Surendra Singh vs Union Of India (Uoi) And Ors. on 29 August, 1989

Equivalent citations: 1990CRILJ906

ORDER

Surendra Narain Jha, J.

1. This application has been filed for issuance of a writ in the nature of habeas corpus praying, inter alia, for revo-cation of the order of detention dated 8th October, 1988 passed by Respondent No. 2, the Joint Secretary to the Government of India, against the petitioner under Section 3 of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the Cofeposa Act)" together with the order dated 29th December, 1988 issued by respondent No. 3, Under Secretary to the Government of India, informing the petitioner that his detention has been confirmed for a period of one year under the provisions contained in Section 8(f) of the Cofeposa Act by the Central Government copies thereof have been annexed as Anne-xures-1 and 2 respectively.

2. The petitioner is the owner of the truck bearing Registration No. PUI4219 and undertakes the transportation of goods from one place to another as provided under the Common Carrier Act, 1865, throughout the territory of India.

3. The petitioner was arrested on 21-5-1988 for alleged violation, of Section 11 of the Customs Act read with Section 3(i) of the Import and Export (Control) Act, 1974 in connection with smuggling of foreign synthetic hosiery clothes vide case No. 71/88 dated 20-5-1988 of the Customs Division, Muzaffar-pur, and was lodged in Muzaffarpur Central Jail

4. While the petitioner was in jail custody in the aforesaid customs case, he was served with the impugned order dated 8th October, 1988, directing that the petitioner be detained and kept in custody in Central Jail, Bhagalpur, in order to prevent him from abetting the smuggling of goods and engaging in transporting smuggled goods together with the grounds in support of the said order.

5. The grounds on which the detention order has been passed is as follows :

> "On 20-5-1988 on basis of information the Customs Officers of Muzaffarpur Division intercepted Truck No. PCI 4219 near Pipra Kothi and apprehended you and your driver Naurang Singh, S/O Late Chota Singh after Chasing when you fled from the said truck which when examined as found to be loaded with synthetic hosiery clothes of 3rd country origin.

The said truck was thoroughly searched in presence of two independent witnesses which subsequently resulted in recovery of 190 bales weighing 3420 kgs. net of synthetic hosiery clothes and some documents.

You could not produce any valid documents for legal possession or legal importation of the goods in question, as such panchanama was prepared and goods, said truck and documents recovered from cabin of said truck were seized under Customs Act. You were arrested under Customs Act on 21-5-88 and forwarded to presiding Officers Special Court for Economic Offences, Muzaffarpur on 21-5-1988, Your bail petition has been rejected by Hon'ble Court of Presiding Officer Economic Offences Court, Muzaffarpur. District Judge, Muzaffarpur and High Court, Patna. Although you are in judicial custody, there is every likelihood of your being bailed out. From the facts and circumstances of the case and the material placed before me I find that as the owner of the truck bearing register No. PCI 4219 you had accepted the job of transporting the smuggled goods from Nepal to India through bordering region of Sikta containing synthetic hosiery clothes of 3rd Country origin. You had full knowledge of smuggled goods being carried in the said truch and you had accompalied alongwith your driver and others.

Your were to receive extra money for the job of transporting the said smuggled goods and you have admitted your guilt.

From the foregoing facts and circumstances it is evident that you are engaged in transporting smuggled goods and abetting the smuggling of goods, (not legible) and unless prevented you will continue to do so in future. Although prosecution and departmental proceedings are likely to be initiated against you it is necessary to detain you. I am satisfied that it is necessary to detain you under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 with a view to preventing you from abetting the smuggling of goods and engaging in transporting the smuggled goods.

6. It appears that from the facts and circumstances of the case and the materials produced before the Detaining Authority he was satisfied that it was necessary to detain the petitioner under the Cofeposa Act with a view to preventing him from abetting the smuggling of goods and engaging in transporting the smuggled goods.

7. The learned counsel appearing on behalf of the petitioner has assailed the impugned order mainly on the ground that it was not essential and justified for the Detaining Authority to pass the impugned order with a view to preventing the petitioner from abetting the smuggling of goods and engaging in transporting smuggled goods as the petitioner was already in jail custody in connection with the aforesaid customs case and his bail application was already rejected, even by this Court. Therefore, the impugned order is not proper and fit to be quashed. It was further submitted that the petitioner could not file his representation because the language in which the grounds of detention was served was not known to him. Therefore, no effective representation could be made and as such

the impugned order is violative of Article 22(5) of the Constitution of India.

