
(1985) 07 BOM CK 0011

In the Bombay High Court

Case No : Criminal Writ Petition No. 170 of 1985

Jethmal Kapurchand Kothari

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 19-07-1985

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 3(1), 8, 9

Citation : (1985) 87 BOMLR 525

Hon'ble Judges : Shah, J;S.N. Khatri, J

Bench : Division Bench

Judgement

Shah, J.—This is a petition for a writ of habeas corpus under Art. 226 of the Constitution challenging the validity of the detention of Kishormal Jethmal Kothari under an order of detention dt. July 16, 1984, passed by the Government of Maharashtra under sub-sec. (1) of S. 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (hereinafter referred to as "the Act"). The grounds together with the material relied on by the detaining authority were served on the detenu two days thereafter i.e. on July 18, 1984. On August 9, 1984, Mr. M. V. N. Rao, Addl. Secretary to the Government of India respondent 2 herein, issued a declaration under sub-sec. (1) of S. 9 of the Act as amended, declaring that he was satisfied that the aforesaid Kishormal Jethmal Kothari abets and is likely to abet the smuggling of goods into and out of Bombay which is an area highly vulnerable to smuggling as defined in Explanation (1) to S. 9(1) of the Act. On August 22, 1984, the State Government made a reference to the Advisory Board under S. 8 for its opinion. The opinion of the Advisory Board dt. November, 17, 1984, that there is sufficient cause for the detention of Kishormal Jethmal Kothari under S. 3(1) of the Act was received by the Government and soon thereafter in exercise of the powers conferred by Cl. (f) of S. 8 of the said Act, the State Government passed an order confirming the detention order and continuing the detention of the said Kishormal Jethmal Kothari and further directing that he will be released from

detention after the completion of two years from July 18, 1984. It appears that in the meantime while the reference was pending with the Advisory Board, the detenu had made a representation dt. August 13, 1984. This representation was rejected and the Government informed the detenu about it by their letter dt. September 3, 1984. This is the second Writ Petition filed on behalf of the detenu. Earlier, the detention was challenged by the present petitioner who is the father of the detenu in Criminal Writ Petition No. 440 of the 1984 in this Court. A Division Bench of this Court dismissed this petition on December, 18, 1984. Some contentions urged before the Division Bench were rejected by the Division Bench. It is not necessary to elaborately mention the nature of the contentions urged in that petition. Suffice it to say that the contentions raised in the present petition were not urged or argued before the Bench in the earlier petition. Since the challenge in the present petition is based on different grounds altogether, the dismissal of the earlier petition would not be a bar for filing the present petition. It has been held by the Supreme Court in *Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others*, , that the doctrine of constructive res judicata is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus on fresh grounds which were not taken in the earlier petition for the same relief. Mr. Govilkar appearing for the respondents 1 and 2 and Mr. Hombalkar, the learned counsel, appearing for respondents 3 to 5 have in the view of the Supreme Court decision fairly stated that the present petition which covers a different range of grounds of challenge is not barred.

2. A number of contentions have been urged in the petition. However, we do not think it necessary to refer to all of them since we are satisfied that the petitioner is entitled to succeed on three counts viz. (1) that since the Advisory Board has given its opinion as to the sufficiency of cause for the detention of the detenu after the expiry of the period of eleven months from the date of detention, the order can be sustained only on the basis of declaration issued by respondent 2 under S. 9(1) of the Act, but the opinion rendered by the Advisory Board does not on the face of it indicate that the opinion is given with reference to the facts justifying the necessity of declaration under S. 9(1) of the Act, (2) that the order of confirmation of detention issued by the detaining authority discloses a non-application of mind inasmuch as the working of the order does not indicate that the confirmation was made on the basis of the declaration issued under S. 9(1) and lastly (3) that the declaration itself is invalid since there is no material from which an inference can be drawn that the detenu is abetting the smuggling of goods "into Bombay" as stated in the declaration and since the opinion of the Advisory Board as well as the confirmation are after the expiry of three months, the same can be sustained only on the basis that the declaration under S. 9(1) is valid.

