
(1989) 02 BOM CK 0012

In the Bombay High Court

Case No : Criminal Writ Petition No. 40 of 1988

Dr. Hannan Gulam Hussain Chaugule

APPELLANT

Vs

State of Goa and another

RESPONDENT

Date of Decision : 17-02-1989

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Criminal Procedure Code, 1973 (CrPC) — Section 439(2)
Customs Act, 1962 — Section 108
National Security Act, 1980 — Section 3

Citation : (1989) 2 BomCR 303 : (1989) 91 BOMLR 669 : (1990) CriLJ 1550

Hon'ble Judges : Kamat, J;A.D. Tated, J

Bench : Division Bench

Judgement

Kamat, J.—By the Order bearing No. 14/11/88-HD(G) dated 3rd November, 1988 purportedly made in the exercise of the powers u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 the State Government directed Shri Gulam Hussain Chaugule, alias, Gulam Hussain Shaikh alias Baba to be detained at the Central Jail, Aguada, a resident of Bandra, Bombay with a view to preventing him from abetting the smuggling of goods. This order was served on Shri Gulam Hussain Chaugule hereinafter called the Detenu on 5th November, 1988 while he was in judicial custody pursuant to the cancellation of the bail earlier granted to him. By the present petition, the petitioner who is the son of the Detenu challenges the order of detention dated 3rd November, 1988 on several grounds. Though as many as ten grounds No. (iv) and (x) were not urged at the time of hearing. We have heard learned counsel for the petitioner as also the learned Public Prosecutor at length. Elaborate arguments were urged and a plethora of authorities cited but in our view this petition could be disposed of on the first ground.

2. The petitioner sets out that the detenu was apprehended on 4th October, 1988 on the reasonable ground that he was at the relevant time establishing contact

over walkie talkie with an Arab Dhow which had brought in contraband namely silver ingots on the high seas off the Aguada Light House. He was proceed before the Chief Judicial Magistrate at Margao on 7th October, 1988 and the remand application prayed for custody for a period of 12 days that the same having been granted by the Chief Judicial Magistrate on 10th October, 1988 an application was presented for bail seeking release of the Detenu. However an order came to be passed on that application on 18th October, 1988 by the Chief Judicial Magistrate, Margao remanding the detenu for a period of seven days in the Intensive Care Unit of the Goa Medical College, Panaji after which he was directed to be released on bail in the sum of Rs. 2 lakhs with sureties attendant with certain conditions set out in the Order. The Bail Bond was accordingly furnished by the detenu and the Detenu was ordered to be released. On or about 24th October, 1988 the Customs authorities moved the Court of Sessions for cancellation of the bail u/s 439(2) Cr.P.C. and on hearing the parties on 29th October, 1988 an order was made by the learned Sessions Judge cancelling the bail granted to the detenu with the result the detenu was taken in judicial custody as from the pronouncement of the order by the Addl. Sessions Judge. Undoubtedly the impugned order of detention was served on the detenu while he was in judicial custody.

3. IT has been therefore urged in ground No. (i) now that the impugned order of detention made by the Detaining Authority is dehors the application of mind as nowhere in the grounds of detention awareness of the fact that the detenu is in judicial custody is found nor the grounds of detention considered as to whether despite the fact that the detenu was in judicial custody there were any reasons much less compelling reasons to clamp down preventive detention when detenu was already effectively prevented from indulging in prejudicial activities of abetting the smuggling of goods. The thrust in the ground therefore appears to be that once the detenu is incarcerated and was already in judicial custody and if the Detaining Authority was bent on taking the detenu under preventive detention the Detaining Authority is bound to have shown awareness of the fact that the detenu was already in custody and at the same time spelling out reasons justifying the issue of the impugned order of detention. And when these two factors of awareness and compelling reasons are absent in the grounds the impugned order of detention must be held to suffer from the vice of non-application of mind and therefore must be held to be invalid and quashed accordingly.

4. Mr. Karmali now urged that these two predicates namely awareness and compelling reasons are explicit from the various decisions rendered by the Supreme Court and what is more followed with respect by the various Division Benches of this court.

