
(1985) 11 GUJ CK 0018
In the Gujarat High Court

Babulal Sundarji Bhanushali

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 29-11-1985

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 3(1)

Citation : (1986) 1 GLR 704

Hon'ble Judges : S.B. Majmudar, J;R.J. Shah, J

Bench : Division Bench

Judgement

S.B. Majmudar, J.—By our earlier order dated 8th November 1985, we had allowed the petition and had quashed the impugned order preventively detaining the petitioner under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. We had deferred recording of reasons for the said order. The reasons for our aforesaid decision are as under:

2. The petitioner was preventively detained by an order dated 22-2-1985 issued by the officer on special duty and Ex-officio Joint Secretary to Government, Home Department (Special), by order and in the name of the Governor of Gujarat, under the provisions of Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA Act for short). The said order was pasted with a view to preventing him from abetting the smuggling of goods. The petitioner was also supplied with grounds of detention on the very same day i.e. 22-2-1985. It is not necessary to refer to the grounds of detention as this petition is required to be allowed on the Military ground that the sponsoring authority had not put before the detaining authority all relevant facts and material which were favourable to the detenu. The petitioner has challenged the aforesaid order of detention by filing the present petition. It was admitted to final hearing by this court. The respondents have filed the affidavit-in-reply opposing the petition. The first affidavit-in-reply was filed by Mr. A.K. Agnihotri Under Secretary to the Government of India, Ministry of Finance. The second affidavit was filed by Mr. T.S. Randhawa, Deputy

Secretary to the Government of Gujarat, Home Department (Special). The third affidavit has been filed by Mr. M.T. Parmar, Under Secretary, Home Department (Special), Government of Gujarat and the fourth affidavit has been filed by Mr. T.S. Randhawa, Deputy Secretary, Home Department (Special), Government of Gujarat.

3. Now is the time for as to refer to the main contentions canvassed on behalf of the petitioner that has found favour with us. Mr. J.R. Nanavati for the petitioner, amongst others contended that the detention order is liable to be quashed and the petitioner is required to be set at liberty mainly on the ground that the detaining authority has not acted favourably to the petitioner and that the sponsoring authority has withheld from the consideration of the detaining authority relevant material which was favorable to the petitioner. Thus, the subjective satisfaction arrived at by the detaining authority against the petitioner is a truncated, lopsided, incomplete and non-genuine satisfaction. In para 20 of the petition the petitioner has contended that the sponsoring authority issued show cause notice No. F-VIII/10/20-3-Collector/84 and the Collector of Customs passed the order of confiscation of goods on 19-10-1984 and the petitioner submitted his reply to the show cause notice on 12-10-1984. That material document is, not supplied by the sponsoring authority to the detaining authority. That would have influenced the detaining authority not to pass such type of order. It is submitted that the material document is not supplied and, therefore, the impugned order of detention is vitiated and requires to be quashed and set aside. In the affidavit-in-reply filed by Mr. T.S. Randhawa, the aforesaid contention is tried to be met in para 14 of the reply affidavit as under:

Merely because show cause notice was issued and the order of confiscation was passed and the petitioner submitted his reply to the show cause notice, the said documents do not become material and relevant. It cannot be said as a general rule that in all cases, whenever it is shown that a show cause notice or its reply is not placed before the detaining authority or is not considered by the detaining authority, ipso facto the detention order will become invalid.

In the light of the aforesaid rival contentions, touching upon the question, the grievance ventilated by the learned Advocate for the petitioner has to be examined.

4. Mr. Nanavati submitted that the incident in question in connection with which the petitioner is detained occurred on 28-1-1984 wherein a team of police officers of Kutch district apprehended certain persons near village Madhpar of Kutch district on the State highway connecting Bhuj with the rest of the Gujarat State. It is alleged that certain smuggled goods such as V.C. Rs. wrist watches were detected on the spot and were found being carried in two trucks bearing registration Nos. MHT 2622 and MRR 9525. Mr. Nanavati submitted that for this very incident, the petitioner was served with a show cause notice by the customs authorities on 21-7-1984. That the petitioner replied to the said show cause notice on 12-10-1984. That, thereafter, the customs authorities confiscated the