3. In order to appreciate the contentions it would be pertinent to refer to the relevant provisions of the Act and the amendments made therein. Under sub-sec. (1) of S. 3 it is inter alia provided that the authorities mentioned therein may, if satisfied, with respect to any person (including a foreigner), that, with a view to

preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from (i) smuggling goods, or (ii) abetting the smuggling of goods, or (iii) engaging in transporting or concealing or keeping smuggled goods, or (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or (v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods, it is necessary so to do, make an order directing that such persons be detained. In other words, it is in the case of any one or more of these five prejudicial activities, that the powers of detention can be exercised under S. 3(1). S. 8 relates to the function and the procedure of the Advisory Board. Under Cl. (b) of S. 8 it is provided that save as otherwise provided in S. 9, the Government shall within five weeks from the date of detention of a person under a detention order make a reference in respect thereof to the Advisory Board constituted under Cl. (a) to enable the Advisory Board to make the report under sub-cl. (a) of Cl. (4) of Art. 22 of the Constitution. Under Cl. (c) of S. 8 the Advisory Board is required to prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned and lastly sub-cl. (f) of S. 8 provides that in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the Government shall revoke the detention order and cause the person to be released forthwith. It is necessary to mention at this stage that the provisions of Cls. (b), (c) and (f) of S. 8 stand amended by the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act, 1984, to a limited extent in the sense that the amendments are operative in cases where a declaration under S. 9(1) is issued and the confirmation of detention takes place within a period of three months, but less than five months and three weeks. These amendments are important and relevant for our cause since a declaration under S. 9(1) has been issued in the present case and presumably acting on the basis of this declaration issued under S. 9(1) the Advisory Board gave its opinion beyond a period of three months, but well within the period of five months and three weeks as per the amendment.

4. Now, we may discuss the effects of the amendments as per the Amendment Act of 1984. As per this amendment both Ss. 8 and 9 stand amended. It would be useful to refer to the provisions of the Amendment Act which runs as under :

"9(1) Notwithstanding anything contained in this Act, any person (including a foreigner) in respect of whom an order of detention is made under this Act at any time before the 31st day of July, 1984, may be detained without obtaining, in accordance with the provisions of sub-cl. (a) of Cl. (4) of Art. 22 of the

Constitution, the opinion of an Advisory Board for a period longer than three months but not exceeding six months from the date of his detention, where the order of detention has been made against such person with a view to preventing him from smuggling goods or abetting the smuggling of goods or engaging in transporting or concealing or keeping smuggled goods and the Central Government or any officer of the Central Government, not below the rank of an Additional Secretary to that Government, specially empowered for the purposes of this section by that Government, is satisfied that such person -

a) smuggles or is likely to smuggle goods into, out of or through any area highly vulnerable to smuggling; or

b) abets or is likely to abet the smuggling of goods into, out of or through any area highly vulnerable to smuggling; or

c) engages or is likely to engage in transporting or concealing or keeping smuggled goods in any area highly vulnerable to smuggling;

and makes a declaration to that effect within five weeks of the detention of such person. "Area highly vulnerable to smuggling" means -

i) the Indian customs waters contiguous to the States of Gujarat, Karnataka, Kerala, Maharashtra and Tamil Nadu and the Union territories of Goa, Daman and Diu and Pondicherry;

ii) the inland area fifty kilometers in width from the coast of India falling within the territories of the States of Gujarat, Karnataka, Kerala, Maharashtra and Tamil Nadu and the Union territories of Goa, Daman and Diu and Pondicherry;

iii) the inland area fifty kilometers in width from the India-Pakistan border in the States of Gujarat, Jammu and Kashmir, Punjab and Rajasthan;

iv) the customs airport of Delhi; and

v) such further or other Indian customs waters, or inland area not exceeding one hundred kilometers in width from any other coast or border of India, or such other customs station, as the Central Government may have regard to the vulnerability of such waters, area or customs station, as the case may be, to smuggling, by notification in the Official Gazette, specify in this behalf.

Explanation 2 - For the purposes of Explanation 1, "customs airport" and "customs station" shall have the same meaning as in Cl. (10) and (13) of S. 2 of the Customs Act, 1962, respectively.

(2) In the case of any person detained under a detention order to which the provisions of sub-sec. (1) apply, S. 8 shall have effect subject to the following modifications, namely :

(i) in Cl. (b), for the words "shall, within five weeks", the words "shall, within four months and two weeks" shall be substituted;

(ii) in clause (c) :-

1) for the words "the detention of the person concerned", the words "the continued detention of the person concerned", shall be - substituted;

2) for the words "eleven weeks", the words "five months and three weeks" shall be substituted;

(iii) in Cl. (f), for the words "for the detention", at both the places where they occur, the words "for the continued detention" shall be substituted.

5. It may be recalled that this amendment was preceded by Ordinance No. 8 of 1984 which came into force on July 13, 1984, and, therefore, the provisions of the Amendment Act have been given retrospective effect from the date of the Ordinance viz., July 13, 1984.

