Prison, Mumbai.

2. Brief facts of the case as set out in the writ petition are as under:

(a) Intelligence was gathered by the Directorate of Revenue Intelligence (DRI), Mumbai, that one sea-faring vessel by name M.T. AL SHAHABA (a Motor Tanker) carrying 700 Metric Tonnes (MT) of Diesel Oil of foreign origin, would be coming into the Indian Customs Waters near B.F.L., Tanker Anchorage area on or about 20th or 21st December, 2004 and the Diesel Oil in the said Vessel would be smuggled into India by offloading the same from the main vessel into small barges.

(b) Pursuant to the above intelligence, the DRI Officers kept a surveillance of the area and noticed the vessel AL-SHAHABA. They also noticed the Diesel was being pumped into the barges from the vessel.

(c) The DRI Officers seized the said vessel, the barges and the diesel oil valued at Rs. 2,31,00,000/- on 22/12/2005 and they also arrested Captain of the Vessel Fouad Ahmed, one Chand who was present in the Vessel and some other persons under Section 104 of the [Customs Act, 1962](#). The DRI Officers, subsequently arrested the Detenu also as the person who had allegedly financed Chand in the Smuggling of the said Diesel Oil into India. All the persons who were arrested were subsequently released on bail by the Learned Additional C.M.M. 3rd Court,

Esplanade, Mumbai.

(d) On the basis of the investigation and the material collected and placed before the Detaining Authority, by the Sponsoring Authority DRI Mumbai, the Detaining Authority came to a conclusion that with a view to preventing the Detenu from abetting the smuggling of goods as well as dealing in smuggled goods otherwise than engaging in transporting or concealing or keeping smuggled goods, it was necessary to detain him under Section 3(1) of the COFEPOSA Act, 1974 and the Detaining Authority accordingly, allegedly passed the said Order against the Detenu on 02/05/2006.

Being aggrieved by the said alleged order of detention and the alleged grounds on which it is purported to have been issued, the petitioner preferred this Petition.

3. The main ground which was pressed before us was that the petitioner is an illiterate man who can barely sign in English but was served detention order in English which was not explained to him in Hindi, the language known to him. This has violated his right to make an effective representation at the earliest opportunity. The order of detention is, therefore, unconstitutional, illegal and bad. Another ground is that the Advisory Board while affording a hearing to the detenu did not allow the detenu to examine witnesses and that the Advisory Board violated the principles of natural justice which have gravely prejudiced the hearing before the Board. The detention order is bad on this account as well. Yet another ground of challenge is that at the time of execution of the impugned order of detention on 29.9.2006, the detenu was in judicial custody. It was incumbent upon the Detaining Authority to consider afresh whether it was necessary to continue with the execution of the detention order in spite of inordinate delay which consideration were most mechanical and is a case of non-application of mind which vitiates the order of detention.

4. Learned Counsel for the State, on the other hand, contends that the affidavit of the Detaining Authority filed in this writ petition explains the stand of the Detaining Authority which is sufficient to dispel any doubt of any violation. He contends that the writ petition is devoid of any merits.

5. Having heard learned Counsel for the parties, we have carefully examined the various contentions. The first challenge to the detention order is taken in ground No. 3 in the writ petition which reads as under:

(iii) The Petitioner says and submits that the Detenu is an illiterate man, who can barely sign in English. The Petitioner says and submits that on 29/09/2006, when the alleged Impugned Order of Detention was being served on him in English, it was incumbent on the part of the Executing Authority to have explained to him the alleged Order of Detention, the Grounds of Detention and the documents contained in the compilation of documents as per the List of Documents in simple Hindi so that, the Detenu could have effectively communicated the alleged Order and Grounds of Detention and the documents, which are also the part of the Grounds of Detention in eye of law. The Petitioner says and submits that since the above exercise of interpreting and explaining the alleged Impugned Order of Detention, Grounds of Detention and the documents was not carried out by the Officers who have executed the Impugned Order of Detention against the Detenu, the Detenu has not been communicated the alleged order and the Grounds of Detention and as a result thereof the Detenu could not make an effective Representation at the earliest opportunity. The Petitioner says and submits that both the facets of Article 22(5) of The [Constitution of India](#) have been violated by the Executing Officers and as a result thereof, the detention of the Detenu has become unconstitutional, illegal, null and void.

