

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 24.12.2011

+ **WP (CRL.) 1672/2011**

BHARTI ARORA ... Petitioner

versus

UNION OF INDIA & OTHERS ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Mukul Rohtagi, Sr Advocate with Mr Saurabh Kirpal,
Mr Sanjay Agarwal, Mr G.K. Sarkar.
For the Respondent/UoI : Mr Pawan Narang with Mr Puskal Gogoi.
For the Respondent/State : Mr Saleem Ahmed (ASC).

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MS. JUSTICE VEENA BIRBAL

JUDGMENT

BADAR DURREZ AHMED, J

1. On 23.12.2011, we had passed the following order:-

“The impugned order of detention bearing No.673/18/2011-Cus.VIII dated 08.09.2011 issued by the respondent No.2 in respect of the detenu (Shri Harmesh Arora) is quashed. The said Shri Harmesh Arora be released from detention forthwith and be set at liberty.
The writ petition is allowed.
The reasons shall follow.
A copy of this order be given dasti under the signature of the Court Master.”

The reasons are as under:-

2. This writ petition seeks the quashing of the detention order bearing No. No.673/18/2011-Cus.VIII dated 08.09.2011 issued by the respondent No.2 (Rasheda Hussain, Additional Secretary to Government of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau, Janpath Bhawan, Janpath, New Delhi) against the detenu (Shri Harmesh Arora). It is also prayed that a direction be issued that the said detenu be released from detention and be set at liberty forthwith. The petition has been filed by the mother of the said detenu.

3. The detention order has been challenged, primarily, on two grounds. One ground of challenge is that the detenu has not been supplied with the relied upon documents, which were meant for him. It is the case of the petitioner that the relied upon documents that were given to the detenu were those which related to Shri Mohan Lal Arora (the detenu's father). As a consequence, the documents, which were meant for the detenu, have not been supplied to the detenu. It is, therefore, contended on behalf of the detenu that the impugned detention order is vitiated inasmuch as the procedural safeguard of supply of relied upon documents *pari passu* the execution of the detention order and the supply of the grounds for detention has not been followed. The other point urged on behalf of the detenu is that the grounds of detention, which have been served upon the detenu, indicate that one of the representations against the detention order can be made to the Joint Secretary (COFEPOSA), Government of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau, 6th Floor, B-Wing, Janpath Bhawan, Janpath, New Delhi – 110001, whereas

the detaining authority, who issued the impugned detention order, was the respondent No.2 and who is an Additional Secretary to the Government of India. According to the learned counsel appearing on behalf of the petitioner, this would also vitiate the detention inasmuch as the opportunity of making a representation to the detaining authority has been denied to the detenu because the representation is to be made to the Joint Secretary (COFEPOSA) and not to the detaining authority. It is, therefore, submitted that there has been a violation of the Constitutional scheme and, consequently, the detention order and the detention pursuant thereto, stand vitiated.

4. On the other hand, it has been contended by the learned counsel for the respondents that, insofar as the first point is concerned, while it is true that the list of relied upon documents, which was served upon the detenu (Harmesh Arora), was, in fact, meant for his father (Shri Mohan Lal Arora), the documents in the case of both the detenu (Harmesh Arora) and his father (Mohan Lal Arora) were identical. He submitted that the only mistake that has been committed is that the list of documents meant for Shri Mohan Lal Arora has been handed over to the detenu (Harmesh Arora). However, Shri Harmesh Arora had endorsed the list which was meant for him by way of acknowledgment of receipt. Thus, according to Mr Narang, who appeared on behalf of the respondents, no prejudice, at all, was caused to the detenu (Harmesh Arora) and, therefore, the detention could not be challenged on this ground. As regards the second point, Mr Narang submitted that the original detaining authority (Smt. Rasheda Hussain) had been transferred

to some other department and that was the reason as to why the representation was to be made to the Joint Secretary (COFEPOSA), who was also empowered under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'the COFEPOSA Act'). Although he was not the person who actually passed the detention order in the present case, Mr Narang submitted that the representation would be considered by an empowered person and, therefore, the detenu can have no grievance on this ground.

