

Ashok Kumar vs Union Of India & Ors on 27 January, 1988

Equivalent citations: 1988 SCR (2) 800, 1988 SCC (1) 541, AIRONLINE 1988 SC 51, 1988 (1) SCC 541, (1988) 1 CRIMES 791, (1988) 34 DLT 215, (1988) 35 ELT 441, (1988) 1 JT 235, 1988 SCC (CRI) 193, (1988) 1 JT 235 (SC), 1983 (2) SCC 254, (1983) 9 ALL LR 224, 1983 ALL CJ 398.1, (1983) ALL WC 397, 1993 SCC (CRI) 301, 1993 SCC (SUPP) 1 459

Author: B.C. Ray

Bench: B.C. Ray, G.L. Oza

PETITIONER:

ASHOK KUMAR

Vs.

RESPONDENT:

UNION OF INDIA & ORS.

DATE OF JUDGMENT 27/01/1988

BENCH:

RAY, B.C. (J)

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RAY, B.C. (J)

OZA, G.L. (J)

CITATION:

1988 SCR (2) 800

1988 SCC (1) 541

JT 1988 (1) 235

1988 SCALE (1) 194

ACT:

Constitution of India, 1950, Articles 22(5) and (6).

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Section 3. Detention order- Certain documents though placed before the Detaining Authority for consideration not supplied to detenu-Effective representation could not be submitted by detenu-Detention order-Quashed.

HEADNOTE:

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The appellant was arrested and detained on 21st March, 1987 pursuant to an order of detention made under s. 3(1) of the Conservation of Foreign Exchange and Prevention of

Smuggling Activities Act, 1974. He was served with the grounds of detention by the Detaining Authority. In the grounds it was stated that the appellant had been indulging in illegal sale and purchase of foreign currency, and also in the sale and purchase of gold of foreign origin on a large scale, and that in three premises connected with the appellant search was carried out on 10th December, 1986 under s. 33 of the Foreign Exchange Regulation Act, 1973.

On 6th April, 1987 the appellant made two representations; one to the Detaining Authority-the second respondent, and another to the Central Government-the first respondent. In these representations the appellant stated that he had no concern whatsoever as regards the premises where search was carried out, and US \$ and primary gold were recovered as the said premises did not belong to him but belonged to his sister-in-law, and that if the relevant documents on the basis of which the detaining authority came to its subjective satisfaction are not given it would not be possible to make any effective representation. On 2nd April, 1987 the appellant also made a representation before the Advisory Board.

The appellant was produced before the Advisory Board on 29th April, 1987 and the Board heard the appellant in respect of his representation. He received a communication dated 7th May, 1987 from

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respondent No. 1 stating that his detention had been confirmed with effect from 21st March, 1987 for a period of one year.

The appellant challenged the order of detention in a writ petition and also prayed for quashing of the said order. It was contended on his behalf: (1) that the grounds of detention were supplied on 21st March, 1987 whereas the vital documents were supplied as late as on 24th April, 1987 and that this was a clear infringement of the provisions of s. 3(3) of the COFEPOSA Act. (2) That the appellant could not make an effective representation against the order of detention in accordance with the mandatory provisions of Article 22(5) of the Constitution of India. The order of detention was also challenged on the ground: that the order of confirmation of detention did not give any indication as to why the Government had specified or determined the maximum period of detention of one year, that there had been an inordinate delay in considering the representation dated 6th April, 1987, that it was disposed of by the Central Government on 29th April, 1987, and that this delay of 23 days had not been satisfactorily explained. This unusual delay in the disposal of the representation also rendered the order of detention bad.

The writ was contested by the first and second respondents by submitting in their counter affidavits that at the time of the search of the premises several personal documents of the detenu like driving licence, his and his

wife's bank passbooks, HUF passbooks, account books were seized from the searched premises, and that in pursuance of his representation dated 6th April, 1987 the detenu was supplied with more documents numbering 150 pages on 24th April, 1987 although the same had not been relied upon in forming the subjective satisfaction of the Detaining Authority.