6. Reply to the same has been furnished in the counter affidavit which is as follows:

Para 5(iii). The grounds of detention were explained to detenu by the Executing Authority in simple Hindi and an endorsement to this effect was also made in this regard on the acknowledged copy and when the detenu refused to sign below the said endorsement, a panchnama was prepared in this regard.

7. The reply of the Detaining Authority as is evident is totally lacking in particulars. The affidavit does not state as to who had served the grounds of detention and who had read over and translated the grounds in Hindi. The affidavit to say the least is unacceptable. The Supreme Court in Smt. Raziya Umar Bakshi v. Union of

India and Ors. 1980 SCC 846, has dealt with such a situation as follows:

2. In support of the rule, Mr. Ram Jethmalani, counsel appearing for the detenu raised two points before this Court. In the first place it was submitted that the counsel on behalf of the detenu has expressly pleaded that the grounds of detention were couched in English, a language which the detenu did not understand at all and these grounds were not explained to him. A specific ground on this aspect of the matter has been taken in ground No. XIII at page 21 of the petition which may be extracted thus:

That the detenu does not know English. The grounds of detention and the order of detention were in English. No vernacular translation of the grounds was given nor they were explained to the detenu in a language known to him.

3. This allegation seems to have been denied by the respondents in para 14 of the affidavit of Mr. P.M. Shah, on behalf of the detaining authority, where he stated that the grounds were explained to the detenu in the language known to him. It was averred in para 5 that one Mr. A.K. Sharma, Police Inspector, C.I.D. (Crime Branch), Ahmedabad had explained to the detenu the order of detention and the grounds communicated to him on January 30, 1980. This affidavit, in my opinion, is wholly inadmissible in evidence. If it was a fact that Mr. Sharma had personally explained the grounds to the detenu, then the respondents should have filed an affidavit of Mr. Sharma himself to show that he had actually explained the contents of the grounds to the detenu by translating the same in the language which he understood. No such affidavit is forthcoming. No contemporaneous record has been produced to show that Mr. Sharma had actually explained or translated the grounds to the detenu. The service of the ground of detention on the detenu is a very precious constitutional right and where the grounds are couched in a language which is not known to the detenu, unless the contents of the grounds are fully explained and translated to the detenu, it will tantamount to not serving the grounds of detention to the detenu and would thus vitiate the detention ex facie.

8. The law on the subject having been enunciated by the Supreme Court as above noted, we are bound by the same. In the present case, the affidavit does not satisfy the requirements of law laid down by the Supreme Court on which account

the detention order stands vitiated.

9. Another ground which has been forcefully canvassed before us is the procedure adopted by the Advisory Board. The grounds in the writ petition are as follows:

(v) The Petitioner says and submits that there is an enormous delay in execution of the Impugned Order of Detention against the Detenu, which has rendered the subjective satisfaction of the Detaining Authority not genuine. The Petitioner says and submits that the Impugned alleged Order of Detention has completely lost its efficacy by efflux of time of about one and half years and the same has become legally unenforceable. The petitioner says and submits that during 02/05/2005 and 29/09/2006, the Detenu was all the time available for the service of the Impugned Order of Detention at his residence as well as at his office at Sion and also at the site of construction of his buildings. The Petitioner is producing and annexing the Affidavits of the following persons to establish that the Detenu had not absconded at any point of time after 02/05/2005:

- (1) Joseph George, a plumbing contractor.
- (2) Bhimaram Ruparam Chaudhary, Hardware Store owner.
- (3) Shaikh Mumtaz Hussain, Purchaser of the Flat from the Detenu.
- (4) Kadar Khan, Purchaser of Flat from the Detenu.
- (5) Shabbir Qureshi, Electrical Wiring Contractor.
- (6) Ramnivas Sahani, Flooring Tiles Contractor.
- (7) Mohammed Munir Ansari, Steel Supplier.

Hereto annexed and marked Annexure P-4 (colly) are the copies of the affidavits of the above persons along with relevant documents.