goods on 19-10-1984 while the impugned detention order was passed against the petitioner for the very same incident on 22-2-1985. That in the sequence of the aforesaid chronological facts, it becomes obvious that the reply which the petitioner gave to the show cause notice of the customs authorities was a very material document which was required to be placed by the sponsoring authority for consideration of the detaining authority. That this had admittedly not been done. To support this contention, he invited our attention to the list of documents supplied to the petitioner alongwith the grounds of detention at annexure "C. The list of documents is found at page 66 of the paper book alongwith annexure "C in the form of an index. This index consists of 85 documents. It is true that neither the show cause notice issued by the customs authorities to the petitioner in adjudication proceedings nor the reply of the petitioner to this notice finds its place in the aforesaid list of documents. However, the learned Counsel for the respondents submitted that at item No. 44 of the said list is found an application filed by the petitioner before the learned Chief J.M.F.C., Bhuj on 11-2-1984. It is at page 417 of the compilation. Thus, the petitioners application to the learned Chief J.M.F.C., Bhuj complaining about the alleged coercion and force used against him by the customs authorities in letting his statement recorded and the fact about the petitioners retraction of the said statement as contained in the aforesaid application were already before the detaining authority and were duly considered by the detaining authority in pasting the impugned order. The learned Counsel for the respondents, therefore, submitted that merely because the petitioners reply to the show cause notice issued by the customs authorities was not placed before the detaining authority by the sponsoring authority, it cannot be said that the subjective satisfaction arrived at by the detaining authority got in any way lopsided or truncated or was incomplete and for that matter, not genuine.

5. It is true that if the petitioners reply to the show cause notice had merely contained reiteration of his earlier stand before the learned Chief J.M.F.C., Bhuj that his statement as recorded by the customs authorities was enforced one and that he had already related the same and that his reply to the show cause notice did not contain any additional material, then it could have been effectively urged by the learned, counsel for the respondents that the subjective satisfaction of the detaining authority cannot be said to be in any way vitiated or could not have been treated to be lopsided. However, the reply to the show cause notice as presented by the petitioner before the customs authorities i.e. the Collector of Customs a copy of which was made available for our scrutiny by the learned advocate for the petitioner and to which the learned Counsel for the respondents had no objection, showed that a part from the fact that the petitioner had stated in his reply to the show cause notice that this statement before the customs authorities was not voluntary one and that it was obtained through threat, he had placed number of additional aspects of the matter for the consideration of the customs authorities when he showed cause why the notice is issued against him should be discharged. Scrutiny of the aforesaid reply showed that the

petitioner had submitted at least 19 additional points for consideration of the customs authorities in the adjudication proceedings by way of his defence. Those 19 additional points submitted in the reply to the show cause notice were as under:

1. That on the date of the incident, he had been to Bhuj for his domestic work.
2. That the police had beat him at the police station and forced him to put his signature on the writings as well as on blank papers.
3. That he had not visited Bhuj on 14-1-1984. He did not know who was Ismail and Umar. He had never met them. He had never seen Asraf.
4. That he had never visited Mandvi on 27-1-1984. He did not know the partner of M/s. Vasantlal Chunilal of Mandvi and M/s. Vijay Trading Company.
5. That he had been to Bhuj only for his domestic work. He had never visited Bhuj on 14-1-1984 in his brother's car.
6. That the police as well as the customs authorities had obtained the signature from him on the photos but he had never seen that person prior to that photo was shown to him.
7. He had never seen village Pahiya. He did not know Juma Vali Mohmed.
8. That he had been to Bhuj for domestic work and he had been to his native place Rajapar.
9. That he had never stayed in Bhanushali Atithi Gruh. He returned from Hajapar village at about 8.30 by bus from Nakhatrana. When he was passing through the road, the police arrested him without any reason and sent him to Bhuj city police station.
10. That when the police took him to Bhuj city police station, he saw that there were Karsan Bachu, Bhanushali and other Sardarjis
11. That prior to that, he had never met Sardarji.
12. That he did not know name of that Sardarji. He only came to know about his name when the show cause notice was served on him.
13. That he did not know Kartarsing Kamalsing Dhillon. He had falsely involved him in the present case.
14. That he had never met Jumma Ismail Hingoja alias Jumma Hotelwala.
15. That even though Himatlal Versi Bhanushali, the partner of Vijay Trading Company, Mandvi had stated before the customs authorities that on 27-1-1984 he had visited Mandvi alongwith Gopalbhai of New Gauri Transport Company, he had never visited Mandvi.
16. If as per the statement of Himatbhai, he belonged to his caste and he was

knowing the petitioner very well and also he knew his father, how was it that he had mentioned his name as Babulal Purshottam Bhanushali in the bill when the petitioner was Bhanushali Babulal Sardarji.

17. That the statement of Devji Kanji Thacker, a partner of M/s. Vasantlal Chunilal and Company, Mandvi showed that Himatlal falsely involved him in this case.

18. That regarding the statement of Chandrakant Manilal Soni it was stated that the petitioner had never visited Mandvi on 27-1-1984.

