Olga Kozireva Vs Union of India and Others

Court: Delhi High Court

Date of Decision: May 18, 2001

Acts Referred: Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 â€" Section 3(1), 8
Constitution of India, 1950 â€" Article 22, 22(5), 226, 227
Customs Act, 1962 â€" Section 102, 104, 110

Citation: (2001) CriLJ 3701 : (2002) 63 DRJ 183 : (2002) 80 ECC 451 : (2001) 4 RCR(Criminal) 682

Hon'ble Judges: Dr. Arijit Pasayat, C.J; Surinder Kumar Aggarwal, J

Bench: Division Bench

Advocate: Mr. Ashutosh, for the Appellant; Mr. Satish Aggarwal, Mr. K.K. Sud, ASG and Mr. Neeraj Jain, for the Respondent

Judgement

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Arijit Pasayat, C.J.
By this petition styled to be under Articles 226 and 227 of the Constitution of India, 1950 (in short the ""Constitution"")

legality and validity of the order dated 19th September 2000 passed by the Union of India-Respondent No. 1 through its Joint Secretary,

Department of Revenue, Ministry of Finance, has been challenged. Said order of Mittimus was passed in exercise of powers conferred u/s 3(1) of

the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short the ""Act"") for detaining the petitioner with a view

to preventing the petitioner (hereinafter referred to as "detenu") from smuggling goods in future. Prayer is for issuance of a writ in the nature of

habeas corpus.

2. Grounds on which detention has been directed and background thereof are as follows:

On 28th August 2000 detenu, a holder of Uzbek passport, arrived at the IGI Airport from Bishkek by flight No. K2-545. She was intercepted at

the exit gate of arrival hall after she had walked through the green channel and was trying to clear her baggage. She was asked by a plain clothed

Customs Officer as to whether she was carrying any dutiable goods, gold or any other item in commercial quantity, to which she replied in the

negative. She was diverted for detailed examination. Two independent witnesses were called and in their presence she was asked whether she

understood English language, to which she replied in the affirmative. She explained that she understands, English language but could not write. She

was again asked in the presence of independent witnesses whether she was carrying any dutiable goods or gold or any other item in commercial

quantity, to which she again replied in the negative. Thereafter when asked by Customs Officer she handed over her air ticket. On scrutiny of the

air ticket, it was found that there were 27 packages weighing 2200 kgs. booked on her air ticket. When confronted with this, she accepted having

brought 27 bags and her intention was to take these bags out of Customs arrival hall with the help of a loader one by one. Remaining 26 bags,

which were lying by the side of the baggage belt No.1, were brought near preventive room in the arrival hall. Baggage tags found on 26 bags were

found tallying with the baggage stub affixed on her air ticket. The officer then served upon her a notice u/s 102 of the Customs Act, 1962 (in short

the ""Customs Act"") informing her that her baggage and person were to be searched and, if she so desired the search could be conducted in the

presence of a Magistrate or a Gazetted Officer of Customs, to which she stated that any Customs Officer can search her and her baggage. All the

27 bags were opened and examined in the presence of independent witnesses and with her association were found to contain off-white Chinese

Silk fabrics measuring 81,160 yards valued at Rs. 81,16,000/- (International Value). She was asked to produce any evidence, documentary or

otherwise, for lawful importation of the recovered fabrics, to which she replied in the negative. The recovered goods were seized u/s 110 of the

Customs Act on the reasonable belief that these were liable to confiscation under the Customs Act. Air-line ticket and excess baggage coupon and

other documents were taken into possession by the Customs Officer. She tendered a voluntary statement on 28th February 2000 which was

recorded in English with the help of one Mukul Kumar, a qualified interpreter of Russian language. She stated that her age was 26 years. She could

read, write and speak Russian language only and understood little English. She was a doctor by profession and had done doctorate from Red

Cross Society, Tashkent in 1992. She had started the business of taking goods to India, where have an easy market selling them at profit and

bringing back goods to Tashkent for being sold for profit. Her husband is a sports person. She was bringing fabrics to India for the last three years

for sale. She stayed in different hotels in Paharganj, New Delhi, where the buyers themselves contacted her to purchase the goods. She was

arrested on 29th August 2000 u/s 104 of the Customs Act and was produced before the Additional Chief Metropolitan Magistrate, Patiala House

Courts, who remanded her to judicial custody. Her application for bail was rejected on 14th September 2000. She filed another bail application on

16th September 2000 and the same was pending consideration on the date of order directing her detention. Scrutiny of her passport revealed that

she had made short trips to India twenty times during the period from 10th May 2000 to August 2000. Considering these relevant factors, it was

thought necessary to direct her detention. She was informed that, if so desired, she could make representation to the Detaining Authority, Central

Government and the Advisory Board. If she wanted to avail the right of representation she was to sent it through the jail authorities where she was

detained.

