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UNION OF INDIA AND ANR.

v

HARISH KUMAR

MARCH 14, 2007

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[H.K. SEMA AND B. SUDERSHAN REDDY, JJ.]

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Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974—s. 3 (1)—Detention under—Writ Petition—Allowed by High Court—On the ground that non-consideration of representation of the detenu, vitiated the detention order being violative of Article 22(5) of the Constitution—No order of release as the period of detention already over—On appeal, held: Detenu has the right to make representation to Central Government and its expeditious disposal under Article 22(5)—The failure on the part of Central Government to consider the representation does not

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render the detention order void ab initio—It is only the further detention which is vitiated—In the facts of the present case, the belated consideration of the representation does not attract protection under Article 22(5) High Court wrongly declared the detention order to be vitiated—There is no impediment to proceed against the detenu under SAFEMA—Constitution of India, 1950—Articles 22(5) and 226—Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976.

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Respondent was detained under section 3 (1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The respondent through his brother filed Writ Petition assailing the legality of the detention order. High Court allowed the petition holding that non-consideration of the representation of the detenu submitted to the Central Government vitiated the order of detention being violative of protection under Article 22 (5) of Constitution of India. However, it also observed that as the period of detention was already over, no direction for release of the detenu was required. Hence the present appeal.

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Allowing the appeal, the Court

HELD: 1.1. The right to make a representation against the order of detention is the most cherished and valuable right conferred upon a detenu

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under Article 22(5) of the Constitution of India and if there has been any A
 infraction of such right the detenu is entitled to be released. The right of a
 person detained to make a representation against the order of detention is a
 comprehensive one. It comprehends that the person detained has the right to
 make a representation not only to the officer who made the order of detention
 but also to the State Government and the Central Government who are B
 competent to revoke the order of detention. In the instant case the
 representation had been considered by the Secretary, Government of India on
 behalf of the Central Government and rejected the same whereas the writ
 petition challenging the detention order had been filed as far back as on
 25.11.2002. The belated consideration of the representation does not satisfy
 the constitutional requirements as provided for under Article 22 (5) of the C
 Constitution. [Paras 8 and 13] [998-G, H; 1001-F]

1.2. Every person detained under the provisions of the Conservation of
 Foreign Exchange and Prevention of Smuggling Activities Act, 1974 has a
 right to make a representation to the Central Government which is required
 to be considered and disposed of as expeditiously as possible. [Para 8] D

Kamlesh Kumar Ishwardas Patel v. Union of India, [1995] 4 SCC 51,
 referred to.

1.3. The failure on the part of the Central Government to independently
 consider the representation submitted by the detenu his detention renders
 further detention of the detenu illegal. The initial order of detention passed
 under Section 3(1) of the COFEPOSA Act does not get vitiated. The very order
 of detention passed under Section 3(1) of the COFEPOSA Act cannot be
 declared void *ab initio*. [Para 8] [999-C] E

1.4. An order of detention passed by the detaining authority on the basis
 of material made available for its consideration and at its satisfaction does
 not get vitiated because of a subsequent infraction of the detenu's right to
 make a representation and its disposal by the authorities. [Para 10] [999-G] F

Meena Jayendra Thakur v. Union of India, [1999] 8 SCC 177; *Rajammal*
v. State of Tamil Nadu and Anr., [1999] 1 SCC 417 and *Smt. Santosh Anand*
v. Union of India and Ors., [1981] 2 SCC 420, relied on. G

1.5. The High Court at the most could have made such declaration and
 disposed of the writ petition requiring no further adjudication inasmuch as
 the respondent was already released. The High Court committed grave error H

A in declaring the detention order to be vitiated. The detention order passed at the satisfaction of the detaining authority on the basis of the material available in no manner gets vitiated for the reason of non-consideration of the representation made by the respondent to the Central Government. The Central Government's inaction in considering the representation of the respondent undoubtedly amounts to infringement of guaranteed right of the detenu but not render initial order of detention void *ab initio*. The initial decision is not *ultra vires* and, therefore, required no interference by the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

[Para 13] [1001-G, H; 1002-A, B]

C 2. The respondent appears to have pressed the writ petition in order to avoid further proceedings under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA). Section 2 of SAFEMA provides that the provisions of the Act shall apply inter alia to every person in respect of whom an order of detention has been made under the COFEPOSA Act provided that such order of detention has not been set aside

D by a court of competent jurisdiction. It is declared that there are no legal impediments to proceed against the respondent under the provisions of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976. [Paras 4 and 14] [997-H; 998-A; 1002-C]

E CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 343 of 2007.

