

Gurbax Singh v. State of Punjab and others (D. S. Tewatia, J.)

has advanced no other reason for withholding the approval of the name of the petitioner.

(7) In the circumstances, I allow this petition and direct the Cane Commissioner to reconsider the name of the petitioner for appointment to the post of Secretary of the Society in accordance with law regardless of the fact that his name has not been forwarded by the Employment Exchange. The petition is allowed to the extent indicated above, with no order as to costs.

N.K.S.

Before D. S. Tewatia & A. S. Bains, JJ.

GURBAX SINGH—*Petitioner*

versus

STATE OF PUNJAB and others—*Respondents.*

Criminal Writ Petition No. 34 of 1978

November 22, 1978.

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (LII of 1974)—Section 3(1)—Constitution of India, 1950—Article 166(1)—Rules of Business of the Government of Punjab, 1977—Rule 9(1)—Order of detention under section 3(1) expressed in the name of the Governor and authenticated by a Deputy Secretary—Such order—Whether invalid—Secretary to State Government—Whether the only competent authority to authenticate detention orders on behalf of the Government.

Held, that a perusal of the provisions of section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, would show that a detention order can be passed by the State Government or any officer of the State Government not below the rank of a Secretary to that Government specially empowered for the purpose of the said section by the State Government. That means that the orders can be passed by the State Government as also by the Secretary of the State Government, if so specially authorised. Wherever an executive order is passed by the State Government, the order has to be passed in the name of the

Governor as envisaged by Article 166 (1) of the Constitution of India, 1950 and where an order of detention is so expressed then *ex-facie* it is the order of the State Government and not of any official of the State Government specially authorised to pass the order as envisaged by section 3(1) of the Act. Clause (1) of rule 9 of the Rules of Business of the Government of Punjab, 1977, expressly authorises not only a Deputy Secretary of the Government but even Under Secretary to the Government to sign by way of authentication an order made in the name of the Governor. Thus, an order under section 3(1) of the Act expressed in the name of the Governor and authenticated by a Deputy Secretary or any other officer as envisaged by rule 9(1) of the Rules cannot be considered to be an invalid order on the ground that the order in question had been signed by a Deputy Secretary instead of Secretary to the Government.

(Paras 4, 5, 6, 11 and 12).

Case referred by Hon'ble Mr. Justice C. S. Tiwana, on 31st August, 1970, to a larger Bench for decision of an important question of law involved in the case. The Hon'ble Division Bench consisting of Hon'ble Mr. Justice D. S. Tewatia and The Hon'ble Mr. Justice A. S. Bains, remanded the writ petition to the Single Bench to decide the same on merits on 22nd November, 1978. The Hon'ble Mr. Justice C. S. Tiwana, finally decided the case on 7th December, 1978.

Petition under Article 226 of the Constitution of India praying that after the perusal of the records a Writ of Habeas Corpus be issued and the detention order and grounds of detention passed by respondent No. 1 against the detenu Gurbax Singh be quashed and Gurbax Singh be ordered to be set at liberty forthwith.

Shrinath Singh, Advocate, for the Petitioner.

G. S. Tulsi, Advocate, for A. G. Punjab, for the Respondent.

JUDGMENT

D. S. Tewatia, J. (Oral)

(1) Gurbux Singh petitioner in Criminal Writ No. 34 of 1978 and Hazara Singh in Criminal Writ No. 35 of 1978, were detained by separate though similarly worded orders dated 23rd January, 1978, passed under sub-section (1) of section 3 of the Conservation of Foreign Exchange and prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the Act). These petitions came up for hearing in the first instance before C. S. Tiwana, J. Before him one of the contentions advanced, on behalf of the petitioner-detenus, was

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that the impugned orders had been signed by Deputy Secretary Home and he not being competent to pass the orders under sub-section (1) of section 3 of the Act, the orders detaining the petitioners were without jurisdiction and illegal. In support of this submission the learned counsel for the petitioners relied on a Single Bench decision of this Court referred in *Narinder Singh v. The State of Punjab, etc.* (1), and pressed to attention the following observation of the learned Judge :—

“The order of detention has been issued under the signatures of the Deputy Secretary to Government, Punjab, Home Department, Chandigarh, under section 3(1) of the Act and the detention order on behalf of the State Government could only be passed by an officer not below the rank of a Secretary specially empowered for this purpose.”

(2) Tiwana, J., finding himself in disagreement with the aforesaid observation has referred the two petitions to us for determining the question which he formulated in the following words :—

“Whether an order of detention under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, can be said to be invalid, if made in the name of the Governor but authenticated by Deputy Secretary (Home).”

(3) Before advertng to the contention advanced on behalf of the petitioner and question formulated by Tiwana, J., first the relevant provisions of the Act may be noticed. Section 3(1) of the Act is in the following terms :—

“The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this Section by that Government may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in

(1) Cr. W. No. 58 of 1978 decided on 17th August, 1978.

any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from—

- (i) smuggling goods ; or
- (ii) abetting the smuggling of goods ; or
- (iii) engaging in transporting or concealing or keeping smuggled goods ; or
- (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods ; or
- (v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods ; it is necessary so to do, make an order directing that such person be detained.”

