
(1991) 04 BOM CK 0004
In the Bombay High Court
Case No : Criminal W. P. No. 1311 of 1990

Deepa Pai

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 08-04-1991

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3, 9(1)
Constitution of India, 1950 — Article 136, 22(5), 226, 32
Customs Act, 1962 — Section 108

Citation : (1991) MhLj 1119

Hon'ble Judges : S. S. Dani, J; H. H. Kantharia, J

Bench : Division Bench

Advocate : M. G. Karmali with U. N. Tripathi, for the Appellant; R. M. Agrawal with A S. Khan For respondent No. 1 R. P. Desai, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

H. H. Kantharia, J.—The petitioner here is the wife of one Ramesh Anant Pai. She takes exception to the detention order passed against her husband under sub-section (1) of section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the said Act"), issued on April 17, 1990 by the third respondent, the Secretary to the Government of Maharashtra, Home Department (Special). Mantralaya, Bombay-400 032 with a view to preventing the said Ramesh Anant Pai (hereinafter referred to as the detenu) from engaging in transportation of smuggled goods. The detention order was served on the detenu on April 20, 1990. The Union of India (first respondent), through Special Secretary, issued declaration u/s 9(1) of the Act on May 10, 1990.

2. Admittedly, the grounds of detention were formulated along with the order of detention and there is no dispute about the service of detention order, grounds of detention and the material relied upon by the detaining authority while

formulating the grounds of detention. Shortly stated, it was alleged against the detenu that on February 19, 1990, customs officers attached to Air Intelligence Unit, intercepted one jeep bearing registration No. BLD 2905 at exit gate No. 5, known as taxi gate, at Sahar Airport, Bombay. The said vehicle was driven by one Orlando Fernandes, Traffic Assistant of Trans-Mediterranean Airways. Another occupant of the jeep was one Gul Rijsinghani, a supervisor of the said Airways. The said jeep thereafter along with occupants was taken to the said Airways Boeing Aircraft at Bay No. 71, near the Air Cargo Complex. Two panchas were called at that place and the detenu and one Nazir Mukadam were found near the Aircraft. The customs officers questioned the detenu and the said Nazir Mukadam regarding concealing of contraband gold in the jeep. They denied having any knowledge about it. The Customs Officers then escorted the jeep along with Gul Rijsinghani, Orlando Fernandes, Nazir Mukadam and the detenu to the cargo warehouse of the said Airways for the purpose of search. While the detenu was being questioned, Gul Rijsinghani vanished from the scene on a pretext of answering the call of nature. He could not be traced thereafter.

However, in the presence of panch witnesses, the jeep was searched by the customs officers which resulted into recovery of 12 blue coloured cloth belts from the tool box below the driver's seat of the jeep. Upon questioning the detenu and Orlando Fernandes by the customs officers, they admitted having concealed cloth belts containing gold bars which were surreptitiously removed from the aircraft by the detenu with the knowledge of Gul Rijsinghani and Orlando Fernandes. The aircraft had arrived from Sharjah. Nazir Mukadam pleaded ignorance. During investigation, seven cloth belts containing 60 stitched compartments each, three other cloth belts having 40 compartments each and the remaining two having 20 compartments each were seized. The detenu identified the cloth belts as (he) ones which he was to give delivery to a person outside the Bombay Airport.

In the meanwhile, the search party was sent to the residence of Gul Rijsinghani and they returned with him to the place of investigation. On opening 12 cloth belts in the presence of two panchas and the Airways staff, the customs officers recovered in all 580 gold bars of 10 tolas each having different foreign markings. The gold bars totally weighed 67.628 grams and were valued at Rs. 1,29,84,576/- and Rs. 2,46,84,220/-. The customs officers seized all the gold bars under a reasonable belief that they were liable for confiscation under the Customs Act, 1962. The house search of Gul Rijsinghani at Bandra revealed recovery of one foreign marked gold bar of 50 grams valued at Rs. 9,600/- and Rs. 17,000/- which were also seized under a panehanama. During further investigation, the statements of detenu, Gul Rijsinghani, Orlando Fernandes and Nazir Mukadam and two crew members of the airways were recorded u/s 108 of the Customs Act. In the house search of the detenu on February 19, 1990, a sum of Rs 70,000/- was recovered and some documents were also seized. From the house search of Orlando Fernandes, a pass book of the Canara Bank and some fixed deposit receipts were seized. The detenu and the other co accused persons

were arrested on February 21, 1990 and were subsequently released on bail. On the basis of the abundant material found on the record, the detaining authority was satisfied about the detention of the detenu and accordingly the impugned detention order was passed.

3. The present petitioner herself had challenged the said detention order by filing a criminal writ petition No. 546 of 1990 in this Court. The said writ petition came to be finally decided by a Division Bench of this Court (Kurdukar and Da Silva, JJ.) on August 22, 1990 and having found no merits in the said writ petition the same was dismissed.

