

Union of India

Vs

Diljeet Singh

Criminal Appeal No. 235 of 1998

(K.T. Thomas, Syed Shah Mohammed Quadri JJ)

23.02.1999

JUDGMENT

Syed Shah Mohammed Quadri, J.

1. Leave is granted.

2. The short but question of some practical significance that arises in this appeal is whether consideration of the report of detention of the respondent under Section 3(1) sent by the State Government under Section 3(2) of the COFEPOSA Act by Joint Secretary (Revenue) to the Government of India renders his continued detention illegal ?

3. The respondent is the detenu. While on his way to Lahore (Pakistan), he was intercepted at Indira Gandhi International Airport by Custom authorities who, on search, found foreign currency equivalent to Indian Rs. 58,33,898.75p. and other articles such as textiles, artificial jewellery, etc. He was detained pursuant to an order made under Section 3(1) of the Conversation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, 'COFEPOSA Act') by the Lt. Governor of National Capital Territory of Delhi with a view to prevent him from smuggling of goods, etc. The detention of the respondent was challenged in Criminal Writ Petition No. 590 of 1997 in the High Court of Delhi. On April 15, 1998, the High Court allowed the writ petition on the ground that the report sent up by the State Government under Section 3(2) of the COFEPOSA Act was considered by the Joint Secretary (Revenue) who was not the competent authority under the notification issued by the Finance Minister in 1966; it was considered by the Secretary (Revenue) after six months along with the representation, therefore, the safeguards provided under Article 22(5) of the Constitution had been violated. Against the said order of the High Court, the Union of India and other officials have come up in appeal by special leave.

4. Mr. K.N. Rawal, learned Additional Solicitor General, contended that the High Court erred in setting aside the order of detention and directing release of the respondent on the ground that 1991 notification was superseded by 1996 order issued by the Finance Minister under which Secretary (Revenue) was the competent authority and that view was not accepted by the High Court of Madras in *Rosana Begum v. State of Tamil Nadu and other, H.C. Petition No. 775 of 1997*.

5. Ms. Sangeeta Bhayana, learned Counsel appearing, for the detenu respondent, submitted that by the 1991 notification, the Finance Minister had delegated his powers under the relevant provisions of the COFEPOSA Act of the Joint Secretary (Revenue) but in 1993 the said notification was superseded when the powers under the COFEPOSA Act were retained by the Finance Minister at the time of distribution of powers between him and the Minister of State for Finance; again, in

1996, he delegated his powers in favour of Secretary (Revenue). Therefore, consideration of the report under Section 3(2) of the COFEPOSA Act by the Joint Secretary was illegal and as there has been no consideration by the competent authority, the rights of the detenu under Article 22(5) of the Constitution were violated. She relied on two judgments of the High Court of Delhi in *D. Rana @ Dharmesh Rana @ Dharmesh Prill v. Union of India and others, Criminal Writ Petition No. 17 of 1997 dated 15th September, 1997* and *Ms. Li Galina and others v. Union of India and others, 1998(1) JCC 6 (Delhi)*.

6. To examine the contentions of the learned Counsel, we shall read the notification, referred to above. The 1991 notification is as follows :

"F.N. 685/14/84-Cus. VIII

GOVERNMENT OF INDIA

MINISTER OF FINANCE

(DEPARTMENT OF REVENUE)

In pursuance of the provisions of rule 3 of the Government of India (Transaction of Business) Rules, 1991, I, Yashwant Sinha, Minister in the Ministry of Finance, Government of India, hereby direct that the powers vested in the Central Government under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974), shall be exercised by the officers in the Ministry of Finance, (Department of Revenue), Government of India, as specified hereunder :-

Provisions of the Act

Officers

(a) Powers under Section 5 sub-section (1) of Section 7, Clause (F) of Section 8 Section 10, Section 11 and sub-section (i) of section 12.

Secretary or Special Secy., or Joint Secretary in the Ministry of Finance (Department of Revenue), Govt. of India.

(b) Clause (b) of Section 8

Deputy Secretary or Under Secretary or Senior Technical Officer in the Ministry of Finance (Department of Revenue), Government of India.