8. In order to appreciate the points raised by the learned counsel appearing on behalf of the petitioner, it is necessary to give some more facts. From the perusal of the order of detention, the grounds in support thereof and the Annexures to the grounds, it would appear that the same had been issued in English language. English is not known to the petitioner, as stated in the writ application. According to the petitioner, he can only understand the GURUMUKHI script of Punjabi language and as such the failure on part of the Detaining Authority to furnish the aforementioned documents in a language known to the petitioner leads to violation of section 3(3) of the Cofeposa Act, which incorporates the provisions of Article 22(5) of the Constitution of India. The petitioner has stated that he has no knowledge of either Hindi or English. Therefore, he was deprived of filing any effective representation to the Authority to the effect that he was not a professional smuggler, who regularly indulges in transportation of smuggled goods.

9. A counter affidavit has been filed on behalf of the Custom Department stating that at the time of service of detention order as well as the grounds of detention the detenu did not make any grievance that he did not understand Hindi or English. The grounds of detention and the detention order have been fully explained to the detenu in Hindi by one Shri R. B. Singh, Inspector of Customs and when the detenu fully understood the contents thereof he put his signature in Gurumukhi without requesting the Authority that he required the Gurumukhi translation of the same. It has further been stated that the detenu was never forced to sign a blank printed form and papers under threat by the Custom officials, who had arrested him. It has also been stated that the petitioner should have requested and demanded the relevant documents in a language which he claimed to understand so as to make him the same available to enable him to make representation against his detention order, but he did not make any such demand or request and now the grievance made to that effect, at this stage, is an afterthought and only to suit his convenience.

10. In support of his first point that the petitioner was in jail custody and it was not essential for the Detaining Authority to pass the impugned order the learned counsel appearing on behalf of the petitioner has relied upon a decision in the case of Rameshwar Shaw v. District Magistrate, Burdwan, reported in AIR 1964 SC 334 : (1964 (1) Cri LJ 257) and Makhan Singh v. State of Punjab reported in AIR 1964 SC 1120 : (1964 (2) Cri LJ 217).

11. Section 3(1) of the Cofeposa Act vests power to the central Government or the State Government or any officer of the Central Government, not below the rank of a joint Secretary to that Government, specially empowered for the purposes of this Section by that Government, or any officer of a State Government, not below the rank of a Secretary to the Government, specially empowered for the purposes of this Section by that Government, to make order detaining certain person, if satisfied with respect to any person including a foreigner with a view to prevent him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from smuggling goods, or abetting the smuggling of goods, or engaging in transporting or concealing or keeping smuggled goods or dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or harbouring persons engaged in smuggling goods or in abetting the smuggling of goods.

12. From a bare perusal of Section 3 of the COFEPOSA Act it will be noticed that before an order of detention can be validly made by the Detaining Authority, he must be satisfied that detention of person is necessary in order to prevent him from acting in any prejudicial manner, as indicated hereinbefore.

13. It was vehemently argued that when a person is already under detention as an under-trial prisoner, it would not be reasonably possible for the Detaining Authority to satisfy himself that the detention of such a person is necessary with a view to prevent him from acting in any prejudicial manner. The basis of the order of detention which the Authority is empowered to pass against a person is that if such order is mot passed against him, he may act in a prejudicial manner. In other words, if the Authority considers it essential to pass such order on the material brought before it in respect of a person, he must examine the said material and first reach to a conclusion that the material shows that such persons may indulge in prejudicial activities if he is not prevented from doing so by an order of detention. The grounds which have been annexed with the impugned order clearly indicate that the Detaining Authority is satisfied on the facts and circumstances of the case and the materials placed before him that it is necessary to detain him under the Cofeposa Act with a view to prevent him from doing any prejudicial act. One of the grounds taken by the Detaining Authority is that "your were arrested under Customs Act on 21 -5-1988 and forwarded to Presiding Officer Special Court for Economic Offences, Muzaffarpur on 21-5-1988. Your bail petition has been rejected by Hon'ble Court of presiding Officer Economic Offences Court, Muzaffarpur, District Judge, Muzaffarpur and High Court, Patna. Although you are in judicial custody, there is every likelihood of your being bailed out" Therefore, the Authority is apprehensive of the fact that the petitioner may be bailed out and he may indulge himself in such activities which may be prejudicial. I am not able to appreciate the fact that how can the Detaining Authority came to the conclusion that a person who is in jail custody may act in a prejudicial manner till he is detained. The Scheme of the section postulates that if an order of detention is not passed against a person he would be free and able to act in a prejudicial manner. That means at the time when the detention order is brought into force, the persons sought to be detained must have freedom of action, which could not be possible for a person who has already been detained and kept behind the bar.