5. Before we consider these rival contentions and examine the decisions cited by the learned counsel, it would be appropriate to set out some facts.

6. On 25.10.2009, officers of the Directorate of Revenue Intelligence commenced search and seizure operations at the office and residential premises of the detenu (Harmesh Arora) as well as of one Harish Chaudhary. On 07.11.2009, the detenu was arrested for the alleged offences under Sections 132 and 135 of the Customs Act, 1962. On 29.12.2009, he was released on bail. The impugned detention order was issued on 08.09.2011 by the respondent No.2 (Rasheda Hussain, Additional Secretary to the Government of India) purportedly in exercise of the powers conferred under Section 3(1) of the COFEPOSA Act for preventing the detenu from engaging in smuggling activities in future. The grounds of detention were also issued on the same date, i.e., on 08.09.2011 under the signatures of the said respondent No.2. On 29.11.2011, the detenu, on coming to know that a detention order has been passed against him, gave advance notice through his advocate

regarding his intention to surrender at about 15.00 hrs in the office of the detaining authority. It was also indicated in the said letter dated 29.11.2011 that the grounds of detention also ought to be served upon him as soon as he surrenders.

7. On 29.11.2011 itself, the detenu surrendered and the impugned order of detention was served upon him under a dated acknowledgement. As per the petition, the acknowledgement of the detenu was taken on each page of the grounds of detention. The list of documents served on the detenu alongwith 1368 pages of the documents mentioned therein was marked as: "List of relied upon documents: Shri Mohan Lal Arora". It is on the basis of this that the submission has been made on behalf of the detenu that the documents referred to and relied upon for the issuance of the detention order against the detenu (Harmesh Arora) have not been supplied to him at all.

8. Upon the detenu being taken into custody, he was lodged in the Central Prison. On 03.12.2011, the petitioner (i.e., the detenu's mother) sent a representation on behalf of the detenu to the Joint Secretary (COFEPOSA) for revocation of the detention order. On the same day, the present writ petition was also filed before this court.

9. In the representation dated 03.12.2011, the point with regard to non-service of the relied upon documents was specifically taken. In ground 'B' of the said representation, it has been mentioned that the documents referred to and relied upon for the issuance of the detention order against the detenu (Harmesh Arora) have not been supplied to him

till date and, therefore, the detenu has been deprived from exercising his fundamental right guaranteed by Article 22(5) of the Constitution of India of making an effective representation at the earliest opportunity. In the very same representation, in ground 'C' thereof, it has also been mentioned that the manner in which the detention order and the grounds of detention and the list of documents have been supplied to the detenu, had caused confusion in his mind and, therefore, resulted in denial of an opportunity of making an effective representation. It has been specifically noted in the said representation that although the impugned order of detention was issued by the respondent No.2, para 28(i) of the grounds of detention gives an impression that the detaining authority is the respondent No.3 inasmuch as the representation is to be made to him. Para 28 (i) of the grounds of detention reads as under:-

“Representation meant for the Detaining Authority should be addressed to the Joint Secretary (COFEPOSA), Government of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau, 6th Floor, B Wing Janpath Bhavan, Janpath, New Delhi-110001.”

Non-supply of relied upon documents

10. It is an admitted fact that the list of documents furnished to the detenu (Harmesh Arora) was, in fact, not meant for him, but for his father (Shri Mohan Lal Arora) as the list itself was titled: “List of relied upon documents: Shri Mohan Lal Arora”. The learned counsel for the petitioner submitted that, if the documents are not supplied *pari passu* the grounds, the order of detention is rendered void *ab initio*. For this proposition, he placed reliance on the Supreme Court decision in the case

of **M. Ahamedkutty v. Union of India and Another: 1990 (2) SCC 1.** The learned counsel for the respondents, on the other hand, relied upon a decision of a Division Bench of this court in the case of **Vijay Kumar Gupta v. Union of India: 2002 (98) DLT 638** to submit that the supply of documents would have to be examined on the touchstone of prejudice, if any, caused to the detenu or not. According to Mr Narang, no prejudice whatsoever had been caused to the detenu inasmuch as the detenu had received the relied upon documents in respect of Mohan Lal Arora, which, according to Mr Narang, were identical to the documents, which were meant for the detenu (Harmesh Arora), but not actually supplied to him. He further submitted that since the documents were identical, no prejudice was caused to the detenu and the fact that a representation was made on the basis of the material submitted to the detenu, this further reinforced the submission that no prejudice whatsoever had been caused.

