

(1994) 07 KL CK 0034
In the High Court Of Kerala
Case No : O.P. (HC) No. 11196 of 1993-S

C. Pathummu

APPELLANT

Vs

Commr. and Secy. to Govt. Home (SSA) Deptt. and Others

RESPONDENT

Date of Decision : 13-07-1994

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 10, 3, 8, 9
Constitution of India, 1950 — Article 22
Customs Act, 1962 — Section 124

Citation : (1995) 56 ECR 19

Hon'ble Judges : Sujatha V. Manohar, C.J;T.L. Viswanatha Iyer, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sujatha V. Manohar, C.J.—Petitioner is the wife of the detenu. On 6.1.1993 the Superintendent of Air Customs, Trivandrum and his party, while keeping surveillance on the passengers boarding a flight to Dubai, intercepted the detenu who was one such passenger on suspicion while the detenu was identifying his baggage outside the export baggage hall. On examination of a brown coloured carton, which was part of detenu's baggage, foreign currencies equivalent to Rs. 1.20 crores were found concealed in the carton inside a packet to banana chips. The foreign currencies and travel documents of the detenu were seized on 6.1.1993 under the provisions of the Customs Act. On 7.1.1993, the detenu gave a statement which he stated, inter alia, that he was employed as a cook in Abu Dabi since 1984. He had to return to India as he received a telephone call informing him that his father was ill. He could not purchase a ticket for his return journey to Abu Dabi since he did not have money. When he was leaving the travel agent's office, one Kunhi Mohammed approached him and offered him a free air ticket and Rs. 10,000/- if he carried a box given by him to Abu Dabi and handed it over to his agent at Abu Dabi who would identify himself by a code word "555". Kunhi Mohammed informed him that the box would contain some

currencies. The detenu, however, stated that he was not aware that a huge amount of foreign currency was in the carton and had he known it, he would not have carried the box.

2. The detenu was arrested on 7.1.1993. He was initially remanded to custody by the Chief Judicial Magistrate, Trivandrum. On 14.1.1993, the detenu filed a petition for bail before the Additional Chief Judicial Magistrate, Ernakulam. In his bail application, the detenu has retracted the statement given by him before the Customs officers on the ground that it was involuntary and false. The Additional Chief Judicial Magistrate, Ernakulam passed an order dated 19.1.1993 granting bail to the detenu on certain conditions which are set out therein. The detenu, however, could not comply with those conditions. He filed an application for variation of the bail order before the Additional Chief Judicial Magistrate, Ernakulam. By his order dated 11.2.1993, the Additional Chief Judicial Magistrate, Ernakulam modified the bail order. The detenu, however, could not comply even with the modified bail order. He filed an application before this Court on 23.2.1993 for further modification of the bail order. The bail order was, therefore, further modified by this Court. The detenu complied with the bail conditions and was released on bail. On 20.4.1993, an order has been passed by the Commissioner and Secretary to the Government of Kerala u/s 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the "COFEPOSA Act") for detention of the detenu. Pursuant to this order, the detenu was arrested on 6.5.1993. He was supplied with the grounds of detention and documents on 7.5.1993.

3. On 29.5.1993, the jail authorities forwarded a representation from the detenu to the Commissioner and Secretary to the Government of Kerala. The same has been considered and rejected on 15.6.1993 by the State Government and on 21.6.1993 by the Central Government.

4. In the meanwhile, on 3.5.1993 a declaration has been made u/s 9(1) of the COFEPOSA Act by the Central Government.

5. The Advisory Board under the COFEPOSA Act gave its opinion on 7.7.1993 upholding the detention of the detenu. Thereafter, the State Government has confirmed the order of detention for a period of two years as set out in the confirmation order.

6. Petitioner has challenged the continued detention of the detenu on various grounds.

7. The first ground relates to the manner in which the Advisory Board has given its opinion. In the confirmation order dated 14.7.1993, in paragraph 3, it is stated:

...The Advisory Board in its report read as sixth paper above has opined that there are reasonable grounds for the detention of the detenu Sri Churapilakkil Assain, u/s (1) of the COFEPOSA Act, 1974.

It is submitted that the Advisory Board has not applied its mind to relevant facts because by the time the Advisory Board gave its opinion, a declaration had already been made u/s 9(1) of the COFEPOSA Act. The Advisory Board had, therefore, to consider whether continued detention of the detenu was justified. The Advisory Board, however, has considered only the initial detention order u/s 3(1)(i) of the COFEPOSA Act.

8. The respondents, however, produced before us the opinion of the Advisory Board which is to the effect that there are "reasonable grounds" for the "detention and continued detention" of the detenu. Clearly, therefore, the Board had in fact considered the question of continued detention of the detenu and had held that such continued detention was justified.

