
(1991) 03 BOM CK 0007

In the Bombay High Court

Case No : Criminal Writ Petition No. 15 of 1991

Abdul Nasir Khan

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 04-03-1991

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 5, 8, 9

Citation : (1991) 93 BOMLR 154

Hon'ble Judges : V.A. Mohta, J;G.D. Patil, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

V.A. Mohta, J.—We have heard Shri Karmali, learned Counsel for the-petitioner detenu and Shri Habibuddin Ahamad, learned Counsel for the State and perused the record with their assistance. We do not see any substance in this second challenge to the order of "detention" and "continued detention" dated April 26, 1990 u/s 3(1) read with Section 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (the Act) for the reasons that follow:

2. The detailed backdrop against which the impugned order was made is set out in the order passed by a Division Bench at Bombay in Abdul Nasir Khan v. L. Hmingliana (1990) Cr.W.P. No. 537 of 1990 while disposing of the first challenge. Hence we are refraining from repeating the same over again here. After hearing exhaustive submission of Shri Ram Jethmalani, then learned Counsel for the petitioner, the said petition came to be dismissed. In this second round of challenge four grounds not urged before are raised by Shri Karmali, learned Counsel for the petitioner;

3. They are:

(1) The impugned order is vitiated because satisfaction recorded by the detaining

authority in the grounds is at material variance with the satisfaction recorded in the order; as a result the detenu was deprived of his valuable constitutional right to make effective representation; (ii) The order has been passed technically by the detaining authority, since he had really no time to scrutinise the documents running into 476 pages during the short period between the submission of the documents and the passing of the order; (iii) The detaining authority failed to apply his mind to the question as to whether there was real possibility of the petitioner being released on bail, necessitating passing of the order of detention; (iv) Advisory Board's recommendation for the continued detention was excessive since the declaration u/s 9(1) of the Act dated May 23, 1990 came into existence only after the reference u/s 8(b) of the Act was made on May 21, 1990.

4. Ground No. (i)

5. In the order of detention it is mentioned that the order is passed with a view to prevent the detenu from "smuggling goods" and "engaging in transporting smuggled goods". Whereas in the grounds there is reference to his activities of "smuggling the goods", "abetting the smuggling," "engaging in transportation of smuggled goods and their disposal". No doubt the activities set out in the various sub-clauses of Section 9(1) are distinct and different, but in a given case they may overlap also. Real point is whether the above difference between the language employed in the order and grounds establishes either the non-application of mind or the prejudice to the right of effective representation against the order and the grounds. Having regard to detailed background stated in the grounds and the order passed thereupon it is not possible to conclude that the two satisfactions run counter to each other. In our view in truth and substance they coincide with each other and it cannot be said that there is non-application of mind by the detaining authority.

6. In the instant case the detenu is an English knowing educated person who has made several representations from time to time against the grounds of detention as well as the order of detention. At no point of time he disclosed that he was in any way confused by the so-called difference between the satisfactions, recorded in the order of detention and the grounds of detention, and his right of representation was in any way prejudiced thereby. Undisputed position is that even at the time of first challenge, no such grievance was made.

7. In this connection our attention was invited to the case of Vijay Kumar Dharna alias Koka Vs. Union of India and others, . But we find that the factual backdrop of that decision is different. The problem there arose in the context of material difference between the original English version and the translation in Gurmukhi-the only language known to the detenu there. It was held that the said difference confused the detenu resulting into prejudice to his right of representation.

8. Our attention was also drawn to the case of Krishna Ram v. State of Maharashtra (1982) Cri 409, where in it has been held that if the conclusion drawn in the order is inconsistent with the conclusion drawn in the grounds of

detention it demonstrates non-application of mind. Such being not the position in the instant matter, the ratio of that decision will have no application. In the case of *Vimal Kumar Bafna v. State of Maharashtra* (1990) Criminal Writ Petition No. 114 of 1990 (Bom.) the ratio of *Vijay Kumar's* case (*supra*) was applied to the facts of that case.