The High Court dismissed the writ petition in view of the affidavit filed by the Detaining Authority-Respondent No. 2 that all the documents seized though placed before the detaining authority he did not rely on them in forming his subjective satisfaction in making the order of detention, and as such the non-supply of certain documents seized from the premises after search to the detenu along with the grounds of detention cannot be said to amount to an infringement of the provisions of Art. 22(5) of the Constitution rendering the order of detention illegal and bad.

Allowing the Appeal, the Court,

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HELD: 1. It is crystal clear that certain documents though placed before the Detaining Authority for consideration were not supplied to the appellant within 15 days from the date of the order of detention as provided under s. 3(3) of the COFEPOSA Act. It is also evident that on the request of the appellant by his representation made on 6th April, 1987 the documents were supplied to him on 24th April, 1987. The representation of the appellant was disposed of by the Advisory Board on 29th April, 1987. In these circumstances, it cannot be denied that the failure on the part of the Detaining Authority to supply the aforesaid material documents prevented the appellant from making an effective representation against the grounds of his detention, and as such the mandatory provision of Art. 22(5) had not been complied with. The order of detention is, therefore, illegal and bad and the same is liable to be quashed. [807C-E]

2. It is necessary for the valid continuance of the detention that subject to Art. 22(6) copies of the documents, statements and other materials relied upon in the grounds of detention should be furnished to the detenu alongwith the grounds of detention or in any event not later than five days and in exceptional circumstances and for reasons to be recorded in writing not later than fifteen days from the date of detention. There are no exceptions or qualifications provided to this rule and if this requirement of Art. 22(5) read with s. 3(3)COFEPOSA Actis not satisfied the continued detention order of detenu would be illegal and void. Appellant directed to be released forthwith. [807G-H; 808A-B, C]

Smt. Icchu Devi Choraria v. Union of India and Ors., [1980] 4 SCC 531 and Kamla Kanahiyalal Khushalani v. State

JUDGMENT :

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No . 54 of 1988 .

From the Judgment and order dated 9.10.1987 of the Delhi High Court in Crl. W.P. No. 262 of 1987.

Soli J. Sorabjee Hukam Chand, Mrs. Nisha Bachhi and Vijay K. Verma for the Appellant.

B. Datta, Additional Solicitor General, P. Parmeswaran Ashok K. Srivastava, A. Subha Rao and C.V. Subba Rao for the Respondents.

The Judgment of the Court was delivered by RAY, J. Special leave granted. Arguments heard. This appeal by special leave is directed against the judgment and order dated 9th October, 1987 passed by the High Court of Delhi in Criminal Writ Petition No. 262 of 1987 discharging the rule and rejecting the writ petition.

The appellant was arrested and detained on 21st March, 1987 from his residence at Dahiwali Gali, Karola Market, Naya Laxman Mandir, Bharatpur by an order of detention made under Section 3(1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 with a view to prevent him from acting in any manner prejudicial to the augmentation of foreign currency and also with a view to prevent him from engaging and keeping smuggled gold. The appellant was served with the grounds of detention by the Detaining Authority, Shri Tarun Roy, Joint Secretary to the Government of India. It had been stated therein that the appellant may make any representation to the Advisory Board against his detention.

In the grounds of detention it was inter alia stated that on the basis of the secret information received in the office of the Assistant Director, Enforcement Directorate, Agra, the appellant had been indulging in illegal sale and purchase of foreign currency and also in the sale and purchase of gold of foreign origin on a large scale and that search of the following premises connected with the appellant was carried out on 10th December, 1986 under Section 37 of the Foreign Exchange Regulation Act, 1973:

- (i) Premises situated in Purana Laxman Mandir, opposite Dr. Ram Kumar, Bharatpur.
- (ii) Premises situated in Daniwali Gali, Karola Market, Naya Laxman Mandir, Bharatpur, and
- (iii) Business premises of M/s Madanlal, Mohanlal and Baldev Singh, Karola, Laxman Mandir Crossing, Near Bata Shop, Bharatpur.

