
(1994) 07 MAD CK 0080
In the Madras High Court
Case No : H.C.P No. 719/94

G.M. Muthu

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 26-07-1994

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3
Constitution of India, 1950 — Article 22

Citation : (1997) 58 ECC 115

Hon'ble Judges : Thanikkachalam, J; Gulab C. Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Gulab C. Gupta, J.—The petitioner has been ordered to be detained u/s 3(1)(ii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 by the first respondent and is now lodged in Central Prison, Madurai. Feeling aggrieved by the said detention, he has filed this habeas corpus petition challenging the legal and constitutional validity thereof.

2. It appears that the detenu is a travelling agent having his travelling agency known as "G.M. Muthu Travels" at Virudhunagar, Kamarajar District. He had employed one Chinna Nagayasamy as his employee who is alleged to have worked in the said travel agency for few days. On the alleged request of the said Chinna Nagayasamy, the detenu arranged passport, visa and air-ticket for his travel to Singapore on the understanding that the said person after obtaining a job in Singapore and earning money, will pay back the cost. It also appears that on 27.10.1993, the detenu had taken the said Nagayasamy to Madras Airport for boarding the airlines flight to Singapore. He was found to be carrying a Britannia Milk Bikies cardboard carton and one brown colour bag which was found to be suspicious by the Customs Intelligence Officers. On a search of the said baggage, it was found to contain rice and assorted foreign currencies of various

denominations and 500 rupee bundles of Indian currency. The said currency was seized after the search under a search memo prepared. On questioning, the said Nagayasamy stated that he resides at Virudhunagar for the time being and was introduced to the detenu who was running the travelling agency. He also stated that the carton containing the above said currency was being carried by him at the instance of the detenu and the said carton was handed over to him by a friend of the detenu. On the aforesaid statement, the detenu was apprehended and his statement recorded. In his statement the detenu informed that he had arranged the passport and ticket of the said Nagayasamy on the promise that the amount incurred would be paid from his earnings subsequently. The detenu also stated that the carton found with foreign currency was being handed over to the said Nagayasamy by a person who was known to him and since Nagayasamy was refusing to oblige the said person, he had requested Nagayasamy to help the said person by carrying the carton for delivery to the named person in Singapore. The detenu denied having any knowledge of the contents of the said carton. In spite of it, a criminal case was registered against him and he was arrested. On being produced before the Magistrate E.O.I, he was remanded to the judicial custody. The detenu filed bail applications which were earlier rejected, but subsequently he was released on bail on condition. It also appears that on being released on bail, the detenu sent a retraction letter stating that he was innocent and his statement was obtained by force. The sponsoring authority felt satisfied that the material collected by him during investigation was sufficient for ordering preventive detention of the petitioner and placed the said material for consideration of the detaining authority/first respondent. The respondent/detaining authority considered the said material and held that the detenu on being released on bail was likely to engage himself in prejudicial activity related to foreign exchange and hence there was the compelling necessity to order his detention under the Act. That is how the impugned order has been passed.

3. It appears that the detenu sent a representation on 12.3.1994 to the respondent/State Government. In the said representation, he requested that a copy thereof be forwarded to the Advisory Board and the Central Government for their consideration. The representation was accordingly forwarded to the Central Government which considered and rejected the same by order dated 18.4.1994.

4. It also appears that the detenu had in his representation requested copies of some documents which according to him were referred to in the grounds, but were not supplied. He also requested his representation before the Advisory Board through an Advocate and for examination of his wife as a witness. The request of the detenu for engaging an advocate was considered by the Advisory Board and rejected as according to the Board, the facts and circumstances did not justify such engagement. As regards the request for examination of the wife of the detenu, the counter-affidavit filed on behalf of the first respondent states that the wife was not present on 24.3.1994 when the Advisory Board met and considered the detenu's case. There is also nothing in the original file indicating the presence of the petitioner's wife at the place of the meeting of the Board.

