

**SARFARAZ ALAM V. UNION OF INDIA & OTHERS VIZ-A-VIZ
PREVENTIVE DETENTION**

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ABSTRACT

Sarfaraz Alam v. Union of India and Others¹ is a Special Leave Petition filed under Article 136 of the Indian Constitution dealing with the preventive detention. The SLP has been filed by the brother in law of the detenu questioning the detention. The case was decided on 4 January 2024 by the Apex Court of the country. The decision was given by the Honorable Bench of Justice Aravind Kumar and Justice M.M. Sundresh. The present matter dealt with the requirement for detention as provided by the Article 22(5) of the Indian Constitution. The Court at length has discussed how serving the grounds times and effectively are the sine qua non of the right of the detenu to make a representation to object the order of the detention. Article 22(5) bounds detaining authority to make sure that the communication whether verbal or written in the language understandable by the detenu is of paramount importance and the failure to do so would lead the court to bend in favour towards the detenu. The court has emphasized on communication as being the first step to ensure that the detaining authority does not work in a manner that would blur the rights of the detenu.

KEYWORDS- *Preventive Detention, Detenu, Communication, Ground, Representation*

1. INTRODUCTION

Preventive detention is detention which curtails the citizen's right on many grounds. Preventive detention means holding a person in custody in order to ensure that the said person does not cause harm or pose a threat to the society.² The Indian Constitution has been very conscious of this and as a consequence added Article 22 to the Constitution which safeguards the right of a person detained by the authorities. Article 22(5) further provides for the procedural requirement whilst making such a detention. Serving of the grounds of the detention to detenu in a language that the detenu understands is an essential condition. The above stated condition forms the foundation which ensures the right to make a representation against the detention order.

In this present case the court focuses on the extent of the communication that has to be made vide Article 22(5)³ and also the consequence of the situation where in the detenu understands the ground for the detention but refuse to accept

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¹ Sarfaraz Alam v. Union Of India & Others, [2024] 1 S.C.R. 267 (India)

² Yash Vithlani & Keerthana B, *Analysing Preventive Detention Laws and Article 21*, THE LAW BRIGADE (PUBLISHING) GROUP (May 26, 2024, 2:09 PM), <https://thelawbrigade.com/wp-content/uploads/2019/05/Yash-Vithlani-Keerthana.pdf>

³ INDIA CONST. art 22, cl. 5.

the same claiming the lack of communication at the behest of the detaining authorities.

2. FACTS

- A total of four people were apprehended of having association with the gold and foreign currencies on the pretext of fleeing from the eagle eye of the Customs Department. Persistent with the apprehension and the knowledge received from the four, recovery was made consisting of colossal amount of gold as well as foreign currency by an effective search.
- As a sequel to the above the detenu was arrested, on the lines of a detention order passed under Section 3 of the COFEPOSA Act⁴ by the authority who made the detention.
- The order of detention against the detenu was passed on 05.09.2023, eventually he was detained on 19.09.2023 in the presence of his family members from his residence. On 20.09.2023, the following day of the detention, the authority the detained reached out to supply the grounds for the present detention coupled with all concerning documents in translated Bengali Language to the detenu. In spite the recurrent efforts of the respondent the detenu rejected to collect the translated copy that at this time was in the correctional home.
- In response to this a panchnama was prepared, the respondents yet again tried to give the documents of the detention to the detenu but all was in vain as the detenu was still upright about his stand, an amenity was still provided to the detenu to wade through the document inch by inch.
- The panchnama was undersigned by a total of 2 independent witnesses. The detenu amazingly had also signed the said panchnama and did not stop at signing but also noted down in the English language “I have refused to receive any document” which was indicative that he was fully aware of the English language and more so the oblivion of the language that he has reiterated is just in the essence of turning around.
- The respondent tirelessly made an attempt twice to supply the documents containing the details of the ground of the detention. The detenu again on 03.10.2023 rejected to accept the documents which he finally accepted the on 10.10.2023. Captivatingly the detenu through his bother in law the appellant filed a Writ on 03.10.2023 itself stating that he had not been supplied the grounds of his detention.
- Calcutta’s High Court via a division bench dismissed the Writ and held that it was owing to the denial of the detenu to accept the document consisting of grounds of his detention which can be proved conclusively by the panchnama.

⁴ The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, No. 52, Acts of Parliament, 1974 (India).

- The SLP at hand has been filed by the detenu's brother in law who was detained by the Respondent by a detention order. The detenu has been aggrieved of the detention order of the respondents which the Calcutta High Court has denied to set aside.

