

(1996) 06 CAL CK 0038
In the Calcutta High Court

In Re: Smt. Manju Devi Mahensaria

Date of Decision : 14-06-1996

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 3(i)(ii)
Constitution of India, 1950 — Article 22(5)

Citation : (1996) 06 CAL CK 0038

Hon'ble Judges : S.N. Chakraborty, J;S.B. Sinha, J

Bench : Division Bench

Advocate : Balai Chandra Roy, F.M. Razack and Abdul Hamid, for the
Appellant;Promode Ranjan Roy and Prantosh Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, J.—This application for issuance of a writ of Habeas Corpus is directed against an order of detention dated 26.3.96. as contained in Annexure "A" to the writ application which reads thus

WHEREAS, I.K.L. Verma, Joint Secretary to the Government of India, specially empowered u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (as amended), is satisfied with respect to the person known as Shri Bharat Kumar Mahensaria S/o Late Gopi Ram Mahensaria, CG 146. Section II, IInd avenue, Salt Lake City, Calcutta 700 091 with a view to preventing him from abetting the smuggling of goods in future, it is necessary to make the following orders :

NOW THEREFORE, in exercise of the powers conferred by Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act. 1974 (as amended). I direct that the said Shri Bharat Kumar Mahensaria be detained and kept in custody in Presidency Jail. Alipore. Calcutta.

The petitioner is the wife of the detenu Sri Bharat Kumar Mahensaria. For the purpose of disposal of this application, it is not necessary to state the fact of the matter in great details, suffice it to say. that a seizure took place on 26.8.95. whereafter various show cause notices were served upon him.

2. The order of detention was ultimately served on the detenu as noticed hereinbefore, on 4.4.96. The detenu filed an interim representation on 12.4.96 praying for supply of translated copies of the documents in Hindi. The said representation was sent by the Jail authorities on 23.4.96. Despite the fact that allegedly the request of the detenu for supply of translated copies of the documents in Hindi had not been supplied, a very detailed representation in 8 copies were handed over to the Superintendent, Presidency Jail, Alipore. on 20.4.96. It is admitted by the jail authorities as is evident from Annexure "X" at page 42 to the affidavit in reply that whereas the representation dated-12.4.96 was sent on 23.4.96. the representation dated 20.4.96 was sent under Memo No. 1162/Cofeposa/96 dated 4.5.96 was posted on 6.5.96. It is urged by Mr. Roy appearing for the petitioner tint such undue delay in remission of the representations of the detenu oh the part of the Jail authorities vitiates the entire order of detention. In support of has aforementioned contention, reliance has been placed by him to the case of Aslam Ahmed Zahire Ahmed Shaik Vs. Union of India and Others, and in the case of B. Alamelu vs. State of Tamil Nadu & Ors:. reported in AIR 1995 SC 539. It is further submitted that the ground of detention is a verbatim copy of the show cause notice. Learned Counsel urges that keeping in view the fact that sufficient number of copies of the representation dated 20.4.96 were handed over to the Superintendent, Presidency Jail, as far back on 20.4.96, it was incumbent on the Central Government to dispose of the said representation, and in any event, contends Learned Counsel, a copy of the writ application having been served upon the Learned Counsel for the Central Government on 8.5.96, which contained the aforementioned representation, there was absolutely no reason as to why the said representation had not been disposed of by the Central Government and/or by the detaining authority as yet Reliance in this connection has been placed in the case of Smt. Gracy vs. State of Kerala & Anr., reported in AIR 1991 SC 1030 and in the case of Jai Prakash vs. District Magistrate, Bulahdshahar, reported in 1993 Suppl. (1) SCC 392 : 1992 AIR SCW 3360.

3. It is further contended that the order of detention suffers from a total non-application of mind.

4. Mr. Roy appearing on behalf of Union of India, however has submitted that Keeping in view the fact that various show cause notices had been served and various documents had to be scanned, there was no delay on the part of the respondents to serve a copy of the order of detention. As regards non consideration of the representation on the part of the Central Government and the detaining authority, our attention was drawn to the statements made in the affidavit in opposition for the purpose of showing that the Central Government has not yet received any copy of such representation and as such, the question of disposal thereof by it, does not arise.

5. So far as the submission made on behalf of the petitioner to the effect that the detaining authority has passed the order of detention without application of

mind, Mr. Roy submits that from the order of detention it would appear that the detaining authority had passed the said order as against the petitioner in terms of Section 3 (i) (ii) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, and the grounds of detention has to be read as a whole for the purpose of considering as to whether the order of detention is legal or not. According to the Learned Counsel, concluding part of the order of detention cannot be read in isolation, and the statements made in the affidavit in opposition in support of the order of detention should be read in the context thereof.

6. As noticed hereinbefore, the order dated 26.8.96 states that the detenu was being detained u/s 3 (i) (ii) of the said Act, with a view to preventing him from abetting smuggling of goods in future. However, upon considering the grounds of detention, which is also dated 26.8.96, it appears that the grounds in support of the said detention states :

From the foregoing the involvement of you and Sri Hanuman Mal Jain and in the fraudulent export and claim of duty drawback is all the more evident.