11. In *M. Ahamedkutty (supra)*, the Supreme Court observed that the Constitutional imperatives in Article 22 (5) are two-fold; one, the detaining authority must, as soon as may be, that is, as soon as practicable, after the detention, communicate to the detenu the grounds on which the order of detention has been made and; two, the detaining authority must afford the detenu the earliest opportunity of making the representation against the order of detention. The Supreme Court observed that the right is to make an “effective” representation and when some documents are referred to or relied on in the grounds of detention,

without copies of such documents, the grounds of detention would not be complete. It is in this context that the Supreme Court held:-

“The detenu has, therefore, the right to be furnished with the grounds of detention along with the documents so referred to or relied on. If there is failure or even delay in furnishing those documents it would amount to denial of the right to make an effective representation. This has been settled by a long line of decisions: *Ramachandra A. Kamat v. Union of India*: 1980 (2) SCC 270; *Frances Coralie Mullin v. W. C. Khambra and Ors.*: 1980 (2) SCC 275; *Smt. Ichhu Devi Choraria v. Union of India*: 1980 (4) SCC 531; *Pritam Nath Hoon v. Union of India*: 1980 (4) SCC 525; *Shri Tushar Thakkar v. Union of India*: 1980 (4) SCC 499; *Lallubhai Jogibhai Patel v. Union of India*: 1981 (2) SCC 427; *Kirit Kumar Chaman Lal Kundaliya v. Union of India*: 1981 (2) SCC 436 and *Smt. Ana Carelina D'Souza v. Union of India*: 1981 Suppl. SCC 53.”

12. The Supreme Court went to the extent of holding that it was immaterial as to whether the detenu already knew about their contents or not. The exact words used by the Supreme Court are as under:-

“20. It is immaterial whether the detenu already knew about their contents or not. In *Mehrunissa v. State of Maharashtra*: 1981 (2) SCC 709, it was held that the fact that the detenu was aware of the contents of the documents not furnished was immaterial and non-furnishing of the copy of the seizure list was held to be fatal. To appreciate this point one has to bear in mind that the detenu is in jail and has no access to his own documents. In *Mohd. Zakir v. Delhi Administration* 1982: 1982 (3) SCC 216, it was reiterated that it being a Constitutional imperative for the detaining authority to give the documents relied on and referred to in the order of detention *pari passu* the

grounds of detention, those should be furnished at the earliest so that the detenu could make an effective representation immediately instead of waiting for the documents to be supplied with. The question of demanding the documents was wholly irrelevant and the infirmity in that regard was violative of Constitutional safeguards enshrined in Article 22(5).”

13. In the present case, we find that the list of documents, which was supplied to the detenu (Harmesh Arora), was not meant for him, but for his father (Shri Mohan Lal Arora). The documents, which are described in the list of documents may have been identical with the documents, which were to be supplied to Shri Mohan Lal Arora, but, how is the detenu to know this? We must emphasise what the Supreme Court observed in *Ahamedkutty (supra)* that one has to bear in mind the fact that the detenu is in jail and has no access to his own documents. The detenu cannot presume that the documents, which were meant for his father, were identical to the documents, which were meant for him. The impugned detention order in respect of the detenu is an independent one and does not relate to the detenu’s father (Shri Mohan Lal Arora). Even the grounds of detention are in respect of the detenu (Harmesh Arora) and not in respect of his father (Shri Mohan Lal Arora). How is the detenu to know as to whether the grounds of detention of a co-detenu or the documents relied upon in the case of a co-detenu are identical to those meant for the detenu ? Consequently, if the list of documents meant for the detenu has not been supplied to the detenu *pari passu* the grounds of detention, it would amount to a violation of the constitutional mandate inasmuch as the detenu would be deprived of the right of making an effective representation. This is exactly what has happened in

the present case. Although this may sound very technical, but, we must not forget that this is not a case of detention post-trial, but of detention without a trial and without the detenu having had an opportunity of meeting the case against him. It is for this reason that the Constitution has provided safeguards which the courts have followed meticulously so that no person is deprived of his liberty without the due process of law.