He relied on the decision of Ramesh Yadav Vs. District Magistrate, Etah and Others, . This was a case relating to the detenu being already an under trial prisoner with a further fact that he was likely to get bail. The order of detention

was made under the National Security Act 1980 on an apprehension that in case the detenu was released on bail he would again carry on with his criminal activities in the area. The Supreme Court observed that if the Detaining Authority had such apprehension the bail application had to be opposed and even in the event the bail was granted the same could have been challenged before the higher forum. It further observed that merely on the ground that detenu being in detention as an under-trial prisoner was likely to get bail and order of detention under the National Security Act should not be ordinarily passed and accordingly the detenu in that case was directed to be released by quashing the detention order. Next in line is the decision of Vijay Kumar Vs. State of Jammu and Kashmir and Others, . The question in this case directly was with regard to non-application of mind by the Direct Magistrate for here again the detenu was arrested and was in jail on suspicion that he had committed offences under certain Ordinance. On a consideration of various aspects of the matter the Supreme Court observed thus :-

"Preventive detention is resorted to, to thwart future action. If the detenu is already in jail charged with a serious offence, he is thereby prevented from acting in a manner prejudicial to the security of the State. May be, in a given case there yet may be the need to order preventive detention of a person already in jail. But in such a situation the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made."

In the absence of these two factors of awareness and non-disclosure of compelling reasons, the Supreme Court came to the conclusion that there was exhibition of non-application of mind, resulting in invalidation of the order. In the case of Shashi Aggarwal Vs. State of U.P. and Others, the question was again the validity of the order of detention when the detenu was already under detention. While holding that u/s 3 of the National Security Act, nothing precludes the authority from making an order of detention against a person while he is in custody or in jail, it is observed that the validity of the order of detention has to be judged in every individual case on its own facts and in that as to whether material apparently disclosed to the Detaining Authority that a person against whom an order of preventive detention is being made is already under custody and yet for compelling reasons his preventive detention is necessary. Again rely upon the case of Ramesh Yadav Vs. District Magistrate, Etah and Others, in paragraph 11 the Supreme Court stated thus :-

"There must also be credible information or cogent reasons apparent on the record that the detenu, if enlarged on bail, would act prejudicially to the interest of public order."

The Supreme Court again reiterated the view taken in Ramesh Yadav's case (supra) in the decision of Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others, . There again the order of detention was served on the detenu while he

was already in jail in respect of some other criminal case. The detention was held to be not justified. The queer facts of this case need be stated with some advantage. When the order of detention was made Binod Singh was at large but however when that order of detention was served Binod Singh was already in jail viz. some other case. What is relevant to be noticed in this case is the fact that the Supreme Court came to hold that there were grounds for passing the detention order and that order when made was valid but it was held to be illegal and invalids as it was served not he detenu when he was already in jail. The Court observed :-

"In this case there were grounds for the passing of the detention order but after that the detenu has surrendered for whatever reason therefore the order of detention though justified when it was passed but at the time of the service of the order there was no proper consideration of the fact that the detenu was in custody of that there was any real danger of his release. Nor does it appear that before the service there was consideration of this aspect properly."

The Court further observed :-

"It is well settled in our Constitutional framework that the power of directing preventive detention given to the appropriate authorities must be exercised in exceptional cases as contemplated by the various provisions of the different statutes dealing with preventive detention and should be used with great deal of circumspection. There must be awareness of the facts necessitating preventive custody of a person for social defence. If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In the instant case when the actual order of detention was served upon the detenu, the detenu was in jail. There is no indication that this factor or the question that the said detenu might be released or that there was such a possibility of his release, was taken into consideration, by the detaining authority properly and seriously before the service of the order. A bald statement is merely an ipse dixit of the officer"

A few more authorities delivered from time to time by the various Division Benches of this Court have also been pressed into services we may however make reference to two unreported cases. In the case of Smt. Savitri Subramaniam Iyer v. Union of India, Criminal Writ Petn. No. 794 of 1988 decided on 26th October, 1988 a Division Bench of this Court quashed the impugned order of detention whereby Subramaniam Iyer was taken under detention. This was a case of an employee of Air India, when searched was found with foreign currency. In the grounds supplied to him the Detaining Authority had mentioned :-

"In view of the foregoing, I have no hesitation in arriving at the conclusion that you have been indulging in unauthorised transactions in foreign exchange in violation of provisions of the Foreign Exchange Regulation Act 1973."

The conclusion after enumerating the grounds mentioned thus :-

"..... satisfied that in view of the facts stated hereinabove, it is necessary to detain you under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 with a view to preventing you from indulging in activities prejudicial to the argumentation of country's foreign exchange resources."