In view of the findings of the Handwriting Experts as detailed above and also other findings regarding involvement of yourself and Sri Jain and others in the scam, a supplementary show cause notice is being issued by the Commissioner of Customs, Calcutta, shortly.

In view of the above, it is evident that Shri Hanuman Mal Jain and you, Shri Bharat Kumar Mahensaria, had together defrauded the Government by misdeclaring, and over-invoicing and illegally exporting the goods and obtaining the opportunity and especially since Shri Jain, in his numerous petitioners/representations claimed that there are more consignments to be sent to the consignee as per the terms of a contract drawn between him and consignee firm. It is also evident that you have been instrumental in systematically causing the country losing a huge amount of revenue.

7. Although in the grounds of detention, various activities of the detenu vis-a-vis Shri Hanu Mal Jain had been stated in details the operative portion of the said grounds, in our opinion, do not leave any doubt that the same related actual involvement of the detenu in making fraudulent export of goods. It has clearly been stated that both Hanu Mal Jain and the detenu were involved in the fraudulent export and claim of duty draw back. It is really not understood as to under what circumstances in the grounds of detention it has been stated that a supplementary show cause notice is being issued by the Commissioner of Customs, Calcutta, shortly, which cannot be contemplated to be within the knowledge of the detaining authority. Moreover, in the concluding portion it has clearly been stated that both Hanu Mal Jain and the detenu had together defrauded the Government by misdeclaring and over-invoicing and illegally exporting the goods. Thus, there cannot be any doubt whatsoever that it is not a case where the detenu had been detained with a view to prevent him from

abetting smuggling.

8. It is interesting to note that in the affidavit in opposition affirmed by the detaining authority it has been stated :

It has never been alleged that Shri Bharat Kumar Mahensaria did himself misdeclare, over invoice export illegally and claim drawback illegally. Rather it has been established that Shri B.K. Mahensaria has master minded the actions/ omissions to defraud the Government along with Shri H.M. Jain.

9. Having considered the matter, we are of the opinion that there cannot be any doubt whatsoever that the order of detention has been passed without proper application of mind. In terms of Article 22(5) of the Constitution of India, the detaining authority was bound to apply his mind as regards the provision under which the detenu was to be detained be under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974.

10. The fact stated hereinbefore, in our opinion, clearly depict a total non-application of mind on the part of the detaining authority. We are further of the opinion that the Superintendent of Presidency Jail was not justified in keeping with him the representations dated 12.4.96 for such a long time, particularly in view of the fact that the main representation was addressed to the Advisory Board, and thus, the same was required to be despatched forthwith. There cannot be any justification whatsoever on the part of the jail authorities to transmit the same on 6.5.96. as is evident from Annexure "X" to the affidavit in reply. The respondent No. 3 has not filed any affidavit in opposition.

11. In Aslam Zahire Ahmed Shaik's case (Supra), the Apex Court had set aside an order of detention on the ground of unexplained delay of 7 days on the part of the Jail Superintendent in transmitting the representation to the Central Government, as a result of which the representation reached the Government 11 days after It was handed over to Jail Superintendent. In the instant case the Jail Superintendent sent the same after a period of 16 days. In B. Alamelu's case (Supra), despite the fact that a copy of the representation was received by the detaining authority and he forwarded the same to the Central Government and the same was promptly rejected, the order of detention was set aside as there had been a delay of about 84 days in forwarding copy of the representation to the Central Government.

12. Keeping in view the aforementioned decisions of the Apex Court there cannot be any doubt that the order of detention is vitiated on that ground also. However, we are not in a position to accept the submission of the Learned Counsel for the petitioner to the effect that the Central Government has failed to dispose of the representation of the detenu within a reasonable time. From a perusal of the copy of the representation which is at page 2163 of the Paper Book, it appears that the same was addressed only to the Advisory Board; even a copy of the said representation was not directed to be sent to the Central Government or the detaining authority. Even nothing has been shown before us that extra copies

were meant to be sent to the Central Government and/or the detaining authority. The detenu has undoubtedly a right to make a representation both before the detaining authority and the Central Government but if he does not choose to do so, the Central Government or the detaining authority cannot be blamed for non disposal of such representation. The detaining authority, in the order of detention has clearly informed the detenu that he had a right to make such a representation. But the detenu did not choose to avail that. In this view of the matter, we are of the opinion that the decisions of the Supreme Court in Smt. Gracy Vs. State of Kerala and another, and Jai Prakash vs. District Magistrate, reported in 1993 Suppl. (1) 6 SCC 392 have no application to the facts of the present case.

13. Keeping in view our findings aforementioned, we do not intend to go into the question as to the alleged inaction on the part of the Central Government in not disposing of the representation which was contained in the writ application.

14. For the reasons aforementioned, this application is allowed. The order of detention dated 26.8.96 as contained to Annexure "A" to the writ application is set aside and the respondent No. 3 is hereby directed to set the detenu at liberty forthwith unless he is wanted in connection with any other case. Advance copy of this order may be sent to the respondent No. 3 through special messenger at the cost of the petitioner.

Certified copy, if applied for, be supplied to the Learned Counsel for the parties expeditiously.

S.N. Chakraborty, J.

I agree.