

CASE NO.:
Special Leave Petition (crl.) 153 of 2003

PETITIONER:
A.C. Razia

RESPONDENT:
Government of Kerala & Ors.

DATE OF JUDGMENT: 07/05/2003

BENCH:
S. RAJENDRA BABU.

JUDGMENT:

J U D G M E N T

(arising out of S.L.P.(CRIMINAL) No. 153 of 2003)

(WITH WRIT PETITION (CRIMINAL) NO. 6 OF 2003)

RAJENDRA BABU, J. :

Leave granted.

The appellant's husband has been detained under Sections 3(1)(i), 3(1)(ii), 3(1)(iii) and 3(1)(iv) of the Conservation of Foreign Exchange and Preservation of Smuggling Activities Act, 1974 (COFEPOSA Act) on 24/6/2002 vide detention Order dated 19/4/2001. The detenu was duly served with the Order of detention along with the grounds of detention and other relevant documents in the Central Jail Trivandrum, where he was detained. It is submitted that these documents were voluminous which is running to more than four hundred pages. Later he was also supplied with an Order in original dated 16/5/2002, which is about twenty pages.

On 13/7/2002 appellant made a representation in regional language (Malayalam) to the detaining authority and to the Central Government. Both these representations were rejected on 30/7/2002 and 29/7/2002 respectively. The case of detenu was referred to the Advisory Board and on the basis of this report the Government has confirmed the detention order on 6/9/2002. Later, a writ petition was filed before the Kerala High Court by the appellant herein seeking the relief of her husband and on being dismissed, the appellant urging the same relief has filed a writ petition before us as well as special leave petition challenging the order of the High Court.

The definite case of the appellant before us is that representation sent to the Central Government was in Malayalam and no English translation of the same was made available to the Central government. It is also submitted that even the documents forming the basis of the Order of detention was in Malayalam and had not been translated into English for the proper appreciation by the Central Government. And since there is nothing on record to show that the concerned officer who dealt with the representation knew Malayalam, the same was not considered in the manner contemplated under the Constitution and COFEPOSA Act. Therefore, it is argued that the detention is vitiated.

On behalf of the State Government it is argued that the consideration of the representation by the Authority and the Government is different. It is also submitted that there is no need to furnish translation of all the documents relating to detention to the Central Government. The Union of India contended that it is not relevant in the context of section 3(2) of the COFEPOSA Act, whether the State Government forwards the relied upon documents to the Central Government or not. Since there is no provision in the COFEPOSA Act for approval of the order of detention by the Central Government, all that the Central Government is to do is to apply its mind for the purpose of taking a decision whether it is necessary to interfere with the order of detention by way of

revocation or modification and for this purpose the Detention Order and the Grounds of detention are adequate...". In this case it is not disputed that the Central Government took decision upon the report under Section 3(2) on the basis of the comments on appellant's representation and on the abridged English Translation of the documents, which was made available to them by the State Government.

The State Government mainly placed its reliance upon the decision of a Constitutional Bench of this Court in *K M Abdulla Kunhi v. Union of India*, (1991) 1 SCC 476. Based on this ruling, they attempted to convince us that while sending the 'report' under Section 3(2) of the COFEPOSA Act there is no need to submit all the translated documents to the Central Government which was relied upon to detain the detenu.

In *Abdulla Kunhi* the main question raised for consideration was whether the confirmation of detention order upon accepting the report of the Advisory Board rendered itself invalid solely on the ground that the representation of the detenu was not considered and subsequent consideration of the representation would not cure that invalidity? This Court answered this in the negative. Analyzing the difference between the purpose of Article 22(5) and Article 22(4) it was held that:

"The constitutional right to make representation under clause (5) of Article 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. However, the obligation of the government to afford to the detenu an opportunity to make representation and to consider such representation is distinct from its obligation to refer the case of detenu along with the representation to the Advisory Board under clause (4) of Article 22 read with Section 8(c) of the COFEPOSA Act to enable the Board to form its opinion and send a report to the government. The obligation of the government to consider the representation is different from the obligation of the Board to consider the representation at the time of hearing the references. The government considers the representation to ascertain essentially whether the order is in conformity with the power under the law. The Board, on the other hand, considers the representation and the case of the detenu to examine whether there is sufficient case for detention. The consideration by the Board is an additional safeguard and not a substitute for consideration of the representation by the government."

