Satyanarayan Modi Vs Jailor, Central Jail

Court: Allahabad High Court

Date of Decision: Jan. 5, 1996

Acts Referred: Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 â€" Section 11, 3, 3(1)
Constitution of India, 1950 â€" Article 22(5)

Citation: (1996) 20 ACR 315

Hon'ble Judges: C.A. Rahim, J; A.P. Misra, J

Bench: Division Bench

Advocate: Daya Shankar Mishra, for the Appellant;

Final Decision: Allowed

Judgement

A.P. Misra, J.
The Petitioner has challenged the detention order dated 30th June, 1989 passed u/s 3(1) of the Conservation of Foreign

Exchange and Prevention of Smuggling Activities Act. 1974 (for short ''COFEPOSA Act)''.

2. Before dealing with the ground of challenge. It is necessary to give certain facts. The incident alleged is dated 16th April, 1989 and the Petitioner

was arrested on 18th April, 1989. On 26th April, 1989 and on 3rd May, 1989, the Special Chief Judicial Magistrate, Allahabad and the Session

Court respectively rejected the Petitioner''s bail application. On 16th May, 1989, the High Court granted bail. The impugned order of detention

thereafter was passed on 30th June, 1989. However, the order could only be executed on 30th June, 1995. The State has given elaborate dates

justifying the delay in executing the said order as according to the State, the Petitioner was absconding. However, on the other hand, learned

Counsel for the Petitioner has referred to the admitted fact that on 26th October, 1994, the Petitioner presented himself before the Special Chief

Judicial Magistrate, Allahabad, on the basis of non-bailable warrant in a case under the Customs Act, which was on the basis of the complaint filed

before the Special Chief Judicial Magistrate, Allahabad, on 5th December, 1990 under the Customs Act and he was sent to jail and remained in

the Central Jail, Naini, Allahabad, till 29th October, 1994. Thereafter on 30th October, 1994, he was granted bail. Further, reference was that on

27th July, 1989, a show cause notice was issued by the authorities under the Customs Act to the Petitioner at the same address, which was replied

by the Petitioner. Thus, the aforesaid facts could not constitute the case of the Petitioner to be an absconder. In the counter-affidavit various facts

and dates have been referred to show that the Respondents made all the efforts, but could not succeed in serving the detention order. Hence, the

delay in serving the detention order on the Petitioner is not on account of any laches on behalf of the Respondents. However, since we are deciding

this petition on a different short ground, hence not necessary to give details of the various dates referred in the counter-affidavit.

3. An argument was raised on behalf of the State, since Petitioner challenged the detention order before the Rajasthan High Court (Jodhpur)

through Writ Petition No. 1311 of 1992, which was dismissed, hence the present petition will not be maintainable. On the other hand, learned

Counsel for the Petitioner repelling this argument, made submissions that irrespective of this there cannot be any res judicata in the matter of liberty

of a person under the preventive detention law, but even if the impugned order could be said to be valid, the question still is whether the

Respondent authorities considered the representation of the Petitioner in accordance with law and have performed their obligations under the law

and the Constitution or not. All these grounds are subsequent to the detention order. In other words, even if detention order could be said to be

valid, his continued detention on failure to perform the constitutional obligation by the Respondent authorities would be illegal. It is further urged

that the petition In the Rajasthan High Court was not a habeas corpus petition and Petitioner was not under detention, the present petition is a

habeas corpus petition. This argument has merit. This writ petition filed in the Rajasthan High Court, as aforesaid, would not be a bar to hear the

present petition.

4. The argument for the Petitioner is that the Respondent authorities failed to perform their obligation of intimating the Petitioner that he has also a

right to make a representation to the Central Government u/s 11 of the COFEPOSA Act, which is mandatory. Thus his continued detention is

rendered illegal.

5. On 28th June, 1995, the Chief Judicial Magistrate, Bikaner (Rajasthan) passed an order for serving the detention order dated 30th June, 1989

which was actually served on him and the Petitioner presented himself before the State of Uttar Pradesh on 30th June, 1995, and taken in custody

and was sent to Central Jail, Fatehgarh on 2nd July, 1995. The allegation is that on 3rd July, 1995. pairokar of the Petitioner prayed about

permitting him to meet the detenu for preparing and making a representation by him, which was not permitted by the Jail authority. Instead, he was

directed for making the said representation through registered letter. Thereafter, by means of registered post the Petitioner"s representation dated

14th July, 1995 was received In the said jail and, after getting the signature of the Petitioner was sent to the authority concerned.