14. A similar point was raised before the Hon'ble Supreme Court in the case of Makhan Singh (1964 (2) Cri LJ 217) (Supra). In the aforesaid case the detenu was served with the order of detention in jail under Rule 30(1)(b) of the Defence of India Rules, 1962, and argument was advanced on behalf of the appellant that the service of the order of, detention, which was effected, was illegal as the petitioner was already in jail custody and, therefore, the order of detention was outside the purview of the aforesaid Rules. In the opinion of the Hon'ble Supreme Court the said argument was well founded and it was accepted. The learned Deputy Advocate General, who appeared for the Respondent in the said case, attempted to distinguish the case on the ground that the scheme of the aforesaid Rule is different from the Scheme of Section 3(1) of the Preventive Detention Act. Their Lordships while disposing of the appeal, observed as follows (para 11) :

> "It is thus clear that the nature and scope of the orders which can be validly passed under Rule 30(1) is very much vider than the order of detention which alone can be made under section 3(1) of the Act, But the question which we have to consider is,

> does this fact make arty difference to the interpretation of the operative part of Rule 30(1) in relation to detention? In our opinion the answer to this question must be in the negative. Rule. 30(1)(b), like Section 3(1)(a), clearly postulates, that an order can be made under it only where it is shown that but for the imposition of the said detention, the person concern would be able to carry out a prejudicial activities of the character specified in Rule 30(1). In other words, one of the conditions precedent to the service of the order permitted under Rule 30(1)(b) is that if the said order is not served on the person, he would be free and able to Carry out his prejudicial activities in question. The fact that other kinds of order can be passed against a person under Rule 30(1) does not alter the essential condition of a valid service of the order contemplated by Rule 30(1)(b) that if the said order is not served, the prejudicial activities may follow. Therefore, we are satisfied that on a plain construction of Rule 30(1)(b) it must be held that the order permitted by it can be served on a person who would be free otherwise to carry out his prejudicial activities. Such a freedom cannot be predicated of the appellant in the present case because he was in jail at the relevant time. Therefore, we do not think that the distinction which the Deputy Advocate General seeks to make between the provisions of Rule 30(1)(b) and Section 3(1)(a) makes any difference to the construction of the Rule. The service of a detention order on a person who is already in jail custody virtually seeks to effectuate what may be called a double detention' and such double detention is not intended either by Section 3(1)(a) or by Rule 30(1)(b) it is plainly unnecessary and outside the purview of both the provisions.

15. In the instant case it is an admitted fact that the petitioner was in jail at the time of passing and service of the detention order and he is still injail even today. The same view has been reiterated by the Hon'ble Supreme Court in the case of Ramesh Yadav v. District Magistrate Etah. AIR 1986 SC 315 : (1986 Cri LJ 312) where his Lordship has said that where the order of detention was passed because the detaining authority was apprehensive that in case the detenu was released on bail he would again carry on his criminal activities in the area, the same was not proper. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, it can be challenged in the higher forum. Merely on the ground that an accused in detention as an undertrail prisoner was likely to get bail, an order of detention under the Act should not ordinarily be passed. I have already indicated above that the ground of detention in the instant easels that the detaining authority was apprehensive of the fact that the petitioner may be bailed out, but 1 find that till today the petitioner has not been released.

16. On the other hand, it was argued on behalf of the Custom Department that there is no bar in passing the detention order even if the person sought to be detained is in jail custody and the detaining authority was aware of the fact that the detenu was in custody when the order of detention was made and yet he was satisfied that his preventive detention was necessary. The learned counsel may be right. As an abstract proposition of law, there may not be any doubt that Section 3(1)(a) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail, but the relevant facts in consideration with the making of the order may differ and that may make a difference in the application of the principle. Therefore, the question as to

whether an order of detention can be passed against a person who is in j ail will always have to be determined in the circumstances of each case. It is obvious that before an authority can legitimately come to the conclusion that the detention of the person is necessary to prevent him from acting in a prejudicial manner, the authority has to be satisfied that if the person is not detained, he would act in a manner which is prejudicial to the Society. But if a person is already within the four corners of a jail, how can it rationally be postulated that if he is not detained, he would act in a prejudicial manner? Therefore, in such cases the power of directing preventive detention given to appropriate authorities must be exercised strictly in exceptional cases as contemplated by the various provisions of the different statutes dealing with the preventive detention and should be used with great deal of circumspection. There must be awareness of the facts necessiating preventive custody of a person for social defence. If a man is in custody and; there is no eminent possibility of his being released, the power of preventive detention should not be exercised. The principle that merely on the ground that accused in detention as an under trial prisoner was likely to get bail, an order of detention under the Act should not ordinarily be passed and if. the apprehension of the detaining authority is true, the bail application can be opposed tooth and nail and in case the bail was granted it can also be challenged in the higher forum. The decision must be bonafide and strictly within the provisions of the Act

17. In the instant case, as the bail application of the petitioner has already been rejected even by this court and he is still in jail custody, the impugned order of detention should not have been passed. Quite apart, the impugned order was passed as far back as 8th October, 1988 and it was confirmed under Section 8(f) of the Cofeposa Act for one year which is going to lapse on 8th October, 1989.