19. That regarding statement of Udhayraj Ramsing Rande head constable of Bhuj police station, it was submitted that he arrested the petitioner from nearby Bhuj bus station but he never arrested him from Madhapar school. The customs authorities recorded the statement of his brother Navin Sunderji Bhanushali which clearly showed that on 14-1-1984, the petitioner was at Sherdi, pilgrimage city of Sai Baba. He had never visited Bhuj on 14-1-1984.

6. The aforesaid 19 contentions mentioned in the reply to the show cause notice as given by the petitioner on 12-10-1984 would clearly not amount to mere duplication of the petitioners contention before the learned Chief J.M.H.C.; Bhuj that his previous statement given to the customs authorities was retracted by him and that it was caused by coercion and force. These 19 additional aspects of the matter obviously put forward diverse defences of the petitioner in connection with the incident in question. They were new aspects and were obviously favourable to the petitioner. The petitioners version on them was required to be placed before the detaining authority by the sponsoring authority so that the detaining authority in all fairness can come to a genuine and correct subjective satisfaction cause the need to preventively detain the petitioner on account of his involvement in the incident in question. This has admittedly not been done. So far as this aspect of the matter is concerned, the issue is no longer res-integra. By a decision of the Supreme Court in Criminal Appeal No. 332 of 1985 with: Writ Petition No. 1923 of 1984 decided by V.D. Tulzapurkar and Ranganath Misra, JJ on. 16-4-1985, it has been ruled that reply to the show cause notice as given by the detenu before the customs authorities in adjudication proceedings was required to be placed by the sponsoring authority for consideration of the detaining authority if it contained material which was favourable to the detenu and that such material cannot be said to be irrelevant and if such material is withheld from the scrutiny of the detaining authority by the sponsoring authority, the continued detention of the detenu would be illegal. Relying upon earlier two decisions of the Supreme Court in Ashadevi Mehta (Detenu) Vs. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat and Another, and Mohmed Shakool Wahid Ahmad v. State of Maharashtra and Ors. (1983) 2 S.C.R. 392, the Supreme Court in the aforesaid decision held that the subjective satisfaction of the detaining authority must be regarded as having been vitiated in view of the fact that the relevant material viz. the reply of the detenu to the show cause notice issued by the customs authorities was not placed by the customs authorities before the

detaining authority. Even prior to that decision. A Division Bench of this Court in *Kurjibhai v. State* 26(1) G.L.R. 85 took the view that if the reply to the show cause notice as given by the detenu contained relevant material favourable to the detenu and if it was not place for consideration of the detaining authority before ordering preventive detention of the detenu, the subjective satisfaction would get vitiated. Even subsequently, diverse Division Benches of this Court have taken the view that withholding of such relevant material from the scrutiny of the detaining authority would vitiate the subjective satisfaction. The said decisions are rendered in *Karsan v. Dilipsinhji* 26 (2) G.L.R. 952, Special Criminal Application No. 215 of 1985 decided by N.H. Bhatt and I.C. Bhatt, JJ. on 11-7-1985, Special Criminal Application No. 193 of 1985 decided by the same Bench on 9-7-1985, and the decision of the Division Bench consisting of G.T. Nanavati and M.B. Shah, JJ. in Special Criminal Application No. 478 of 1985 decided on 3-9-1985. As we have already observed earlier, if the reply to the show cause notice had merely reiterated the fact that the petitioner had retracted his statement before the customs authorities and that the same fact was already before the detaining authority in the shape of the petitioners own application before the learned Chief J.M.F.C. Bhuj mentioning the very same fact, it could not have been effectively stated on behalf of the petitioner that this relevant aspect of the matter was kept out of consideration of the detaining authority by the sponsoring authority. But on the facts of this case as discussed by us earlier, 19 additional aspects of the matter which were favourable to the detenu were kept not of consideration of the detaining authority by the sponsoring authority. They were very much covered-by the reply to the show cause notice. Thus, the reply to the show cause notice did not travel on the beaten track but went ahead of it by mentioning the aforesaid 19 additional points for consideration of the concerned authority and which obviously were favourable to the detenu as they highlighted his own defence version about the incident. They can certainly be treated to be having a propensity to tilt the balance one way or the other so far as the question of preventive detention of the detenu goes. As this favourable additional material as contained in the reply to the show cause notice was kept out of scrutiny of the detaining authority by the sponsoring authority by not submitting a copy of the petitioners reply to the show cause notice for consideration of the detaining authority, the subjective, satisfaction of the detaining authority must be held to have got vitiated.

7. Consequently the said satisfaction must be treated to be not genuine arm a lopsided and truncated one. Only on this short ground, the impugned order of detention is liable to be quashed and set aside and the petitioner is required to be released forthwith.

8. The aforesaid are the reasons which resulted in our earlier order of 8th November 1985 allowing the petition.