3. APPELLANTS SUBMISSIONS

The appellant who has approached the honorable Supreme Court is the brother in law of the detenu. The senior counsel for the appellant made his submissions as follows-

- The first and foremost submission of the appellant was that it is erroneous to point out that the detenu had denied the reception of the grounds on which his detention was made.
- The detenu was neither apprised of the reasons nor communicated of his fundamental right which was to make representation opposing the detaining order. Both apprising and communication are the sine qua non under Article 22(5)⁵.
- The appellant also contended that the appropriate material such as conversation over the telephone, which should have been supplied to the detenu have not been done holistically.
- The appellant also brought it to the notice of the court that if the arrest was done in the presence of the family members of the detenu the family members should have been supplied with the details of the detention at the earliest.
- The appellant also contended that if the detenu was out rightly refuting to accept the detention order stating the grounds there should have been an affidavit stating the same.
- Lastly the appellant submitted that detention is not a regular exercise and if any detention is made and there happen to be dual views as to the detention, that view should be accepted by the court that stands in the support of the detenu and not other way round.

4. RESPONDENTS SUBMISSIONS

The respondent in the present case is the Union of India being legally represented by the Additional Solicitor General. The respondent mainly argues in the following lines

- The principal argument was that due process of law with respect to preventive detention has been followed by the detaining authority. In

⁵ INDIA CONST. art 22, cl. 5.

consonance with Section 3 of the COFEPOSA Act⁶ sufficient efforts were made the next day also to serve the translated version stating the grounds for the said preventive detention.

- It was contended that it was the detenu who refused to accept the stated grounds of the detention and so in the presence of two independent witnesses a panchnama was eventually drawn for recording that the detenu out rightly did not accept the document. The Panchnama was undersigned by the detenu along with a note which irrefutably stated that the detenu has refused the reception of the concerned document.
- The respondent claimed that the note fulfills both the tests requisite under Indian Constitution vide Article 22(5).
- Lastly the respondent contended that contention of the appellant is a mere afterthought and so for this reason the present appeal holds no ground.

5. ISSUES INVOLVED

The main issue involved in the present case pertains to what extent the communication can be made both verbally and in writing in light of Article 22(5) of Indian Constitution while communication of the grounds of detention for the purpose of making a representation against the order of detention.

6. JUDGMENT

The judgment given by the Apex court can be studied on the following parameters-

➤ ARTICLE 22(5)

The Apex Court discussed in full detail Article 22(5) of the Constitution of India and divided it into fragments.

- The first fragment is the one which is the obligation of the detaining authority to supply the detenu with the detention grounds and relevant material which should be communicated in a language that the detenu is conscious of.
- The second fragment deals with the right to make a representation against the detention order which by default is dependent on the first fragment.

The above stated dual fragments are an indication of the cardinal responsibility of the authorities to duly and at the earliest supply the grounds of detention and any other documents necessary. The same should be in a language

⁶ The Conservation of Foreign Exchange and Prevention Of Smuggling Activities Act, 1974, No. 52, Acts of Parliament, 1974 (India).

that detenu can acknowledge so he can at the earliest make a representation to object the order of detention. The Court discussed the essentials pertaining to Article 22(5)⁷ as follows -

- **Serving The Grounds**

The first and foremost duty of the detaining authorities which is the subsequent right of the detenu is to be served and made aware of the ground of the detention. The supplying of the grounds and other important material to the detenu has to be done effectively while ensuring that no language barriers defeat the purpose of the communication. The Court differentiated between background facts which lead to the order of detention and the detention grounds as follows

- The former background facts might not be in full detail but
- The detention grounds which are the dictating force of the order of detention must and should be served to the detenu

The effective communication of the detention grounds is thus sine qua non to the right to make a representation that have been given to the detenu under Article 22(5)

- **Communication**

Communicating the ground of detention to the detenu is one of the first steps that the detaining authority is bound to do. The detenu might be literate or illiterate and being mindful of this the communication may be verbal or written. Language should not become a barrier in the communicating of the ground of detention. In a situation where the detenu has himself denied to accept the grounds of the detention

- **Right To Representation**

The detenu should be made aware of the fact that he has the right to representation against the said order of detention. This right being a fundamental right is available to all whether one can read and write or not. The communication to the detenu should be made which may be verbal or written which shall form the basis of the right to representation

Article 22 (5) - Mutual Rights and Duties

The above stated right of the detenu and duties of the authorities constitute 2 distinct parts of Article 22 (5). The two superimpose each other but are interdependent on each other which are the true nature of Article 22 (5). The focal point of the provision is knowledge to the detenu which will be the guiding force

⁷ INDIA CONST. art 22, cl. 5.

to make the representation against the detaining order and invariably satisfying the essential of Article 22 (5) which is an inalienable fundamental right given by the Indian Constitution to the detenu.