On 6th April, 1987, the appellant made two representations; one to the Detaining Authority, 2nd respondent and another to the Central Government, the 1st respondent. In the representation to the Detain-

ing Authority, the appellant stated that he had no concern whatsoever as regards the residential premises situated at Purana Laxman Mandir, opp. Dr. Ram Kumar, Bharatpur where the search was conducted and on such search US \$ and primary gold were recovered, as the said premises does not belong to him but belongs to his sister-in-law. The appellant's residential premises is situated in Dahiwali Gali, Karola Market, Naya Laxman Mandir, Bharatpur. It had also been stated therein that the relevant documents on the basis of which the detaining authority came to the subjective satisfaction were not supplied to him and unless the said documents are given to him it will not be possible for him to make any effective representation against the grounds of detention. In the second representation to the Secretary, Government of India dated 6th April, 1987 also the appellant while reiterating the same facts stated that even the house from where the alleged recovery of foreign currency and gold was made is not his residential premises but is the residence of his sister-in-law. The appellant also stated that he was innocent and he should be released forthwith by revoking the order of detention. The appellant also stated that the Detaining Authority supplied him the relevant documents and also the information asked for in his letter dated 6th April, 1987 only on 24th April, 1987. The appellant also made a representation before the Advisory Board on 27th April, 1987.

The appellant was produced before the Advisory Board on 29th April, 1987 and the Advisory Board heard the appellant in respect of his representation. The appellant received a communication dated 7th May, 1987 from the respondent No. 1 stating therein that his detention had been confirmed with effect from 21st March, 1987 for a period of one year.

The appellant thereafter challenged the order of detention by a writ petition and also prayed for quashing of the said order of detention on the ground inter alia that the documents relied upon by the Detaining Authority in coming to his subjective satisfaction for making the order of detention in question which were required to be supplied to him along with the grounds of detention, were not supplied to him. The grounds of detention were supplied to him on 21st March, 1987 whereas the vital documents were supplied to him as late as on 24th April, 1987 in infringement of the provisions of Section 3(3) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act to be hereinafter called as the said Act. This vitiated the entire detention order in as much as the appellant could not make an effective representation against his order of detention in accordance with the mandatory provisions of Article 22(S) of the Constitution of India. The order of detention was also challenged on the ground that the order of confirmation of detention did not give any indication as to why the Government had specified or determined the maximum period of detention of one year. The detention order is, therefore, illegal. It had also been stated in the writ petition that there had been inordinate delay in considering the representation sent on 6th April, 1987 through the Superintendent of Jail to the Detaining Authority and the Central Government. The said representation was disposed of by the Central Government on 29th April, 1987 and as such there was delay of 23 days which had not been explained. This unusual delay in the disposal of the detenu's representation renders the order of detention bad.

A counter affidavit was filed on behalf of respondent Nos. 1 and 2 affirmed by one Shri S.K. Chaudhary, Under Secretary, Ministry of Finance, Department of Revenue. In para 4 of the said affidavit it was stated that "it is also pertinent to submit that at the time of search several personal documents of the petitioner like copy of driving licence, his and his wife's bank passbooks including a HUF passbook, account books were seized from the said premises." It was also stated in para 7 of the said affidavit that the information sought in the representation of 6th April, 1987 received in the office of the Detaining Authority on 15th April, 1987 was totally irrelevant for the purpose of making any representation. In para 10 of the said affidavit it had been stated that the detenu was supplied with more documents numbering 150 pages on 24th April, 1987 in pursuance of his representation dated 6th April, 1987, although the same were not relied upon in forming the subjective satisfaction of the Detaining Authority. The Detaining Authority, Shri Tarun Roy, Joint Secretary to the Government of India, Department of Revenue, Ministry of Finance, New Delhi in paras 3 and 4 of his affidavit stated as under:

"3 That I was aware that no separate statement had been recorded by the Custom authorities and as such there was no question of suppressing the same. The result of the seizure was also placed before me as given in the panchanama which were placed before me.

4. That although all the documents seized from the premises of the petitioner were before me but, I had not relied on all of those documents in forming my subjective satisfaction. I have relied only on those documents which are mentioned to be relied in the list of documents annexed with the grounds of detention."

The learned Judge of the Delhi High Court while dismissing the writ petition observed that in view of the affidavit filed by the Detaining Authority, the respondent No. 2, that all the documents seized though placed before him, he did not rely on all of them in forming his subjective satisfaction in making the order of detention and as such the non-supply of those documents to the petitioner along with the grounds of detention, cannot be said to amount to infringement of the provisions of Article 22(5) of the Constitution rendering the order of detention illegal and bad.

