

(1999) 01 BOM CK 0046

In the Bombay High Court

Case No : Criminal Writ Petition No. 341 of 1998

Abdul Basheer

APPELLANT

Vs

The State of Maharashtra and others

RESPONDENT

Date of Decision : 13-01-1999

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 7(1)
Constitution of India, 1950 — Article 22(5)
Customs Act, 1962 — Section 108

Citation : (1999) 5 BomCR 423 : (1999) BomCR(Cri) 423

Hon'ble Judges : Smt. R.P. Desai, J;N. Arumugham, J

Bench : Division Bench

Advocate : Mrs. A.M.Z. Ansari, for the Appellant; Rajeev Patil, Assistant Public Prosecutor, for the Respondent

Judgement

N. Arumugham, J.—By filing the writ of habeas corpus under Article 226 of the Constitution of India, the petitioner, who is a friend of the detenu, by name, Shri Abbas Kacheri Kunnummal, has challenged the order of detention passed by the 2nd respondent, viz. Shri G.S. Sandhu, Secretary to the Government of Maharashtra, Home Department (Preventive Detention) and Detaining Authority vide No. S.P.L. 3(A)/ P.S.A. 1097/77 Home Department (Special), Mantralaya, Mumbai 400 032 dated 11-11-1997, as confirmed by the State of Maharashtra, the 1st respondent, thereby, detaining the detenu by virtue of section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 for all its alleged impropriety and illegality. The order of detention above referred shown in Annexure-A and the grounds of detention shown in Annexure-B and the documents relied upon by the detaining authority in Annexure-C, were executed on the detenu on 3-2-1998 and served upon him all the three documents simultaneously.

2. The prejudicial activities grounded in the order of detention at Annexure-B, in substratum, are as follow :

On 8-6-1997 the Air Intelligence Unit with its officers on suspicion, intercepted one passenger, by name, Shri Abbas Kacheri Kunnummal, the detenu herein, who was holding Indian Passport No. K-320542 issued on 27-2-1992 at Kozhikode, Kerala, near the exit gate of Module I arrival Hall of Sahara International Airport, Bombay. It appears that the said detenu had arrived from Riyadh by Saudia Arabian Airlines Plight No. SV-742 on ticket No. 65:4221:365:791:1 for the sector Riyadh-Bombay (which was stapled with another ticket No. 065:4221:356:792:2 for Bombay Cochin) and opted to clear himself through green channel. The officers of the Air Intelligence Unit, asked him in the presence of the panchas whether he was carrying any gold in his baggage or on his person to which he replied in the negative . On dissatisfying with his reply, his baggage consisting of one brown colour briefcase as hand baggage and one cardboard carton as checked in baggage bearing tag No. SV-161565, was put in the screening machine, in the presence of panchas, which showed some dark patches on the monitor which could not be explained by him. Examination of his baggage resulted in the recovery of 13 dry battery cells of "Everyday" brand. All of which were broken open which resulted in the recovery of 38 gold bars of 10 tolas each bearing foreign markings, totally weighing 4310.50 grams and valued at Rs. 17,02,647/- IMV and Rs. 20,27,600-LMV. These contrabands were seized by officers concerned in the presence of the panchas with reasonable belief that they could have smuggled into India and hence liable to confiscate under the provisions of the Customs Act, 1962. The detenu had admitted the knowledge of the presence of contraband gold in his baggage concealed in the dry battery cells.

3. Then he was examined and his statement was recorded on 8-6-1997 u/s 108 of the Customs Act, 1962 in which he had stated, inter alia, that he has been working in Riyadh as a salesman in a clothing store, and earning 700 Saudi Riyals per month and on his arrival from Riyadh by Saudia Airways flight No. SV-742 after opting to clear himself through the green channel, his baggage was screened again by customs officers on suspicion and that on opening the baggage, the officers recovered one piece of "Eveready" brand battery cell which they broke open which resulted in the recovery of three gold biscuits of 10 tolas each and that, on thorough search of his baggage by officers resulted in the recovery of 12 more battery cells which were broke open and resulted in the recovery of 34 gold bars or 10 tolas each, thus in all 37 gold bars of 10 tolas, each totalling weighing 4310.5 grams valued at the above value referred to above and thus he admitted the said facts in his statement. He would further admit that he came to India after a stay of one year and that the said contraband does not belong to him but however the said contraband was concealed in battery cells and that he met his childhood friend by name Abdul Majeed s/o Late Shri Imbichi Mohd. Haji who gave him a ticket for 8-6-1997 from Riyadh to Bombay and connecting flight to Cochin and that the said Abdul Majeed packed tour bags and told him that there was gold in the baggage to be handed over to K. Moideen of Kerala; and that he would be paid a commission of Rs. 50.000/ -

and that the said gold was to be collected from his residence in Kerala by K. Moideen and that he knew that what he had done was wrong and was an offence under law and that he had done this job to earn quick money.

