1989 CRI. L. J. 1644
GUJARAT HIGH COURT
D. C. GHEEWALA , J. and J. P. DESAI , J.

Spl. Criminal Appln. No. 886 of 1986, D/- 29 - 4 - 1988

Sunil Fulchand Shah Petitioner v. Union of India and others Respondents

(A)Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S.3(2) - Detention under - Compliance with provisions of S.3(2) - Forwarding of comprehensive report containing order of detention and grounds of detention to Central Govt. - Sufficient compliance with S.3(2).

So far as Sub-Sec. (2) of S.3 of the COFEPOSA is concerned, either the order of detention and the grounds of detention are to be forwarded along with the report or a comprehensive report is to be submitted containing the substance of the order of detention, the grounds of detention and the substance of the material on which the order of detention is passed. That will be sufficient compliance with Sub-Sec. (2) of S.3.

(Para4)

Where the comprehensive report containing grounds of detention and order of detention was submitted to Central Govt., there was sufficient compliance with subs. (2) of S.3.

(Para4)

(B)Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S.3(2), S.11 - Order of detention - Decision not to revoke or modify order of detention taken by Central Govt. after considering detention report and grounds of detention - Continued detention not vitiated.

(Para8)

(C)Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S.3, S.9(1) - Notification under extending period of detention - English translation of Gujarati documents not placed before Competent Officer who issued declaration - Competent Officer not conversant with Gujarathi - Notification vitiated, hence quashed - Provisions of S.3 being complied with order of detention and continued detention not vitiated - Detenu required to undergo detention for period as mentioned in original order.

(Para9)

Cases Referred	Chronological Paras
1984 Cri LJ 81 (Gauhati)	6
1981 Cri LJ 1686 : AIR 1981 SC 2005	9
1980 Cri LJ 555 : AIR 1980 SC 789	7
1980 Cri LJ 1015 : AIR 1980 SC 1361	7
(1980) 3 SCC 295 : (1980) 3 SCR 738	6 , 7
1976 Cri LJ 622 : AIR 1976 SC 734	6

M.G. Karmali with K.S. Nanavati, for Petitioner; H.M. Bhagat, Standing Counsel (for Nos. 1 and 2) and J.U. Mehta, Asstt. Govt. Pleader (for Nos. 3 and 4), for Respondents.

** Only portions approved for reporting by High Court are reported here.*

Judgement

1. J. P. DESAI, J. :-[Para 1 x x x x x].

2. Mr. M.G. Karmali who appears for the petitioner drew our attention to ground (vi) of challenge at page 12 of the petition and submitted that no affidavit was filed on behalf of the Central Government in this regard. He submitted that there was nothing on record to show as to what action was taken by the Central

Government after the report was submitted by the State Government as required by S.3(2) of the COFEPOSA and, therefore, the continued detention of the detenu is vitiated. He submitted that the State Government was bound to disclose as to whether along with the report the State Government had forwarded copy of the order of detention, the grounds and documents on the basis of which the impugned order of detention was issued against the detenu and that bulk of the documents is in Gujarati language, while the officer dealing with the matter does not know Gujarati and, therefore, English translation