5. On the aforesaid facts, the legal validity of the impugned order has been challenged on several grounds. It is first submitted that as long as the detenu was not aware, of the contents of the carton, it could not be reasonably inferred that he was involved in smuggling of the foreign currency and therefore, the subjective satisfaction of the detaining authority is vitiated. We do not find ourselves in agreement with the said submission. The statement of the detenu recorded during investigation clearly shows that the person allegedly handing over the carton to Nagayasamy was known to him and yet his name has not been disclosed. Though the detenu has stated that the carton was to be delivered to an address in Singapore, the said address is also not disclosed. It is unthinkable that a person known to the detenu and willing to take the risk of sending such a huge amount in foreign currency through his conduit could do so without disclosing his name. Apparently therefore, it is a case where the detenu has knowingly not disclosed vital information presumably because many others involved in the racket might have been apprehended. Detenu's effort to keep vital information secret would justify the inference that he is not an innocent person. Normally no one would trust an unknown person like Nagayasamy with such a huge amount of foreign currency. Then, no travel agent would normally pay for travel of an employee in service only for few days. It is therefore reasonable to hold that Nagayasamy was being used as a carrier for the currency in question. In such a situation, it is difficult to believe that detenu was not aware of the contents of the carton. It is therefore reasonable to hold that the detenu was himself involved in this smuggling. There is therefore sufficient material on record to justify the subjective satisfaction of the detaining authority in this behalf. This Court is not sitting as an appellate authority over the order passed by the detaining authority. Nor do we exercise revisional jurisdiction over him. In this view of the matter, we find no substance in the aforesaid submission.

6. It was thereafter urged that copies of the bail order dated 24.11.1993 by which the detenu was released from judicial custody and the order on his two earlier bail applications dismissing the same were not supplied to him and therefore, his right of representation under Article 22(5) of the Constitution remains violated. As regards non-supply of the order dismissing bail applications the decision in Ahmed Kutty, M.V. v. Union of India reported in 1990 SCC (Cri) 258 which has been followed in P.U. Abdul Rahiman Vs. Union of India and others, and Abdul Sathar Ibrahim Manik v. Union of India and Ors. 1992 SC (Cri) 1 is the authority for the proposition that an order rejecting bail application need not be supplied to the detenu. There is no reason for us to take any different view of the matter. Indeed we are not entitled to take any different view as we are bound by the law laid down by the Supreme Court. Learned Counsel for the petitioner however submitted that in Ahmed Kutty's case (supra) the authority has not relied upon the bail rejection order and therefore, the Supreme Court took the view that the said order need not be supplied. But in the instant case, the authority has not only referred to; but also relied upon the same and therefore, it was necessary for the authority to furnish the copies of those

orders. He has placed strong reliance on Abdul Rahimon's case (supra). We do not however read the said judgment as making a distinction as aforesaid. We are also not in agreement with the learned Counsel that the subjective satisfaction of the detaining authority is based on the bail rejection order in any manner. A fair reading of the grounds only indicate that the reference is only by way of narration and nothing else. In this view of the matter, we are of the opinion that the non-supply of the order rejecting the bail application has no effect, either on the subjective satisfaction of the detaining authority nor on the right of the detenu to make any effective representation against his detention.

7. As regards non-supply of the bail order dated 24.11.1993, it is the case of the petitioner that a summary of the said order containing only the operative portion thereof was placed for consideration of the detaining authority and the said authority has relied upon the same. This according to the learned Counsel is not in accordance with law which requires the detaining authority to consider only the full text of the order and supply a copy thereof to the detenu. It is however admitted that the copy of the summary order has been made available to the detenu. This would therefore comply with the requirements of law that the material relied upon by the detaining authority for reaching subjective satisfaction should necessarily be supplied to the detenu. The decisions relied upon by the learned Counsel for the detenu in the case of Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others, , P.U. Abdul Rahiman Vs. Union of India and others, and Abdul Sathar Ibrahim Manik v. Union of India and Ors. 1992 SC (Cri) 1 do not deal with a like situation. These were the cases where the summary of the order was neither relied upon nor furnished and hence constitutional validity of this process was not considered and decided. In Ahmed Kutty's case, the detaining authority himself sent for the bail application and the order thereupon, but the copies thereof were not supplied to the detenu. Even then it was submitted before the Court that those documents were not relied upon by the detaining authority and therefore their non-supply had no effect. This was not accepted by the Supreme Court which held that the documents were in fact relied upon and hence their non-supply vitiated the detention. Other two cases only follow this law. The facts in the present case are different. Here the full text of the bail order was neither sent for by the detaining authority nor a copy thereof was before the detaining authority. Those cases cannot therefore support the submissions of the learned Counsel. The question in such a situation would be whether the authority has failed to properly exercise his mind in relying upon the fact of the release of the detenu on bail without having before him the full text of the bail order? In this connection, the submission of the learned Counsel for the detenu is that test of prejudice is not the proper test to be applied. It is the constitutional guarantee under Article 22(5) which is material and therefore, the said guarantee has to be strictly enforced. As at present advised we are of the view that the constitutional guarantee is sacrosanct and therefore, it is our obligation to see that the said guarantee is not defeated by any prejudicial act of the detaining authority. In all such cases, therefore it would