4. On summoning Mr. K. Moideen by the office of the Asstt. Commissioner of Central Excise at Calicut, his statement was also recorded on 11-6-1997 u/s 108 of the Customs Act and that in which he had admitted and corroborated the whole incident and facts narrated by the detenu himself.

5. The investigation done in this case also, revealed that the detenu had made two previous visits in the last four years and Mr. K. Moideen had made four visits in the last five years. Then the detenu was arrested on 8-6-1997 and remanded to judicial custody which was extended from time to time. However, the learned Addl. Chief Metropolitan Magistrate, Mumbai, granted bail to the detenu on 17-6-1997, so also the said Mr. K. Moideen was also arrested and released on bail on 13-6-1997. After issuing show cause notice to the detenu on 28-10-1997 and considering the manner in which the contraband was concealed and the quantity of the same recovered, and that the detenu conversing with smuggling activities of gold and having satisfied it the prejudicial activities committed by the detenu and for future, the detaining and sponsoring authorities arrived at the subjective satisfaction that the smuggling activities of gold by the detenu were totally prejudicial one and apprehending that he would indulge in further prejudicial activities of similar nature, after having given all the statutory warnings and intimations to the detenu, the 2nd respondent has clamped preventive detention order against the detenu on 11-11-1997 and the said impugned order is since being canvassed and challenged by this writ petition. To arrive at his subjective satisfaction, the detaining authority has relied upon 50 documents in number as exhibited in Annexure-C of the compilation.

6. Of the several grounds, the impugned order of detention passed against the detenu has been challenged particularly ground Nos. 4, 5, 6, 7 and 8 by the petitioner.

7. Repudiating the every one of the grounds, however, justifying the passing of the detention order above referred, Mr. C.S. Sandhu, Secretary to the Government of Maharashtra. Home Department (Preventive Detention) and Detaining Authority, Mumbai, has filed a detailed sworn return which is substantiated and supported by Mr. B.S. Wankhede, Desk Officer, Home Department (Special), Government of Maharashtra, Mantralaya, Mumbai, by filing a separate sworn return. That apart, Mr. C. Rigzin, Assistant Commissioner of Customs, COFEPOSA Cell Sahar Airport, Mumbai, being the sponsoring authority, has also filed a sworn affidavit/return to explain the actions taken by them with regard to sponsoring of the proposal to clamp the detention order against the detenu under the relevant provisions of law. In short to say, the three affidavits or returns filed by and on behalf of the respondents, would clearly and not only deny the grounds but also the arguments advanced on behalf of the petitioner viz. the detenu.

8. We have heard the rival submissions from Mrs. A.M.Z. Ansari, learned Counsel for the petitioner and Mr. Rajeev Patil, learned Additional Public Prosecutor for and on behalf of the respondents.