@page-CriLJ1645

is required to be sent and there is nothing on record to show as to whether the English translation of the documents was sent or not. The State Government has filed affidavit at page 77 to 81. Para 7 of the said affidavit deals with this aspect. The said affidavit shows that on the same day on which the order of detention was issued i.e. 20-10-1984 the report was submitted to the Central Government. It shows that the copy of the order of detention and the grounds of detention which were in English were forwarded to the Central Government along with the Gujarati translation of the same and the documents which were in Gujarati were also forwarded along with the report. The affidavit shows that translation was not submitted but the substratum of the said Gujarati documents was duly incorporated in the grounds of detention in English and that way, the State government has complied with the provisions of S.3(2) of the COFEPOSA. There is no affidavit on behalf of the Central Government as to when the report was received and how it was dealt with. In view of this, the file from the Central Government was called for and we have perused the said file. The said file shows that the matter was dealt with by one Mr. Dwivedi, Competent Officer of the Central Government authorised to deal with such matters. It appears that the order of detention in English, the grounds of detention in English and the documents which were in Gujarati were forwarded to the Central Government and Mr. Dwivedi, after receiving the report under S.3(2) perused the order of detention and the grounds of detention and was of the opinion that no ground was made out for revoking the order of detention. He also at the same time observed that if and when a representation was received from the detenu, that representation will be considered. Mr. Karmali submitted that the documents were in Gujarati and the documents were admittedly not got translated in English either by the State Government or by the Central Government and, therefore, while considering the report under S.3(2), Mr. Dwivedi could not have looked into the documents or considered them which were in Gujarati because Mr. Dwivedi does not understand Gujarati. The learned Counsel Mr. S.D. Shah appearing for the Union of India fairly conceded that Mr. Dwivedi does not know Gujarati. In fact, an affidavit of one Mr. Bakshi, Collector of Customs and Central Excise, Rajkot has been filed, which shows that he was serving at the relevant time as Deputy Secretary, Gold Control, Department of Revenue, New Delhi and he used to explain to Mr. Dwivedi in English the contents of the documents which were in Gujarati language. This makes it clear that Mr. Dwivedi at that time did not know Gujarati. It is pertinent to note that Mr. Bakshi has made a general statement in the affidavit that he used to explain the documents which were in Gujarati to Mr. Dwivedi in English. He does not say that he explained these particular documents of this case to Mr. Dwivedi. But apart from this, it will be difficult for anyone to remember the translation of so many documents which were in Gujarati. If Mr. Dwivedi was expected or bound to consider the documents which were sent along with the order of detention and the grounds of detention, then certainly one would be inclined to say that the continued detention of the detenu will be vitiated because he could not have taken proper decision on the report without looking into the

English translation of the Gujarati documents which were many in number. He could not have remembered the translation of each and every document, assuming that Mr. Bakshi might have explained the contents of the documents to Mr. Dwivedi in English. But the question is whether Mr. Dwivedi was expected to go through the documents which were forwarded to him along with the grounds of detention and the order of detention while considering the report received by the Central Government under S.3(2) of the Act.

3. The submission of Mr. Karmali in this regard was twofold the first submission of Mr. Karmali was that the report includes not only the grounds of detention but also the material on which the order of detention is passed and, therefore, the State Government was expected to forward the order of detention, the grounds of detention as well as the documents on which the detention order was based. Mr. Karmali submitted that in

@page-CriLJ1646

that case English translation of the documents was required to be submitted to the Central Government while submitting the report because if the Officer dealing with the matter at that end did not understand Gujarati, he will not be in a position to go through the documents.

4. The second submission is that in any case Mr. Dwivedi was bound to get the documents translated in English before taking decision one way or the other on receiving the report under S.3(2) and he having not done so, the continued detention of the detenu is vitiated. As against this, the learned Assistant Government Pleader Mr. J.U. Mehta for the State and Mr. S.D. Shah, for the Union of India submitted that there was sufficient compliance of S.3(2) of the COFEPOSA in the present case because not only the order of detention and the grounds of detention but even the documents were forwarded to the Central Government while forwarding the report. They submitted that the English translation of the documents was substantially incorporated in the grounds of detention and, therefore, Mr. Dwivedi, who did not know Gujarati was in a position to go through the grounds of detention and decide for himself whether a case was made out for revocation or not. They submitted that looking to the provisions of the act in question, only a report was required to be submitted by the State Government to the Central Government and that the documents were not required to be forwarded at the time of submitting the report. They submitted that even the grounds of detention were not required to be separately submitted to the Central Government if the grounds were incorporated in the report to be submitted under S.3(2). They drew our attention to Sub-Sec. (2) of S.3 of the COFEPOSA, which reads as follows :-

"When any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order."

