Tsering Dolkar vs Administrator, Union Territory Of ... on 18 February, 1987

Equivalent citations: 1987 AIR 1192, 1987 SCR (2) 323, 1987 BLJR 482, AIR 1987 SUPREME COURT 1192, 1987 (2) SCC 69, 1987 JT 479, 1987 CRIAPPR(SC) 90, 1987 (3) IJR (SC) 158, 1987 SCC(CRI) 275, (1987) 28 ELT 188, (1987) 11 ECC 416, (1987) 1 RECCRIR 426, (1987) 1 SCJ 533, (1987) ALLCRIC 220

Author: Misra Rangnath

Bench: Misra Rangnath, R.S. Pathak

PETITIONER:
TSERING DOLKAR

Vs.

RESPONDENT:
ADMINISTRATOR, UNION TERRITORY OF DELHI & ORS.

DATE OF JUDGMENT18/02/1987

BENCH:
MISRA RANGNATH
BENCH:
MISRA RANGNATH
PATHAK, R.S. (CJ)

CITATION:
1987 AIR 1192 1987 SCR (2) 323
1987 SCC (2) 69 JT 1987 (1) 479
1987 SCALE (1)367

ACT:
Constitution of India, 1950: Article 22(5).
Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974; SS. 2(f) & 3(1).
Preventive Detention--Grounds of detention and copies of documents not in language understood by detenu--Validity of detention order.
Practice & Procedure:
Detention order challenged on ground of non-application of mind--Return to the rule--Utmost care to be taken in making the affidavit of return.

HEADNOTE:

The husband of the petitioner, who is of Ladakhi origin, was found by the Customs authorities in possession of considerable quantity of gold with foreign markings and Indian currency. A large number of gold pieces of foreign origin, Indian currency and US dollars were also recovered from his residence. He failed to produce the relevant papers though he claimed these articles. He admitted the recovery but maintained that he held the articles for a third person.

The detaining authority relying upon the materials available in the proceedings before the Customs authorities made an order of detention under s.3(1) read with s.2(f) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The grounds in support of that order and copies of 17 documents were supplied to the detenu alongwith it. The representation made by him against detention was rejected by the Advisory Board.

In the writ petition under Article 32 of the Constitution it was contended for the petitioner that the detenu has been denied a fair and adequate opportunity of representing against his detention in as much as the grounds of detention and the copies of documents accompanying
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the grounds were furnished in Tibetan language while the detenu knew only Ladakhi, that copies of all the material documents shown in the list were not supplied to him, that the order was vitiated as the detaining authority did not apply its mind to the relevant papers before making the impugned order, and that the representation made by him was not sent to the Advisory Board in good time.

Allowing the writ petition, the Court,

HELD: 1.1 The requirement of law within the provisions of Art. 22(5) of the Constitution is that the detenu has to be informed about the grounds of detention in a language which he understands. The fact that the detenu's wife knew the language in which the grounds were framed did not satisfy the legal requirement. This denied to the detenu a fair and adequate opportunity of making an effective representation against his detention. [329D-E]

1.2 In the matter of preventive detention, the test is not one of prejudice but one of strict compliance with the provisions of the Act and when there is a failure to comply with those requirements it becomes difficult to sustain the order. [329G-H]

The requirements of law having not been met the order of detention in the instant case, cannot, therefore, be supported. [330C]

Hadibandhu Das v. District Magistrate Cuttack & Anr., [1969] 1 SCR 227 and Prakash Chandra Mehta v. Commissioner and Secretary, Government of Kerala & Ors., [1985] 3 SCR 697, referred to.

2. The respondents have acted in a casual manner and

have failed to realise what amount of care has to be taken in making a return to the rule in a matter involving challenge to preventive detention. In the list of documents supplied to the detenu alongwith the order of detention in all 17 items were shown whereas in the record of the detaining authority produced before the Court 18 items in all were mentioned. A copy of the letter of the Collector of Customs dated June 11, 1986 in reply to petitioner's letter dated April 19, 1986 was not included in the list of documents and supplied to the detenu. Furthermore, the letter of the Collector of Customs dated June 23, 1986 to the detenu was not in reply to the detenu's letter dated April 28, 1986 as mentioned in the return. When the allegation was that there was no application of mind in the making of the order of detention, the return should have come either from the detaining authority or a person who was directly connected
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with the making of the order and not by a person who filed the affidavit on the basis of the record of the case. [328D-E; 327A]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition (Crl.) No. 670 of 1986.