3. In support of the writ application, primarily, three points have been urged. Firstly, it is submitted that the order of detention and/or the grounds

of detention were not served on her. Secondly, even if it was accepted that she had refused to accept the grounds of detention and/or the order of

detention same was to be supplied again when a specific prayer was made therefore. That having not been done, opportunity was not afforded to

her to make an effective representation. Strong reliance was placed on a decision in Smt. Changamma Vs. State of Karnataka and another, in

support of the stand. Thirdly, since a representation was filed before the Advisory Board there was an inbuilt requirement to send it to the

Detaining Authority. Strong reliance was placed on two decisions of the Apex Court i.e. Smt. Gracy Vs. State of Kerala and another, and Amir

Shad Khan and another Vs. L. Hmingliana and others, in support of this stand.

4. Learned counsel for the respondents, on the other hand, submitted that plea about non service is a false stand. As a matter of fact, as records

would reveal Air Customs Officers from IGI Airport went to Tihar Jail on 20th September 2000 to serve the detention order in original Along with

translated copies of detention order in Russian language, which detenu refused to receive. Panchnama to this effect was drawn on the spot in the

presence of (1) Deputy Superintendent Central Jail No. 6A, Tihar, New Delhi and (2) Head Matron, Central Jail No. 6A, Tihar, New Delhi.

Detention order, grounds of detention and relied upon documents in English Along with its translated copies in Russian language were again sent on

23rd September 2000. An interpreter to explain the grounds of detention, etc. was also sent, as a matter of abundant caution though she

understood English. But she again refused to receive them. On verification of records, we find that in fact the stand of the respondents about

detenu"s refusal to receive the documents is factually correct. That being the position, we do not accept the first stand of the petitioner.

5. Second and third points urged are linked with the question whether petitioner was granted reasonable opportunity of making a representation.

Legal position with regard to issuance of writ of habeas corpus in preventive detention cases and the detenu"s entitlement to relief needs to be

considered carefully. The writ of habeas Corpus called by Blackstone as the great and efficacious writ in all manner of illegal confinement. It really

represents another aspect of due process of law. As early as 1839 it was proclaimed by Lord Denman that it had been for ages effectual to an

extent never known in any other country Lord Halsbury L.C. stated in Cox v. Hakes (1890) 15 AC 506 that the right to an instant determination

as to the lawfulness of an existing imprisonment is the substantial right made available by this writ. Article 22 of the constitution confers four

fundamental Rights on every person, except in two cases mentioned in clause (3), as essential requirements and safeguards to be followed when it

is necessary to deprive any person, for any cause whatsoever and for, however, brief a period of his personal liberty by placing him under arrest or

keeping him in detention. Those are (i) to be informed, as soon as may be, of grounds of such arrest; (ii) not to be denied the right to consult and to

be defended by a legal practitioner of his choice; (iii) to be produced before the nearest Magistrate within a period of twenty four hours of such

arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate (iv) not to be detained in custody beyond

the said period of twenty four hours without the authority of a Magistrate Clauses (1) and (2) contain the guarantee of the four Fundamental Rights

enumerated above, Clause (3) contains two exceptions and provides that the constitutional guarantees do not apply to (a) enemy aliens, and (b)

persons arrested or detained under any law providing for preventive detention. Clauses (4) and (7) are devoted to laying down certain fundamental

principles as to preventive detention and guaranteeing certain Fundamental Rights to persons who are arrested under any law for preventive

detention. The Fundamental Rights guaranteed by Clauses (4) and (7) to persons detained under any law for preventive detention relate to the

maximum period of detention, the provisions of any Advisory Board to consider and report on the sufficiency of the cause for detention and the

right to have the earliest opportunity of making a representation against the order of detention. Preventive detention is an anticipatory measure and

does not relate to an offence while the criminal proceedings are to punish a person for an offence committed by him. They are no parallel

proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the Executive is convinced that

such detention is necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects which are specified by the

law. The action of Executive in detaining a person being only precautionary, the matter has necessarily to be left to the discretion of the executive

authority. It is not practicable to lay down objective rules of conduct, the failure to conform to which should lead to detention. In case of preventive

detention of citizen, Article 22(5) of the Constitution enjoins the obligation of the appropriate Government or of the detaining authority to accord

the detenu the earliest opportunity to make a representation and to consider that representation speedily. The right to make a representation implies

right of making an effective representation. It is the constitutional right of the detenu to get all the ground on which the order has been made. As has

been said by Benjamin Cardozo ""A Constitution states or ought to state not rules for the passing hour but the principles for an expanding future"".