➤ IMPORTANT PRECEDENTS

The Court while delivering the judgment depended on the following judgments

- *Lallubhai Jogibhai Patel v Union of India*⁸ the Court discussed in depth the word “communicate”. The word communicate is a powerful word which implies the adequate knowledge of the fundamental facts which form the “grounds” should be well informed in writing and in a language that the detenu can comprehend. The underlying principle of this communication is so to ensure that the detenu has an opportunity to make efficacious representation. Article 22(5) necessitates that the grounds for the detention which have been made understood only vocally and no effort has been made to give the same in written format in a comprehensible language will defeat the purpose and aim of the Article.
- *State Of Bombay v. Atma Ram Shridhar Vaidya*⁹ the Apex Court while dealing with the right of representation that has been accorded to the detenu on the pretext of intimating the ground of detention is to make sure that the detenu has the “opportunity” to object the detention order. This opportunity should however be given at the earliest possible time along with the supply of not only the ground of the order but also any other material that is of importance to the detaining order which will be fundamental under Article 22 (5).
- *Harikisan v. State of Maharashtra*¹⁰ the detenu was unable to comprehend the ground served to him because of the lack of proficiency of the English language. The Court while placing reliance on the importance of the effective communication of the ground of detention, mere physical delivery of the information is not sufficient rather complete effective knowledge of the grounds should be given to make sure that the representation is made. Failure to do so will directly hit the fundamental right under Article 22(5).

➤ DISMISSAL OF APPEAL

The court while placing reliance on the facts held that no relief should be given to the detenu because

⁸ *Lallubhai Jogibhai Patel v Union of India*, A.I.R. 1981 S.C. 728 (India)

⁹ *State Of Bombay v. Atma Ram Shridhar Vaidya*, A.I.R. 1951 S.C. 157 (India)

¹⁰ *Harikisan v. State of Maharashtra*, A.I.R. 1962 S.C. 911 (India)

1. The detenu had suppressed the facts that there was no intimation by the respondent with reference to the ground of detention
2. The detenu had approached the court with unclean hands as he was not only well versed with the English Language but further more signed the panchanama along with a note of non acceptance of the grounds which were duly served by the respondents.
3. The grounds of detention were read clearly to the detenu thereby communication was done duly in the presence of 2 independent witnesses, which implies that detenu was very mindful of his right to representation objecting the detention.

The grounds for the detention of the appellant's brother in law being the detenu in the present case, which formed the foundation of the detention done by the concerned authorities, were brought into the knowledge of the detenu. The failure to make the representation restricts the detenu's right to look into the entirety of the facts especially the conversation done telephonically which has been relied on by the detenu.

The Apex Court clearly brought on record that the Court concerns itself in the present appeal only to the scope of the legality of the present order of the detention in light of Article 22 of the Indian Constitution and in no way is the court dealing with it as a criminal case against the accused as it would have done in normal circumstances.

The Court further observed that the any ancillary issue raised by the appellant also does not stand on a strong footing worthy of acceptance. In fact the reasons for the detention were intimated to the detenu at the earliest precisely the next day after the detention was done.

In light of the above rationale the Supreme Court found the appeal to be without any ground and did not intrude into the impugned order which the Calcutta High Court respectfully passed and dismissed the appeal

7. CONCLUSION

The present case dealt in detail with the rights of the detenu in light of the Article 22(5). The fundamental rights accorded by the Supreme Court are for the purpose of safeguarding and protecting the citizens from the powers which might go unbridled in the hand of those who are the organ of the state. In this case also the detenu being fully aware of the English language having being served the grounds and his non acceptance of the same despite efforts by the detaining authority indicate only one thing that is the detenu wanted to misuse the provision of the law. No right can override the basic and fundamental rights of a

human being.¹¹ There is a dire need to protect the rights of the detenu but on the same hand there is a requirement to ensure that the law pertaining to preventive detention is abided. To ensure this following are the suggestions-

- Strict adherence to the procedure recommended by the law should be followed by the officials
- The basic rights of the detenu should be taken into consideration while making any detention
- The ground of the detention should be clearly explained to the detenu in the language that the detenu understands.
- The fact that the grounds have been communicated should be recoded to avoid any subsequent problem.
- Advisory Board should be constituted in every state to keep a tab on any preventive detention that takes place.
- The police officials should be trained to deal with the situations in legal manner whatsoever keeping in mind that “bail is the rule, jail is the exception”.

REFERENCES

- https://digiscr.sci.gov.in/view_judgment?id=MzY0NjQ=
- <https://indiankanoon.org/doc/196206119/>
- https://main.sci.gov.in/supremecourt/2023/41809/41809_2023_14_1501_49181_Judgement_04-Jan-2024.pdf
- <https://thelawbrigade.com/wp-content/uploads/2019/05/Yash-Vithlani-Keerthana.pdf>
- <https://www.ijilr.org/wp-content/uploads/Preventive-Detention-Laws-in-India-The-Emergent-Need-to-be-Seen-in-the-Light-of-Article-22-of-the-Constitution-of-India.pdf>

¹¹ Nandini Tripathy, *Preventive Detention Laws in India - The Emergent Need to be Seen in the Light of Article 22 of the Constitution of India*, INTERNATIONAL JOURNAL OF INTEGRATED LAW REVIEW, (May 26, 2024, 2:15 PM) <https://www.ijilr.org/wp-content/uploads/Preventive-Detention-Laws-in-India-The-Emergent-Need-to-be-Seen-in-the-Light-of-Article-22-of-the-Constitution-of-India.pdf>