They submitted that what is required to be submitted to the Central Government is only a report and nothing more. They fairly conceded that a mere intimation about the detention cannot be said to be a report as contemplated by Sub-Sec. (2) of S.3 of the COFEPOSA. They submitted that if a comprehensive report showing the grounds of detention and mentioning the substance of the documents upon which the detention order is passed is submitted to the Central Government, that will be sufficient compliance with Sub-Sec. (2) of S.3 of the COFEPOSA and that the grounds of detention or the documents upon which the order is passed are not required to be submitted to the Central Government. We find much substance in this submission of the

learned Counsel for the respondents because it is pertinent to note that while Sub-Sec. (2) of S.3 of the COFEPOSA only makes a mention about the report to be submitted to the Central Government, the corresponding provisions of the other Acts specifically provide that while forwarding the report, the grounds of detention and the documents on which the detention order is passed have to be submitted to the higher authorities. Sub-Sec. (3) of S.3 of the Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980 says that when an order is made by either the District Magistrate or the Commissioner of Police detaining any person, he has to report forthwith the said fact to the State Government together with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the matter. Similar provision is found in Sub-Sec. (3) of S.3 of the Preventive Detention Act, 1950 which also says that when an order is made by an officer of the State Government, he has to forthwith report the fact to the State Government together with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the matter. Similar provision will be found in Sub-Sec. (3) of S.3 of the Maintenance of Internal Security Act, 1971. In the National Security Act, 1980 also similar provision will be found in Sub-Sec. (4) of S.3 of the said Act. It thus appears that while in other Acts providing for detention a provision is made that together

@page-CriLJ1647

with the report the grounds of detention and other material have to be forwarded, there is a clear departure so far as the COFEPOSA is concerned. In view of this, we are in agreement with the learned Advocates for the respondents that so far as the COFEPOSA is concerned, all that is required to be done by the State Government is to forward a report to the Central Government and nothing more. The report, of course, should be comprehensive and not a mere intimation and the learned Counsel for the respondents fairly concede that mere intimation cannot be said to be a report. In the present case, the order of detention and the grounds of detention read together make out a comprehensive report because the grounds of detention contain substantial incorporation of the statements therein. The documents were in Gujarati and the Officer who had to deal with was not in a position to read these documents and, therefore, we have to ignore the fact that the documents were forwarded, while considering whether there was compliance with Sub-Sec. (2) of S.3 of the COFEPOSA. We are of the opinion that so far as Sub-Sec. (2) of S.3 of the COFEPOSA is concerned, either the order of detention and the grounds of detention are to be forwarded along with the report or a comprehensive report is to be submitted containing the substance of the order of detention, the grounds of detention and the substance of the material on which the order of detention is passed. That will be sufficient compliance with Sub-Sec. (2) of S.3 of the COFEPOSA. In the present case, that has been done and, therefore, it cannot be said that there was violation of Sub-Sec. (2) of S.3 of the COFEPOSA in the present case.

5. As discussed earlier, S.3(2) of the COFEPOSA provides that when an order of detention is made by the State Government or by an Officer empowered by the State Government, the State Government has to forward to the Central Government a report in respect of the order within ten days. There is no provision for approval of the said order of detention by the Central Government. So far as other Statutes providing for detention are concerned, an officer of the State Government who passes an order of detention has to report the fact of detention to the State Government together with the grounds on which the order has been made and such other particulars which have a bearing on the matter

and such order is not to remain in force beyond a particular period unless in the meantime it has been approved by the State Government. This shows that when the fact of detention is reported to the State Government about the detention under other statutes, the State Government has again to apply its mind and decide whether the order should be approved or not. The State Government has thus to arrive at a subjective satisfaction as if the State Government is itself a detaining authority. It appears that because no approval of the Central Government is required under the COFEPOSA while approval of the State Government is required so far as the other Statutes are concerned, the above distinction is made between Sub-Sec. (2) of S.3 of the COFEPOSA and the corresponding provisions in the other Acts. So far as the COFEPOSA is concerned, all that the Central Government is required to do in the light of the provisions of S. 3 read with S.11 of the COFEPOSA is to apply its mind for the purpose of taking a decision whether the order is to be revoked or modified. The Central Government, of course, has to apply its mind to the report which, of course, should be a comprehensive report as discussed earlier for taking a decision whether the order should be revoked or modified while so far as the other Statutes are concerned, the State Government to which the fact of detention is reported has to apply its mind to the grounds of detention and also the material which have a bearing upon the matter for deciding whether the order should be approved or not. The State Government has thus to apply its mind as if it is a detaining authority because if the State Government does not approve the order, the order will not remain in force. The State Government is thus similarly situated as the detaining authority itself so far as the other statutes are concerned, while it is not so far as the COFEPOSA is concerned.

