2024 INSC 18

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. OF 2024
[Arising out of SLP (Crl.) No. 13193 of 2023]

SARFARAZ ALAM … APPELLANT

VERSUS

UNION OF INDIA & ORS. … RESPONDENTS

J U D G M E N T

M. M. Sundresh, J.

1. Leave granted.

2. Heard the learned senior counsel appearing for the appellant and the learned Additional Solicitor General for the respondents. We have perused the pleadings, documents and judgments. The present appeal is at the behest of the brother-in-law of the detenue, who is challenging the validity of the detention order and aggrieved at the refusal of the High Court of Calcutta to set aside the order of detention passed by the respondents.

FACTUAL BACKGROUND

3. On receiving information pertaining to a consignment containing gold and foreign currencies, escaping the watchful eyes of the customs department, four persons were apprehended. On eliciting further information from them, a search was conducted yielding huge quantity of gold, along with the recovery of foreign currencies of various denominations. As a consequence, the detenue was arrested, followed by a detention order passed by the detaining authority in exercise of the powers conferred under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as **"COFEPOSA Act"**). Prior to the said order he obtained an order of bail.

4. The detention order was passed against the detenue on 05.09.2023 after which he was subsequently detained on 19.09.2023 from his home, in the presence of his family members. Following the heels of the said order, the respondents made an endeavor to serve the grounds of detention along with the relevant documents on the very next day i.e., 20.09.2023 with due translation in the Bengali language. The detenue who was in a correctional home steadfastly refused to receive them despite persuasive attempts made by the Respondents. A *panchnama* was prepared, and before its due execution another abortive attempt was made to make him receive the

grounds of detention, along with the relevant documents. The detenue reiterated his earlier stand, however, a facility was extended to him to read the documents in its entirety. The *panchnama* was signed not only by two independent witnesses but the detenue as well. Interestingly, the detenue after signing the *panchnama* in the English language has proceeded further to write "*I have refused to receive any document*", leading to the obvious inference that his so called ignorance of English was only an afterthought.

5. Two more attempts were made by the respondents to serve the documents along with the grounds of detention. After refusing to receive the same on the second occasion i.e., on 03.10.2023 it was finally received by him on 10.10.2023. Interestingly, the detenue, through the appellant, filed the Writ Petition on 03.10.2023 *inter alia* contending that the respondents have not served the grounds of detention. The Division Bench of the High Court of Calcutta dismissed the Writ Petition *inter alia* holding that it was the detenue himself who had refused to receive the grounds of detention, a fact clearly indicated and proved through the *panchnama.*

SUBMISSIONS OF THE APPELLANT

6. Learned senior counsel appearing for the appellant submitted that it is incorrect to state that the detenue has refused to receive the grounds of detention. In any case the detenue has not been informed or communicated

regarding his right to make a representation against the detention order. Both functions are mutually reinforcing as mandatory under Article 22(5) of the Constitution of India, 1950.

7. Not all the relevant materials have been served on the detenue, such as the telephonic conversation between the detenue and others. The grounds of detention could have been served on the family members of the detenue even on the first occasion. There ought to have been an affidavit on the refusal of the detenue pertaining to the grounds of detention, by the official concerned. So also, on the question of the contents having been read over to him and being read by him. An order of detention being an exception, if two views are possible, the one in favor of the detenue should find favor with the Court. To reinforce the aforesaid submissions, learned senior counsel have placed reliance on the following decisions of this Court,

- **State Legal Aid Committee, J&K v. State of J&K, (2005) 9 SCC 667**
- **Kamleshkumar Ishwardas Patel v. Union of India, (1995) 4 SCC 51**
- **Thahira Haris v. Govt. of Karnataka, (2009) 11 SCC 438**

SUBMISSIONS OF THE RESPONDENTS

8. Repelling the contentions of the appellant, the learned Additional Solicitor General appearing for the respondents submitted that due procedure has been followed and ample opportunities were provided. The

translated version of the grounds of detention along with the relevant documents were attempted to be served upon the detenue on the very next day after his detention in due compliance of Section 3 of the COFEPOSA Act. A *panchnama* was drawn in the presence of two independent witnesses to cover the incident of detenu's refusal in accepting the ground of detention as per the extant principles of law. The *panchnama* bears the signature of the detenue with a remark "*I have refused to receive any document*", this sufficiently indicates that twin test enshrined in Article 22(5) of the Constitution of India was duly complied with. Even in the grounds of detention there are adequate averments clearly indicating detenue's right to make representation to the named authorities. The contention raised is only an afterthought and therefore the present appeal deserves to be dismissed.