From the final Judgment and Order dated 04.05.2005 of the High Court of Delhi at New Delhi in Writ Petition (Crl). No. 1362 of 2002.

F Amarendra Sharan, ASG, B.B. Singh, Amit Anand Tiwari, B.K. Prasad and P. Parmeswaran for the Appellants.

Dr. Abhishek M. Singhvi, R.K. Handoo, K.V. Mohan and Santosh Dwivedi for the Respondent.

G The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. Leave granted.

H 2. This appeal by way of special leave petition is directed against the judgment dated 4.5.2005 of the Delhi High Court in Writ Petition (Crl.) No. 1362 of 2002. The appellants are the Union of India and the detaining authority.

The Joint Secretary, Government of India issued the order of detention under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the COFEPOSA Act") on 14.6.2002. The said order of detention was served upon the sole respondent on 5.9.2002. The grounds of detention were set out in the backdrop of the detailed factual matrix which were made available to the detaining authority about various alleged omissions, misdeclaration and concealment etc. which according to the detaining authority amounted to smuggling of goods within the meaning of the provisions of the COFEPOSA Act. We are not required to notice the details of the grounds of detention for the purposes of disposal of this appeal.

3. The respondent through his brother filed the writ petition in Delhi High Court on 21.11.2002 assailing the legality of the order of detention on various grounds. The only ground on which the writ petition was pressed and disposed of relates to non-consideration of the representation dated 01.10.2002 submitted to the Central Government by the detenu. It was contended that non-consideration of the said representation vitiated the order of detention being violative of the protection granted under Article 22 (5) of the Constitution of India. The High Court, by the impugned judgment, allowed the writ petition holding that there has been a failure on the part of the Central Government in considering the representation of the detenu. The order of the High Court, however, is not clear and it may be useful to notice the operative portion thereof which reads as under:

"In view of the foregoing discussion, it is held that there has been a failure on the part of respondents to consider within a reasonable time the representation of the petitioner sent vide dated 27.9.2002, by the Central Government as required in terms of Section 11 of the COFEPOSA thereby vitiating the detention order dated 14.6.2002 which had been rendered otiose. Held accordingly. As the period of detention is already over and the petitioner is not under detention no direction for release of the petitioner are required to be given."

4. We may at the outset state that in view of the fact the period of detention came to end by afflux of time and the detenu had already been released on 4.9.2003 the High Court could have simply disposed of the writ petition without going into the legality of the order of detention. The respondent appears to have pressed the writ petition in order to avoid further proceedings under the Smugglers and Foreign Exchange Manipulators

A (Forfeiture of Property) Act, 1976 (hereinafter referred to as "the SAFEMA"). Be it noted Section 2 of the SAFEMA provides that the provisions of the Act shall apply inter alia to every person in respect of whom an order of detention has been made under the COFEPOSA Act provided that such order of detention has not been set aside by a court of competent jurisdiction.

B 5. Mr. Amarendra Sharan, learned Additional Solicitor General appearing for the appellants submitted that the High Court committed gross error in quashing the detention order dated 14.6.2002 with its laconic observation "stands vitiated". By virtue of the impugned judgment and order of the High Court the appellants are prevented to proceed further in the matter under the SAFEMA. Learned Additional Solicitor General further contended that assuming without admitting even if the representation of the respondent was not considered and disposed of within a reasonable time, only the continued detention of the detenu may be vitiated and the original detention order cannot be declared void ab initio.

