

(SUPREME COURT OF INDIA)

Union of India and Another

Vs

Sneha Khemka and Another

HON'BLE JUSTICE DORAISWAMY RAJU AND HON'BLE JUSTICE S. B. SINHA

23/01/2004

Criminal Appeal No. 954 of 1997

JUDGMENT

The Judgment was delivered by S.B. SINHA, J.

Whether representation made by the detenu or on his behalf is required to be considered by all the authorities is the sole question involved in this appeal which arises out of a judgment and order dated 19.12.1995 passed by a Division Bench of the Calcutta High Court in Criminal Miscellaneous Case No. 5039 of 1995.

2. The husband of the first respondent herein was arrested on 17.6.1995 on the charge of having grossly undervalued imported Floppy Disk Drives whereby customs duty to the extent of Rs. 21.53 lakhs was evaded. During investigation of the said case, the detenu made a confessional statement before the Customs Officer but on being produced before the Chief Metropolitan Magistrate, Calcutta, he retracted therefrom. He was granted bail in the aforementioned case.

3. The first respondent herein thereafter filed a writ application before the Calcutta High Court for quashing the statement allegedly obtained from her husband by the Customs Officer.

4. He was thereafter detained under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, (hereinafter referred to as 'the COFEPOSA'. for the sake of brevity). The said order of detention was served on him on 28.8.1995.

5. The detenu, made three representations - firstly, on 4.9.1995 before the Joint Secretary,

COFEPOSA which was rejected on 21.9.1995; the second on 11/12.9.1995 addressed to Shri K.L. Verma, Joint Secretary to the Government of India which upon obtaining the comments of the Sponsoring Authority was rejected on 9.10.1995; and the third on 14.9.1995, addressed to the Secretary to the Government of India which was rejected by the Finance Minister on 16.10.1995.

6. Questioning the validity or otherwise of the said order of detention, the wife of the detenu, the first respondent herein, filed a Criminal Miscellaneous Case before the Calcutta High Court which was marked as Criminal Miscellaneous Case No. 5039 of 1995, inter alia, praying for:

*"(a) a writ of and/ or other and/ or direction in the nature of Habeas Corpus calling upon the petitioners and each one of them to forthwith set the detenu at liberty. **

(b) a writ of and/ or order and/ or direction in the nature of Mandamus commanding the petitioners and each one of them to show cause as to why the order of detention being No. F. No. 673/89/95-CUS. VIII dated 22.8.95 passed by the petitioner No.2 be not quashed and/ or set aside.

(c) a writ or and/ or order and/ or direction in the nature of certiorary commanding the petitioners, their servants, agents and associates and each one of them to transmit the records relating to the issuance of the order of detention being N.F. No. 673/89/95/Cus. VIII dated 22.8.1995 to the Hon'ble High Court so that the same may be quashed and/ or set aside and a conscionable justice done;

*(d) a writ of and/ or order and/or direction in the nature of prohibition prohibiting or restraining the petitioners each one of their agents, servants and associates to forbear from giving any effect of further effect to the order of detention being No. F. No. 673/89/95-Cus. VIII dated 22.8.1995." **

7. A Division Bench of the High Court in the impugned judgment observed that the first representation made by the Joint Secretary, who is the detaining authority, was not placed before the Central Government and was not considered by it at all. As regard, the second representation also, the High Court made an observation that the same had not been independently considered by the Central Government irrespective of the stand taken by the Joint Secretary to the Government of India. So far as the third representation is concerned, it was observed that there was no clear indication in the relevant file that the said representation was considered by the detaining authority independently. Relying on or on the basis of three decisions of this Court in Kamleshkumar Ishwardas Patel etc. vs. Union of India and others etc. 4), Kubic Darusz vs. Union of India and others) and Smt. Gracy vs. State of Kerala and Another), the High Court allowed the writ petition holding that:

*"... The proposition of law has been well established that all the representations as made to either of the three Authorities namely, the Detaining Authority, the Central Government and the Advisory Board have to be considered by all the three Authorities independently of each other and unless there be separate consideration of each one, there will be no sufficient compliance of law in so far as the provision under Article 22(5) of the Constitution of India is concerned. In this view of the matter we are constrained to hold in the facts and circumstances of the present case that the order of detention has been rendered otiose in view of the non-consideration of all the representations by all the three Authorities on account of which the detenu is liable to be released from detention." **

8. Mr. P.P. Malhotra, learned senior counsel appearing on behalf of the appellant, would submit that

the High Court went wrong in taking the aforementioned view inasmuch representations made by or on behalf of the detenu in terms of the provisions of the COFEPOSA are required to be considered by the concerned authorities independently.