(vi) The Petitioner says and submits that the Detenu had through his Advocate submitted a Representation on 09/10/2006 to the Honourable Advisory Board, constituted by the Central Government under Section 8 of the COFEPOSA Act.

The Petitioner says and submits that in the said Representation in para (11) and also in the prayer Clause c of the said Representation, the Detenu through his Advocate prayed for examining the witnesses in his defense, particularly to establish that the Detenu was not absconding during the period he is said to be so absconding. The Petitioner says and submits that, even, oral request was made to the Honourable Members of the Advisory Board on 14/10/2006 by the Advocate for the Detenu, during the personal hearing of the case of the Detenu by the Honourable Advisory Board at New Custom House, Mumbai, to allow the Detenu to examine the above witnesses and the Detenu also offered the above witnesses for cross-examination, but the Honourable Advisory Board did not allow to do so and the Detenu, through his Advocate, was constrained to file the affidavits of the aforesaid persons. The Petitioner says and submits that had the Honourable Advisory Board allowed the above witnesses to be examined by the Detenu and cross-examined by the other side, it could have been proved beyond doubt that the Detenu, was not all all absconding. The Petitioner says and submits that the Honourable Advisory Board by not allowing the Detenu to examine the above witnesses, deprived the Detenu an effective personal hearing and Representation before it and thereby, the proceedings of the Honourable Advisory Board have been vitiated because of the procedure adopted by the Honourable Advisory Board and also by the fact that the rights of Detenu under Article 22(5) of the [Constitution of India](#) have been violated. Hereto annexed and marked Annexure P-5 is a copy of Representation dated 09/10/2006 submitted to the Honourable Advisory Board.

10. Reply on behalf of respondent Nos. 1 & 2 is as follows:

Para 5(v). Due and diligent searches were made by the Sponsoring Authority as well as the Executing Authority from time to time and all the efforts were made to trace out the whereabouts of the detenu, but he could not be traced. Order Under Section 7(1)(a) and 7(1)(b) of the COFEPOSA Act were issued and it was duly published in the newspapers. The contention that the detenu was available for serving the detention order is without any basis. Also, all the persons who had filed the said six affidavits have their business dealings with the detenu and thus they have their own vested interest in filing the affidavits and rescuing the detenu. It is

also evident from the similar language of the affidavits that these are motivated and devoid of any merits. The chronological list at Annexure R-3 gives the events leading to the issue of Detention Order and the list at Annexure R-4 about the attempts made to detain him by the Executing Authority/Sponsoring Authority. It will be seen there from that there were no undue or unexplained delay in the processing of the case.

Para 6. The Hon'ble Advisory Board consisting of 3 sitting Judges of Delhi High Court had considered the need for the continued detention of the accused as per the provisions in the COFEPOSA Act, in its meeting held in Mumbai on 14.10.06 wherein the accused as well as his advocates presented their case before the Hon'ble Advisory Board. The affidavits were filed by the detenu's advocate before the Honourable Advisory Board at the meeting. The Hon'ble Advisory Board had called for the comments on the affidavits which were duly furnished by the Sponsoring Authority. Thus all the material facts were made available to the Hon'ble Advisory Board for giving their final opinion as provided in the COFEPOSA Act. The Advisory Board had in its opinion dated 30.10.2006 given the opinion that there exists sufficient cause for the detention of the detenu, Shri Sadruddin Basar Khan, based on the above opinion, has been confirmed by the Finance Minister that he should be detained for one year from the date of detention.

11. The law on the question whether a detenu has a right to lead evidence before the Advisory Board has been settled by the Supreme Court in A.K. Roy v. Union of India and Anr. : 1982 CriLJ340 paragraph 105 which reads as follows:

105. The last of the three rights for which Shri Jethmalani contends is the right of the detenu to lead evidence in rebuttal before the Advisory Board. We do not see any objection to this right being granted to the detenu. Neither the Constitution nor the National Security Act contains any provision denying to the detenu the right to present his own evidence in rebuttal of the allegations made against him. The detenu may therefore offer oral and documentary evidence before the Advisory Board in order to rebut the allegations which are made against him. We would only like to add that if the detenu desires to examine any witnesses, he shall have to keep them present at the appointed time and the obligation can be cast on the

Advisory Board, like any other Tribunal, is free to regulate its own procedure within the constraints of the Constitution and the statute. It would be open to it, in the exercise of that power to limit the time within which the detenu must complete his evidence. We consider it necessary to make this observation particularly in view of the fact that the Advisory Board is under an obligation under Section 11(1) of the Act to submit its report to the appropriate Government within seven weeks from the date of detention of the person concerned. The proceedings before the Advisory Board have therefore to be completed with the utmost expedition.