9. Ground No. (ii)

10. The documents running into 476 pages were handed over to the detaining authority by the sponsoring authority on April 23, 1990. The detention order and the grounds of detention are contemporaneously prepared on April 24, 1990. The contention is that it is nearly impossible to go through all the papers and to formulate the grounds during this short period. We do not agree. Apart from the fact that there is no material on record to substantiate this assumption, disposal of matters like this does not depend merely upon the volume of the papers. It depends upon the experience and competency of the detaining authority. We are informed that the detaining authority Mr. Hmingliana has been dealing with such matters since more than three years. He has sworn an affidavit that considering the urgency of the matter, he worked over time and started reading the papers as soon as they were received in the morning of April 23. Only the two papers connected with the bail position were received in the evening and after considering the entire material he had passed 5 detention orders against different persons. There is no reason as to why the version given by the detaining authority should be discarded.

11. Our attention was invited to the case of *Shri Umesh Chandra Varma v. Union of India* (1989) Supreme Court Criminal Appeal No. 878/85 decided on December 20, 1989 (Unre). In that case voluminous documentary evidence was supplied in the evening and within few hours the detaining authority has passed the order, on that very night, Supreme Court was not satisfied that it was a case of application of mind. In *M.K.J. Abubakar v. The Joint Secretary, Government of India* (1989) Writ Petition No. 83 of 1988 (Madras High Court) Madras High Court also took the same view in somewhat similar back ground. Both these decisions are rendered against peculiar background of these orders and no ratio as such can be deduced therefrom.

12. Ground No. (iii)

13. The detaining authority was quite conscious of the fact that the detenu was in jail. The DRI (Director of Revenue Intelligence) had placed his assessment before the detaining authority to the effect that since complaint was not filed before the Magistrate by that time and many times in such background accused are released on bail, there was a possibility of the detenu also being released on bail. The detaining authority on the basis of the said report and the material supplied by the DRI, was subjectively satisfied that the petitioner was likely to be released on bail. It is contended that the use of the word "likely" and non-use of the words "real possibility" in the order of detention does not satisfy the test laid

down in the latest decision of the Supreme Court in the case of Kamarunissa and Others Vs. Union of India and another, . We do not agree, Supreme Court has laid emphasis not on the words used but on the substance of the matter. We are satisfied that the tests laid down by the Supreme Court are fully satisfied. It is not necessary to couch the satisfaction in particular language only.

14. Ground (iv):

Reference to the Advisory Board u/s 8(b) of the Act was made on May 21, 1990 in which it was mentioned that the Central Government was already moved for making a declaration u/s 9(1) of the Act. Declaration u/s 9(1) of the Act was made by the Special Secretary to the Government of India on May 23, 1990. Copy of the said declaration was supplied to the detenu on June 8, 1990. On July 3, 1990 the detenu made a representation to the Central Government for issuance of copies of documents connected with the said declaration. The said representation was rejected on July 13, 1990 on the ground that they were already supplied. Copy of the declaration was placed before the Advisory Board on September 21, 1990. The detenu thereafter appeared in person before the Advisory Board. The Advisory Board heard him also on the question of his "continued detention". The Advisory Board vide its opinion dated October 15, 1990 stated that there was sufficient cause for the "detention" u/s 3(1) and also for "continued detention" u/s 9(1) of the Act. The submission that since the reference was made u/s 8(b) before the declaration was made, the Advisory Board could not have opined on the question of continued detention and hence the opinion was in excess of the reference, does not appeal to us in the above background.

15. Our attention was drawn to the case of Satar Habib Hamdani Vs. K.S. Dilipsinhji and Others, wherein well defined distinction between "detention" and "continued detention" has been noticed and so also the absence of the words "continued detention" in the opinion of the Advisory Board. Under the circumstances, it was held that the detention for more than one year was unauthorised. We are unable to see how the above decision is of any assistance to the detenu.

16. Shri Habibuddin has invited our attention to Section 5(1) of the Act. In the view we are making of the grounds urged, it is unnecessary to consider the impact of that provision in the instant matter.

17. In the result, we find no substance in this Habeas-Corpus petition. It is dismissed.

18. Needless to mention that upon dismissal of this petition the extension of lime granted by us for detenu's continuation in Nanavati Hospital, Bombay comes to an end. Needless also to mention that the petitioner is free to move the authorities in that matter and they are free to pass appropriate orders.