14. In this context, it would be apt to refer to **State of T.N. v. Senthil Kumar: AIR 1999 SC 971**, wherein the Supreme Court had observed that:-

“Whereas punitive incarceration is after trial on the allegations made against a person, preventive detention is without trial into the allegations made against him. The Courts, therefore, adhere to strict compliance of the procedural safeguards in every case of preventive detention. A casual or random approach in complying with procedural safeguards more often results in infringement of the safeguard and vitiates the detention.”

Section 3(3) of the COFEPOSA Act reads as under:-

“3. Power to make orders detaining certain persons. –

- | | | | | |
|-----|--|-------|-------|-------|
| (1) | xxxxx | xxxxx | xxxxx | xxxxx |
| (2) | xxxxx | xxxxx | xxxxx | xxxxx |
| (3) | For the purposes of clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily 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.”

15. So, as per Section 3(3) of the COFEPOSA Act, the grounds of detention have to be supplied to the detenu ‘as soon as may be after the detention’, but, ordinarily 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 is no claim of any exceptional circumstances on the part of the respondents. As such, the grounds ought to have been furnished within five days of the detention, that is, within five days of 29.11.2011. Now, in **M. Ahamedkutty** (*supra*), the Supreme Court observed as follows:-

“The right is to make an effective representation and when some documents are referred to or relied on in the grounds of detention, without copies of such documents, the grounds of detention would not be complete.”

(underlining added)

16. In the present case, the documents which were supplied to the detenu on 29.11.2011, as per the list furnished to him, were meant for Sh. Mohan Lal Arora. It is not now open to the respondents to submit that the documents meant for Sh. Mohan Lal Arora and the detenu (Harmesh Arora) were identical. How was the detenu to know ? If a mistake had been committed on 29.11.2011, the detaining authority had five days to correct the mistake by supplying the set of documents meant for the detenu. This, too, was not done. It is only indicative of the casual manner and approach of the detaining authority in complying with the procedural safeguards. If the documents meant for the detenu which

have been relied upon in the grounds have not been supplied within the stipulated time, it can only mean that the detenu has been denied his right of making an effective representation.

17. Therefore, there is a violation of the Constitutional mandate enshrined in Article 22(5) of the Constitution. Consequently, the detention is vitiated and the detention order is liable to be quashed and the detenu is entitled to be set at liberty forthwith.

Who is the detaining authority ?

18. The detention order has undoubtedly been issued by the respondent No.2 (Rasheda Hussain, Additional Secretary to the Government of India). It is also clear that the purported grounds of detention have also been signed by the said respondent No.2. But, in the said grounds, the detenu has been informed that the representation meant for the detaining authority should be addressed to the Joint Secretary (COFEPOSA), Government of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau, 6th Floor, B Wing, Janpath Bhawan, Janpath, New Delhi – 110001. From this, it can be inferred that though the detention order has been passed by the respondent No.2, the representation is to be addressed to the respondent No.3.

19. Section 3(1) of the COFEPOSA Act, inter alia, stipulates that any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of Section 3, may make an order of detention. In other words, the officer,

who is to function as a detaining authority under the COFEPOSA Act, must not be below the rank of a Joint Secretary to the Government of India and that such officer must also be specially empowered for the purposes of the said Section. There is no dispute with the fact that Smt Rasheda Hussain was specially empowered for the purposes of Section 3 of the COFEPOSA Act by virtue of an order dated 17.06.2011 which was also published in the Gazette of India. The order reads as under:-

“MINISTRY OF FINANCE”
(Department of Revenue)
(CENTRAL ECONOMIC INTELLIGENCE BUREAU)

ORDER

New Delhi, the 17th June, 2011

S.P.1418(E). – In exercise of the powers conferred by sub-section (1) of Section 3, of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974), the Central Government hereby specially empowers Smt. Rasheda Hussain, Additional Secretary to the Government of India, for the purpose of the said Section.”