9. Despite refusal of the detenue on the first occasion in receiving the grounds of detention, a second attempt was made on 03.10.2023, and ultimately on 10.10.2023, the detenue received the ground of detention with all the relevant documents. These chronological events amply suggest the conduct of the detenue in evading to receive the grounds of detention.

DISCUSSION

10. Article 22(5) of the Constitution of India can broadly be divided into two parts. Of these two parts there lies an underlying duty and obligation on the part of the authorities in not only serving the grounds of detention as soon as the case may be, after due service of the detention order and communication of the grounds of detention along with the documents relied upon in the language which he understands, but also for the purpose of affording him the earliest opportunity of making a representation questioning the detention order.

11. Therefore, the first part involves the bounden duty of the authorities in serving the grounds of detention containing such grounds which weighed in the mind of the detaining authority in passing the detention order. In doing so, adequate care has to be taken in communicating the grounds of detention and serving the relevant documents in the language understandable to the detenue. The second part is with respect to his right of making the representation. For exercising such a right, a detenue has to necessarily have adequate knowledge of the very basis of detention order. There is a subtle difference between the background facts leading to detention order and the grounds of detention. While the background facts are not required in detail, the grounds of detention which determine the

detention order ought to be found in the grounds supplied to the detenue. In other words, the knowledge of the detenue is to the subjective satisfaction of a detaining authority discernible from the grounds supplied to him. It is only thereafter that a detenue could be in a better position to take a decision as to whether he should challenge the detention order in the manner known to law. This includes his decision to make a representation to various authorities including the detaining officer. Therefore, an effective knowledge *qua* a detenue is of utmost importance.

12. On the second aspect, a detenue has to be informed that he has a right to make a representation. Such a communication of his right can either be oral or in writing. This right assumes importance as a detenue in a given case may well be a literate, semi-literate or illiterate person. Therefore, it becomes a cardinal duty on the part of the authority that serves the grounds of detention to inform a detenue of his right to make a representation.

13. While the aforesaid two rights and duties form two separate parts of Article 22(5) of the Constitution of India, they do overlap despite being mutually reinforcing. Though they travel on different channels, their waters merge at the destination. This is for the due compliance of Article 22(5). The entire objective is to extend knowledge to the detenue leading to a representation on his decision to question the detention order. Such a right

is an inalienable right under scheme of the Constitution of India, available to the detenue, corresponding to the duty of the serving authority.

14. Having reiterated the said principle of law, the question for consideration is '*to what extent a communication can be made both orally and in writing*'. In a case where a detenue is not in a position to understand the language, a mere verbal explanation would not suffice. Similarly, where a detenue consciously declines to receive the grounds of detention, he has to be informed about his right to make a representation. In such a scenario, the question as to whether the grounds of detention contained a statement that a detenue has got a right to make a representation to named authorities or not, pales into insignificance. This is for the reason that a detenue despite refusing to receive the grounds of detention might still change his mind and receive them if duly informed of his right to challenge a detention order by way of a representation. We may clarify, in a case where a detenue receives the ground of detention in the language known to him which contains a clear statement over his right to make a representation, there is no need for informing verbally once again. Such an exercise, however, would be required when the grounds of detention do not indicate so.

15. We would like to reinforce our position on the aforesaid exposition of law by placing reliance on the following decisions of this Court:

- **Lallubhai Jogibhai Patel v. Union of India, (1981) 2 SCC 427**

> **"20**….**"Communicate" is a strong word. It means that sufficient knowledge of the basic facts constituting the "grounds" should be imparted effectively and fully to the detenu in writing in a language which he understands. The whole purpose of communicating the "ground" to the detenu is to enable him to make a purposeful and effective representation. If the "grounds" are only verbally explained to the detenu and nothing in writing is left with him, in a language which he understands, then that purpose is not served, and the constitutional mandate in Article 22(5) is infringed**. If any authority is needed on this point, which is so obvious from Article 22(5), reference may be made to the decisions of this Court in *Harikisan* v. *State of Maharashtra* [1962 Supp 2 SCR 918 : AIR 1962 SC 911 : (1962) 1 Cri LJ 797] and *Hadibandhu Das* v. *District Magistrate* [(1969) 1 SCR 227 : AIR 1969 SC 43 : 1969 Cri LJ 274]."
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> (emphasis supplied)