@page-CriLJ1648

6. Our attention was drawn by the learned Counsel appearing for the respondents to a decision reported in Bikash Narayan Sarma v. State of Assam, 1984 Cri LJ 81 of the Gauhati High Court, wherein a view has been taken that the order cannot be set aside on the ground that the Central Government had not applied its mind to the report. The Gauhati High Court has, after taking into consideration the decisions of the Supreme Court in Sabir Ahmed v. Union of lndia, (1980) 3 SCC 295 : and Mohd. Dhana Ali v. State of West Bengal, AIR 1976 SC 734 : (1976 Cri LJ 622), taken the above view. We have carefully gone through the above judgement of the Gauhati High Court and with respect to the learned Judges who decided that case, we regret our inability to agree with the view propounded in that decision so far as this aspect is concerned. It appears that the Gauhati High Court has placed reliance upon the case of Mohd. Dhana Ali (supra) in reaching this conclusion. We have carefully gone through the decision of Mohd Dhana Ali (supra) which appears to have been decided on its own facts as observed by the Supreme Court in Sabir Ahroed's case (supra). It appears that in the case of Mohd. Dhana Ali (supra), the Central Government was not a party to the proceedings. The Supreme Court took the view that as the Central Government was not a party to the petition, it was not possible to say that the Central Government had not applied its mind to the report. It is difficult to agree with the view taken by the Gauhati High Court that Mohd. Dhana Ali's case lays down that the Central Government has not even to apply its mind to the report. It cannot be said that the report which is submitted to the Central Government is to be placed in a cold storage. The relevant discussion will be found at para 5 in the judgement of the Supreme Court delivered in Mohd. Dhana Ali's case (supra). The Supreme Court has observed at para 5 that S.14 of the Maintenance of Internal Security Act only confers a discretion on the Central Government to revoke or modify an

order of detention made by the State Government but does not confer any right or privilege on the detenu. It is further observed by the Supreme Court that the mere fact that the Central Government does not choose to revoke or modify the order of detention without anything more cannot necessarily lead to the irresistible inference that the Central Government failed to apply its mind. The Supreme Court has further observed that the State Government had done whatever it was required to do when it sent a report to the Central Government. The Supreme Court has then further observed as follows :-

"In these circumstances, it cannot be said by any stretch of imagination that as Central Government did not apply its mind under S.14 of the Act, this would invalidate the order of detention. There is no material before us to show that the Central Government did not apply its mind at all under S.14 of the Act. The argument on this score is, therefore, rejected."

These observations made by the Supreme Court do not show that the Central Government has not to apply its mind of the report to be submitted to it by the State Government. All that this decision says is that merely because the Central Government does not revoke or modify the order, the order cannot be vitiated. In view of this, we are not in a position to agree with the view expressed by the Gauhati High Court.

7. Mr. M.G. Karmali for the petitioner relied upon the decision of the Supreme Court in the case of Sabir Ahmed v. Union of India (1980 (3) SCC 295) (supra). The Supreme Court in that case was considering the question whether the detention will be vitiated if the Central Government does not apply its mind to the representation made by a detenu. The Supreme Court was considering S.11 of the COFEPOSA in that case. S.11 of the COFEPOSA empowers the Central Government to revoke or modify an order of detention. We would like to reproduce para 12 of the aforesaid judgement of the Supreme Court because Mr. Karmali has relied upon the same.