be proper to consider whether the petitioner's right of making representation under Article 22(5) of the Constitution is defeated in any manner? Contending that it is the petitioner's right to not only make a representation but also that the exercise of that right being dependent on his obtaining the grounds which includes basic material on which the subjective satisfaction of the detaining authority is based, the question arising for consideration is whether either of the two guarantees included in the aforesaid provision remains defeated in the instant case? Having given our anxious consideration to the facts and circumstances of the case, we find nothing to justify the inference that the constitutional guarantee is in any manner defeated or even impaired. The detenu has been given a copy of the bail application so that everything said in his favour has been made known to him. He has also been given the operative portion of the bail order to indicate that he was a free man because of the order. Though reasons that persuaded the Magistrate to grant bail have not been supplied, conditions attached to the bail order have been made known. Exercise of right under Article 22(5) is not in any manner dependent upon the reasoning of the Magistrate. Even the strict interpretation of this provision would not permit enlargement of its contents in any manner, which appears to be the only intention of the detenu. This is not permissible and the detenu can only request an opportunity to make an effective representation. Indeed, we are of the opinion that the right can in such a situation be more effectively exercised as the detenu would be free to assume that his submission as contained in the bail application have led to his release on bail. Under the circumstances, we are of the opinion that the constitutional guarantee under Article 22(5) of the Constitution is not in any way impaired by the use and supply of summary and non-supply of the full text of the bail order. The decision of this Court in *Jaikumar v. Union of India*, ILR (1994) Mad. 1008 is based on its own facts and does not affect this conclusion.

8. It was thereafter submitted that the detenu had in his representation asked for some of the documents in Tamil, which were not supplied and he has been denied the right of making effective representation. It is particularly submitted that the search warrants issued against the detenu and the co-detenu Nagayasamy though mentioned in the ground, were not supplied in Tamil, the only language understood by the detenu. The submission is that the detenu does not understand English and was therefore not able to read or make use of the search warrant. Reliance has been placed on the Supreme Court decision in *Manjit Singh Grewal v. Union of India* 1990 SCC (Cri) 608 and this Court's decision in *Jahafar Ali v. Union of India* 1992 LW (Cri) 527. These decisions without doubt lay down the broad proposition that the documents forming the basic material on which the subjective satisfaction of the detaining authority is founded, must be made available to the detenu in a language understood by him. If the document is not supplied in the said language, the detenu's right to make representation would necessarily be defeated. The question for consideration therefore is whether the petitioner is a person who does not

understand English. This Court is not able to accept the said submission in view of the fact that the petitioner is engaging in running a travel agency which not only arranges passports for foreign travels, but visa and tickets also. It is not the petitioner's statement that he has been taking the help of any English knowing person in his business. If the detenu's statement recorded during investigation is believed, it will not be easy to infer that he does not understand English. Be that as it may, it is not the non-supply of every document that would defeat his right under Article 22(5) of the Constitution. It has been laid down more than once that the detenu is entitled to have copies of only those documents which have been relied upon by the detaining authority to form subjective satisfaction or form the basic material for recording the subjective satisfaction of the detaining authority. Each and every document mentioned in the grounds do not form the basic material and therefore, all of them need not be supplied. Search warrant is really one such document that cannot have, by any stretch of imagination, any bearing on the subjective satisfaction recorded by the authority. Under the circumstances, this Court would not find any justification in the submission that the detenu's right had been defeated only because this document was not made available to him in Tamil. In this connection, the decision in *Kamarunnissa and Others Vs. Union of India and another*, (para 14) is important and relied upon by this Court.

