

Sabir Ahmed

Vs

Union of India

Writ Petition No. 168 of 1980

(Sarkaria, J.)

18.04.1980

JUDGMENT

SARKARIA, J. –

1. This is a writ petition filed by one Sabir Ahmed to challenge the detention of his brother, Dawood Hasan Sheikh Ibrahim, under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the COFEPOSA).
2. The detenu was in the custody of the Customs when on September 8, 1979, he was produced before the Metropolitan Magistrate, Esplanade Court, Bombay and was remanded to judicial custody and later on granted bail by the Sessions Judge by an Order, dated September 28, 1979.
3. On October 2, 1979, an order of detention passed under Section 3(1) of COFEPOSA by Shri Pradhan, the Secretary to Maharashtra Government in the Home Department, was served on him. The grounds of detention were also served on him on the same date.
4. On November 14, 1979, the detenu made a representation to the detaining authority, in which he inter alia asked for supply of the copies of documents and statements relied upon in the grounds of detention. The representation of the detenu was not dealt with by Shri Pradhan, but by the Minister of State in the Home Ministry of the State Government, and was rejected on December 10, 1979. The Minister is said to have been authorised to deal with the representation of detenus by a standing order made by the Chief Minister on December 3, 1979. In the meantime, the Advisory Board met and considered the representation of the detenu and made a report to the government on December 6, 1979 for approval of the detention. The said minister had dealt with the representation and rejected it after the Board had made its report to the government.
5. On November 19, 1979, the detenu made an application to the Central Government for revocation of the order of his detention under Section 11 of COFEPOSA, and this has not been dealt with by that government till today.
6. Mr. Jethmalani, appearing for the detenu, has made four submissions :
 - (1) The Minister of State was not competent to dispose of the representation of the detenu, because the Order dated December 3, 1979, made by the Chief Minister did not invest him with the necessary authority to dispose of the representation.
 - (2) The representation has not been dealt with expeditiously by the State of

Government. On the other hand, it was mechanically sent for remarks to the Customs Department on November 18, 1979, and thereafter the report of the Customs Department was received by the State Government on November 28, 1979.

(3) The application of the detenu for obtaining copies of the relevant documents was improperly rejected, and as a result, he has been deprived of his constitutional right of making an effective representation.

(4) The detenu had a right to move the Central Government for revocation of the order of his detention. For that purpose he submitted a petition addressed to the Central Government on November 19, 1979. But, the Central Government has callously ignored it and has not dealt with it so far. This delay and inaction for an indefinite period, which now exceeds four months, vitiates the detention. Reliance for this contention has been placed on two recent judgments of this Court in *Shyam Ambalal Siroya v. Union of India* ((1980) 2 SCC 346 : 1980 SCC (Cri) 447), by a Bench of three learned Judges; and *Tara Chand v. State of Rajasthan* ((1980) 2 SCC 321 : 1980 SCC (Cri) 441), by a Bench of two learned Judges.

7. We will take the last contention first, because in the course of his arguments the learned counsel for the petitioner, while reserving his arguments on other points, has dealt with this point only.

8. On the other hand, regarding contention 4, Mr. Datar, appearing for the Central Government, submits that Section 11 of COFEPOSA merely confers a discretion on the Central Government to revoke or modify an order of detention made by the State Government. It does not confer any right or privilege on the detenu to make a representation to the Central Government under that section.

9. In line with the same argument Mr. Nain appearing for the respondent-State, submits that Section 11 merely gives a power which is to be exercised by the Central Government suo motu after receiving the report from the State Government under Section 3(2). It is conceded that the power conferred on the Central Government under Section 11 is a supervisory power, but that according to the learned counsel, does not mean that the detenu have been invested with a right to move the Central Government for revoking the detention. Mr. Nain further tried to distinguish *Shyam Ambalal Siroya* case (1975 Supp SCR 124 : (1975) 2 SCC 586 : 1975 SCC (Cri) 695) on the ground that therein, the detaining authority was the Central Government, while in the instant case, the order was passed by the State Government.