9. It is, however, submitted by learned advocate for the petitioner that the Advisory Board should have applied its mind only to the question of continued detention. It was not entitled to give any opinion on the detention of the detenu. Therefore, the order of the Advisory Board is vitiated because it referred both to detention and continued detention. We do not find any substance in this submission. What is required to be examined is whether the Advisory Board had applied its mind to all material circumstances and if after doing so it had arrived at a valid conclusion. The declaration u/s 9(1) was certainly considered by the Advisory Board and it has opined that the continued detention of the detenu is justified. A reference also to detention does not in any way affect this aspect of the Advisory Board's opinion which is the material aspect. In our view, simply because the Board has also made a reference to the detention will not vitiate the opinion of the Advisory Board.

10. The second point urged by learned Advocate for the petitioner in this connection is that u/s 8(c) of the COFEPOSA Act, the Advisory Board to which a reference is made is required to give its opinion "as to whether or not there is sufficient cause for the detention of the person concerned"... In a case where a declaration is made u/s 9(1), the word "detention" in Section 8(c) is replaced by the words "continued detention". The Advisory Board therefore, is required to give its opinion whether there is sufficient cause for the continued detention of the person concerned. The language used by the Advisory Board in its opinion is Some what different. The Board has said that there are reasonable grounds for the detention and continued detention of the detenu. It is submitted by learned advocate for the petitioner that this indicates that the Board did not apply its mind to material facts. We do not find any substance in this submission. The Board has undoubtedly to opine whether there is or there is not sufficient cause for the continued detention of a person in respect of whom a declaration is made u/s 9(1). When the Board says that there are reasonable grounds for continued detention, it is in effect giving its opinion that there is sufficient cause for continued detention. We do not see how by using the words "reasonable grounds" instead of "sufficient cause", the Board has failed to apply its mind to any relevant material or to arrive at a correct finding.

11. The next contention raised by learned Counsel for the petitioner is that the confirmation order does not set out correctly the opinion expressed by the Advisory Board. The order of confirmation, therefore, is passed without application of mind to the Advisory Board's opinion and is, therefore, vitiated.

12. It is undoubtedly true that in paragraph 3 of the confirmation order, the reference to the nature of the opinion given by the Advisory Board contains an error in as much as instead of saying that the Advisory Board had opined that there are reasonable grounds for the detention and continued detention of the detenu, there is reference only to the detention of the detenu. What, however, we have to see is whether the confirmation order is passed on the basis of relevant material.

13. Paragraphs 1 to 3 of the confirmation order are recitals of the steps taken under the COFEPOSA Act. In paragraph 4 of the confirmation order, it is stated that the case was considered afresh by the State Government with full application of mind u/s 8(c) of the COFEPOSA Act. The Government confirmed the detention of the detenu and ordered u/s 10 of the COFEPOSA Act that the detention shall continue for a period of two years from 6.5.1993. It clearly shows that the State Government was fully aware of the fact that there had been a declaration u/s 9(1) of the COFEPOSA Act. In fact, this declaration is also referred to in paragraph 2 of the confirmation order and the order of confirmation is passed on the basis of material which is set out in the confirmation order after the State Government had applied its mind afresh to all relevant material including the opinion of the Advisory Board. A slight error in referring to the Advisory Board's opinion in paragraph 3 does not, in our view, materially affect the order of confirmation. It is in the nature of a minor mistake especially because the confirming authority was fully aware of the fact that there was a declaration in the case of the detenu u/s 9(1) as is apparent from the confirmation order itself and the confirmation order also shows that the opinion submitted by the Advisory Board was, in fact, considered before the order of confirmation was passed. As we have said earlier, the opinion of the Advisory Board is clearly given bearing in mind that there is a declaration u/s 9(1) of the COFEPOSA Act in respect of the detenu. Therefore, there is only a minor mistake in the recital in paragraph 3 of the confirmation order which do not, in our view, affect the order of confirmation Vide : Suresh Bhojraj Chelani Vs. State of Maharashtra, .

14. It is next submitted on behalf of the petitioner that the representation of the detenu which is dated 29.5.1993 was not placed before the declaring authority before a declaration was made u/s 9(1) and hence the declaration u/s 9(1) is vitiated.

