(1991) 08 MAD CK 0010

In the Madras High Court

Case No : Writ Petition No. 2630 of 1991

Jahafar Ali APPELLANT

Vs

Union of India and two Others RESPONDENT

Date of Decision : 16-08-1991

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)

Citation : (1992) LW(Cri) 527

Hon'ble Judges : Maruthamuthu, J;Arunachalam, J

Bench : Division Bench

Advocate : A.K.S. Thahir, for the Appellant; K. Ilias Ali, A.C.G.S.G. for Respondents 1 and 2 and Mr. B. Sriramulu, Public Prosecutor for Respondents 3, for the Respondent

Final Decision : Allowed

Judgement

1. The Petitioner himself is the detenu. In this writ petition, he has prayed for the issue of a habeas for his production before this Court to be set

free after quashing the impugned order of detention made by the first respondent dated 18.1.1991 in exercise of the powers conferred u/s 3(1) of

the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

2. The short facts which led to the detention of the petitioner will have to be stated. On 8.11.1990 the petitioner arrived at the Madras

International Airport from Dubai by Air Indian Flight UL 121. He had in his possession a washing machine. On his oral declaration, he was cleared

the washing machine was detained for payment of duty. The petitioner went over to the Airport again on 12.11.1990 with the detention receipt

furnished to him even on 8.11.1990 for clearing the washing machine. On surprise, the washing machine was opened and on removal of the bottom

plastic panel, the rotor was found tampered with and it was removed and cut open. On close scrutiny, two yellow metal discs were recovered. A

licenced goldsmith who was summoned tested the metal discs and certified them to be gold of 24 carat purity. A confessional statement from the

detenu followed, leading to arrest and his later production before Court. Subsequently, the impugned order of detention was promulgated.

3. Mr. A.K.S. Thahir, learned counsel for petitioner, has taken several contentions in the memorandum of grounds in the writ petition, has confined

his arguments to the following single ground:

Though the above cause memo is dated 17.1.1991, it has not been placed before the Detaining Authority for issuing the order of detention of

18.1.1991. Even otherwise, by his representation dated 13.2.1991, he has requested for supply of show-cause notice, sanction to prosecute and

the complaint in the criminal court. The representation was rejected on 2.3.1991 and the documents requested were supplied only on 5.3.1991,

frustrating the very object for which those documents were requested to make an effective representation. Further, those important documents had

not been placed before the Advisory Board. These factors would be sufficient, according to learned counsel, to vitiate the impugned order of

detention.

4. We have heard Mr. A. Ilias Ali, learned Additional Central Government Standing Counsel, on this submission. He contended that the

documents requested had been supplied and therefore there was no violation of the constitutional mandate. He was unable to inform us if these

vital documents had been placed before the Advisory Board, since the case file and representation file of the detenu were not traceable. We

placed before us a letter addressed to the Assistant Collector of Customs (COFEPOSA), Customs, House, Madras, dated 1st July 1991, by the

Under Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi, in which it is stated that the case file and

representation file of the detenu is not traceable. It is again surprising that this letter dated ''1st July 1991'' contains details of telex dated 25.7.1991

received by the Government of India on 1.8.1991. Obviously, instead of 1st August 1991, the letter is dated ''1st July 1991''. Even in the letter, callousness and negligence is patent. The learned Additional Central Government Standing Counsel represents that till today the file has not yet

been traced and forwarded to him. The missing of the file not only shocks the conscience of the Court but portrays the ridiculous manner in which

important detention files an dealt with. This is not the first time that the detention files are not placed before this Court, either due to missing of the

same or for some other reason withheld. If the preventive detention law will have to be enforced strictly for the ultimate benefit of the Society, the

Authorities concerned will have to seriously take note of this episode of missing of files and take quick steps to remedy this deled to prevent such

recurrence in future. Further suitable action against erring officials should be initiated.

5. Once the detaining Authority had thought it fit that the documents sought for by the detenu for making an effective representation were vital

documents mid chose to supply the same to the detenu, that must have been done in fairness before rejection of the representation on 2.3.1991. It

is not as though on any statutory time limit the representation had to be rejected even before the supply of the vital documents requested. The

representation dated 13.2.1991 had been received on 22.2.1991 and was rejected on 2.3.1991, but the documents were supplied only on

5.3.1991 and that too without translated copies of those documents in Tamil, the only language known to the detenu. The order of detention and

the grounds were originally served to the detenu in Tamil. If that be so, the Detaining Authority owed a duty to supply all documents, later though

fit to be furnished, in the language known to the detenu. That was obviously not done. Further, a Division Bench of this Court in K.V. Jesudasan v.

State of Tamil Nadu 1989 Cri. L.J. 637, held

A document which cases into existence after the detention order and which has some relevance as regards the detention order has to be

necessarily placed before the Advisory Board.

In law, the responsibility of the Advisory Board in the scheme of preventive detention is extremely important. It is a body, independent from the

detaining authority, whose duty is to go into the facts in order to appreciate whether it is proper or not to keep the person concerned under

detention. The detaining authority has to abide by the opinion of the Advisory

Board in case the Advisory Board opines that it is not necessary to

detain the person concerned. Therefore, the detaining authority cannot vest on himself any discretion regarding the opportunity of forwarding or not

forwarding to the Advisory Board any material which may have some relevance on the detention. The relevance is to be ascertained having regard

to the nature of document and not to its content in respect of which one may be led to form a subjective opinion.

The Division Bench, while choosing to observes as aforestated, took note of the similar view expressed by two other Division Benches of this

Court. It will be too late in the day for the detaining Authority to contend that show-cause notice, sanction order and the criminal complaint are not

vital documents which need not have to be placed before the Advisory Board.

6. There are several other in surmountable infirmities a well which would vitiate the order of detention. Since we propose to allow this writ petition

on the above single ground, the other infirmities need not require detailed security.

7. For all the reasons stated above, the impugned order of detention cannot be sustained and is therefore set aside. The petitioner is directed to be

set at liberty forthwith, unless otherwise required, in connection with any other case. This Writ petition is allowed.