(Under Article 32 of the Constitution of India). Ram Jethmalani and Ms. Rani Jethmalani for the Petitioner. G. Ramaswamy, Additional Solicitor General, R.P. Srivas- tava and Ms. S. Relan for the Respondents. The Judgment of the Court was delivered by RANGANATH MISRA, J. By this application under Article 32 of the Constitution the wife of the detenu Wang Chuk assails the order of his detention under section 3(1) read with section 2(f) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the "COFEPOSA Act") made on July 21, 1986 by the Administrator of the Union Territory of Delhi. The detenu is of Ladakhi origin and has been residing at Delhi for some time. The grounds served on him along with the order of detention stated that on March 18, 1986, the Cus- toms Authorities on the basis of previous information in their possession intercepted the vehicle in which the detenu was travelling and inquired of him if he was in possession of contraband or smuggled gold. He answered in the affirma- tive and disclosed that he was carrying smuggled gold packed in a piece of cloth. At the Customs House where he was taken, 36 pieces of gold with foreign markings Valued at a little more than three lakhs and seventy-three thousand rupees (Rs.3,73,000) were recovered from the cloth pack. When the detenu failed to produce authority in support of the possession of it, the same were seized under the Customs Act as also the Gold Control Act. As a follow-up action, the residential premises of the detenu were searched and from there 11 pieces of gold with foreign markings, 65 cut pieces of gold of foreign origin, fifteen thousand U.S. Dollars and Indian currency of Rupees five lakhs sixtytwo thousand and two hundred (Rs.5,62,200) were recovered. The detenu failed to produce relevant papers though he claimed these articles. They too were seized.

The detenu admitted the recovery but maintained that one Puchung, owner of Hotel Kanchan in Nepal owned these arti- cles and the detenu held them for him on the understanding that as and when Puchung asked for the whole or any part of them. the same would be delivered to him. Puchung had been visit- ing the detenu's house now and then for the said purpose. The detenu was arrested but was enlarged on bail. The de- taining authority relying upon the materials available in the proceedings before the Customs Authorities made the order of detention. Along with the order of detention the grounds in support thereof were supplied to the detenu. Copies of 17 documents as indicated in Annexure 'C' were also supplied to him.

The detenu made a representation against the detention and the Advisory Board afforded a personal hearing to him on the 7th and 9th of October, 1986. His detention has been confirmed.

In response to the rule, the respondents have made a return and in the affidavit justification for the order has been given. Rejoinder has been filed by the petitioner. Mr. Jethmalani appearing in support of the writ petition has advanced three submissions and they are:

> 1. The detenu has been denied a fair and adequate opportunity of representing against his detention inasmuch as the grounds of detention and copies of the documents accompa-

nying the grounds were not in English language and copies thereof have been furnished in Tibetan language while the detenu knew only Ladakhi; and copies of all the material docu- ments shown in Annexure 'C' were not supplied to him.

2. The representation made by him dated 6/12-9-1986 was not sent to the Advisory Board in good time and reached the Board either on the date of hearing or after the hearing which spread over two days had begun; and

3. The order was vitiated as the detaining authority did not apply its mind to the rele- vant papers before making the impugned order. Before we proceed to deal with the matter on merits, certain aspects which came to be noticed during the hearing though not specifically pleaded, may first be indicated. The petitioner annexed to the writ petition a list of documents marked as Exhibit 'C' said to have been supplied to the detenu along with the grounds of detention. In all 17 items were shown therein.

Learned Additional Solicitor General appearing for the respondents produced the record of the detaining authority during the hearing where in the office copy 18 items in all were mentioned.

In paragraph 4 of the counter-affidavit filed by Shri C.P. Tripathi on behalf of the detaining authority, it was stated that:

> "Letter dated 19.4.1986 of the petitioner, addressed to the Collector of Customs, Customs House, New Delhi, together with a list of persons, etc. was placed before the detaining authority and a copy of the same has been supplied to the detenu along

with the grounds of detention."

In a subsequent affidavit Shri Tripathi stated that the correct contents of the said paragraph as per the record of the respondents should be read as under:

> "Letter dated 19.4.1986 of the petitioner addressed to the Collector of Customs, Customs House, New Delhi together with a list of persons along with the reply dated 11.6.1986 of the Collector of Customs to the petitioner was placed before the detaining authority."

The list of documents does not mention the letter dated 11.6.1986 and the respondents' learned counsel has ultimate- ly accepted the position that a copy of that document was not supplied to the detenu.