9. It was thereafter submitted that the Advisory Board has not considered the detenu's request to examine his wife as a witness. It is true that the detenu had made such a request in his representation. It has been laid down in the case *Harbans Lal Vs. M.L. Wadhawan and Others*, that the detenu cannot claim such a right without keeping the witness present. Under the circumstances, it will have necessarily to be shown that the detenu had kept his wife present for examination before the Advisory Board on 24.3.1994 when the said Board met for consideration of his case. The original records of the proceedings do not mention the presence of the petitioner's wife. There is therefore, no basis for the submission that the petitioner's wife was present and even then the request to examine her, has been rejected by the Advisory Board. As regards the petitioner's prayer for engaging an advocate to assist him, the request has been considered by the Advisory Board and rejected. There is no law and no decision has been brought to our notice that the petitioner has a right to be represented before the Advisory Board through an advocate. Under the circumstances, we do not find any illegality in the matter for the aforesaid reasons.

10. It was thereafter submitted that the case of the detenu has not received individual consideration of the detaining authority and has been clubbed with the case of co-detenu Nagayasamy and thereby a serious prejudice has been caused to him. We find no basis for such a submission. The incident under consideration is one and involves not only the detenu, but Nagayasamy also. In such a case, it is appropriate to consider the cases together so that all material available receives full and proper consideration. We therefore, find no justifications in the grievance as aforesaid.

11. It was eventually submitted that the petitioner's representation has been considered by the Central Government after a long delay of 36 days and therefore, the impugned detention is rendered invalid. There is no counter affidavit filed by the Central Government and hence, a request has been made by the learned Counsel for the detenu to accept the facts stated by him as correct and decide the aforesaid grievance on that basis. Even assuming that this would be a proper course it will be the burden of the petitioner/detenu to prima facie satisfy this Court that unreasonable delay has taken place in consideration of the representation. In the instant case, the representation is dated 12.3.1994 and addressed to the State Government. This representation is not addressed to the Central Government and therefore, it was not sent to the Central Government by the Superintendent, Central Prison, Madras. The request of the detenu that a copy of the representation should be forwarded to the Central Government, could therefore be ascertained only after the representation had been received and read by the State Government. Under the circumstances, the question of delay would not immediately arise. The delay question would arise only when the representation had reached the Central Government and was not considered with the required promptness. It is the affidavit of the first respondent that the representation was received by them on 17.3.1994 and hence it could not have been sent to the Central Government earlier. Under the circumstances it is not proper to allege that 36 days delay has taken (sic) in the disposal of the representation. As regards the actual date of receipt of the representation " the Central Government, no counter affidavit has been filed on their behalf. The learned Counsel (sic) ever offered to show us the file to indicate how the representation was dealt with after its receipt. learned Counsel for the petitioner objected to this course and submitted that since the counter affidavit not been filed, it will not be proper for this Court to look into the original file. Even if we do not (sic) into the file, we would not hold the delay to be of any substance in view of the decision in *Kamla Bui v. Commissioner of Police, Nagpur* 1993 SCC (Cri) 913 which lays down that the delay should be considered in the context of administrative necessities and short delays should always be ignored. Then (sic) view of the decision in *Ram Sukrya Mhatre v. R.D. Tyagi and Ors.* 1992 SCC (Cri) 960 there is no (sic) reason why this Court would not be able to look into the original file. It is therefore clear that the presentation was forwarded by the State Government to the Central Government on 17.3.1994 and (sic) thereafter processed in the office by forwarding it to the Madras Customs for para remarks on (sic).3.1994. The remarks were prepared and forwarded to the Central Government on 8.4.1994 and thereafter the Central Government decided the same on 18.4.1994. The submission of the learned Counsel for the Central Government is that if four holidays in the month of March, and five holidays in the month of April are ignored, the representation would be deemed to have been decided within ten days. We do not wish to engage ourselves in any arithmetical exercise. We are however of the view that even if the entire period from the date of receipt of the representation by the Central Government till the date of its disposal is taken into consideration, there would not be any delay in the

consideration of the same. There is no mathematical formula to be applied in such cases and each case has to be judged on its own facts. In the instant case, the transmission delay is natural because of the distance between the two cities. For this reason, this Court would not hold that it was a case of undue delay in deciding the representation.

12. In view of our conclusion aforesaid, the petition fails and is dismissed.

13. Learned Counsel for the petitioner orally prayed for leave to appeal to the Supreme Court. Since the matter has been decided on the basis of the Supreme Court's decisions, leave is refused.