Mr. Soli J. Sorabji, learned counsel appearing on behalf of the detenu has submitted with much vehemence that non-supply of the vital documents which were considered by the Detaining Authority in forming his subjective satisfaction violates the provisions of Article 22(5) of the Constitution as the appellant was prevented from making effective representation to the grounds of detention. It has been submitted by the learned counsel that those documents which comprised of the 3 bank passbooks of the appellant and his wife and one driving licence of the appellant which had been seized and taken possession of by the Customs Department will clearly show that the residential address of the appellant mentioned therein is the house in Dahiwali Gali, Karola Market, Naya Laxman Mandir, Bharatpur and not in Purana Laxman Mandir, opp. Dr. Ram Kumar, Bharatpur which house does not belong to the appellant but to his sister-in-law. The foreign currency i.e. US \$ as well as the primary gold which were found out on search from the house in Purana Laxman Mandir cannot be connected with the appellant as he had specifically stated in his representation that he is not the owner of the said house. It has also been submitted in this

connection that in spite of the specific objection taken by the appellant in his representation, no attempt was made on behalf of the Detaining Authority to ascertain who is the owner of the said house. The non-supply of the said documents had greatly handicapped the appellant in making an effective representation against the rounds of detention served on him.

This submission of the learned counsel was tried to be repelled by the Additional Solicitor General by contending that in view of the affidavit filed by the Detaining Authority, Shri Tarun Roy, Joint Secretary to the Government of India, Department of Revenue, Ministry of Finance, that he did not consider those documents though the same were placed before him in forming his subjective satisfaction in making the order of detention and so non-supply of those documents along with the grounds of detention to the appellant did not vitiate the order of detention. It was also submitted that the appellant and his relation, Manoj Kumar were present at the time of the search and the appellant subsequently fled away to show that the house in Purana Laxman Mandir from where the foreign currency and primary gold were recovered belonged to the appellant.

After considering the submission, it is crystal clear that the aforesaid documents though placed before the detaining Authority for his consideration were not supplied to the appellant within 15 days from the date of the order of detention as provided under Section 3(3) of the said Act. It is also evident from the affidavit of Shri S.K. Chaudhary, Under Secretary, Ministry of Finance, Department of Revenue, New Delhi that on the request of the appellant by his representation dated 6th April, 1987, the documents were supplied to him on 24th April, 1987. The representation of the appellant was disposed of by the Advisory Board on 29th April, 1987. In these circumstances, it cannot be denied that the failure on the part of the Detaining Authority to supply the aforesaid material documents prevented the appellant from making an effective representation against the grounds of detention and as such the mandatory provisions of Article 22(5) have not been complied with. The order of detention in our considered opinion, is therefore, illegal and bad and the same is liable to be quashed. As the appeal succeeds on this ground alone we do not deem it necessary to consider the other objections raised against the order of detention.

It is pertinent to refer here to the decision of this Court in *Smt. Icchu Devi Choraria v. Union of India and ors.*, [1980] 4 SCC 531 wherein it has been held that the right to be supplied the copies of the documents, statements and other materials relied upon in the grounds of detention without any undue delay flows directly as a necessary corollary from the right conferred on the detenu to be afforded the earliest opportunity of making a representation against the detention, because unless the former right is available, the latter cannot be meaningfully exercised. It has been further held that it is necessary for the valid continuance of detention that subject to Article 22(6) copies of the documents, statements and other materials relied upon in the grounds of detention should be furnished to the detenu along with the grounds of detention or in any event not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days from the date of detention. There are no exceptions or qualifications provided to this rule and if this requirement of Article 22(S) read with Section 3(3) of COFEPOSA Act is not satisfied, the continued detention of the detenu would be illegal and void. Similar observations have been made in the case of *Kamla Kanahiyalal Khushalani v. State of Maharashtra and Another*, [1981J 2 SCR

459. For the reasons aforesaid, we allow the appeal and set aside the judgment and order of the High Court and quash the order of detention. We direct the Government to release the appellant from jail forthwith. There will be no order as to costs.

N.V.K.

Appeal allowed.