10. Both the learned counsel, appearing for the respondents, relied upon the decision of this Court in *Mohd. Dhana Ali Khan v. State of W. B.* (1975 Supp SCR 124 : (1975) 2 SCC 586 : 1975 SCC (Cri) 695). Counsel further submitted that what has been said by Fazal Ali, J. in *Mohd Dhana Ali Khan* case (1975 Supp SCR 124 : (1975) 2 SCC 586 : 1975 SCC (Cri) 695), conflicts with the ratio of *Shyam Ambalal Siroya* ((1980) 2 SCC 346 : 1980 SCC (Cri) 447) and *Tara Chand* ((1980) 2 SCC 321 : 1980 SCC (Cri) 441) relied upon by the petitioner. It is urged that on account of this conflict, the matter should be referred to a larger Bench for reconsideration. It is maintained that the last mentioned two cases have not been correctly decided. If the ratio of these two decisions - proceeds the argument - is liberally applied then it means that the detenu has a right to vex the Central Government by making endless representations even where no new facts have come to light.

11. In the alternative, Mr. Nain contended that only in a case where the representation is based on the discovery of new matter or facts, the Central Government may be required to consider it. The

proper course for the court even in such cases, according to Mr. Nain, is to issue a direction to the Central Government to consider the representation within a period specified by it, and not to quash the detention. In this connection reference was made to *Ram Bali Rajbhar v. State of W. B.* ((1975) 3 SCR 63 : (1975) 4 SCC 47 : 1975 SCC (Cri) 321).

12. It is true that Section 3(2) of COFEPOSA mandates the State Government to send a report to the Central Government. But it does not mean that the representation made by the detenu, if any, should also be sent along with that report. There appears to be no substance in the contention that the Central Government is under no duty to consider a representation made to it by the detenu for revoking his detention if it simply repeats the same allegations, statement of facts, and arguments which were contained in the representation made to the detaining authority. It is common experience that an argument or submission based on certain facts which does not appeal to a tribunal or authority of first instance, may find acceptance with a higher tribunal or supervisory authority. Whether or not the detenu has under Section 11 a legal right to make a representation to the Central Government is not the real question. The nub of the matter is whether the power conferred by Section 11 on the Central Government, carries with it a duty to consider any representation made by the detenu, expeditiously. The power under Section 11 may either be exercised on information received by the Central Government from its own sources including that supplied under Section 3 by the State Government, or, from the detenu in the form of a petition or representation. Whether or not the Central Government on such petition/representation revokes the detention is a matter of discretion. But this discretion is coupled with a duty. That duty is inherent in the very nature of the jurisdiction. The power under Section 11 is a supervisory power. It is intended to be an additional check or safeguard against the improper exercise of its power of detention by the detaining authority or the State Government. If this statutory safeguard is to retain its meaning and efficacy, the Central Government must discharge its supervisory responsibility with constant vigilance and watchful care. The report received under Section 3, or any communication or petition received from the detenu must be considered with reasonable expedition. 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 protracted procrastination.

13. The plea specifically taken by the writ-petitioner in Ground No. XXII of his affidavit, runs as under :

The petitioner says that he made a representation to the Central Government for revocation of the detention order under Section 11 of the COFEPOSA. The Central Government has not considered the said representation and thus the detenu's continued detention is illegal.

Earlier, in paragraph 7 of his affidavit, also, he had mentioned that he had sent a communication to the Central Government, Department of Revenue, COFEPOSA Branch, asking for revocation of the detention order, but no reply had been received. In spite of the fact that this ground was specifically taken, Mr. R. K. Thawani, Deputy Secretary to the Government of India, Ministry of Finance, has not in his counter-affidavit said anything with regard to this plea or the facts alleged in the affidavit of the writ-petitioner. The conclusion is, therefore inescapable that the Central Government has not at all considered the petition made by the detenu requesting for revocation of his detention under Section 11. According to the allegations in the writ petition, this written communication was sent by the detenu to the Central Government on November 19, 1979. We are now in the middle of March, 1980.