6. These amendments have been made in accordance with the powers given to the Parliament under Cl. (7) of Art. 22 of the Constitution which inter alia provides that the Parliament may by law prescribe -

the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-cl. (a) of Cl. (4);

7. Clause (4) of Art. 22 lays down the mandate that -

No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless - (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention :

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-cl. (b) of Cl. (7).

8. Declaration under S. 9 can be issued only with regard to persons carrying on the prejudicial activities mentioned in Cls. (a), (b) and (c) of sub-s. (1) of S. 9. S. 3 covers a wider range of activities and it is only when the Government or the Officer empowered by the Government satisfied with the prejudicial activity falls within any of the categories mentioned in S. 9 that a declaration can be issued. Such a declaration has to be made within five weeks of the detention of the said person. The consequence of a valid declaration under S. 9 is twofold viz., that it extends the period of detention for a longer period without obtaining the opinion of the Advisory Board and further that on confirmation of detention by the State Government extends the period of detention from one year to two years. Once a declaration under S. 9 is issued, the original S. 8 gives place to S. 8 as amended pursuant to S. 9(2). Whereas the normal Cl. (b) of S. 8 requires a reference by the Government to the Advisory Board to be made within a period of five weeks

from the date of detention; on a declaration under S. 9 the period gets extended to four months and two weeks. Again whereas in a normal case of detention Cl. (c) of S. 8 requires the Advisory Board to submit its opinion within 11 weeks from the date of detention, on a declaration under S. 9 the period during which the Advisory Board must submit its opinion is extended to five months and three weeks. The third important aspect is in relation to the satisfaction on the part of both the Advisory Board and the State Government. Whereas in the normal case of detention, under Cl. (c) of S. 8 the Advisory Board is required to give its opinion as to whether or not there is sufficient cause for the "detention" of the person concerned, when a declaration under S. 9 is issued, Advisory Board has to give its opinion as to whether or not there is sufficient cause for the "continued detention" of the person concerned. It is on receipt of the opinion of the Advisory Board that there is sufficient cause for the detention of the person concerned that the Government has to apply its mind and take a decision as to whether the detention should be confirmed. At this stage also in view of the amended Cl. (f) of S. 8 on a declaration under S. 9, the confirmation of the detention order by the Government can take place only if the Advisory Board has reported that there is in its opinion sufficient cause for the "continued detention" (not merely sufficient cause for the "detention" as when there is no declaration issued) of a person. It is significant that the Parliament has taken care to use the expression for the "continued detention" both in Cls. (c) and (f) of S. 8 on a declaration under S. 9 being issued. In our opinion, this amendment of additional word "continued" is not merely of form but of substance and it cannot be said that even if the Advisory Board has merely reported as to the sufficiency of the cause for the detention of the person, it should be deemed to have given its report as to the sufficiency of cause for the continued detention of the person concerned. When the Advisory Board acts on the declaration and gives its report beyond five weeks of the detention, it has also to apply its mind to the question as to whether a declaration under S. 9 is validly issued. In other words, the Advisory Board has to address its report as to whether there is material to show that the prejudicial activity attributed to the detenu falls in the category or categories described in S. 9 and whether these activities are carried on in a vulnerable area as defined in S. 9 and finally the law lays down that the opinion must be on the question as to whether or not there is sufficient cause for the "continued detention" of the person concerned. The confirmation of the detention order by the Government can be made only on the Advisory Board giving its opinion that there is sufficient cause for the continued detention of the person concerned. It is possible to construe the opinion of the Advisory Board without the use of the prefix "continued" as one being given without reference to S. 9 and without going into the validity of the declaration, but in that event the Advisory Board has to give its opinion within a shorter time and not the time as extended by reason of the Notification. The Parliament has made a clear distinction between a normal cause of detention as against a case of detention where the declaration under S. 9(1) is issued by the notificatid8 as provided in S. 9(2). It is also to be borne in mind that the proceedings before the Advisory

Board and its report excepting that part of the report in which the opinion of the Advisory Board is specified is confidential as provided in Cl. (e) of S. 8. If the opinion is expressed in a language different than the one contemplated by the provision, then there is no means whereby it can be ascertained whether the Advisory Board had applied its mind to the question of validity of declaration under S. 9(1). It is to be borne in mind that the law of preventive detention encroaches upon the liberty of a person and unless it is established that the procedure prescribed by the law is scrupulously followed, the order of detention cannot be sustained. The opinion part of the Advisory Board in the instant case runs thus :

"The Advisory Board is of the opinion that there is sufficient cause for the detention of Shri Kishormal Jethmal Kothari under S. 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974."