12. This has further been dealt by the Supreme Court in *Harbans Lal v. M.L. Wadhawan and Ors.* 1987 SCC 151, where the Supreme Court has held in paragraph 6 which reads as under:

6. We have not been told that the Advisory Board has regulated any procedure that oral evidence will not be permitted when it enquires into orders of detention. Even if there is any such procedure it will be of no legal consequence after the law in this behalf had been laid down by this Court in *A.K. Roy Case*. The right to adduce oral evidence by examining witnesses is a right available to a detenu under the above decision and this should be deemed to be incorporated in the statute dealing with detention without trial. Support for this position was sought by the learned Counsel for the petitioner from a decision of this Court in *Narendra Purshotam Umrao v. B.B. Gujarat*. In that case, this Court was dealing with the absence of any express provision in Section 8(b) of the COFEPOSA Act placing an obligation to forward the representation made by a detenu along with the reference to the Advisory Board unlike those contained in Section 9 of the Preventive Detention Act, 1971. It was contended in that case that in the absence of an express provision in this behalf no obligation was cast on the government to consider the representation made by the detenu before forwarding it to the Advisory Board or to forward the same to the Advisory Board. After discussing the scope of Article 22(5), this Court held (SCC p. 644, para 23) the constitutional safeguards embodied in Article 22(5) of the Constitution, as construed by this Court must, therefore, be read into the provisions of Section 8(b) of [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) to prevent any arbitrary executive action.

13. The Supreme Court by this judgment raised the status of the right of the detenu to adduce oral evidence to that being a right in the nature of a constitutional safeguard embodied in Article 22(5) of the Constitution and laid down that if this right is denied to the detenu, the necessary consequence must follow.

14. In the present case, the Advisory Board not only refused to allow oral evidence to be led by the detenu but went on to seek opinion from the Detaining Authority after closing its hearings behind the back of the detenu. This, with great respect, cannot be accepted as a procedure fair, just and acquittable. the Advisory Board though may regulate its procedure must necessarily do so without violating the carnal principles of natural justice. The Advisory Board commenced and concluded its proceedings on 14.10.2006 and went on to receive information from the Detaining Authority on 20.10.2006 and delivered its order approving the detention on 30.10.2006. The fact that the Advisory Board, in the first instance, shut out the oral evidence of the detenu but received evidence by way of affidavit which were not controverted by the Detaining Authority by cross-examining the witness who were present at the time of hearing. The Advisory Board could not have allowed the Detaining Authority to give Explanations subsequent to its closing the hearings and using the material so provided by the Detaining Authority in arriving at its conclusion to uphold the detention order.

15. This, with great respect, as already stated, is an unacceptable procedure adopted by the Board which has denied the detenu of an effective consideration before the Advisory Board as also violated the principles of natural justice. Consequently, the detention order is vitiated on this ground as well.

16. The other grounds of detention need hardly detain us any further since we have already held that the order of detention dated 2.5.2006 bearing No. F. No. 673/14/2005-CUS.VIII, issued by Sh. R.K. Gupta, Joint Secretary to the Government of India, specially empowered under Section 3(1) of the [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) (as amended), is bad.

17. We, therefore, quash the order of detention dated 2.5.2006 bearing No. F. No. 673/14/2005-CUS.VIII, issued by Sh. R.K. Gupta, Joint Secretary to the Government of India, specially empowered under Section 3(1) of the [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) (as amended) with respect to the person named Sadruddin Basar Khan, S/o Shri Basar Lal Khan, R/o Parsik Hill, Sector 26, Plot No. 93, Navi Mumbai. Criminal Writ Petition No. 2502 of 2006 is allowed and Rule made absolute. The detenu, Sadruddin Basar Khan, who is in detention, shall be set at liberty forthwith, if not wanted in any other case.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com