4. Thereafter a representation was made on behalf of the detenu to the Hon'ble Minister of State for Home, Government of Maharashtra by the advocate of the detenu vide letter dated August 25, 1990 (Exhibit F to the petition) raising various contentions as to how the detention order was illegal. The Assistant Secretary to the Government of Maharashtra, Home Department (Special) by his reply dated September 10, 1990 (Exhibit G to the Petition) informed "the learned Advocate of the detenu that there was no substance in the representation made by him on behalf of his client and the same was rejected. The petitioner thereafter filed the present writ petition on November 19, 1990 raising various fresh grounds challenging the detention order in question. Before we deal with the merits of the matter, here we may dispose of a preliminary objection raised by the respondents about the maintainability of the second writ petition.

5. Thus, it was urged on behalf of the respondents by Mr. Agrawal learned Counsel representing the Union of India, that this second writ petition is not maintainable because a writ petition of habeas corpus filed on behalf of the detenu was earlier decided by a Division Bench of this Court (Kurdukar and Da Silva, JJ.) on August-22, 1990 and as such the second writ petition of habeas corpus will not be maintainable before this very Court whether or not the ground taken now is fresh or a ground was available and the same was not taken earlier. Elaborating his argument, Mr. Agrawal urged that the writ petition of habeas corpus was disposed of by this Court which was not disposed of by a Bench as such but by the High Court and, therefore, even on fresh grounds no second petition for habeas corpus will lie. In the submission of the learned Counsel the remedy available to the detenu was under Article 32 of the Constitution which is different from the one available under Article 226 of the Constitution. He further submitted that both these Articles operate in different spheres and in almost all the reported and unreported judgments of the Supreme Court, it was held that a second writ petition was maintainable under Article 32 of the Constitution and not under Article 226 of the Constitution. Mr. Agrawal also urged that at the most the detenu could challenge the judgment and order recorded in his earlier writ petition under Article 136 of the Constitution in Appeal. In support of his contentions, Mr. Agrawal relied upon two judgments of the Full Bench of this Court in (i) Mathari Ramaji Chikate vs. Emperor, AIR 1948 Bom 326 and (ii) In Re: Prahlad Krishna Kurne, and a Supreme Court judgment in Ghulam Sarwar

Vs. Union of India (UOI) and Others, and a judgment of the Gujarat High Court in Ratilal Devabhai Navik Vs. State of Gujarat and Another, .

6. We are not able to persuade ourselves to agree with the submission of Mr. Agrawal as the same submissions were made by the same learned Counsel, on behalf of the Union of India, before two separate Division Benches of this Court in which the same four abovesaid authorities were cited and were dealt with and the point was decided against the clients of Mr. Agrawal. Thus, in case of Brijendra Narayan Choudhary and Another Vs. S.M. Singh and Another, and in case of Rajesh Kumars/o Kumarbhai Bhodia vs. A. K. Batabyal and others. Criminal Writ Petition No. 1195 of 1989 decided on December 20. 1989 the same contentions were raised by Mr. Agrawal with the help of the same authorities. The first criminal writ petition No. 1194 of 1986 was decided on January 20. 1987 by a Division Bench consisting of Kurdukar and Kolse Patil, JJ. and the second criminal writ petition No. 1195 of 1989 was decided as said earlier on December 20. 1989 by a Division Bench comprising Mehta and Halbe, JJ. Both these Division Benches have elaborately dealt with the same arguments of Mr. Agrawal and after carefully considering the four authorities cited by him came to the conclusion that the second petition on fresh grounds could be maintainable. We respectfully agree with the said two Division Benches and see no valid reason to differ from the view taken by our learned brothers. It is not in dispute that the grounds now taken in the instant second writ petition are fresh grounds and that being so. in our opinion, the second writ petition is maintainable on fresh grounds. Before parting with discussion on this point, we may also slate that various other judgments of the Division Benches of this Court are brought to our notice by Mr. Karmali learned Counsel appearing on behalf of the petitioner, and to cite a few of them they are (1) Criminal Writ Petition No. 1112 of 1985 in Keshavrao Jagatrao Bhosale vs. State of Maharashtra and others, decided by a Division Bench comprising Sawant and Kantharia. JJ. on August 12. 1986. (ii) Criminal Writ Petition No. 26 of 1989 in Prabhakar Mahadeo Pokale vs. Union of India and others, decided on September 19. 1989 by a Division Bench presiding over the Panaji Bench of this Court consisting of H. H. Kantharia and G. D. Kamat. JJ. and (iii) Criminal Writ Petition No. 623 of 1990 in case of Mohammed Iqbal Dawood vs. A. K. Batabyal and others, decided on 6th November. 1990 by a Division Bench consisting of S. W. Puranik and S. S. Dani. JJ. in which it was held that the second writ petition by a detenu on fresh ground could be maintainable. It may be noted here that before Writ Petition No. 11 12 of 1985 was filed by Keshavrao Bhosale, his wife had filed criminal writ petition No. 50 of 1985 earlier challenging his detention which was rejected by a Division Bench of this Court (Dharmadhikari and Tated, JJ.) on April 29. 1985. That judgment, we are told, was challenged in the Supreme Court unsuccessfully and thereafter Keshavrao (the detenu) filed criminal writ petition No. 1112 of 1985 on fresh grounds which was allowed by a Division Bench of this Court of which one of us (Kantharia, J.) was a member and the detention order earlier confirmed by this Court was quashed. This is the consistent view which this Court has taken with

which we respectfully agree and thus find no substance in the argument of Mr. Agrawal that a second writ petition of habeas corpus could not be maintained even on fresh grounds.