The concept of grounds used in the context of detention in Article 22(5) has to receive an interpretation which will keep it meaningfully in tune with

contemporary notions of the realities of the society, and the purposes of the Act in the light of concepts of liberty, and fundamental freedoms.

While the expression grounds for that matter includes not only conclusions of fact but also all the basis facts on which those conclusions were

founded; they are different from subsidiary facts or further particulars or the basic facts. The detenu is entitled to obtain particulars of the grounds

which will enable him to make an effective representation against the order of detention.

It has been said that the history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening

the substance of the right to move the Court against executive invasion of personal liberty and the due dispatch of judicial business touching

violations of this great right is stressed in the words of Lord Denning as follows:

Whenever one of the King''s Judges takes his seat, there is one application which by long tradition has priority over all others, counsel has but to

say: My Lord, I have an application which concerns the liberty of the subject and forthwith the Judge will put all other matter aside and hear it. It

may be an application for a writ of habeas corpus, or an application for bail but whatever form it takes, it is head first."" (Freedom under the Law,

Hamlyn Lectures, 1949).

The Constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of States security public order,

disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions. In Smt.

Icchu Devi Choraria Vs. Union of India (UOI) and Others, , Bhagwati, J. spoke of this judicial commitment:

The court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of

the social cost involved in the release of a possible renegade.

This is an area where the Court has been most strict and scrupulous in ensuring observance with the requirement of he law and even where a

requirement of the law is breached in the slightest measures, the Court has not hesitated to strike down the order of detention.

In Vijay Narain Singh Vs. State of Bihar and Others, Justice Chinnapa Reddy in his concurring majority view said:

.....I do not agree with the view that those who are responsible for the national security or for the maintenance of public order must be the sole

judges of what the national security or public order requires. It is too perilous a proposition. Our Constitution does not give as carte blanche to any

organ of the State to be the sole arbiter in such manner.....

[Page 1336 (of AIR)]

.....There are two sentinels, one at either end. The legislature is required to mark the law circumscribing the limits within which persons may be

preventively detained and providing for safeguards prescribed by the Constitution and the Courts are required to examine, when demanded,

whether there has been any excessive detention, that is whether the limits set by the Constitution and the legislature have been transgressed....

In Hem Lall Bhandari Vs. State of Sikkim and Others, it was observed:

It is not permissible in matters relating to the personal liberty and freedom of a citizen to take either a liberal or a generous view of the lapses on

the part of the officers....

6. As the factual background would go to show that detenu was offered the order of detention and the grounds of detention, which she refused to

accept them. After having so done, petitioner cannot take the stand that she was denied the opportunity of making effective representation. Though

decision in Smt. Changamma''s case (supra) supports the stand of the detenu, we do not subscribe to the view. What has to be seen is whether the

constitutional mandate of affording earliest opportunity to make representation has been complied with. It is to be noted that there is indirect

admission to the effect that documents were offered. This is clearly borne out from letter sent by detenu''s Advocate, dated 19.10.2000

(Annexure-B). In a given case concerned detenu may have genuinely misplaced or lost the documents supplied. In that background he may ask for

fresh supply of copies. What would be the effect of non supply in such a case has to be considered in the background of the factual position in

each case. It cannot be said that whenever a demand for documents is made for whatever purposes or reason, non supply of the same would be

fatal. That would be giving a premium to a sinister design in certain case. Where the design is sinister or a calculated one to build up a defense, the

same has to be nipped in the bud. A person cannot take advantage of his own remiss. The Detaining Authority has done his part in offering the

order of detention and/or the grounds of detention. in such a case, it cannot be said that it has denied the detenu reasonable opportunity of making

a representation. What would constitute a denial would, at the cost of repetition, we may say, entirely depend on the fact of each case.

7. Article 22(5) of the Constitution of India provides as under:

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.