Sd/-

(Yashwant Sinha)

Minister of Finance

New Delhi : 26.4.1991"

7. From a perusal of this notification, two things are evident that :(i) it is a statutory notification issued under the provisions of Rule 2(3) of the Government of India (Transaction of Business) Rules, 1991 and (ii) it contains delegation of powers of the Central Government under various provisions noted in Column (1) in favour of officers noted in Column (2). It may be noted that Section 3(2) is not mentioned in Column (1) of the said notification.

8. The office order of 20th January, 1993 (hereinafter referred to as "the 1993 order"), relevant portion of which are reproduced hereunder, shows that it does not deal with delegation of powers of the Central Government under the COFEPOSA Act.

"No. A-22012/2/93-Admn. 1

Government of India/Bharat Sarkar

Ministry of Finance/Vitta Mantralaya

Department of Expenditure/Vyaya Vibhag

New Delhi, the 20th January, 1993

OFFICE ORDER

Subject :- Allotment of work to Ministers.

Finance Minister has decided that the Ministers of State in the Ministry of Finance will be allocated the following items of work :

1., MINISTER OF STATE (REVENUE AND EXPENDITURE)

SHRI M.C. CHANDRASEKHAR MURTY

DEPARTMENT OF REVENUE

A. (i) to (viii) x x x x x

(ix) COFEPOSA, (a) Parole

(b) Transfer of prisoners.

(x) to (xii) x x x x x

B. The following items of work will be put to Finance Minister through Minister of State of Revenue and Expenditure :-

(i) to (xii) x x x x x

(xiii) COFEPOSA - (a) Representations of revocation

(b) Confirmation of detention Period.

(xiv) x x x x "

9. A cursory look of the order makes it clear that it relates to various subjects of different departments and their distribution between the Minister for Finance and Minister of State (Revenue and Expenditure). There is nothing to connect the 1993 order with delegation of powers under the COFEPOSA Act. It cannot, therefore, be legitimately contended that this order supersedes the 1991 notification.

Now, the office order of 25th July, 1996 may also be noticed here :

"F. No. 50/61/96-Ad. I

Government of India

Ministry of Finance

Department of Revenue

New Delhi, the 25th July, 1996.

OFFICE ORDER NO. 160 OF 1996

Subject : Delegation of powers - Orders regarding -

The Finance Minister has delegated the powers to Secretary (Revenue) in respect of the disposal of the following cases :-

(i) All files concerning representation from COFEPOSA/PITNDPS detainees addressed to the Government of India.

(ii) Application for parole except where the applications are addressed to the Minister of COFEPOSA/PITNDPS cases.

(iii) All files relating to routine extension of period of eligibility under Sec. 36(i) (VIII) of the Income-tax Act (Except those cases where this concession is being granted for the first time or when extension is being rejected.

(iv) All cases of concessions under Sec. 10(15)(A) of Income-tax Act where airlines are being given exemption from deduction of tax at source on lease rents being paid for hiring of aircraft.

(N.M. Mookerjee)

Additional Secretary to the Govt. of India"

10. From a plain reading of the 1996 order, extracted above, it appears that it relates to delegation of powers under the COFEPOSA Act among other Acts. Under this order, the Finance Minister delegated powers to the Secretary (Revenue) to dispose of files relating to COFEPOSA/PITNDPS and files relating to some provisions of the Income-tax Act. It may be noted here that there is no reference to Section 3(2) or, for that matter, any of the provisions of the COFEPOSA Act in this office order. But in so far as the COFEPOSA Act is concerned, the delegation of powers relates to disposal of files concerning representation from the detainees under COFEPOSA/PITNDPS