D 6. Dr. Abhishek M. Singhvi, learned Senior Counsel appearing for the respondent while countering the submissions of the learned Addl. Solicitor General contended that the High Court was fully justified in quashing the very order of detention. It was further submitted that the right to make representation against the order of detention is conferred upon the detenu under Article 22 (5) of the Constitution of India and its non-consideration vitiates the very order of detention. The concept of continued detention would be applicable only in cases where there has been a declaration made under Section 9 of the Act extending the period of detention without obtaining the opinion of the Advisory Board.

F 7. We have carefully considered the rival submissions and scrutinized the impugned judgment of the Delhi High Court and the conclusion arrived at in the said judgment.

G 8. It is so well settled and needs no re-statement that the right to make a representation against the order of detention is the most cherished and valuable right conferred upon a detenu under Article 22(5) of the Constitution of India and if there has been any infraction of such right the detenu is entitled to be released. Construing the provisions of Article 22 (5) this Court in more than one decision explained that the right of a person detained to make a representation against the order of detention is a comprehensive one. It comprehends that the person detained has the right to make a representation

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not only to the officer who made the order of detention but as well as to the State Government and the Central Government who are competent to revoke the order of detention. Under Section 3 of the COFEPOSA Act an order of detention can be made by: (i) the Central Government; or (ii) an officer specially empowered by the Central Government; or (iii) the State Government; or (iv) an officer specially empowered by the State Government. Section 11 of the COFEPOSA Act in clear terms provides for revocation of detention order by authorities other than the authority which has made the order. Under clause (b) of sub-section (1) an order made by an officer specially empowered by the Central Government or an order made by the State Government can be revoked by the Central Government. This means that the Central Government has the power to revoke the order made by an officer specially empowered by the Central Government. We do not find any difficulty whatsoever to hold that every person detained under the provisions of the COFEPOSA Act has a right to make a representation to the Central Government which is required to be considered and disposed of as expeditiously as possible.[See: *Kamlesh Kumar Ishwardas Patel v. Union of India*, [1995] 4 SCC 51]. This Court in *Kamlesh Kumar Ishwardas Patel's case* (supra) while considering the effect of non-consideration of a representation of the person detained by the officer making the order of detention observed thus:

“On that basis it has to be held that since there was a denial of the constitutional safeguard provided to the detenu under Article 22 (5) of the Constitution on account of the failure on the part of the officer who had made the order of detention to independently consider the representation submitted by the detenu against his detention and to take a decision on the said representation *the further detention of the detenu Ishwardas Bechardas Patel is rendered illegal.*”

In the same analogy it must be held that the failure on the part of the Central Government to independently consider the representation submitted by the detenu against his detention renders further detention of the detenu illegal. The initial order of detention passed under Section 3 (1) of the COFEPOSA Act does not get vitiated. The very order of detention passed under Section 3 (1) of the COFEPOSA Act cannot be declared void *ab initio*. It is unnecessary to multiply authorities in support of our conclusion. In *Meena Jayendra Thakur v. Union of India*, [1999] 8 SCC 177 this Court relying on the judgment rendered by the Constitution Bench in *Kalesh Kumar Ishwardas Patel* (supra) held:

A "the authority issuing a declaration under Section 9 of the COFEPOSA
Act must intimate the detenu that he has the right of opportunity to
represent to the declaring authority and non-intimation of the same
infringes upon the constitutional right of the detenu to make a
B representation under Article 22 (5) and, therefore, the notification
issued under Section 9 (1) becomes invalid and the *continued detention*
pursuant to such declaration and the opinion of the Advisory Board
within the extended period as well as the confirmation by the State
Government are vitiated."