- **State of Bombay v. Atma Ram Shridhar Vaidya, AIR 1951 SC 157**

> **"10**….The question has to be approached from another point of view also. As mentioned above, **the object of furnishing grounds for the order of detention is to enable the detenu to make a representation i.e. to give him an opportunity to put forth his objections against the order of detention. Moreover, "the earliest opportunity" has to be given to him to do that. While the grounds of detention are thus the main factors on which the subjective decision of the Government is based, other materials on which the conclusions in the grounds are founded could and should equally be conveyed to the detained person to enable him to make out his objections against the order. To put it in other words, the detaining authority has made its decision and passed its order**. The detained person is then given an opportunity to urge his objections which in cases of preventive detention comes always at a later stage. The grounds may have been considered sufficient by the Government to pass its judgment. **But to enable the detained person to make his representation against the order, further details may be furnished**

to him. In our opinion, this appears to be the true measure of the procedural rights of the detained person under Art. 22(5).

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12…The conferment of the right to make a representation necessarily carries with it the obligation on the part of the detaining authority to furnish the grounds i.e., materials on which the detention order was made. In our opinion, it is therefore clear that while there is a connection between the obligation on the part of the detaining authority to furnish grounds and the right given to the detained person to have an earliest opportunity to make the representation, the test to be applied in respect of the contents of the grounds for the two purposes is quite different. As already pointed out, for the first, the test is whether it is sufficient to satisfy the authority. For the second, the test is, whether it is sufficient to enable the detained person to make the representation at the earliest opportunity.

13. The argument advanced on behalf of the respondent mixes up the two rights given under Art. 22(5) and converts it into one indivisible right. We are unable to read Art. 22(5) in that way. **As pointed out above, the two rights are connected by the word "and". Furthermore, the use of the words "as soon as may be" with the obligation to furnish the grounds of the order of detention, and the fixing of another time limit, viz., the earliest opportunity, for making the representation, makes the two rights distinct. The second right, as it is a right of objection, has to depend first on the service of the grounds on which the conclusion i.e. satisfaction of the Government about the necessity of making the order, is based. To that extent and that extent alone, the two are connected. But when grounds which have a rational connection with the ends mentioned in S. 3 of the Act are supplied, the first condition is satisfied. If the grounds are not sufficient to enable the detenu to make a representation, the detenu can rely on his second right and if he likes may ask for particulars which will enable him to make the representation. On an infringement of either of these two rights the detained person has a right to approach the Court and complain that there has been an infringement of his fundamental**

right and even if the infringement of the second part of the right under Art. 22(5) is established he is bound to be released by the Court. To treat the two rights mentioned in Art. 22(5) as one is neither proper according to the language used, nor according to the purpose for which the rights are given.

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16. This detailed examination shows that preventive detention is not by itself considered an infringement of any of the fundamental rights mentioned in Part III of the Constitution. This is, of course, subject to the limitations prescribed in clause (5) of Art. 22. That clause, as noticed above, requires two things to be done for the person against whom the order is made. By reason of the fact that cl. (5) forms part of Part III of the Constitution, its provisions have the same force and sanctity as any other provision relating to fundamental rights. **As the clause prescribes two requirements, the time factor in each case is necessarily left fluid. While there is the duty on the part of the detaining authority to furnish grounds and the duty to give the detained person the earliest opportunity to make a representation which obligations, as shown above, are correlated, there exists no express provision contemplating a second communication from the detaining authority to the person detained. This is because in several cases a second communication may not be necessary at all. The only thing which emerges from the discussion is that while the authorities must discharge the duty in furnishing grounds for the order of detention "as soon as may be" and also provide "the earliest opportunity to the detained person to make the representation", the number of communications from the detaining authority to the detenu may be one or more and they may be made at intervals, provided the two parts of the aforesaid duty are discharged in accordance with the wording of cl. (5). So long as the later communications do not make out a new ground, their contents are no infringement of the two procedural rights of the detenu mentioned in the clause.** They may consist of a narration of facts or particulars relating to the grounds already supplied. But in doing so, the time factor in respect of the second duty, viz., to give the detained person the earliest opportunity to make a representation,

cannot be overlooked. That appears to us to be the result of cl. (5) of Art. 22."