addressed to the Government of India, i.e., representation under Section 11 and application for parole under Section 17 to the Secretary (Revenue). Omission of Section 3(2) in the notification/orders is not material as the report submitted by the State Government is for purposes of exercise of powers under Section 11 of the COFEPOSA Act. It may be noticed that the subject matter of the 1991 notification and the 1996 order is in effect the same. But it must be borne in mind that the 1996 order is not a statutory order whereas the 1991 notification is a statutory notification issued under Rule 3 of the Transaction of Business Rules. It is true that where a subsequent order does not specifically supersede an earlier order but if both the orders relate to the same subject and are issued in exercise of the same power, statutory or otherwise, notwithstanding absence of specific words superseding earlier orders in the subsequent order, it can be inferred that the earlier notification has been impliedly superseded. But where the earlier order is a statutory notification and the subsequent order is not a statutory notification/order but is merely an executive order such an inference cannot be drawn as a non-statutory order cannot replace a statutory notification even if it purports to do so specifically though a statutory notification can substitute a non-statutory notification/order. We are, therefore, unable to hold that the 1996 order supersedes the 1991 notification. It thus follows that the Joint Secretary in the Ministry of Finance (Department of Revenue), Government of India was competent to exercise the powers of the Central Government under various provisions mentioned in the notification, including Section 3(2) of the COFEPOSA Act.

11. It is brought to our notice that on April 22, 1993, the Finance Minister has issued statutory notification under Rule 3 of the Business Rules in supersession of all previous orders on the subject under which the Secretary in the Department of the Revenue, Ministry of Finance, is delegated the power to dispose of representation under Section 11 and the Secretary, Additional Secretary and Joint Secretary, COFEPOSA in the Ministry of Finance (Department of Revenue), have power to deal with the matter under sub-section (2) of Section 3, Section 5, sub-section (1) of Section 7 of the COFEPOSA Act. Inasmuch as the impugned order of detention was passed earlier to notification of 1998, it is of no consequence in this case.

12. We shall now refer to the cases cited at the Bar. In *D. Rana (Supra)*, a Division Bench of the Delhi High Court took the view that the 1991 notification stood superseded by the 1996 Order and accordingly held that the disposal of the representation by the Joint Secretary was no disposal in the eye of law; as the representation remained undisposed of, the continued detention of the detenu was illegal and the detenu was entitled to be released. Following that judgment, another Division Bench of the Delhi High Court in *Ms. Li Galina (supra)* took the same view. However, a Division Bench of the Madras High Court in *Rosana Begum v. State of Tamil Nadu and others* when faced with the same question, viz., whether the 1991 notification was superseded by 1996 Order, came to the conclusion that both 1991 and 1996 office orders co-existed and 1996 office order was nothing but an order giving more clarity to the existing 1991 order. In that view of the matter, it held that the consideration by the Joint Secretary was proper.

13. In the light of the above discussion, we find it difficult to endorse the view of the Delhi High Court and for the reasons, we approve the judgment of the Madras High Court in *Rosana Begum's* case (*supra*).

14. It may be pointed out that in these cases the question was one of consideration of representation of the detenu under Section 11 of the COFEPOSA Act. But in the instant case, the question is not one of consideration of representation but non-consideration of the report of the State Government submitted under Section 3(2) of the COFEPOSA Act by the competent authority which was held by

the High Court as violation of Article 22(5) of the Constitution.

15. Here it may be useful to refer to clause (5) of Article 22 of the Constitution, which runs thus :

"22(5). When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

The safeguards for the detenu embodied in clause (5) of Article 22 are two-fold. The authority making the order of detention shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. From this analysis of the clause, it appears to us that consideration of the report of the State Government by the Central Government is not part of the safeguards embodied under Article 22(5) of the Constitution. The Central Government's power to revoke the order of detention under Section 11 may be either *suo moto* on consideration of report under Section 3(2) or on the representation made either by the detenu or any other person on his behalf against the order of detention. Consideration of report sent up by the State Government under Section 3(2) of the COFEPOSA Act by the Central Government or a competent authority to whom that power is delegated is a statutory requirement which is in addition to the obligation imposed by Article 22(5) of the Constitution. Non-compliance of the statutory requirement, like abrogation of safeguards, would vitiate continued detention of a person ordered to be detained under the COFEPOSA Act.

16. In this view of the matter, we cannot sustain the order of the High Court appealed from as we have held above that the Joint Secretary (Revenue) was competent to consider the report sent up by the State Government under Section 3(2) of the COFEPOSA Act. The order of the High Court dated 15th April, 1998 in Criminal Writ Petition No. 590 of 1997 is set aside and the appeal is accordingly allowed.