7. Now, about the merits of the matter, Mr. Karmali learned Counsel on behalf of the petitioner, urged that the representation dated August 25, 1990 made on behalf of the detenu by his Advocate was not properly considered and the same was disposed of with total non-application of mind by the Government of Maharashtra which has violated the fundamental right of the detenu and thus the detention order was vitiated. The submission of the learned Counsel is that in the representation several points were raised to which a reply dated September 10, 1990 was received by the learned Advocate of the detenu from the Assistant Secretary to the Government of Maharashtra, Home Department (Special) stating that the points raised in paras Nos. 1 to 5 have already been decided by the High Court in writ petition No. 546 of 1990 which statement was factually incorrect. It shows that the representation was disposed of in a casual and cavalier manner and with total non-application of mind. There seems to be good substance in the submission of Mr. Karmali. For we were taken through the judgment recorded by this Court on August 22, 1990 in criminal writ petition No. 546 of 1990 and we do not find that the two points at serial numbers 2 and 5 raised in the petition were at all considered and decided by this Court. It is no doubt true that points Nos. 1, 3 and 4 raised in the representation on behalf of the detenu were considered by this Court and decided but it is not correct to say that points Nos. 1 to 5 were already decided by this Court because we find from the judgment earlier recorded by this Court that points Nos. 2 and 5 were not at all considered and decided by this Court. Thus, point No. 2 in the representation reads as under:

"2. The detenu submits that on 19-2-1990 while effecting the seizure of bars purported to be gold bars the sponsoring authority having drawn sample for assay purpose, it was incumbent upon the sponsoring authority to place before the detaining authority and also furnish a copy of the said assay report to the detenu. The detenu submits that for non-placing of such a vital document before the detaining authority affects the subjective satisfaction of the said authority as well as for non-furnishing the copy of the said report affects and violates the right to representation of the detenu as guaranteed under Article 22(5) of the Constitution of India. Hence the order is illegal and unconstitutional, ought to be quashed and set aside."

And point No. 5 raised in the representation reads as under:-

"5. The detenu submits that the detaining authority having resorted to the extraordinary laws of preventive detention without having considered the fact that as to whether an action under normal law penal law of land would be adequate to meet the ends of justice. Hence it can be said that the impugned order of detention is punitive by nature than preventive. It is, therefore, mala fide, null and void."

As stated above, these two points were not considered and decided by this Court while deciding writ petition No. 546 of 1990 on 22nd August, 1990. It may be stated here that in reply to this submission made on behalf of the detenu. Mrs. Desai learned Additional Public Prosecutor appearing on behalf of respondents Nos. 2 and 3, argued in the same terms as was mentioned in the affidavit of S. S. Kolkar. Desk Officer. Home Department (Special), on behalf of the State of Maharashtra, in para 5 as under:

"There is nothing wrong if the State Government had taken into account the fact that the Hon'ble High Court had confirmed the earlier order of detention and while confirming it had considered the points raised by (he Petitioner in the representation and decided them. The decision of the Hon'ble High Court is binding and ought to be considered. It was not open for the State Government to take a contrary view, on the aspects on which the Hon'ble High Court has given a judgment. The Government must not be influenced by the opinion of the Advisors" Board, but it can certainly be guided by the judgment of the Hon'ble High Court. I deny that there is any violation of Article 22(5) of the Constitution of India. I say that the Government had considered all the points raised by the detenu's advocate in the representation. Merely because they are not mentioned in the reply it does not mean that they were not considered. No separate representation has been received from the detenu so far. The Government has considered all the points made in the representation which was forwarded by the Advocate and a detailed reply was given to him on 10-9-1990."

As stated hereinabove, we have been taken through the judgment of this Court recorded on 22nd August, 1990 in criminal writ petition No. 546 of 1990 and we do not find that points Nos. 2 and 5 raised in the representation on behalf of the detenu were at all considered by this Court. That would mean that not only-the representation made on behalf of the detenu was disposed of in a casual and cavalier fashion with a total non application of mind but also that the affidavit filed on behalf of the State Government in this regard was filed with non-application of mind. All this considered in toto leaves no manner of doubt in our mind that the fundamental right of the detenu enshrined in and guaranteed by Article 22(5) of the Constitution was violated. That being so, the continued detention order was bad in law and the same has got to be quashed and set aside.

8. In this view of the matter, the writ petition succeeds and the same is allowed. The continued detention order is quashed and set aside. The detenu shall be set at liberty forthwith unless required in some other case. Rule is accordingly made absolute.