6. The main question pressed by learned Counsel for the Petitioner, on which we are deciding this petition, is that the Respondent authorities did

not intimate the Petitioner regarding his right of making representation to the Central Government, which renders his continued detention illegal. It is

not in dispute, nor it has been stated that the detaining authority, while serving the detention order or at any time subsequently, ever intimated the

detenu about his right of making the representation to the Central Government u/s 11 of the Act. In the counter-affidavit filed by Dr. Samar

Bahadur Singh, Deputy Jailor, Central Jail, Fatehgarh, the only averment In this regard is that the representation, which is given by the Petitioner on

14th July, 1995 was forwarded through special messenger to the authority concerned and further that the representation submitted by the

Petitioner was sent to the State Government as well as Central Government. In the counter-affidavit filed by A.Q. Farooqi, Special Secretary,

Home Department, Government of Uttar Pradesh, Lucknow, it is stated (relevant portion is quoted hereunder):

...But if the detaining authority is State Government, there will be no violation of Article 22(5) of the Constitution of India, If the detaining authority

has not disclosed in the detention order that the Petitioner can make his representation to the Central Government. Though the Central Government

has power in the present case, to revoke the Impugned order but It Is mentioned here that actually the Petitioner has sent his representation to the

State Government which was also addressed to the President of India. The State Government received the representation and sent a copy to the

Central Government on 3.8.95, i.e., after receiving the comment of the sponsoring authority in the matter.

7. Thus, the stand of the Respondents is, if the detaining authority is the State Government, there is no violation of Article 22(5) of the Constitution

of India, if the detaining authority has not disclosed in the detention order that the Petitioner can make his representation to the Central

Government. This stand further makes it clear that the detaining authority has not Intimated the detenu that he has a right to make representation to

the Central Government.

8. Law In this regard is well settled.

In Kamlesh Kumar Ishwardas Patel v. Union of India (1995) SCC 643. the Supreme Court held:

Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order or detention

which can be made not only to Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the

order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority

which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation

carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a

representation against the order of detention to the authorities who are required to consider such a representation.

9. The aforesaid decision is for the Constitution Bench of the Supreme Court. Similar, argument, was raised for the State in the counter-affidavit,

as aforesaid, came for consideration in the case of K.B. Shivhare v. Superintendent of District Jail Hamirpur and Ors. Habeas Corpus Writ

Petition No. 27208 of 1995 decided on 15th December, 1995 in which it was held that not only Petitioner has a right to make representation to

the Central Government, but there is corresponding obligation on the authority making the detention order to inform the detenu of his right to make

a representation against the order of detention. Subsequent to this decision, learned Counsel for the Petitioner also relies on a case in Mrs. Nutan

J. Patel v. S.V. Prasad and Anr. JT 1995 (81 SC 496, wherein it has been held:

Where the detention order has been made u/s 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...This right of the

detenue is in addition to his right to make the representation to the State Government and the Central Government. This, right to make a

representation necessarily implies that the person detained must be informed of 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 representation and the failure to do

so results In denial of the right of the person detained to make a representation.

However, for the State argument has been raised that as copy of the said representation was sent to the Central Government also, he is not

prejudiced on account of this.

10. In the case of K.B. Shivhare (supra) the question of prejudice was also considered and it was held:

The argument for the State that no prejudice is caused to the detenu as his representation was forwarded by the State Government to the Central

Government has also no merits. It is not disputed that the detenu was not informed that he can make representation to the Central Government and

he did not make any representation to the Central Government. What was sent to the Central Government was only a copy of representation to

the State Government and not a representation to the Central Government. This apart, where fundamental right or constitutional right is violated the

question of no prejudice is not relevant. No authority could take a defence of prejudice where there is infraction or violation of any fundamental

right.

11. The obligation was cast on the authority concerned to intimate the detenu of his right to make representation to the Central Government. That,

admittedly, was not performed, only sending a copy of the representation would not constitute it to be a representation made to the Central

Government.

12. Learned State Counsel further made submission that since the representation was addressed to Dr. Shankar Dayal Sharma, President of India,

apart from other authorities. It would be representation to the Central Government. By merely referring to the various other authorities to which

copies were sent, would not constitute that representation to be a representation to the Central Government. At the most, it could be a case where

copy is to be sent of the said representation to the said authorities. A copy of the representation would not constitute to be representation to the

said authority. Addressing the representation, as aforesaid. In no way could be construed one to have been made to the Central Government

especially in the background when the Petitioner was not made aware of his right of making representation to the Central Government. It was a

case like many also of sending such copy to the President of India. Even, alternatively, if this is possible to construe that the aforesaid address to be

meant for Central Government in the absence of the Petitioner being aware of the right that thrust of additional force of invoking this right from

another authority would be lacking. When a person is aware that two different authorities have right to revoke the order, his thrust of making of

representation with force would be different than merely making it unaware of this right by merely sending copies of the said representation to the

various authorities.

13. In view of the decision of this Court in the case of K.B. Shivhare (supra) and the Constitutional Bench decision of the Apex Court In Kamlesh

Kumar Ishwardas Patel (supra) and previously as laid down In Mrs. Nutan J. Patel (supra) and on the facts of this case, we held that the

Respondent detaining authority did not perform its obligation of intimating the detenu of his right of making representation to the Central

Government and this is violative of Article 22(5) of the Constitution of India. Hence, the impugned detention order dated 30th June, 1989 is not

sustainable. This is also a case where the said detention order was really executed after six years, that is to say, the order of detention Is dated

30th June, 1989, executed only on 30th June, 1995.

14. For the aforesaid reasons, we hold, the continued detention of the Petitioner is violative of Article 22(5) of the Constitution of India. Hence, the

detention order dated 30th June, 1989, is held to be illegal and is set aside. The detenu shall be set at liberty forthwith, unless required in some

other case. The writ petition is allowed with costs.