9. The learned counsel would urge that the first two representations being made to the Joint Secretary who was the detaining authority, the same were required to be considered by him and not by the Central Government. Similarly, the third representation having been made to the Central Government, it was for it consider the same independent of the representation made by the detenu before the detaining authority.

10. Mr. Ganguli, learned senior counsel appearing on behalf of the respondent, per contra, would submit that different representations may contain different grounds and in that view of the matter unless the Central Government or for that matter, the detaining authority is possessed of the representation(s) made before other authorities, effective disposal thereof would not be possible. The learned counsel would contend that the High Court having rendered its judgment in terms of the binding precedent of this Court in Kamleshkumar Ishwardas Patel (supra), the same should not be interfered with. In any event, Mr. Ganguli would submit that as several other contentions were raised by the respondent before the High Court, having regard to the fact that the period of detention is long over, this Court may not exercise its jurisdiction under Article 136 of the Constitution of India.

11. An order of the detention under the COFEPOSA can be passed: (1) by an authority specially empowered by the Central Government ; (2) by the State Government (3) by the Central Government.

12. The detenu on being served with the order of detention having regard to the constitutional protection contained in clause (5) of Article 22 of the Constitution of India is entitled to be afforded an earliest opportunity of making a representation there-against. Clause (5) of Article 22 of the Constitution of India obligates the authority making the order of preventive detention: (1) to communicate to the detenu the grounds on which the order of detention has been made; (2) to afford the detenu the earliest opportunity of making a representation against the order of detention.

A right to make a representation is, therefore, a facet of fundamental right. Article 22(5) of the Constitution does not state as to before whom such representation is to be made, and provisions therefor are laid down in the statute under which the detenu has been detained. It is now well-settled that the object and purpose of the representation is to enable the detenu to obtain relief at the earliest opportunity wherefor, he may make representation before such authority which can revoke the same by setting him at liberty. The cleavage in opinion of this Court as to whether the detaining authority can pass an order revoking the order of detention came up for consideration before a Constitution Bench of this Court in Kamleshkumar Ishwardas Patel (supra) wherein this Court in no uncertain terms held that the revoking authority has the requisite jurisdiction to revoke an order of detention. Upon service of the order of detention on the detenu, the detaining authority or the State Government is obligated to forward to the Central Government a report thereabout; whereafter the latter is entitled to consider at its earliest opportunity, the validity or otherwise thereof so as to enable it to intervene in appropriate cases by exercising its power of revocation. Furthermore, the representation of the detenu, if any, at a later stage is required to be considered by the Central Government in terms of Section 11 of the Act which read thus:

"11. Revocation of detention orders - (1) Without prejudice to the provisions of section 21 of the General Clauses Act, 1897, a detention order may, at any time, be revoked or modified -

(a) notwithstanding that the order has been made by an officer of a State Government, by that State Government or by the Central Government.

(b) notwithstanding that the order has been made by an officer of the Central Government or by a State Government, by the Central Government.

(2) The revocation of a detention order shall not bar the making of another detention order under section 3 against the same person." *

13. A bare perusal of Section 11 of the Act would clearly shows that the authority vested in the Central Government or the State Government to revoke an order of detention is without prejudice to the provisions contained in Section 21 of the Central Clauses Act, 1897. In terms of Section 21 of the General Clauses Act, an authority who passes an order has the jurisdiction can revoke the same.

14. The power of the State Government or the Central Government, therefore, is in addition to the power the detaining authority to revoke an order of detention. A detenu in law, therefore, is entitled to make different representations before different authorities at different times in terms of statutory as also constitutional schemes.

15. Each authority, concededly, is required to apply its mind on the materials placed on records and pass an order either rejecting or allowing the said representation. A representation of the detenu having regard to clause (5) of Article 22 of the Constitution of India must also be disposed of within a reasonable time.

16. It is equally well-settled that the constitutional right to make a representation includes the right to obtain proper consideration thereof by the authority to whom it is made.

17. Would that mean, as he has held by the High Court, that a representation made before one authority must also be considered by other authorities? The answer to the said question must be rendered in the negative. *If it is to be assumed that the three different authorities before whom the representations are made are required to obtain copies of the representations made to the others: before a representation is considered, the concerned authority will have to make an enquiry from the authorities as to whether a representation had been made to it and if the answer thereof is in the affirmative, to obtain a copy thereof.*

18. *Once such an enquiry is made and eventually if in the meanwhile an order on such representation has been passed by the concerned authority, the same would also be required to be obtained. Apart from the fact that such procedure is not contemplated, a great delay would ensue thereby which would run counter to the constitutional schemes; as the detenu has a fundamental right to have the same considered and obtain an order on his representation by the appropriate authority at the earliest opportunity.* *