15. In this connection it is necessary to look at certain dates. The representation was sent on 29.5.1993. It was received by the Central Government on 1.6.1993. The last date of making a declaration u/s 9(1) was 5.6.1993. The declaration, in the present case has been made on 3.6.1993. Looking to the last date for

making the declaration, the representation was sent at a very late stage. For proper consideration of the representation, it would have been necessary for the declaring authority to forward the representation to the State Government and the detaining authority for their comments. The time of the disposal of the declaring authority was inadequate for properly considering the representation received by them on 1.6.1993 before making the declaration u/s 9(1). In these circumstances, it cannot be said that the declaration is vitiated because the representation which was received only four days prior to the last date for making a declaration could not be considered.

16. It is next contended by learned advocate for the petitioner that the declaration u/s 9(1) was not placed before the Advisory Board because the reference was made to the Advisory Board on 31.5.1993 while the declaration is of 3.6.1993. We have been shown the documents forwarded to the Advisory Board and the opinion of the Advisory Board and we are satisfied that the declaration u/s 9(1) was, in fact, forwarded to the Advisory Board and the Advisory Board has given its opinion bearing in mind the declaration u/s 9(1) of the COFEPOSA Act.

17. The next point urged before us is to the effect that in the grounds of detention, while the statement made by the detenu on 7.1.1993 has been referred to, there is no reference to the retraction of the statement made by the detenu in his bail applications. This vitiates the order of detention as the detaining authority has not applied its mind to the fact that the detenu had retracted the statement. It is, however, pointed out to us on behalf of the respondents that along with the grounds of detention, various documents referred to and relied upon by the detaining authority were also furnished to the detenu. One such document is the bail application made by the detenu dated 14.1.1993 before the Additional Chief Judicial Magistrate, Ernakulam. This bail application contains a retraction by the detenu of the statement made by him on 7.1.1993. Therefore, the detaining authority was aware of the retraction made by the detenu of his earlier statement.

18. In the case of State of Gujarat Vs. Sunil Fulchand Shah and Another, , the Supreme Court has observed that in the grounds of detention it is not necessary for the detaining authority to set out its reaction to every piece of evidence. In the case of G. Lakshmikantan Vs. Union of India and others, the Delhi High Court considered a case where the detenu had made a statement before the Customs Officer, and through a letter, he had retracted his earlier statement. The retraction was also mentioned in the bail applications which were referred to in the grounds of detention and were placed before the detaining authority. The Delhi High Court said that the failure to place the retracting letter before the detaining authority did not vitiate the detention because the detaining authority was aware of the fact that the detenu had retracted his earlier statement.

19. In the present case, in the grounds of detention, there is an express reference to the bail application of the detenu and his being granted bail by the

Additional Chief judicial Magistrate, Ernakulam. The bail application clearly contains a retraction of his earlier statement by the detenu. It cannot, therefore be said that the detaining authority was unaware of the retraction by the detenu of his statement before the Customs authorities. A similar view has been expressed by this Court in the case of *B. Subaida v. State of Kerala* 1993 (1) KLJ 489 where the Court has held that a reference to remand to judicial custody and subsequent release on bail can be treated as an indication of application of mind by the detaining authority not merely to the order granting bail, but also to the contents of the bail application. In the present case, the bail application is, in fact, annexed to the grounds of detention clearly indicating that it was one of the documents considered by the detaining authority.

20. Learned advocate for the petitioner drew our attention to an unreported decision of the Supreme Court dated 23.2.1990 in W.P. (Crl) No. 602 of 1989 *Mohammed Towfeek v. State of Tamil Nadu* delivered by Ahmadi and Fathima Beevi JJ., in which the Supreme Court has held that where the detenu had retracted his statement and this retraction is not referred to in the grounds of detention, the order of detention is bad. In the present case, however, there is a reference to the bail application in the grounds of detention and the bail application is annexed to the grounds of detention. This bail application contains retraction of the detenu. Therefore, it cannot be said that the detaining authority had not applied its mind to the retraction. As said earlier the detaining authority is not required to state in the grounds of detention its reaction to every piece of evidence which is relied upon by it. If all material factors have been considered by the detaining authority before the passing of the order of detention, the detention order can be held valid.

21. It is next urged that the grounds of detention do not refer to subsequent modifications of the bail order. Looking to the circumstances of the present case, we do not see how subsequent modifications of the bail order can be said to be material. As the modifications of the bail order were not relied upon in the grounds of detention, the same need not be supplied to the detenu. It was urged that the last application for modification of bail which was made before this Court contained a new version of the detenu to the effect that he had been given the box in question to carry by another passenger on the same flight and this version was not placed before the detaining authority. This belated version of the detenu in the last bail application is not reflected in either his first or second application. The earlier bail applications have merely contained a retraction of the statement made by the detenu before the Customs authorities. The detaining authority was fully aware of the fact that the detenu had retracted his statement which he had made before the Customs authorities. The third bail application, in our view, is not a material document in the present circumstances. As it is not relied upon in the present case a copy of that document need not be furnished to the detenu.