9. It is contended by Mr. Karmali, the learned counsel appearing for the detenu that in the absence of the use of the expression "continued detention" by the Advisory Board in its opinion which has relevance to the validity of the declaration under S. 9(1), it should be presumed that the Advisory Board must not have applied its mind to the validity of the declaration under S. 9(1). Consequently, this opinion stands vitiated. Since the confidential part of the record is not available to us in order to ascertain the actual scope of enquiry undertaken by the Board it is not possible to express any positive opinion on this aspect of the matter. All that we can say on the basis of the text of the opinion made available to us is that it cannot be said with certainty that the aspect of "continued detention" which is connected with the question of validity of the declaration under S. 9(1) has been considered by the Advisory Board.

10. As far as the order of confirmation by the State Government is concerned, we find that it merely reproduces the Advisory Board's opinion in the terminology employed by the Advisory Board. It does not show the awareness on the part of the Government about the omission of the word "continued" in the opinion rendered by the Advisory Board. While confirming the order of detention the Government also must apply its mind to the aspects contained in S. 9(1) and specify itself that the conditions for the issuance of a declaration existed in the present case. Under the circumstances, the order of the State Government merely reproducing the opinion of the Advisory Board which on the face of it itself does not conform to the requirements of S. 8(c) as applicable to a case under S. 9 would get vitiated on the ground of total non-application of mind on the part of the Government.

11. Mr. Govilkar submitted even where the case is not covered by S. 9 what the Advisory Board is required to consider is not only whether the initial order of detention is valid or not, but it has also to consider whether there is sufficient cause for the detention on the date of the opinion. Reliance was placed on the Supreme Court decision in A.K. Roy and Others Vs. Union of India (UOI) and Others, where it has been held that the duty and function of the Advisory Board

is to determine whether there is sufficient cause for the detention of the person concerned on the date on which the order of detention was passed and/or whether there is sufficient cause for the detention of that person on the date of its report. It was, therefore, submitted that when the Advisory Board uses the word "detention" in its opinion even in a case not covered by S. 9 it is deemed to have enquired also into the "continuity" of detention up to the date of the opinion to the Government. The case before the Supreme Court did not involve the interpretation of expression "continued detention" vis-a-vis the word "detention" for the purpose of S. 8(c) or 8(f). The legislature has advisedly amended Ss. 8(c) and 8(f) by S. 9(2) and substituted the expression "continued detention" for the word "detention". This is because the order of detention issued by reference to S. 9(1) leads to serious consequences from the point of the detenu inasmuch as the period of detention gets extended. There was considerable argument before us as to the meaning of the word "continued detention" vis-a-vis "mere detention". According to Mr. Govilkar it has reference to the period of detention after the expiry of three months which is the normal period of detention without obtaining the opinion of the Advisory Board. In support of this argument reliance was placed on the marginal note to S. 9 which runs thus :

"Cases in which and circumstances under which persons may be detained for periods longer than three months without obtaining the opinion of Advisory Board."

On the other hand Mr. Karmali submitted that the expression "continued detention" in amended S. 8 has reference to the detention after the expiry of one year, which is the normal period of detention. In other words, according to Mr. Karmali by using expression "continued detention" the Advisory Board endorses the the continuance of detention beyond the period of one year. Even accepting either of these two interpretations, it would appear that the expression "continued detention" in Ss. 8(c) and 8(f) is of significance and shows the intention of the legislature to make a distinction between the two classes of detentions viz. the case of normal detention in which declaration under S. 9 is not issued and a case where such a declaration is issued. In the view that we have taken, it is not necessary for us to go any further into this aspect.

12. It may be noticed that in the National Security Act also similar amendments to the provisions of that Act have been made. The amendments made are the 2nd Amendment Act, 1984. The provisions of S. 14(a) are in pari material with those of S. 9 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. We may also incidentally mention that an amendment similar to S. 9 was incorporated in the corresponding provisions of National Security Act by the 2nd Amendment Act, 1984, in respect of the disturbed area viz. Punjab and Chandigarh. This only shows that the addition of the word "continued" is not formal, but has been intentionally made by the legislature with a view to distinguish the case of order of detention where

declaration under S. 9 is issued from the one where no such declaration is issued.