What is mandated under the Constitution is that the Detaining Authority shall ""as soon as may be"" communicate the grounds of detention and shall

afford the detenu the earliest opportunity of making a representation. fulfillment of these two requirements is linked with the fundamental right of the

detenu. The question of ""affording"" the earliest opportunity of making a representation is dependant on fulfillment of the first requirement to

communicate the grounds of detention ""as soon as may be"". To put it differently, the right under clause (5) of Article 22 is two fold; (a) the

authority making the order must communicate to the detenu the grounds on which the order has been made, as soon as may be, after the order has

been made and (b) the detenu must be afforded the earliest opportunity of making representation against the order.

8. The expression ""afford"" in the context it is used means provide, extend, furnish, supply, to give. As the factual scenario would go to show, the

requisite documents were offered to the detenu without loss of time and within the time prescription. After having refused to accept them when

tendered it is not open to the detenu to say that she was not afforded earliest opportunity to make a representation. Even if it is accepted that there

was non-response to a request for supply of copies of documents, that cannot be said to be a case of not affording the earliest opportunity. If there

is compliance on the first occasion, mandate of Article 22(5) is complied with. Second ground of attack is also without merit.

9. Coming to the third plea about the requirement, to send the representation, of the Advisory Board to the concerned authority, as noted above,

foundation of the stand is decision of the Supreme Court in Gracy''s case (supra) and Amit Shad Khan''s case (supra).

The question was examined recently by the Apex Court in R. Keshava Vs. M.B. Prakash and Others, . It was observed in para 12 as follows:

A perusal of the aforesaid section and other relevant provisions of the Act makes it abundantly clear that no duty is cast upon the Advisory Board

to furnish the whole of the record and the representation addressed to it only to the Government along with its report prepared u/s 8(c) of the act.

It may be appropriate for the board to transmit the whole record along with the report, if deemed expedient but omission to send such record or

report would not render the detention illegal or cast an obligation upon the appropriate government to make inquires for finding out as to whether

the detenu has made any representation, to any person or authority, against his detention or not. We are of the opinion that in Gracy''s case (supra)

it was not held that any such duty was cast upon the board but even if the observations are stretched to the extent, we feel that those observations

were uncalled for in view of the scheme of the Act and the mandate of the Constitution.

In paras 14 and 17 following observations have been made which also throw considerable light on the issue.

14. In view of the constitutional and legal position, as noted by us, we find it difficult to agree with the reasoning in the aforesaid observations. In

the absence of constitutional or statutory provisions, we are unable to observe that the Advisory Board was under an obligation to forward the

whole of the record of its proceedings to the State Government. The State Government while confirming the order of detention has to peruse the

report of the Advisory Board along with other record, if any, in its possession, and cannot determine the legality of the procedure adopted by the

Advisory Board. Under clause (f) of Section 8 of the act, the government is not bound by the report of the Advisory Board and in every case

where the Advisory Board reports that there is, in its opinion, sufficient cause for the detention of a person may confirm the detention order. The

word ""may"" used in this clause does not cast duty upon the appropriate government to necessarily accept the opinion for further detention.

However, where the Board reports that there is, in its opinion, no sufficient cause for the detention of the person concerned, the appropriate

government has no option but to revoke the detention order and cause the persons to be released forthwith. When the report of the Advisory

Board opinion that there exists sufficient cause for detention of a person is not binding upon the appropriate government, there is no infirmity in its

order passed without consideration of the proceedings of the Advisory Board. The obligation of the appropriate government is restricted to the

extent of examining the report conveying the opinion of the Board regarding further detention of the detenu. Similarly the observations made by this

Court in Harbans Lal Vs. M.L. Wadhawan and Others, to the effect that the non submission of the entire record being the record requirement of

law, cannot be held to be good law on the point.

17. We are satisfied that the detenu in this case was apprised of his right to make representation to the appropriate government/authorities against

his order of detention as mandated in Article 22(5) of the Constitution. Despite knowledge, the detenu did not avail of the opportunity. Instead of

making a representation to the appropriate government or the confirming authority, the detenu chose to address a representation to the Advisory

Board alone even without a request to send its copy to the concerned authorities under the Act. In the absence of representation or the knowledge

of the representation having been made by the detenu, the appropriate government was justified in confirming the order of detention on perusal of

record and documents excluding the representation made by the detenu to the Advisory Board. For this alleged failure of the appropriate

government, the order of detention of the appropriate government is neither rendered unconstitutional nor illegal.

In view of the aforesaid observations of the Supreme Court, the third plea also lacks merit as it is fairly conceded that there was no request

contained in the representation before the Advisory Board to sent it to any other authority.

10. Since all the grounds of challenge to the order of detention are without any substance or merit, the inevitable result of the writ petition is its

dismissal, which we direct.