22. In the case of *M. Mohd. Sulthan v. Jt. Secy. to Govt. of India Finance Deptt.* 1990 ECR 187 (SC) : ECR 1774 SC : AIR 1990 SC 2222, the Supreme Court has

held that the application of the detenu for relaxing conditions of bail and the order passed thereon whereby the conditions for release on bail were relaxed cannot be regarded as material documents and the failure to produce the same before the detaining authority before it passed the order of detention would not vitiate the order of detention. The Supreme Court has followed its own decision in the case of Haridas Amarchand Shah of Bombay Vs. K.L. Verma and Others, in this connection and has distinguished the decision in M. Ahamedkutty Vs. Union of India (UOI) and Another, . The facts in the present case are similar to those in the case of M. Mohd, Sulthan's case (Supra).

23. Petitioner has relied upon the decision of the Supreme Court in Sita Ram Somani Vs. State of Rajasthan and Others, . In that case, the documents which showed that the detenu was granted bail and that he had retracted the confession were not placed before the detaining authority. The Supreme Court said that this would vitiate the satisfaction arrived at by the detaining authority. This case will have no application to the facts of the present case where there is an express reference to the bail application in the detention order. The only question we have to consider is whether subsequent applications for modification of the order of release on bail and the subsequent order modifying the conditions for release on bail are to be considered as material documents. In the circumstances of the present case, we do not see how they are material documents.

24. Learned Advocate for the petitioner has also relied in this connection on the decision of the Supreme Court in State of U.P. Vs. Kamal Kishore and Another, . In that case also, inter alia, the bail application and the facts mentioned therein were not placed before the detaining authority. This was one of the reasons for holding that the order of detention was vitiated. In the present case, the bail application was placed before the detaining authority. Only subsequent applications for modification of the bail have not been so placed. We do not see how the subjective satisfaction of the detaining authority has been in any manner vitiated by not placing these subsequent applications for modification of bail order before the detaining authority. Since these documents have not been considered by the detaining authority, they need not be furnished to the detenu.

25. It is next submitted that after the order of detention, certain adjudication proceedings were commenced against the detenu. On 15.5.1993, a show cause notice was issued to the detenu u/s 124 of the Customs Act, 1962. The petitioner contends that as the show cause notice was issued prior to the meeting of the Advisory Board which was held on 7.7.1993, the show cause notice ought to have been placed before the Advisory Board. The detenu had sent a reply dated 12.7.1993 to this show cause notice. As this reply was sent prior to the order of confirmation which is dated 14.7.1993, this reply of the detenu should have been considered before the confirmation order was passed. As this has not been done, the proceedings against him are vitiated. Both the show cause notice of 15.5.1993 and the reply of the detenu to the show cause notice dated 12.7.1993

are documents which have come into existence subsequent to the order of detention as well as the declaration u/s 9(1). We do not see any provision of law under which the detaining authority even after making the order of detention and the declaring authority after making a declaration u/s 9(1) is required to continuously consider all subsequent documents which come into existence. At the highest, such subsequent material may be relevant for the purpose of considering whether the order of detention or continued detention should be revoked or not. But such subsequent documents cannot vitiate the order of detention or declaration u/s 9(1).

26. It is lastly urged that the detenu made a request for supply of certain documents which were supplied to him only after the advisory Board furnished its opinion and an order of confirmation had been passed. Therefore, the right of the detenu to make an effective representation has been seriously affected. The documents asked for, in the present case, were the applications of the detenu for modification of terms and conditions of release on bail and the orders passed thereon. In the first place, these documents are not material documents as set out above. They are not referred to in the grounds of detention. There was no obligation, therefore, on the part of the detaining authority to supply these documents to the detenu. Nevertheless, the documents were supplied/to the detenu on 23.9.1993. Since the documents are not in any way relevant, non-supply or late supply of these documents would not affect in any manner the right of the detenu, under Article 22(5) of the Constitution of India, to make an effective representation.

27. In the case of Madan Lal Anand Vs. Union of India and others, , the detaining authority had placed reliance on three Civil Miscellaneous applications and supplied to the detenu copies of these three Civil Miscellaneous applications. A copy of the civil revision petition was, however, not supplied to the detenu. The Supreme Court said that the Civil revision petition had not been referred to or relied upon in the grounds of detention and it was not necessary for the detaining authority to supply a copy of the Civil revision petition to the detenu.

In our view, therefore, the petitioner has not made out any case for setting aside the orders passed in the present case. The original petition is, therefore, dismissed. In the circumstances, however, there will be no order as to costs.