18. Considering all these facts and the cases referred to above, I find force in the first submission made on behalf of the petitoner.

19. So far as second point is concerned, it was argued that the petitioner was not knowing the language in which he was served with the grounds of detention. Therefore, he could not file an effective representation, as required under Article 22(5) of the Constitution. In this connection the learned counsel has relied upon the decisions in the case of Haribandhu Das v. The District Magistrate, Cuttack, AIR 1969 SC 43 : (1969 Cri LJ 274), Lallubhai Jogibhai v. Union of India AIR 1981 SC 728 : (1981 Cri LJ 288) and Mrs. Tsering Dolkar v. The administrator Union Territory of Delhi AIR 1987 SC 1192 : (1987 Cri lJ 988).

20. In the case of Haribandhu Das (1969 Cri LJ 274) (Supra) the grounds of detention was served on the detenu in the language which was not known to him and the detention order was challenged on one of the grounds that the order and the grounds in respect thereof served upon him were written in English language, which the appellant did not understand. Their Lordships held that mere oral explanation by the authorities of such a complicated order of the nature made against the appellant without supplying him the translation in the script and language which he understood, amounts to denial of the right of being communicated the grounds and of being affording the opportunity of making effective representation against the order. It is Well settled that service of the ground of detention of the detenu is a very precious constitutional right and where the grounds are in a language which is not known to the detenu unless the contents of the grounds are fully understood

and translated to the detenu, it will tantamount to not serving the grounds of detention and would thus vitiate the detention ex facie.

21. In Lallubhai Jogibhai Patel's case (1981 Cri lJ 288) (SC) (supra) also, the grounds of detention was served in English language which the detenu did not know. Their Lordships have held that the grounds Which were not supplied to the detenu were evidently a part of those materials which had influenced the mind of the Detaining Authority in passing the impugned order of detention.

22. It may be noted here that Article 22(5) of the Constitution requires that the ground of detention must be communicated to the detenu. Where the materials supplied to the detenu is in the language not known to him, he, cannot file the representation. In the instant case, it has been stated on oath that the petitioner could not file his representation because the grounds of detention was served in English and explained to him in Hindi, which language he was not knowing. It was pointed out by the learned counsel that the detenu has signed some of the statements in Gurumukhi language because he was not knowing either English or Hindi.

23. It was submitted on behalf of the Custom Deptt. that the grounds and the annexures thereof were explained to the petitioner by a Custom Inspector and after understanding the same the petitioner has signed his statement, which was recorded after interception in Gurumukhi. Now it is an admitted position that the detenu does not know English or Hindi and the grounds served on him were in English. It has also been stated in the affidavit of the Custom Inspector that he himself has explained the contents of the grounds of detention to the detenu and after understanding the same he signed statement. From the record it appears that the detenu has signed some of the statements in GURU-MUKHI script of the Punjabi language. Admittedly, no translation of the grounds of detention was served on the detenu GURU-MUKHI language, which is the mother tongue of the detenu. The learned counsel appearing on behalf of the Custom Deptt. has relied upon a decision in the case of Bidyadeb Barmav. District Magistrate, Tripura, Agar-tala, AIR 1969 SC 323 : (1969 Cri LJ 525) and referred paragraph No. 21 of the said decision. The observation made by their Lordships does not help the Department at all. In the said case the petitioner complaied that the order of detention and the grounds supplied to him were in English and he knew only Bengali and Tripuri, but their Lordships found that the petitioner had filed a petition in English and not satisfied that the petitioner was handicapped. But the facts of the present case is otherwise. That being the case, there was a breach of constitutional imperative which requires that the grounds should be communicated to the detenu in a language which the detenu undertstands. In catena of decisions of the Hon'ble Supreme Court it has been firmly established that one of the constitutional imperatives embodied in Article 22(5) of the Constitution of India is that all the documents and materials relied upon by the Detaining Authority in passing the order of detention must be supplied to the detenu as soon as practicable in a language known to him to enable him to make an effective representation. This has not been done in the instant case. Therefore, on this ground also the application is bound to succeed.

24. Thus both the contentions canvassed by the learned counsel appearing on behalf of the petitioner on merit are sound and fit to be accepted.

25. The result is that the petition succeeds and the impugned order of detention passed by respondent No. 2 Joint Secretary to the Government of India, on 8th October, 1988 and confirmed by respondent No. 3. Under Secretary to the Government of India on 29th December, 1988 is hereby quashed. The petitioner is directed to be released forthwith, if not required otherwise.