C 9. The Court further proceeded to consider the question as to whether
the initial order of detention issued under Section 3 (1) of the COFEPOSA
Act can be held to be *ab initio* void on the ground that the authority issuing
declaration under Section 9 of the COFEPOSA Act failed to intimate the
detenu of his right to represent to the declaring authority. This Court after
elaborate consideration of the matter held:

D "The infraction of the constitutional right to make a representation
or the opinion of the Advisory Board and the order of detention not
being made within the period prescribed under law does not get into
the satisfaction of the detaining authority while making an order of
detention under Section 3 (1) of the COFEPOSA Act. If the detaining
E authority on the basis of the materials before him did arrive at his
satisfaction with regard to the necessity for passing an order of
detention and the order is passed thereafter, the same cannot be held
to be void because of a subsequent infraction of the detenu's right
or of non-compliance with the procedure prescribed under law. On
such infraction and for non-compliance with the procedure prescribed
F under law, *the further detention becomes illegal*. But it does not
affect the validity of the order of detention itself issued under Section
3 (1) of the Act by the detaining authority." (emphasis added)

G 10. In our considered opinion the decision of this Court in *Meena
Jayendra Thakur* (supra) is an authority for the proposition that an order
of detention passed by the detaining authority on the basis of material made
available for its consideration and at its satisfaction does not get vitiated
because of a subsequent infraction of the detenu's right to make a
representation and its disposal by the authorities. We are unable to agree
with the submission of Dr. Singhvi, learned Sr. Counsel for the respondent.

H 11. In *Rajammal v. State of Tamil Nadu & Anr.*, [1999] 1 SCC 417 there

was a delay in considering the representation made by the detenu therein and the Court came to the conclusion that the delay from 9.2.1998 to 14.2.1998 remained unexplained and "such unexplained delay has vitiated further detention of the detenu. The corollary thereof is that further detention must necessarily be disallowed." This Court accordingly directed the detenu to be set at large. The order of detention as such was not quashed.

12. In *Smt. Santosh Anand v. Union of India & Ors.* [1981] 2 SCC 420 one Mangat Ram Anand was detained under the order dated April 3, 1979 issued under Section 3 (1) of the COFEPOSA Act. On April 20, 1979 a representation was made to the detaining authority (Chief Secretary) by the detenu against the order of detention. On 24.5.1979 the detenu was informed that his representation has been considered by the Administrator, Delhi and had been rejected. In the writ petition filed on behalf of the detenu it was contended that detenu's representation ought to have considered by the detaining authority itself, namely, by the Chief Secretary but the same had been straight away considered by the Administrator, who under Section 2 (f) of the COFEPOSA Act was the State Government for the Union Territory, thus depriving the detenu of his remedy to approach the Administrator as a higher authority after the rejection of his representation by the detaining authority. This Court came to the conclusion that the representation was not rejected by the detaining authority and as such constitutional safeguard under Article 22 (5) cannot be said to have been strictly observed or complied with but this Court did not quash the detention order dated April 3, 1979 but held "the continued detention of the detenu was clearly illegal and deserves to be quashed and the detenu be released forthwith."

13. In the instant case the representation dated 1.10.2002 has been considered by the Secretary, Government of India on behalf of the Central Government and rejected the same on 30.1.2003 whereas the writ petition challenging the detention order had been filed as far back as on 25.11.2002. The belated consideration of the representation does not satisfy the constitutional requirement as provided for under Article 22 (5) of the Constitution. The High Court at the most could have made such declaration and disposed of the writ petition requiring no further adjudication inasmuch as the respondent was already released on 4.9.2003. The High Court in our considered opinion committed grave error in declaring the detention order dated 14.6.2002 to be vitiated. The detention order dated 14.6.2002 passed at the satisfaction of the detaining authority on the basis of the material available in no manner gets vitiated for the reason of non-consideration of the

A representation dated 1.10.2002 made by the respondent to the Central Government. The Central Government's inaction in considering the representation of the respondent undoubtedly amounts to infringement of guaranteed right of the detenu but does not render initial order of detention *void ab initio*. The initial decision is not *ultra vires* and, therefore, required no interference by the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

14. For the aforesaid reasons we are of the view that the High Court committed grave error in quashing the order of detention dated 14.6.2002. We accordingly declare that there are no legal impediment to proceed against the respondent under the provisions of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976.

15. The appeal is accordingly allowed with no order as to costs.

K.K.T.

Appeal allowed.