(4) A perusal of the provisions of section 3(1) of the Act would show that the detention order of the kind *inter alia* can be passed by the State Government or any officer of the State Government, not below the rank of a Secretary to that Government specially empowered for the purpose of the said section by the State Government. That means that the orders can be passed by the State Government as also by the Secretary of the State Government, if so specially authorised.

(5) Wherever an executive order is passed by the State Government, the Order has to be passed in the name of the Governor as envisaged by Article 166(1) of the Constitution of India which is in the following terms :—

“All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.”

(6) So in the first instance it shall have to be seen as to whether the order is expressed in the name of the Governor or not. If it is so expressed then *ex facie* it is the order of the State Government and not of any official of the State Government specially authorised to pass the order as envisaged by section 3(1) of the Act.

(7) The impugned order annexed to Civil Writ No. 34 of 1978, by way of sample is reproduced. It is in the following terms :—

“Whereas the Governor of Punjab in exercise of the power conferred on him under sub-section (1) of section 3 of the

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Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Parliament Act No. 52 of 1974) as amended, passed the order of detention in respect of Gurbux Singh @ Mahla, son of Darshan Singh, Jat, r/o village Pandori Sukha Singh, P.S. Ajnala, District Amritsar,

- (2) And whereas the Advisory Board have opined that there is sufficient cause for the detention of Gurbux Singh @ Mahla,
- (3) Now, therefore, the Governor of Punjab, in exercise of the powers conferred on him under sub-section (f) of section 8 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 as amended, hereby confirms the aforesaid order of detention and is pleased to order that the said Gurbux Singh @ Mahla shall continue to be in detention in the custody of Inspector General of Prisons, Punjab in any jail of the State of Punjab for a period of one year from the date of his detention.
- (4) He shall be governed, while under detention by the Punjab Detenus (Conditions of Detention) Order, 1974.

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Deputy Secretary to Govt., Punjab,
Home Department.”

(8) A perusal of the order would clearly show, since it is expressed in the name of the Governor, that the impugned orders in the two writ petitions were orders of the State Government.

(9) Now the next question that arises for consideration is as to whether the Deputy Secretary to Government, Punjab, Home Department, had in law the capacity to authenticate the orders passed in the name of the Governor. To determine that question, one has to first refer to the provisions of clauses (2) and (3) of Article 166 of the Constitution of India. These are in the following terms:—

“(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is

so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

- (3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

(10) Clause (2) aforesaid of Article 166 envisages that orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules made by the Governor and clause (3) aforesaid authorises the Governor *inter alia* to make rules for transaction of the business of the Government of the State.

(11) Rule 9 of the Rules promulgated on 20th June, 1977, is the one which deals with the authentication of orders and instruments made and passed under clause (2) of Article 166 of the Constitution of India. Clause (1) of rule 9 which is relevant for our purpose is in the following terms :—

"Every order or instrument of the Government of the State of Punjab shall be signed either by a Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary or an Under Secretary or such other officer as may be specially empowered by the Governor in that behalf and such signature shall be deemed to be the proper authentication of such order or instrument."

(12) Clause (1) of rule 9 of the Rules expressly authorises not only a Deputy Secretary of the Government but even Under Secretary of the Government to sign by way of authentication an order made in the name of the Governor. In view of the aforesaid we are of the considered view that an order under section 3(1) of Act expressed in the name of the Governor and authenticated by a Deputy Secretary or any other officer as envisaged by rule 9(1) of the Rules cannot be considered to be an invalid order on the ground that the order in question had been signed by a Deputy Secretary instead of Secretary to the Government.

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(13) The Secretary of the Punjab Government is required to sign the order only in the event of he himself passing the order, if so empowered specially by the State Government but in that case the order would not be of the State Government, it would be an order of the Secretary of the State Government specially authorised by the State Government.

(14) The learned counsel for the petitioners brought to our notice besides the order of Gurnam Singh, J., another decision of this Court rendered by Dhillon, J., in *Jaswant Rai v. The State of Punjab & others* (2). In fact, Gurnam Singh, J., had followed the ratio of the aforesaid decision rendered by Dhillon, J. The facts of those two cases were entirely different. Impugned detention orders are not produced in either of the judgments but from the discussion it appears that those orders were passed by the Home Secretary in his personal capacity specially authorised as delegate of the State Government and not as an officer authenticating the orders of the State Government in terms of rule 9(1) of the Rules. The ratio of the aforesaid two decisions cannot be taken to be that the Deputy Secretary of the State Government, cannot authenticate an order passed by the State Government. The ratio of those decisions has to be taken and so it appears from the observation quoted from one of the judgments that where the order is passed by an official of the State as a delegate of the State Government by virtue of being specially authorised on that behalf then the official not below the rank of Secretary alone could pass such an order.

(15) For the reasons aforesaid the question formulated by the Referring Judge is answered in the negative. The writ petitions are remanded to the Single Judge to decide the same on merits in accordance with our aforesaid observations. The office is directed to list these petitions before the learned Single Judge next week.

N.K.S.

Before B. S. Dhillon, J.

STATE OF HARYANA—*Petitioner.*

versus

HARBHAJAN SINGH and another—*Respondents.*

Criminal Revision No. 3-R of 1978.

December 8, 1978.

*Code of Criminal Procedure (2 of 1974)—Sections 209 and 323—
Cross-cases arising out of the same incident—One set of accused*

(2) Cr. W. No. 27 of 1978, decided on 24th May, 1978.