(emphasis supplied)

- **Harikisan v. State of Maharashtra, AIR 1962 SC 911**

"7. It has not been found by the High Court that the appellant knew enough English to understand the grounds of his detention. The High Court has only stated that "he has studied up to 7th Hindi standard, which is equivalent to 3rd English standard". The High Court negatived the contention raised on behalf of the appellant not on the ground that the appellant knew enough English, to understand the case against him, but on the ground, as already indicated, that the service upon him of the Order and grounds of detention in English was enough communication to him to enable him to make his representation. We must, therefore, proceed on the assumption that the appellant did not know enough English to understand the grounds, contained in many paragraphs as indicated above in order to be able effectively to make his representation against the Order of Detention. **The learned Attorney-General has tried to answer this contention in several ways. He has first contended that when the Constitution speaks of communicating the grounds of detention to the detenue, it means communication in the official language, which continues to be English; secondly, the communication need not be in writing and the translation and explanation in Hindi offered by the Inspector of Police, while serving the order of detention and the grounds, would be enough compliance with the requirements of the law and the Constitution; and thirdly, that it was not necessary in the circumstances of the case to supply the grounds in Hindi. In our opinion, this was not sufficient compliance in this case with the requirements of the Constitution, as laid down in cl. (5) of Art. 22. To a person, who is not conversant with the English language, service of the Order and the grounds of detention in English, with their oral translation or explanation by the police officer serving them does not fulfil the requirements of the law. As has been explained by this Court in the case of The State of Bombay v. Atma Ram Sridhar, 1951 SCR 167 : (AIR 1951 SC 157), cl. (5) of Art. 22 requires that the grounds of his detention should be made available to the detenue as soon as may be, and that the earliest opportunity of making a representation against the Order should also be afforded to him. In order that the detenue should have that opportunity, it is not sufficient that he has been physically delivered the means of knowledge with which to make his representation. In order that the detenue should be in a position effectively to make his representation against the Order,**

> **he should have knowledge of the grounds of detention, which are in the nature of the charge against him setting out the kinds of prejudicial acts which the authorities attribute to him. Communication, in this context, must therefore, mean imparting to the detenue sufficient knowledge of all the grounds on which the Order of Detention is based. In this case the grounds are several & are based on numerous speeches said to have been made by the appellant himself on different occasions and different dates. Naturally, therefore, any oral translation or explanation given by the police officer serving those on the detenue would not amount to communicating the grounds. Communication, in this context, must mean bringing home to the detenue effective knowledge of the facts and circumstances on which the Order of Detention is based**."
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> (emphasis supplied)

16. On facts, we find that the detenue is not entitled to any relief as he has not only suppressed the facts as proved in his refusal to receive the grounds of detention, apart from reading them in detail, but has also approached the Court with unclean hands. It seems to us that it is a deliberate ploy adopted by the detenue to secure favourable orders from the Court. A perusal of the *panchnama* clearly indicates the adequacy of his knowledge in English, as he has not only signed the document in English but also made his objection with respect to receipt of the grounds of detention. We find no error in the procedure adopted by the respondents as due compliance was made to translate all documents in Bengali apart from persuading the detenue to receive them. In addition, the *panchnama* was signed by the independent witnesses. The detenue also read the grounds of detention and the relevant

documents. Therefore, he was well aware of his right to make a representation.

17. As discussed, the grounds of detention forming the basis of the satisfaction of the detaining authority, were made known to the detenue. He cannot seek all the facts, including access to the telephonic conversation relied on, especially when he did not exercise his right to make the representation. It is pertinent to mention that we are only dealing with the validity of the detention order and not a regular criminal case against the accused.

18. The other grounds raised also do not merit any acceptance, in the light of our earlier discussion. We also find that the grounds of detention were attempted to be served on the detenue at the earliest point of time – i.e. on the very next day after his detention.

19. For the foregoing reasons, we find no ground to interfere with the impugned order passed by the High Court of Calcutta. The appeal stands dismissed. Pending application(s), if any, stand(s) disposed of.

……..J.
(M. M. SUNDRESH)

..……..J.
(ARAVIND KUMAR)

NEW DELHI;
JANUARY 04, 2024