13. Turning to the contentions about the total absence of material to support the declaration as regards the detenu's activity of abetting the smuggling of goods into the highly vulnerable area, a few facts as they emerged from the grounds furnished to the detenu need to be mentioned. The story is that one Mrs. Leela Budh Singh accompanied by one Mohamed Kunj came to Bombay by Gulf Air on 3rd May 1984. Mrs. Budh Singh got through the customs security stayed at Sangam Guest House in Bombay. It is alleged that she was sent by one Ravindra of Abudabi with the gold biscuits or gold bars for disposal in India. On their arrival Mrs. Budh Singh and Mohammed Kunj were received by one Peer Khan at the Air Port. Since they wanted to find out buyers for the contraband goods, Peer Khan on their behalf met various people including the detenu. Various offers were made, but the detenu's bid was the highest. Mrs. Budh Singh, however, put a condition that he should pay the price in dollars. The detenu agreed to the proposal and then procured 17,000 dollars which were handed over by him to Peer Khan on her behalf. On 5th May, 1985, Mrs. Budh Singh was to leave for Abudabi by Gulf Air. However, she was intercepted at the Air Port and she was found carrying currency notes of 17,000 dollars. She was apprehended and charged for attempted export of foreign currency. The detenu was also charged for abetting the attempted export of foreign currency by Mrs. Budh Singh.

14-16. As far as the detenu is concerned, this is the only material on which the additional inference is sought to be drawn that the detenu had also abetted in smuggling of gold into Bombay. As pointed out earlier, the detenu had filed the earlier petition challenging his detention. The Division Bench held that there was material to show that the detenu had abetted the smuggling of foreign currency out of India. However, the question as to whether there was material to draw an inference that the detenu had abetted the smuggling of gold into India was not raised in the earlier petition. The material on the basis of which the inference of the detenu having abetted the smuggling of gold into India is based on the statement of Mrs. Budh Singh recorded in the panchanama dt. May 6, 1984. The statement runs thus :

"At this stage of time one more person was brought in the said office, who on questioning gave his name as Kishormal Jethmal Kothari residing at 262, Bapti Road, Kamathipura, Bombay 400 008, having a shop by name Mahavir Textile situated in the same premises. At this stage Mrs. Leela Budhsingh was asked in our presence whether she knew this person who has given his name as Kishormal Jethmal Kothari and in what connection. She stated in our presence that this (Kishormal) was the same person who had come along with Sayed Mohamed Peer Khan at about 1 p.m. on 3-5-1984 and who had received the said gold which she had brought from Abudabi by concealing on her person. The said gold bars were given to said Kishormal in the room No. 16, Sangam Guest House, Grant Road, Bombay 400 008 in presence of Mohd. Kunj.

17. Admittedly, there is no other material on record. This statement merely

shows the purchase of gold by detenu from Mrs. Budhsingh. As indicated earlier, the allegation itself is that several persons were contacted and the gold was sold to the detenu as he offered the highest price. We are unable to see how any inference of the detenu having abetted the smuggling of gold into India can be drawn on the basis of the above material. There is no rational nexus whatsoever between the material sought to be relied on and the inference drawn from such material. We find that there is no material on record which could possibly lead to the inference that the detenu abetted smuggling of gold into India. Now, it is worth noticing that in the grounds of detention or the order passed by the detaining authority there is no reference to abetment of smuggling of goods into India by the detenu. This is also apparent from the affidavit of Shri B. K. Chougule, Special Secretary to the Government of Maharashtra, Home Department, who passed the order of detention. He has merely stated -

"I have correctly come to the conclusion that the detenu has abetted and attempted to illegally export foreign currency out of the Country necessitating his detention."

18. He has merely made a general statement that the declaration made under S. 9 of the Act by the Central Government is also correct having regard to the nature of the act in which the detenu was involved. There is no specific averment about the abetment of smuggling of goods into India. The affidavit of Shri Agnihotri who is working as Under Secretary to the Government of India in the Ministry of Finance, Department of Revenue, shows that he has, however, relied on the statement of Mrs. Leela Budhsingh identifying the detenu as the person who had received the gold brought by her from Abudabi to support the inference that the detenu had abetted the smuggling of goods into India. As we have discussed above, this statement cannot lead to any such inference at all in the absence of any other material on record. In our opinion, the declaration under S. 9 in so far as it states that the detenu had abetted the smuggling of goods into India clearly discloses a clear non-application of mind in reaching such a conclusion. The declaration, therefore, cannot be sustained and is invalid. It would, therefore, follow that the Advisory Board was bound to give its opinion within less than three months of the order of detention as required by S. 8 of the Act disregarding the amendment, in case where a valid declaration under S. 9 is issued. On this additional ground the order of detention or the continued detention of the detenu is rendered illegal. In the result, the petition is allowed. The order of detention is set aside. The detenu is directed to be set at liberty forthwith, if not required in any other case. Rule made absolute accordingly.

19. Petition allowed.