IN THE HIGH COURT OF KARNATAKA AT BENGALURU

ON THE 18TH DAY OF JULY, 2019

BEFORE

THE HON'BLE MR. JUSTICE RAVI MALIMATH

AND

THE HON'BLE MR. JUSTICE H.P.SANDESH

WRIT PETITION (HC) NO. 61 OF 2019

Smt. Maimuna

v/s.

Government of Karnataka

ORDER

The petitioner is the wife of the Detenu, Sri.Akbar Siddik. She is interested in the life, welfare and personal liberty of the Detenu. That an order of detention dated 03.04.2019, at Annexure-A, was passed by Sri.Rajneesh Goel, Additional Chief Secretary to Government, Home Department, Karnataka Government Secretariat, Vidhana Soudha, Bengaluru, directing detention of the Detenu. It was noted in the order of detention that Sri.Rajneesh Goel, is specially empowered under Section-3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short 'COFEPOSA Act') and being satisfied that 'with a view to prevent the Detenu - Sri.Akbar Siddik, from the act of smuggling gold,' has passed an order of Detention in terms of Section-3(1)(i),

(ii) and (iv) of the COFEPOSA Act, directing detention of the Detenu-Sri.Akbar Siddik. The grounds for detention were also furnished to the Detenu, along with seven box files of relied upon documents.

2. The primary contention of the learned counsel for the petitioner is that consequent to para–69 of the grounds for detention furnished to the Detenu, the Detenu was given a right to make representations against the detention to the Detaining Authority, the Government of Karnataka, the Central Government and the COFEPOSA Advisory Board.

3. Accordingly, on 24.04.2019, a representation was made to the Detaining Authority, through the Chief Superintendent, Central Prison, Bengaluru. It was forwarded from the Chief Superintendent, Central Prison, Bengaluru to the Government of Karnataka on 30.04.2019. On 03.05.2019, it was forwarded to the Sponsoring Agency by the Government. On 08.05.2019, the Sponsoring Agency has sent comments and reports. On 24.05.2019, an endorsement was issued considering the representation. In the interregnum, one more representation was made. Even though it was dated 24.04.2019, the same was sent only on 04.05.2019 to the

State Government. The same was forwarded to the Sponsoring Agency on 13.05.2019. On 14.05.2019, the Sponsoring Agency sent comments and reports on the representation.

4. A reply has been furnished by Sri.Rajneesh Goel, the Additional Chief Secretary to the Government Home Department, vide an endorsement dated 24.05.2019. The second representation has not been considered at all. There is only one reply that has been received by the Detenu. Therefore, he pleads that when two representations have been made, both require to be considered by the concerned authorities. That there is a delay of one month in considering the first representation, which is fatal. That non-consideration of the second representation is also a ground to declare the further detention of the detenu as being illegal.

5. The same is disputed by Sri.Sandesh J. Chouta, learned Senior Advocate and Additional Advocate General appearing for the respondents-State by placing reliance on the statement of objections. He pleads that there is no delay in considering the representations of the Detenu. He has narrated the various dates with regard to the manner in which the representations were considered

by the State. That while in the process of considering the first representation dated 24.04.2019, the second representation was submitted on 04.05.2019. Therefore, the second representation was also sent to the concerned authorities to record their comments and to issue para-wise remarks. Immediately on receipt of the same, the instant reply has been furnished. Therefore, it cannot be said that there is any delay.

6. So far as the primary contention that two representations have been submitted and only one representation has been considered, the learned senior counsel submits that the endorsement is issued on the consideration of both the representations by the concerned authority. That Sri.Rajneesh Goel is not only the Detaining Authority, but also the Specially Empowered Authority of the State. Therefore, having received the para-wise remarks and other comments from the concerned authority, it is indeed a futile exercise to reproduce the same by the authority by issuing a second reply. The said authority being the very same authority and he having considered the representations, would satisfy the requirement of law.

7. Heard learned counsels.

8. It is undisputed that two representations were made by the Detenu consequent upon the right given to the him to make representations to the Detaining Authority, the Government of Karnataka, the Central Government and the COFEPOSA Advisory board. The Detaining Authority is Sri.Rajneesh Goel, Additional Chief Secretary to the Government. The first representation dated 24.04.2019, made to the Detaining Authority was dispatched by the Prison Authority on the next date i.e., on 25.04.2019. The second representation even though was dated 24.04.2019, was furnished to the Jail Superintendent on 04.05.2019, which was thereafter dispatched. Therefore, the first representation was made to Sri.Rajneesh Goel and the second representation was made to the State Government.

9. On considering the contentions, we have no hesitation to hold that so far as the representations made by the Detenu is concerned, only one of them has been answered. Even though it is being stated by the State that the representations which have been considered is to be read as a consideration by the Detaining Authority, as well as the State Government, we are unable to accept such a contention. There cannot be a two-in-one reply. It violates the law. There is a constitutional duty on the respondents

to consider the representations of the detenu. The failure to consider the representations results in denial of the right conferred on the detenu. The right of the detenu is not only to make a representation to the Detaining Authority but also to the State Government, Central Government as well as the Advisory Board. When representations have been made, one to the Detaining Authority and the other to the State Government, necessarily the Detaining Authority would have to consider the representation, as much as the State Government also would have to consider it. There cannot be one reply to two representations. Even otherwise, the said contention is not supported by any material. The reply furnished does not indicate that it is a reply on behalf of the Detaining Authority as well as the State Government. Hence, such a contention cannot be accepted. Therefore, we are of the view that the single reply furnished by the respondents cannot in law be said to be a reply by the Detaining Authority as well as by the State Government. There is no pronouncement of law to support such a contention. It is sufficient in the given facts and circumstances of this case, to hold that since two representations have been made, and only one having been considered, the other representation has remained unanswered even as on date.