"12. It is true that S.3(2) of COFEPOSA mandates the State Government to send a report to the Central Government. But it does not mean that the representation made

@page-CriLJ1649

by the detenu, if any, should also be sent along with that report. There appears to be no substance in the contention that the Central Government is under no duty to consider a representation made to it by the detenu for revoking his detention, if it simply repeats the same allegation, statement of facts, and arguments which were contained in the representation made to the detaining authority. It is common experience that an argument or submission based on certain facts, which docs not appeal to a Tribunal or authority of first instance, may find acceptance with a higher Tribunal or supervisory authority. Whether or not the detenu has under S.11 a legal right to make a representation to the Central Government is not the real question. The nub of the matter is whether the power conferred by S.11 on the Central Government, carries with it a duty to consider any representation made by the detenu, expeditiously. The power under S.11 may either be exercised on information received by the Central Government from its own sources including that supplied under S.3 by the State Government, or, from the detenu in the form of a petition or representation. Whether or not the Central Government on such petition/ representation revokes the detention is a matter of discretion. But this discretion is coupled with a duty. That duty is inherent in the very nature of the jurisdiction. The power under S.11 is a supervisory power. It is intended to be an additional check or safeguard against the improper exercise of its power of detention by the detaining authority or the State Government.

If this statutory safeguard is to retain its meaning and efficacy, the Central Government must discharge its supervisory responsibility with constant vigilance and watchful care. The report received under S.3, or any communication or petition received from the detenu must be considered with reasonable expedition. What is "reasonable expedition" is a question depending on the circumstances of the particular case. No hard and fast rule as to the measure of reasonable time can be laid down. But it certainly does not cover the delay due to negligence, callous inaction, avoidable red-tapism and unduly protracted procrastination."

The discussion made at para 12 shows that the Central Government can exercise the powers under S.11 either on information received by the Central Government from its own sources including that supplied under S.3 by the State Government, or, from the detenu in the form of a petition or representation. The discretion, as observed by the Supreme Court, is coupled with a duty and that duty is inherent in the very nature of the jurisdiction. The supervisory power conferred by S.11 of the Central Government is intended to be an additional check or safeguard against the improper exercise of its power of detention by the detaining authority or the State Government and if this statutory safeguard is to retain its meaning and efficacy, the Central Government must discharge its supervisory responsibility with constant vigilance and watchful care. The report received under S.3, or any communication or petition received from the detenu must be considered with reasonable expedition, as observed by the Supreme Court. These observations do not in any way lay down that the same standard has to be applied while applying its mind to the report under S.3(2) by the Central Government as has to be applied while considering a representation. If a report is submitted to the Central Government and the Central Government takes a decision on the report, in absence of any representation or petition by the detenu, that the Central Government does not think it fit to revoke or modify the order, then that decision does not become final because the Central Government has again to apply its mind to the representation or petition, if any, received from the detenu and then take a decision whether the order is required to be revoked or modified. If the Central Government takes a decision on a representation or petition from the detenu that no case is made out for revoking or modifying the order of detention, then that order will be final so far as the Central Government is concerned, and, therefore, while considering representation or petition, the Central Government is bound to apply its

@page-CriLJ1650

mind not only to the report submitted to it by the State Government but also to the material upon which the order of detention is passed. The Central Government in that case shall have to apply its mind as if it itself is a detaining authority, but while considering only the report submitted to it under S.3(2), all that is required to be done by the Central Government is to look into the report which, of course, should be a comprehensive report as discussed by us a little earlier and then take a decision whether the order is required to be revoked or modified. We may again mention here even at the cost of repetition that the observations made by the Supreme Court in the case of Sabir Ahmed (supra) upon which Mr. Karmali relies, cannot be read as laying down that even while considering the report of the State Government, the Central Government has to even to look into the material on which the order is passed. The Supreme Court was not considering as to what will be the effect if the material on which the order is passed is not considered by the Central Government while exercising its powers under S.11 of the Act on the report submitted to it by a State Government. It cannot be said from the observations made