9. The first ground dwelt by Mrs. A.M.Z. Ansari upon the impugned detention order, is that the impugned order of detention has been passed by the detaining authority without having any reference to the stringent conditions imposed by the learned Addl. Chief Metropolitan Magistrate while modifying bail conditions and imposing certain stringent conditions which order has not at all been placed by the sponsoring authority before the detaining authority and that since the said document is of very vital in nature, non-consideration of the same has gone to the root of passing of the detention order and that therefore she would contend that the impugned order of detention has become vitiated. Though Mr. Rajeev Patil, learned Addl. Public Prosecutor appearing for the respondents has denied the same by contending that the subsequent orders passed by the learned Metropolitan Magistrate in modifying the conditions of bail originally granted do not amount to a material fact and as such assuming for a moment the same cannot be passed nor considered by the detaining authority before the impugned order was passed. In the above context, we have perused meticulously the case papers and the factual matrix of the case. It would appear that on arresting the detenu on 8-6-1997 itself he was produced before the learned Addl. Chief Metropolitan Magistrate and on 13-6-1997 bail was granted to the detenu with a condition that he must pay cash security of Rs. one lac to avail the bail. The said order of bail, though passed by the learned Addl. Chief Metropolitan Magistrate with the knowledge of the sponsoring authority, has not been availed of by the detenu for the reason of his so-called "the financial difficulty". Therefore, it was necessitated for him to file an application before the learned Addl. Chief Metropolitan Magistrate for modification of bail conditions. After hearing the petitioner, the learned Metropolitan Magistrate appears to have modified the condition for granting bail pertaining to cash security of Rs. one lac to Rs. 60,000/-. While doing so, the learned Metropolitan Magistrate has imposed certain other conditions amongst whom that the detenu was also directed to appear before the Court on specified time every day for a period of two weeks and that thereafter directed the detenu to appear before the authorities concerned as and when required. It is noticed, thus, that while the first condition of cash security was reduced, two more conditions were added by the Court of law itself to avail of the bail and then accordingly the detenu seems to have availed of the same. The order in respect of subsequent two added conditions to avail of the bail by the detenu passed by the learned Metropolitan Magistrate, has not been placed before the detaining authority while clamping the impugned order of detention for the reason that imposing two subsequent conditions are very stringent and that so much so the said order passed by the learned Metropolitan Magistrate becomes, according to the petitioner, very important and that in so long as the same has not been considered by the detaining authority nor placed before it, the learned Counsel would contend that the clamping of the

detention order would become clearly vitiated. In the context of controversy of the same by the learned Addl. Public Prosecutor, we have examined the said contention.

10. As rightly contended by Mr. Rajiv Patil learned Addl. Public Persecutor, we have to see that the subsequent two conditions, viz, to appear before the Court on a particular time for a period of two weeks, and then for rest of the period to appear before the authorities as and when required, added in the order by the learned Addl. Chief Metropolitan Magistrate on modification with the conditions of the original bail order, would not amount to stringent conditions and that further the said two conditions, in our considered view, form part of and an integral part of the original order of bail passed in favour of the detenu. We have come to this conclusion for the simple reason, that either on the day of passing the order of bail, at the first instance, or the second instance, it is noticed that the learned Addl. Chief Metropolitan Magistrate had not touched nor abridged or modified the order of bail granted with regard to the conditions for availing the bail are concerned. The learned Addl. Chief Metropolitan Magistrate had modified it and added in the order the new conditions. Since the conditions imposed either in the original first order or the subsequent order, are amount to only basis for availing of the bail and the remedy of the bail granted by the learned Addl. Chief Metropolitan Magistrate remains intact, in our considered view, the granting of bail is the genesis of which the conditions are to be fulfilled over the spacing of the same. There is no controversy amongst the Bar that the subsequent order and the earlier order of bail, the two in respect forms a part of one and the same and an integral part of each other. If that is the position being found out, it is not always desirable nor reasonable to segregate either the later part of the order of bail or the earlier part of the bail for the purpose of considering the same in arriving at a subjective satisfaction upon the prejudicial activities of the detenu.

11. Pertinent at this stage to note the case law relied upon by Mrs. A.M.Z. Ansari rendered in Dr. Mannan Gulam Hussain Chougule v. The Union of India and others, by the Bench of this Court in Criminal Writ Petition No. 2364 of 1991 dated 20-3-1992. For the factual matrix of the instant case, we are at every difficulty to import the ratio held by the Bench of the Court in the above case to be applied in the instant one.

12. For the reasonings given above that the order of bail granted by the learned Addl. Chief Metropolitan Magistrate to the detenu on 17-6-1997 is only a factor which is to be taken note of either by the sponsoring authority or the detaining authority for the purpose of passing the impugned order of detention and the modification of the conditions for availing of the bail whatsoever made by the learned Metropolitan Magistrate who granted the bail, in howsoever manner, would not be the criteria and that as such in this context segregating the conditions in the bail order cannot at all be sustained for the purpose of attributing the importance and vital nature of the document to be placed before the detaining authority for the purpose of clamping the order of detention. In this

regard, after having carefully considered, we are totally satisfied to accept the contention made by the learned Additional Public Prosecutor and reject the contention projected on behalf of the petitioner.