19. Keeping in view the aforementioned principles, we may examine the decisions relied upon by the High Court.

20. In *Kubic Darusz* (supra), the question which arose was as to whether the grounds of the detention are required to be supplied to the detenu in the language understood by him so as to enable him to make an effective representation and that the representation submitted by him was required to be considered, acted upon or replied by all the authorities. This Court observed that indisputably, the representation may be made by the detenu to the appropriate Government and it is the appropriate Government that has to consider the representation within a reasonable time holding:

"Even if the Advisory Board had made a report upholding the detention the appropriate Government is not bound by such opinion and it may still, on considering the representation of the detenu and keeping in view all the facts and circumstances relating to the case, come to its own decision whether to confirm the order of detention or to release the detenu; as in that case there was nothing to show that the Government considered the representation before making the order confirming the detention. The Constitutional obligation under Article 22(5) was not complied with. In the instant case there was no consideration before and even after the Advisory Board considered the case of the detenu. It can not therefore, be said that the representation was disposed of in accordance with law."

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21. In *Smt. Gracy* (supra), the detenu's case was referred to the Central Advisory Board by the Central Government and during the pendency of the reference before it, a representation was made to the Advisory Board. The Advisory Board considered the reference relating to the detenu made by the Central Government and also the detenu's representation submitted to it and opined that there was sufficient cause to justify his preventive detention. The order of Central Government confirming his detention was passed thereafter. This Court, in the fact situation obtaining therein, held that the detenu has a dual right to get his representation disposed of by the Advisory Board and the detaining authority independently stating:

"The contents of Article 22(5) as well as the nature of duty imposed thereby on the detaining authority support the view that so long as there is a representation made by the detenu against the order of detention, the aforesaid dual obligation under Article 22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the Advisory Board or to both. The mode of address is only a matter of form which cannot whittle down the requirement of the constitutional mandate in Article 22(5) enacted as one of the safeguards provided to the detenu in case of preventive detention."

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22. The Constitution Bench of this Court in *Kamleshkumar Ishwards Patel* (supra) was dealing with a situation where the Joint Secretary to the Government of India, Ministry of Finance, who was the specially empowered officer to make an order of detention under Section 3 of the COFEPOSA Act, forwarded the representation made to him by the Central Government which was eventually rejected by the latter. Agrawal, J., speaking for the Bench noticed the provisions of Sections 3 and 11 of the COFEPOSA Act as also Section 21 of the General Clauses Act and upon considering a large number of decisions answered the question thus:

"Where the detention order has been made under Section 3 of the COFEPOSA Act and the PIT NDPS Act by an officer specially empowered for that purpose either by the Central Government or the State Government the person detained has a right to make a representation to the said officer and the said officer is obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on the person detained to make a representation against the

order of detention. This right of the detenu is in addition to his right to make the representation to the State Government and the Central Government where the detention order has been made by an officer specially authorised by a State Government and to the Central Government where the detention order has been made by an officer specially empowered by the Central Government, and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed for his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation." *

23. In that case, inter alia, the following question had arisen for consideration before the Full Bench of the High Court.

"(3) Does failure to take independent decision on revocation of order of detention by the specially empowered officer under the COFEPOSA Act and merely forwarding the same with recommendation to reject, result in non-compliance with constitutional safeguard under Article 22(5) of the Constitution?" *

24. Referring to *Sat Pal vs. State of Punjab and others*), *Raj Kishore Prasad vs. State of Bihar* as also the decision in *Santosh Anand vs. Union of India*), it was held:

*"Having found that the representation of the person detained was not considered by the officer making the order of detention the High Court was in error in holding that the said failure on the part of the detaining authority to consider and decide the representation is not fatal to the order of detention. We are, therefore, unable to uphold the answer given by the Full Bench to Question No.3 and, in our view, the said question should be answered in the affirmative. On that basis it has to be held that since there was a denial of the constitutional safeguard provided to the detenu under Article 22(5) of the Constitution on account of the failure on the part of the officer who had made the order of detention to independently consider the representation submitted by the detenu against his detention and to take a decision on the said representation the further detention of the detenu *Ishwards Bechardas Patel* is rendered illegal.."* *

25. The decisions of this Court whereupon reliance has been placed by the High Court, therefore, nowhere state that copy of the representation made by the detenu to one authority must be placed before all the authorities and all such authorities also should consider and pass orders on those representations, though really not made to any one of them. #

26. The impugned judgment and order, therefore, cannot be sustained, which is set aside accordingly.

27. However, ordinarily we would have remitted the matter back to the High Court for consideration on other questions raised in the writ petition by the respondent herein but as the period of detention has long expired, we do not intend to do so. We, therefore, do not wish to express any opinion on the validity or otherwise of the order of detention.

28. This appeal is disposed of with the aforementioned observations. No costs.

J