The challenge to the impugned order of detention was accepted on behalf of the detenu that the detention order and the grounds *pari pasu* delivered to the detenu were totally silent on the question that the detenu would indulge in similar activities in future and therefore it is necessary unless prevented by an order of detention. The Division Court observed that in the absence of such a conclusion not being recorded in the grounds, the detention order was liable to be quashed and accordingly did so. To this same effect is the decision in Criminal Writ Petn. No. 46 of 1988 in the case of Karamat Ahmed v. L. Hminglians disposed of by another Division Bench of this Court on 20th April, 1988. The grounds of detention did not disclose why preventive action was necessary in spite of the petitioner being already in custody. In the absence of such a conclusion the detention order was held to be invalid for the reason of non-application of mind.

There is no point in multiplying authorities as some more authorities were cited before us by the learned counsel for the detenu but we however feel that we may not take notice of them.

5. Coming to the facts of the present case in the first place it may be observed that the detention order dated 3rd November, 1988 recites that the State Government is satisfied that with a view to preventing the detenu from abetting the smuggling of goods it is necessary to make the order and the impugned order was accordingly made. In the grounds after narration of several facts the conclusion arrived at which are relevant for our purposes need be recorded and more particularly in view of great stress having been placed by the learned Public Prosecutor. Paras 14, 15, 16 and 17 read this :-

"14. The State Govt. have considered your bail application and that bail applications of the rest of the persons arrested in this case by the Customs Officers and the courts orders thereon. Similarly the State Government have consideration the anticipatory bail applications filed by Shri Shankar Vishwanath Tari and the orders passed by the different Courts in respect of all these applications. The State Govt. have also considered various medical reports pertaining to examinations of persons arrested in this case. The State Govt. has considered the appeal filed by Customs Department before Addl. D. & S. Judge, Margao against your release on bond and the Court's orders thereon.

15. The State Government have also considered the possibility of your being penalised in the adjudication proceedings under the Customs Act, and the possibility your being prosecuted in this case in criminal court. The State Government have also considered the possibility of the seven crew members of

Arab dhow Tahran Har being prosecuted by the Immigration Department for their illegal entry into India.

16. The State Government has considered the retraction letter made by you and the reply given to you by Customs.

17. Copies of statements and other documents which have been taken into consideration by the State Government while passing this detention order are enclosed as per the index attached. From the above material the State Government is satisfied that you are engaged in abetting the smuggling of goods worth crores of rupees into this country. The State Government is therefore fully convinced that there is sufficient cause to pass detention order against you with a view to preventing you from abetting the smuggling of goods."

Now Mr. Karmali in the first place contended that regard being had to these conclusions it is not clear that the Detaining Authority was aware that after the order was made by the learned Sessions Judge cancelling the bail granted earlier to the detenu by the Chief Judicial Magistrate that the detenu was already in judicial custody from 29th October, 1988. He therefore says that this non-awareness is fatal and must lead to the invalidation of the detention order. He further says that he is equally strong on the point that it was further clearly incumbent upon the Detaining Authority to have given reasons as to why the detenu was required to be taken in preventive detention when he was already in custody and in the absence of these reasons the order must be again held to be illegal. He therefore urged that as long as these two facets well settled by the Supreme Court are not adhered to the invalidation of the impugned order of detention is a must.

6. Mr. Karmali however did not rest there and further canvassed that despite such elaborate ground having been raised in the petition he says that even the counter filed on behalf of the Detaining Authority by the Under Secretary, Home Department is totally silent on the point. Mr. Karmali fairly stated it was yet open to the Detaining Authority to have filed an affidavit. Ground No. (i) of the petition has been replied to by para 5 of the counter affidavit filed by the Under Secretary of the Home Department and except that he has made a statement that the Detaining Authority was aware of the fact that the detenu was in judicial custody and not a free man at the time of making of the impugned order, there is total silence in the matter of the requirement of giving the compelling reasons as to yet why the detention order was necessary.