Therefore, that would render the further detention of the Detenu as being bad in law.

10. The law on consideration of the representation is well-settled and is not necessary to be reiterated. Whenever a representation is made, the same shall be considered as early as possible. If a representation is not considered as early as possible and there is no acceptable reason for the delay, the further detention of the detenu becomes illegal on that ground alone. However, in the instant case, the second representation has not even been considered by the authority. Therefore, it is a case of non-consideration. When a representation is not even considered, the right of the detenu stands infringed rendering his further detention as illegal.

11. Our view flows from the judgments of the Hon'ble Supreme Court , which are as follows:

(i) In the case of RAMA DHONDU BORADE VS. V.K.SARAF, COMMISSIONER OF POLICE AND OTHERS, reported in AIR 1989 SCC 1861, the Hon’ble Supreme Court held at para 20 as follows:

> *“20. The Detenu has an independent constitutional right to make his representation under Article 22(5) of the*

Constitution. Correspondingly, there is a constitutional mandate commanding the concerned authority to whom the detenu forwards his representation questioning the correctness of the detention order clamped upon him and requesting for his release to consider the said representation within the reasonable dispatch and to dispose the same as expeditiously as possible. This constitutional requirement must be satisfied with respect but if this constitutional imperative is observed in breach, it would amount to negation of the constitutional obligation rendering the continued detention constitutionally impermissible and illegal, since such a breach would defeat the very concept of liberty – the highly cherished right – which is enshrined in Article 21 of the constitution."

(ii) In the case of RATTAN SINGH VS. STATE OF PUNJAB AND OTHERS, reported in 1981 SCC (Cri) 853, the Hon'ble Supreme Court at para – 4 held as follows:

"4. There is no difficulty insofar as the representation to the Government of Punjab is concerned. But the unfortunate lapse on the part of the authorities is that they overlooked totally the representation made by the detenu to the Central Government. The

representations to the State Government and the Central Government were made by the detenu simultaneously through the Jail Superintendent. The Superintendent should either have forwarded the representations separately to the Governments concerned or else he should have forwarded them to the State Government with a request for the onward transmission of the other representation to the Central Government. Someone tripped somewhere and the representation addressed to the Central Government was apparently never forwarded to it, with the inevitable result that the detenu has been unaccountably deprived of a valuable right to defend and assert his fundamental right to personal liberty. May be that the detenu is a smuggler whose tribe (and how their numbers increase!) deserves no sympathy since its activities have paralyzed the Indian economy. But the laws of preventive detention afford only a modicum of safeguards to persons detained under them and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenus. Section 11(1) of COFEPOSA confers upon the Central Government the power to revoke an order of detention even if it is made by the State Government or its officer. That power, in order to be real and effective, must

imply the right in a detenu to make a representation to the Central Government against the order of detention. The failure in this case on the part either of the Jail Superintendent or the State government to forward the detenu's representation to the Central Government has deprived the detenu of the valuable right to have his detention revoked by that Government. The continued detention of the Detenue must therefore be held illegal and the detenu set free."

(iii) In the case of KAMALESHKUMAR ISHWARDAS PATEL VS. UNION OF INDIA AND OTHERS, reported in 1995 SCC (Cri) 643, the Hon'ble Supreme Court at para – 38 held as follows:

"38. Having regard to the provisions of Article 22(5) of the Constitution and the provisions of the COFEPOSA Act and the PIT NDPS Act the question posed is thus answered: Where the detention order has been made under Section – 3 of the 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 order 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 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 failure to do so results in denial of the right of the person detained to make a representation."

(iv) In the case of AMIR SHAD KHAN vs. L.HMINGLIANA AND OTHERS, reported in 1991 SCC (CRI) 946, the Hon'ble Supreme Court at para–3 held as follows:

"3. xxx

Thus on a conjoint reading of Section 21 of the General Clauses Act and Section 11 of the Act it becomes clear that the power of revocation can be exercised by three authorities, namely, the officer of the State Government or the Central Government, the State Government as well as the Central Government. The power of revocation conferred by Section 8(f) on the appropriate Government is clearly independent of this power. It is thus clear that Section 8(f) of the Act satisfies the requirement

of Article 22(4) whereas Section 11 of the Act satisfies the requirement of the latter part of Article 22(5) of the Constitution. The statutory provisions, therefore, when read in the context of the relevant clauses of Article 22, make it clear that they are intended to satisfy the constitutional requirements and provide for enforcement of the right conferred on the detenu to represent against his detention order. Viewed in this perspective it cannot be said that the power conferred by Section 11 of the Act has no relation whatsoever with the constitutional obligation cast by Article 22(5).”

Therefore, we are of the considered view that the further detention of the detenu cannot be sustained and he is entitled to be released forthwith.

12. Under these facts and circumstances, Sri.Kiran S. Javali, learned counsel appearing for the petitioner submits that it would not be necessary for the Court to go into the various other contentions urged. The same is not disputed by the respondents’ counsel. Hence, none of the other contentions have been taken into consideration.

13. For the aforesaid reasons, petition is allowed. The further detention of the detenu, namely, Sri.Akbar Siddik, son of Sri.Moiddin Byari, is held to be illegal. He is directed to be released from the 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.

The impleading application in I.A.No.1 of 2019, stands rejected.