(Emphasis supplied)

First of all it is to be noted that there is a fundamental difference between the consideration of a representation by the Government under Section 3 and that of the one by the authority under Section 8 of COFEPOSA Act. The Government under its constitutional obligation under Article 22(5) will have to ascertain whether the order itself is permissible under law or not. Whereas the Authority is looking the matter under Article 22(4). In that case the Authority was not considering the correctness of the detention per se. They were only concerned about the duration of detention. For ascertaining the extension of detention, it may not be necessary to look into all the relevant documents. It is in this context that this Court held that the report to the government and to the authority is different. Therefore, *Abdulla Kunhi* cannot be employed to buttress the argument advanced on behalf of State Government. This being the position, the other two decision cited to support the arguments by the State Government *P K Chakrabarty & others v. State of West Bengal*, 1969 (3) SCC 400, and *Jayanarain Surul v. State of West Bengal*, 1970 (1) SCC 219, is also of no assistance to decide the case in hand.

Preventive detention is an extraordinary measure enabling the detention of a person without trial. Then the only option for the detenu is to make a representation to the concerned authorities. His right to liberty under Article 21 depends upon the proper consideration of such representation. Fundamental right to liberty in these cases could be ensured only by a proper consideration of the representation after full and independent application of mind on the representation and on the relevant documents. This Court in a string of cases

has pointed out the 'dual obligations' of the State and Authorities under Article 22 (5). They are (i) to communicate the detenu the grounds on which the detention order has been made and (ii) to afford to the detenu the earliest opportunity of making representations against the detention order. In *Amir Shad Khan v. L Hmingliana*, (1991) 4 SCC 39, it was held that the right to make a representation against the detention order thus flows from the Constitutional guarantee enshrined in Article 22 (5). Therefore decision upon any such representation should be taken only after proper consideration of the same.

In this case the only point for consideration is whether the Central Government has properly considered the representation by the appellant or not. Thus, the focal point of dispute is not the effect of Report sent under Section 3(2) of the COFEPOSA Act, 1974 but non-consideration of the original representation to the Central Government in the light of Article 22(5) of the Constitution. For a proper consideration by the Central Government, there should be full and independent application of mind on the representation and on all the documents upon which the detention order was passed. This could not be done by a ritualistic perusal of the documents in a perfunctory manner. The grounds of detention and the documents upon which it is based should be strictly scrutinized. For this purpose, the necessary documents should be translated into the language which could be understood by the concerned person who is sitting upon judgment over the same and without which, the full and independent application of mind cannot be ensured. Therefore the non-translation of relevant documents in the present case vitiates full and independent application of mind over the representation. It falls foul of Article 22 (5). There is no indication anywhere that the documents referred to in the order of detention are not really relevant in examining the grounds of detention. It is not the case of respondents that the reference to documents in the order of detention is made only in the passing but not relied upon.

It is also to be noted that for the proper exercise of the power of revocation under Section 11 of the COFEPOSA Act, there should proper consideration of the representation by the revocation authorities (concerned officers, State Government or the Central Government). As pointed out, this could be done only by the full and independent application of mind on the representation and on all the documents upon which the detention order was passed. For this purpose also translated documents is quiet necessary. In *Ayya alias Ayub v. State of UP & Anr.*, (1989) 1 SCC 374 it was held that "if a piece of evidence which might have reasonably affected the decision to pass an order of detention is excluded from consideration, there would be failure of application of mind, which in turn, would vitiate the order detention." Here it is not necessary to anticipate whether the authority would have or would not have rejected the representation if all the documents were produced for consideration. In *T Delkar v. Administrator, Union Territory Delhi*, (1987) 2 SCC 69, it is pointed out that the role of the Court is only to ascertain whether the constitutional safeguard has been infringed or not. Since in this case the concerned authority had not placed representation and the allied documents in a translated form before the Central government, the latter could not exercise full and independent application of mind in the appellant's case. Consequently, the guaranteed rights under Article 22(5) of the Constitution is violated. It must be made clear that Section 3(2) of the COFEPOSA Act cannot control or whittle down the ambit of Article 22(5) of the Constitution.

It is worthwhile to refer *Union of India v. Diljeet Singh*, (1999) 2 SCC 672, in the context of present case. Wherein, it was held that:

"Consideration of report sent up by the State Government under Section 3(2) of the COFEPOSA Act by the Central Government or a competent authority to whom power is delegated is a statutory requirement which is in addition to the obligations imposed by Article 22(5) of the Constitution. Non-compliance of the statutory requirement, like abrogation of safeguards, would vitiate continued detention of a person ordered to be detained under COFEPOSA Act."

In result, the appellant's representation was not properly evaluated. Therefore, the detention in the present case violates the constitutional guarantee under Article 22(5). The High Court has not looked into this dimension of the case. In a cryptic manner they disposed of the matter by just commenting on the proficiency of the detenu over English language. The same is liable to be

reversed.

The appeal as well as the writ petition is allowed and the order of detention is quashed. The detenu unless otherwise required in any other matter shall be set at liberty forthwith.

JUDIS