7. As against these submission Mr. Bhobe, learned Public Prosecutor very vehemently canvassed before us that the grounds clearly disclose that in the first place the Detaining Authority was aware that the petitioner was in judicial custody and secondly further disclose the reasons which compelled the Detaining Authority to make the detention order. Placing reliance on paras 14, 15, 16 and 17 in particular and the grounds furnished in general Mr. Bhobe urged that the fact that paragraph 14 discloses that the Detaining Authority has considered the

appeal filed by the Customs Department before the Sessions Judge against the release of the detenu on Bail Bond and the Court's order thereon and having regard to the undeniable fact that Court order was placed before the Detaining Authority according to him clearly established that the Detaining Authority was aware that the detenu was already in judicial custody when the Detention Order was made. Mr. Bhobe now banked on paragraph 17 and more particularly on the words :-

"From the above material the State Government is satisfied that you are engaged in abetting the smuggling of goods worth crores of rupees into this country. The State Government is therefore fully convinced that there is sufficient cause to pass detention order against you with a view to preventing you from abetting the smuggling of goods."

Mr. Bhobe says that the satisfaction of the State Government was that the detenu was presently engaged in abetting the smuggling and the conviction derived therefrom by the Detaining Authority that there was sufficient cause to pass the detention order with a view to preventing the detenu from abetting clearly indicates the so-called compelling necessity. Mr. Bhobe now says that this is not without reason and this is supported by the entire grounds and regard being had to paragraph (vi) of the grounds therefore in which a reference has been made to the statement of the detenu recorded by the Customs Officer u/s 108 of the Customs Act wherein the detenu has incriminated himself in some prejudicial transactions in the past from 1984 onwards.

8. Having shown this Mr. Bhobe placed reliance firstly in the authority of State of Gujarat Vs. Sunil Fulchand Shah and Another, . Mr. Bhobe relies on this authority to urge that when inferences can be culled out from reading of the entire grounds than the so called compelling reasons though not mentioned in so many words cannot matter to render the order invalid. We are afraid that on facts the decision rendered in State of Gujarat v. Sunil Shah is entirely different. It relates to the argument raised therein canvassed on behalf of the detenu respondent that on appreciation of the material and drawing of the grounds it was incumbent upon the Detaining Authority to record its reactions. This was however negated by the Supreme Court by saying that there is no merit in such contention and it is not necessary to mention in the grounds the reaction of the Detaining Authority in relation to every piece of evidence separately. On facts of the case the Supreme Court therein further observed that on consideration of the documents the Detaining Authority was not impressed by certain statements made therein. We are afraid that the requirement as to the awareness and showing of the compelling reasons was not touched in the case.

9. There is considerable merit in what is contended by Shri Karmali. We have gone through the grounds furnished pari pasu with the order of detention on 5th November, 1988. The local address indicated in the detention order for service on the detenu is Goa Medical College, Panaji. It is common ground that the detenu was in Goa Medical College while under custody. The order of cancellation of bail

was admittedly before the Detaining Authority. Now reading the grounds of detention together with these documents though it is acceptable that the Detaining Authority was aware of the fact that the detenu was in custody there is nothing to indicate nor apparent that the Detaining Authority applied its mind to the compelling reasons as to why the preventive detention was at all yet necessary. Inasmuch as neither the order nor the grounds disclosed that the Detaining Authority addressed to the compelling reasons the absence thereof must invalidate the order of detention. Such requirement was all the more necessary because the detenu was in custody pursuant to the order of cancellation of the bail earlier granted. Neither the anti-social nature of the prejudicial activity nor the increase in the tribe can wittle down the modicum of procedure and requirement established under the law. The law laid down casts a duty on the Detaining Authority to disclose the compelling reasons why detention is to be clamped even though the detenu is already in custody.

10. Mr. Bhobe however submitted that since several other point had been urged and elaborately argued and large number of authorities scanned, it is desirable that we give a considered judgment. He says that since the detenu is being released qua the first ground in the event the matter is taken to the Supreme Court and the Department succeeds the matter may be remitted to this Court for reconsideration on other points. Since we have applied the law laid down by the Supreme Court to the facts of this case viz. ground No. (i) we do not feel it necessary to render our decision on the other points urged on behalf of the petitioner.

11. Petition accordingly succeeds. Rule made absolute in terms of prayer (a). The detention order bearing No. 14/11/88-HD-(G) dated 3rd November, 1988 is quashed and the detenu is set at liberty, however if not wanted in any other case. It is common ground that the detenu is in judicial custody pursuant to the cancellation of the bail by the order of the Addl. Sessions Judge. The detenu accordingly shall remain in judicial custody unless directed otherwise.

12. Petition allowed