by the Supreme Court in the above case that the continued detention of the detenu will be vitiated if the Central Government applies its mind only to the report submitted to it under S.3(2) of the Act without anything more. All that the Supreme Court says is that the Central Government has to apply its mind to the report submitted to it for considering whether any interference is called for or not. We are not inclined to agree with the submission made by Mr. Karmali that even though Sub-Sec. (2) of S.3 of the COFEPOSA does not provide that the State Government has to forward to the Central Government the grounds of detention and the material on which the order is passed, the Central Government is bound to consider the material also while considering the report. If the Central Government, on receiving the report, sits silent over the same and does not apply its mind to the same, then the continued detention will certainly be vitiated in view of the clear pronouncement of the Supreme Court in the case of Sabir Ahmed (1980 (3) SCC 295) (supra) and other two decisions, viz. Tara Chand case (1980 Cri LJ 1015) (SC) and Shyam Ambalal Siroya case (1980 Cri LJ 555) (SC) referred to by the Supreme Court in para 15 of the judgement.

8. The discussion made above will go to show that the continued detention of the detenu based on the order of detention dt. 20-10-1984 passed by the Officer on Special Duty and Ex-Officio Joint Secretary to the Govt. of Gujarat, Home Department (Special) is not vitiated, because the decision not to revoke or modify the order of detention was taken by the Central Government only on going through the detention report and the grounds of detention. We may mention here even at the cost of repetition that the officer of the Central Government Mr. K.K. Dwivedi who has taken the decision not to revoke or modify the order has specifically observed in the endorsement made by him that he had carefully gone through the detention report and the grounds of detention. It is nowhere stated that he had also carefully gone through the other material on record, though he has only stated that having regard to the material on record and the provisions of the Act there was no reason to revoke or modify the order. He nowhere states that he had also gone through the material which was in Gujarati. He has even mentioned that as and when a representation is received, the matter will be reconsidered in the light of the pleas that the detenu may make. The Competent Officer Mr. Dwivedi was thus conscious of the position that if a representation was received, it was required to be considered.

9. The detenu was required to undergo detention for a period of one year from the date of his arrest in pursuance of the order of detention dt. 20-10-1984, but in the present case, a declaration under S.9(1) of the COFEPOSA has been issued and if that Notification is not vitiated, then the detenu will be required to undergo detention for a period of two years. The learned Advocate Mr. Karmali for the petitioner contended and, in our opinion, very rightly, that the Notification under S.9(1) of the COFEPOSA is vitiated because English translation of the Gujarati documents was not placed before the Competent Officer Mr. M.L. Wadhwan

@page-CriLJ1651

who issued the declaration, Annexure-'D', dt. 22-7-1986, who did not know Gujarati. The learned Counsel Mr. S.D. Shah appearing for the Union of India very fairly conceded that it was a fact that Mr. M.L. Wadhawan did not know Gujarati. In view of this, English translation of the documents was required to be placed before him when he applied his mind whether declaration under S.9(1) should be issued or not. When no such translation of the documents was placed before him, the Notification under S.9(1) is vitiated. The learned Advocates appearing for the respondents were unable to satisfy us that the Notification under S.9(1) is not vitiated in

spite of the above fact. Hence, so far as S.9(1) Notification is concerned, it is required to be quashed, with the result that the petitioner shall have to undergo detention for a period of one year only from the date of his arrest in pursuance of the Order dt. 20-10-1984, of course, excluding the period during which he was out of custody as a result of the order passed by us in this petition earlier whereby we quashed the detention. See State of Gujarat v. Adam Hasam Bhaya, AIR 1981 SC 2005 : (1981 Cri LJ 1686).

In the present case, the order of detention and the continued detention of the detenu in pursuance of the said order of detention is not vitiated because the provisions of S.3 of the COFEPOSA have been complied with in the present case, notwithstanding the fact that S.9(1) Notification was issued in the present case. If the requirements of S.3 were not followed in the present case but the requirements of S.9 only were followed, then the original order of detention and the continued detention in pursuance of that order would also be vitiated once it is found that S.9(1) Notification is vitiated. But in the present case, it is not so and, therefore, notwithstanding the fact that S.9(1) Notification is being quashed, the order of detention and the continued detention in pursuance of the original order of detention is not vitiated.

[Paras 10 and 11.x x x x].

Petition Partly Allowed .