13. Coming to the second attack made by Mrs. A.M.Z. Ansari that there was a delay in execution of the order of detention which covers clearly the period of about three months and that the said delay has remained unexplained. It also goes to the root of the clamping of the detention order is concerned. We may observe that the above contention has also not been substantiated. In this context, we feel it relevant to quote the contents made by the detaining authority in para 7 of his sworn reply affidavit which are as under :--

"With reference to para 4(iv) of the petition, I say that the order of detention dated 11-11-1997 along with grounds of detention, annexure and relied upon the documents in support thereof were sent vide Government letter, Home Department dated 11-11-1997 to the Secretary to the Government of Kerala, Home (S.S.A.) Department, Thiruvananthpuram, Kerala for execution of the same upon the detenu. I say that the Additional Chief Secretary, Government of Kerala vide his letter dated 15-11-1997 forwarded all the aforesaid documents to the Superintendent of Police, Kozhikode Rural for execution upon the detenu. The said letter was already endorsed to me and it was received in the Home Department on 24-11-1997. I say that in the meantime the Superintendent of Police, Kozhikode Rural, Kerala, vide his wireless message No. 790/CAMP/97/DR. dated 3-2-1998 informed that the detention order has been executed upon the detenu by Shri Alikoya, Assistant Sub-Inspector on 3-2-1998 at 15.00 hrs. and the detenu will be sent to Mumbai General Prison, Mumbai, immediately. The said wireless message was received in the Home Department on 4-2-1998 and therefore the Government did not initiate the action u/s 7(1)(a) and (b) of the COFEPOSA Act, 1974 against the detenu. I say that the contents of the present grounds also relate to the Executing Authority and I, therefore, crave leave to refer to and rely upon the affidavit, if filed by the Executing Authority. However, I deny that the order dated 11-11-1997 was belatedly served on the detenu on 3-2-1998, i.e. after the period of two months. I say that as the order of detention was forwarded for execution to Government of Kerala, Home Department of Government of Maharashtra was awaiting further progress of the matter from Government of Kerala. I say that the procedure for cancellation of bail for forfeiture of the amount by the detenu would have taken longer time and therefore though the proposal to initiate action against the detenu as he made himself scarce was being initiated. I say that the Home Department received the communication from the Government of Kerala that the detention order was executed and therefore further action u/s 7(1)(a) & (b) of the COFEPOSA Act was not initiated. I deny that because of the execution of detention order after three months upon the detenu the satisfaction arrived at by me is rendered sham. I deny that the order of detention is mala fide, null and void".

14. We also feel it relevant to advert to the contents made by the sponsoring

authority about the so-called "delay" in para 5 of his sworn affidavit which is as under :--

"With reference to Ground 4(iv) of the writ petition, I say that the order of detention was issued on 11-11-1997 and was forwarded to the Secretary to the Government of Kerala for execution. I say that the copy of the said order was received in the COFEPOSA CELL on 13-11-1997 and immediately on receipt of the detention order, a telex was issued to the Assistant Commissioner (Prev.), Special Customs Preventive Unit, Kozhikode, on 13-11-1997 itself, for apprehending the detenu. I say that instructions were also issued to the prosecution cell and the seizing unit on 17-11-97 and 18-11-97 respectively for apprehending the detenu, whenever he appears either before the Court or before the authorities or any other place. I say that on 14-11-1997 and 16-11-1997 were closed holidays and therefore these instructions were issued on 17-11-1997 and 18-11-1997. I say that a reminder was also issued to Asstt. Commissioner, Special Customs Preventive Unit, Kozhikode on 24-12-97 to pursue the matter and apprehend the detenu. As a result of continuous efforts, the detenu was finally apprehended on 2-2-1998 by the Superintendent of Central Excise, Special Customs Preventive Unit, Kozhikode with the help of police of Kozhikode. I say that there were continuous efforts made by the Department, to apprehend the detenu and, therefore, the department did not move the Court for cancellation of bail and forfeiture of cash deposit, which is resorted to only after exhausting all means to trace the detenu. I say that the detenu was absconding and to the information of department the detenu was in Kerala and therefore the process of cancellation of bail would have further delayed the execution of detention order".

15. In the context of the above categorical reply, we are constrained to say that there was no delay at all in executing the order of detention and even if assuming that there was a delay of three months, it is noticed that by filing the sworn return by the sponsoring authority and the detaining authority, as abovementioned, the said authority has explained the same very convincingly and cogently. It is for the above reasonings, we are not in a position to accept the very contention of Mrs. A.M.Z. Ansari with regard to the second contention of delay in execution of the order of detention in the instant case.