14. Contrary to the counter-affidavit filed by Mr. S. M. Sule, Under-Secretary to the Government of Maharashtra, Home Department, Mr. Nain submitted that, in his opinion, the Central Government did not consider the representation/petition of the detenu because it might be labouring under a misapprehension that once a writ petition for habeas corpus has been filed on behalf of the detenu and the court is seised of the case, anything done by the government thereafter might amount to contempt of court. The apologetic explanation imagined by him contrary to the stand taken in Mr. Sule's counter-affidavit, is hardly an excuse for not performing its statutory duty by the Central Government. Although about four months have gone by since the despatch of the representation by the detenu, yet the Central Government has not applied its mind to it. It has just ignored it.

15. The ratio of Tara Chand case ((1980) 2 SCC 321 : 1980 SCC (Cri) 441 and Shyam Ambalal Siroya case ((1980) 2 SCC 346 : 1980 SCC (Cri) 447) applies with all its force to the facts of the instant case. The decision in Mohd. Dhana Ali Khan (1975 Supp SCR 124 : (1975) 2 SCC 586 : 1975 SCC (Cri) 695), stands on its own peculiar facts. In principle, there is no conflict between the ratio of that case and the two subsequent decisions aforesaid.

16. In Tara Chand case ((1980) 2 SCC 346 : 1980 SCC (Cri) 447), the order of detention was passed by the Government of Rajasthan, and the detenu had addressed a representation to the President who forwarded it to the Finance Ministry of the Union Government for necessary action. It was common ground that the representation was no considered by the Union of India, nor was any order passed on it. On these facts Murtaza Fazal Ali, J., speaking for the court, held that Section 11(1) of the COFEPOSA

clearly enjoins that the Central Government may revoke or modify an order passed by the State Government Once a representation is made to the Central Government it is duty-bound to consider the same in order to exercise its discretion either in rejecting or accepting it. If there is inordinate delay in considering the representation that would clearly amount to violation of the provisions of Article 22(5) so as to render the detention unconstitutional and void.

17. The ratio of Tara Chand case ((1980) 2 SCC 321 : 1980 SCC (Cri) 441) was followed in Shyam Ambalal Siroya case ((1980) 2 SCC 346 : 1980 SCC (Cri) 447), wherein a stand similar to the one before us was taken by the Central Government in the counter-affidavit filed on its behalf. The stand taken was that the detention order was not vitiated merely because the Central Government had not considered the representation of the detenus made to it for revocation of the detention under Section 11 of the COFEPOSA. The court rejected this contention with this observation : (SCC pp. 348, 349, para 6)

The power of the Central Government to revoke the order of detention implies that the detenu can make a representation for exercise of that power. Any petition for revocation of an order of detention should be dealt with reasonable expedition ... It may be permissible for the Central Government to take reasonable time for disposing any revocation petition. But it would not be justified in ignoring the representation for revocation of the detention as a statutory duty is cast upon the Central Government. It is necessary that the government should apply its mind and either revoke the order of detention or dismiss the petition, declining to order for revocation.

In that case, the representation addressed to the Central Government was not forwarded to the Central Government and, as such, was left unattended for nearly four months.

18. It is true that in Shyam Ambala Siroya case ((1980) 2 SCC 346 : 1980 SCC (Cri) 447), the

detaining authority was an Additional Secretary to the Central Government. But he did not derive his authority to pass the detention order from the rules of business framed by the Central Government under Article 77(3) of the Constitution. Such authority was given to him under the statute itself. It is, therefore, not correct to say that in that case, the order passed by the detaining authority was to be deemed an order passed by the Central Government itself. In any case, so far as the ratio of that decision is concerned, this is a distinction without a difference.

19. Shyam Ambalal Siroya case ((1980) 2 SCC 346 : 1980 SCC (Cri) 447) was a decision rendered by a Bench of three learned Judges. We are bound by the ratio of the two aforesaid decision. Respectfully following the same, we hold that since a representation made by the detenu to the Central Government has been ignored and left unattended for a period of about four months, the detention cannot be justified as being according to procedure prescribed by law. In view of the stand taken by the respondent-State in the counter-affidavit filed on its behalf we do not feel inclined, in the circumstances of the case, to issue a direction to the Central Government to consider and dispose of the representation of the detenu now.

20. We, therefore, allow this writ petition and set aside the detention and direct release of the detenu.

21. These, then, are the reasons which we now give in support of our Order, dated March 14, 1980, by which we allowed Sabir Ahmed's writ petition and ordered the detenu's release.

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