In the later affidavit filed by Shri Tripathi on behalf of respondents it has again been stated that:

> "That similarly in the said referred counter- affidavit, subpara (ii) of page 5 reads as under:
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> 'Letter dated 28.4.1986 from the petitioner to the Collector of Customs, along with affidavits of Smt. Tsering Wang Chuck, Mrs. Billa, Shri Nadak, Mrs. Pema, Shri Tse Wang, Mrs. Kalsang Dolma, Mr. Teeman were also placed before the detaining authority. I say that even the reply of the above referred letter from the Collector of Customs was considered by the detaining authority, a copy of which has also been supplied to the detenu along with the grounds of detention.' Whereas the correct contents of the said para as per the record of the respondents should read as under:- Letter dated 28.4.1986 from the petitioner to the Collector of Customs along with affidavit of the petitioner, Mrs. Billa, Shri Nadak, Mrs. Pema, Shri Tse Wang, Mrs. Kalsang Dolma, Mr. Teeman were placed before the detaining authori- ty. Even the .reply dated 23.6. 1986 of the Collector of Customs, to the detenu was also considered by the detaining authority and a copy of the same has also been supplied to him along with the grounds of detention. '' It is conceded by the learned counsel for the respond- ents that the letter of the Collector of Customs dated 23.6. 1986 to the detenu was not in reply of the detenu's letter dated 28.4. 1986 as mentioned in the affidavit. The facts narrated above clearly indicate that the respondents have acted in a casual manner and have failed to realise what amount of care has to be taken in making a return to the rule in a matter involving challenge to pre- ventive detention. Mr. Jethmalani has rightly commented that when the allegation was that there was no application of mind in the making of the preventive detention, the return should have come either from the detaining authority or a person who was directly connected with the making of the order and not by Shri Tripathi who filed the affidavit on the basis of the record .of the case.

> The detenu has contended that he understands only La- dakhi language but he can hardly write, read or converse in that language. Admittedly his wife who is the petitioner before us is a Tibetan refugee and apparently is conversant with both Tibetan as also English. It is the case of the respondents in the affidavit of Shri Tripathi filed on January 13, 1987 that:
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> "It is thus apparent that the detaining au- thority while passing the detention order has fully considered all the 17 documents running to pages 1 to 45 which have been supplied to and received by the detenu along with transla- tion thereof in the Tibetan language as admit- ted in the writ petition."

It is not disputed that the law as laid down by this Court requires the detaining authority to provide the material to the detenu in a language which he understands in order that an effective representation against his detention may be made. A Constitution Bench of this Court in the case of Hadibandhu Das v. District Magistrate Cuttack & Anr., [1969] 1 SCR 227 has indicated:

> "Mere oral explanation of a complicated order of the nature made against the appellant without supplying him the translation in script and language which he understood would, in our judgment, mount to denial of the right of being communicated the grounds and of being afforded the opportunity of making a represen- tation against the order."

This view has been reiterated in several decisions of this Court, (See [1962] 2 Supp. SCR 918, [1969] 1 SCR 227, [1975] 2 SCR 215).

The learned Additional Solicitor General relied upon the feature that the petitioner-wife knew both English and Tibetan languages and an effective representation as a fact had been made. There can be no two opinions that the re- quirement of law within the provisions of Article 22(5) of the Constitution is that the detenu has to be informed about the grounds of detention in a language which he understands. The fact that the detenu's wife knew the language in which the grounds were flamed does not satisfy the legal require- ment. Reliance was placed by the learned Additional Solicitor General on a decision of this Court in Prakash Chandra Mehta v. Commissioner and Secretary, Government of Kerala & Ors., [1985] 3 SCR 679 in support of his contention that unless the detenu was able to establish prejudice on account of the fact that the grounds of detention and the documents accompanying the grounds were not in a language known to the detenu the order would not be vitiated. There is no clear indication of the test of prejudice being applied in that case. On the facts relevant before the Court, a conclusion was reached that the detenu was merely reigning ignorance of English and on the footing that he knew English, the matter was disposed of. We must make it clear that the law as laid down by this Court clearly indicates that in the matter of preventive detention, the test is not one of prejudice but one of strict compliance with the provisions of the Act and when there is a failure to comply with those requirements it becomes difficult to sustain the order. (See AIR 1975 SC 1513, [1975] 2 SCR 832, AIR 1975 SC 245).

The remaining contention of the petitioner is about the represen-

tation made to the Advisory Board. It is a fact that the representation made on 12.9.1986 though received immediately thereafter in the office of the detaining authority had not been sent to the Advisory Board until heating begun. But in the report of the Advisory Board which has been produced before us during the hearing of the matter we find reference to the representation. In the absence of any clear material as to when exactly the representation reached the Advisory Board we propose to accept the submission of the learned Additional Solicitor General that the representation was before the Advisory Board when the matter was heard and the detenu was afforded an opportunity of personal hearing. The net result is that the order of detention cannot be supported for t. he defects and shortcomings indicated above. We allow the application. The order of detention is quashed and we direct that the detenu be set at liberty forthwith.

P.S.S. Petition allowed.