16. Though the learned Counsel for the writ petitioner has relied upon a case law held by the Supreme Court held between Smt. Sultan Abdul Kader v. Joint Secretary to Government of India and others, 1998 S.C.C. (Cri.) 1534, we are not in a position to import the ratio of the same for the facts of the instant case for the reason that the factual matrix of that case is totally different and distinguished from the instant one and the case in hand wholly involves an interested transaction for the purpose of execution and that, even therefore, as rightly and justifiably explained by the detaining and sponsoring authorities, the said ground cannot be sustained. So this ground also must fail.

17. The third ground argued by Mrs. Ansari is that the copies of the documents,

particularly pages 83, 84, 91, 125, & 132 of the writ compilation, were not legible which resulted in deprivation of the right of the detenu to make an effective and efficacious representation and that, therefore, it comes under the teeth of Article 22(5) of the Constitution of India and that as such on this ground also, the impugned order of detention becomes vitiated.

18. We have heard forceful argument made by learned Additional Public Prosecutor with regard to the above contentions made by the learned Counsel for the petitioner. On a careful perusal of the said pages or copies of the documents filed in the compilation, we find, except page 83, that other copies of the pages are very clear and decipherable. Therefore, no malice can be attributed upon the said pages. With regard to certain writings on the other left side page of 83, it is true that there is some faint point, but as rightly pointed out by the learned Additional Public Prosecutor, it is merely an order passed by the learned Addl. Chief Metropolitan Magistrate in connection with the production of the detenu by issuing an examination warrant for the purpose of recording further say. Therefore, it is manifest that it is not an important document so as to arrive at the subjective satisfaction in passing the order of detention. It is for this reasoning the third ground projected by the learned Counsel for the petitioner must also fail.

19. Likewise, Mrs. Ansari also projected a contention, fourthly, that some documents found in language Malayalam has not been understood by the detaining authority nor considered by him for the very reasoning that the detaining authority, i.e. the second respondent, does not know Malayalam language at all. This aspect has been duly and promptly responded by the detaining authority in para 10 of his reply which is as under :-

"With reference to ground 4(vii) of the petition, I say that the copies of pages 65 and 66 are the copies of declaration of paddy and ration card No. 130173 dated 18-9-1991. I say that the above mentioned documents which were placed before me and though they were in Malayalam the nature of document was informed to me and therefore it was not necessary to have a translation of those documents as they were not constituted the basic facts. I deny that I have not applied my mind to the aforesaid documents. I deny that the satisfaction arrived at by me was sham and unreal and therefore the order of detention is mala fide, null and void. I say that there was no question of having documents to be translated into English as those documents were not relevant for the purpose of subjective satisfaction. However, the said documents were placed before me which has not affected the detention order in any manner. I deny that the order of detention is mala fide, null and void."

20. The last ground agitated by the learned Counsel for the petitioner is that photocopy of the photograph of the detenu has not been furnished to him so as to make an effective representation to the concerned authorities. A pertinent reply has been given in para 11 of the sworn affidavit filed by the detaining authority. Since we are satisfied by the explanation given in para 11 of the said

sworn affidavit, we feel that there exists no need or occasion for us to have a detailed discussion or consideration about the said ground. Straightway, we may observe that in the context of reply given by the detaining authority in para 11 of his sworn affidavit, it can be accepted very well and that the contention made by the learned Counsel for the petitioner would automatically fail.

21. In Abdul Sathar Ibrahim Manik Vs. Union of India and others, , the Supreme Court has observed the following ratio.:-

"From the above discussion it emerges that even if the bail application and the order refusing bail are not placed before the detaining authority or even if placed, if the detaining authority does not refer to or rely upon or has failed to take them into consideration, that by itself does not lead to an inference that there was suppression of relevant material or in the alternative that there was non application of mind or that subjective satisfaction was impaired. When these documents are neither referred to nor relied upon, there is no need to supply the same to the detenu."

22. Having considered the whole gamut of rival contentions and the case law referred to in the factual matrix of the instant case, we do not across any merits in this writ petition and that, therefore, this writ petition must fail.

23. No other substantial points have been argued by and on behalf of either of the parties.

24. In the result, for all the foregoing reasonings, observations and findings, the writ petition must fail and accordingly it is dismissed. Rule issued already has, thus, been discharged.

25. Writ petition dismissed.