

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

BEFORE

THE HON'BLE MR. JUSTICE RAVI MALIMATH

AND

THE HON'BLE MR. JUSTICE H.P.SANDESH, DATED:28-06-2019

MRS. KRISHNA DAS SAROH VS. . GOVERNMENT OF KARNATAKA BY PRINCIPAL SECRETARY, BENGALURU AND ANOTHER

ORDER

RAVI MALIMATH J.

The petitioner is the wife of the Detenu Sri. Rajnish Kumar Saroh. That the petitioner is interested in the life, welfare and personal liberty of the Detenu. That the Additional Chief Secretary, Government of Karnataka, Home Department, Bengaluru, passed an order of detention bearing No.HD 3 SCF 2019, dated 21.02.2019, under Section 3 (1) (ii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The grounds and the order of detention was served on the Detenu on 05.03.2019. He was also furnished with the relevant documents. It was also communicated to him that he is entitled to make a representation to the detaining authority against the detention order through the Senior Superintendent of Police, Central Prison, Bengaluru. He accordingly submitted his representation on 28.03.2019. The representation was rejected by the order dated 04.04.2019 vide Annexure- E to the writ petition. At that stage, the instant writ petition was filed seeking to quash the order of detention.

2. Notices were ordered to the State. In the interregnum, the Advisory Board submitted its report dated 06.05.2019. Thereafter, the State vide order dated 08.05.2019 passed the order confirming the order of detention.

3. (a) Sri. Kiran S. Javali, learned Counsel appearing for the petitioner, contends that the grounds of detention as well as the order of detention are illegal. That no grounds are made out to sustain the order of detention. He primarily pleads on the question of the representation being not considered by the appropriate authority. He submits that in terms of the grounds of detention furnished to him, he was entitled to make a representation to the detaining authority against the detention order. The detention authority was the Additional Chief Secretary, Government of Karnataka, Home Department, Bengaluru. The representation was made by the Detenu, to the said officer, namely, the Additional Chief Secretary to the Government of Karnataka. However, the representation has been rejected by the Under Secretary to Government, Home Department (Police Services- B), in terms of the order dated 04.04.2019 vide Annexure- E. Therefore, he reported in 1995 SCC (Cri) 643, with reference to para 38, which reads as under:

" 38. Having regard to the provisions of Article 22 (5) of of the the Constitution Constitution and and the provisions of the COFEPOSA Act and the PIT NDPS Act the question posed is thus answered:Where the detention order has der s been made under Section of the r COFEPOSA Act and the PIT NDPS Act by an officer specially empowered for that purpose either by the Central Government or the State Government the person detained has a right to make a representation to the said officer and the said officer is obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on the person detained to make a representation against the order of detention.This right of the Detenu is in addition to his right to make the representation to the State Government and the Central Government where the detention order has been made by an officer specially authorized by a State Government and to the Central Government where the detention order has been made by an officer specially empowered by the Central Government, and to have the same duly considered.

This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of O detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the fa to do so results in denial of the right of the person detained to make a representation.¹

4. (a) Sri. Sandesh J.Chouta, learned Additional Advocate General appearing for the respondents disputes the said contention.He places reliance on the statement of objections filed.He contends that there has been application of mind and the rejection of the representation of the Detenu is in accordance with law.He also places the records for consideration.

(b) Reliance was placed on the judgment of the Hon'ble Supreme Court in the case of UNION OF INDIA AND OTHERS VS. SALEENA reported in (2016) 3 SCC437. He contends that the question of application of mind and the order that has been communicated, should suffice the requirement of law.In the instant case, there has been application of mind by the Additional Chief Secretary is concerned.Therefore, only because the order is communicated in the name of the Under Secretary, would not vitiate the order of detention.

5. Heard learned Counsels.

6. So far as the judgment relied on by the learned Counsel for the petitioner is concerned, the law is well settled.The representation made to the designated authority would necessarily have to be considered by that authority alone.The consideration by any other authority would vitiate the order of detention.

However, the learned Counsel for the respondents relies on the judgment of the Hon'ble Supreme Court in the case of UNION OF INDIA AND OTHERS VS. SALEENA reported in (2016) 3 SCC437. We have considered the judgment in extenso.A similar question arose for consideration in the said judgment.The Hon'ble High Court of Kerala, had set aside the order of on detention on the ground that the constitutional requirement was not satisfied, since the authority who was subordinate to the competent authority had rejected the representation.This order was challenged before the Hon'bie Supreme Court.In considering the order of the

High Court, the records pertaining to the case were looked into. Therein the competent authority was the Special Secretary-cum-Director General, Central Economic Intelligence Bureau, Ministry of Finance, Department of Revenue. However, the communication was made by the Under Secretary, Government of India. However, on examining the records the Hon'ble Supreme Court found, that the competent authority had stated, as narrated in para 29 of the order, which reads as under:

" I have gone through the representation. I do not find sufficient ground for exercising powers under Section 11 of the COFEPOSA Act. The representation is rejected. "

This order which was passed by the competent authority was communicated by the Under Secretary. Therefore, the Hon'ble Supreme Court held that there has been application of mind so far as the competent authority is concerned. It was detailed in the judgment. There was no need to elaborate the reasons by the competent authority to justify his application of mind. The order itself would reflect the application of mind by the competent authority. Therefore, the order of detention was upheld.

1 However, factually, the same cannot be applied to the facts of the instant case. We have examined the records in detail. There is no order passed by the Additional Chief Secretary that would narrate his application of mind. The communication of the rejection of the representation of the petitioner, is by the Under Secretary to the Government. Admittedly, he is not the competent authority. The competent authority is the Additional Chief Secretary. It was he alone who should have applied his mind to the representation made by the petitioner. The records do not indicate any order being passed by the Additional Chief Secretary to that extent. However, in the aforesaid judgment of the Hon'ble Supreme Court, the competent authority, however short the order may be, had applied its mind and rejected the representation. In the absence of non application of mind by the competent authority herein, the order of detention cannot be sustained.

8. Therefore, the law on the issue is well established. It is the competent authority alone that has to consider the representation of the Detenu by applying its mind. If the rejection of the representation is by any other authority, other than the competent authority, such a rejection of the representation cannot be considered as a valid rejection in the eye of law. In the absence of any rejection order by the concerned competent authority, it has to be held that there is non-consideration of the representation.

9. Under these circumstances, we do not find it necessary to consider the other grounds urged by the learned counsel for the petitioner. Both learned counsels also submit that in view of the aforesaid observations, it would not be necessary to consider the other contentions.

10. For the aforesaid reasons, Writ Petition Habeas Corpus No.49 of 2019 is allowed. The order of detention dated 21.02.2019 bearing No.HD 3 SCF 2019 passed by the Additional Chief Secretary to Government, Home **** Department, Bengaluru, is hereby quashed.

The Detenu, namely, Sri. Rajnish Kumar Saroh, son of Sri.Umed Singh Saroh, is directed to be released from custody forthwith, if he is not required in any other case/s.

Registry is directed to communicate the operative portion of this order to the Jail Authorities, Central Prisons, Parapanna Agrahara, Bengaluru, forthwith, for necessary action.

Pending interlocutory application No.2 of 2019 stands rejected.