20. It is apparent that Smt. Rasheda Hussain was specially empowered under Section 3 by name and not by virtue of her office. The fact that she was an Additional Secretary to the Government of India is only her qualification for being empowered, as Section 3(1) requires that the officer of the Central Government should not be below the rank of a Joint Secretary.

21. It was argued on behalf of the detenu that Smt. Rasheda Husain was an Additional Secretary when the order dated 17.06.2011 under Section 3(1) was passed and she continues to be an Additional Secretary to the Central Government. Thus, she continues to be the

detaining authority and therefore the detenu's representation ought to be considered by her. It was contended on behalf of the respondents that Smt. Rasheda Hussain has been transferred to Faridabad on her promotion as Director General, National Academy of Customs, Excise & Narcotics, Faridabad and that on 10.09.2011 she relinquished the charge of Additional Secretary (COFEPOSA) in order to assume the charge as Director General, NACEN, Faridabad. The transfer on promotion was in pursuance to the Office Order No.168/2011 issued vide F. No.A32012/30/2010-Ad.II dated 09.09.2011. It was, therefore, submitted by the learned counsel for the respondents that Smt. Rasheda Hussain was no longer the detaining authority insofar as the detenu (Harmesh Arora) was concerned. Consequently, the representation was to be addressed to the Respondent No.3 [Joint Secretary (COFEPOSA), Government of India] who had also been specially empowered under Section 3(1) to function as a detaining authority by virtue of an order dated 10.05.2010 which was also published in the Official Gazette.

22. It was further submitted on behalf of the respondents that since Smt. Rasheda Hussain had been transferred on promotion, she no longer was the detaining authority and, therefore, respondent No.3 would take her place as he was also empowered under Section 3(1) of the COFEPOSA Act.

23. According to the learned counsel for the petitioner, there are several problems with the line of argument adopted by the respondents. First of all, the course suggested by the respondents would mean that a Joint Secretary would be considering the revocation of a detention order

passed by an officer senior in rank inasmuch as Smt. Rasheda Hussain was an Additional Secretary when she passed the impugned detention order. Secondly, Smt. Rasheda Hussain was empowered by name and not by virtue of office. Therefore, her transfer would not alter her position as a detaining authority in respect of the detenu (Harmesh Arora). There is no order revoking her authority to function as a detaining authority under Section 3(1) of the COFEPOSA Act. It might have been a different matter if Smt. Rasheda Hussain had retired or resigned from service. But, that is not the case. It was argued that she continued to be an Additional Secretary to the Government of India and, therefore, her authority to act under Section 3(1) of the COFEPOSA Act continued, at least, insofar as the detenu (Harmesh Arora) was concerned. Thirdly, the power of the detaining authority to consider a representation flows from Section 21 of the General Clauses Act, 1897 which provides that where, by any Central Act or Regulation a power to issue notifications, orders, rules or by-laws is conferred, then that power includes a power exercisable in the like manner and subject to the like sanction and condition (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued. Thus, the representation must be addressed to and considered by the person who can revoke the order of detention. And, that person is the detaining authority who passed the detention order, if he / she is available in service and his / her authority has not been revoked. Fourthly, it was submitted that the detention order was issued on 08.09.2011 and the grounds were also signed by Smt. Rasheda Hussain on 08.09.2011. At that point of time, she had not been transferred, yet the grounds indicated

that the representation meant for the detaining authority ought to be sent to the Joint Secretary (COFEPOSA). It was argued that she could not have done so. Fifthly, in any event, this has created confusion in the mind of the detenu as he is not sure as to who is his detaining authority for the purposes of considering his representation.

24. All these are serious concerns on the part of the detenu. However, because of the view we have already taken on the point of non-supply of relied upon documents, we do not feel it necessary to conclusively deal with the question as to who is to consider the detenu's representation meant for the detaining authority. We leave this issue open.

25. These are the reasons as to why, by our said order dated 23.12.2011, while allowing the writ petition, we quashed the impugned detention order and directed that the detenu (Shri Harmesh Arora) be released from detention forthwith and be set at liberty.

BADAR DURREZ AHMED, J

VEENA BIRBAL, J

December 24, 2011

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