
(1995) 11 MAD CK 0026

In the Madras High Court

Case No : H.C.P. No's. 1118 and 1119 of 1995

Julaiga Begum

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 20-11-1995

Acts Referred:

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

Constitution of India, 1950 — Article 21, 22

Citation : (1996) 54 ECC 29

Hon'ble Judges : Jayarama Chouta, J;Arunachalam, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Arunachalam, J.—These two habeas corpus petitions are disposed of together by a common order, since the argument advanced is

identical. Further, both the petitioners, who are the detenus themselves, are allegedly involved in the same ground crime. Mrs. Julaiga Begum,

petitioner in H.C.P. No. 1118 of 1995, is the mother of Saira Banu, petitioner in H.C.P. No. 1119 of 1995. By two different orders of detention

dated 30.6.1995, passed by the first respondent, it exercise of the powers conferred by Section 3(1)(i) of the Conservation of Foreign Exchange

and Prevention of Smuggling Activities Act, 1974 (as amended) (Central Act 52 of 1974), these two petitioners have been preventively detained

with a view to preventing them from smuggling goods in future.

2. Brief facts which led to the passing of the impugned orders may have to be stated: On 27.5.1995, these two petitioners, holders of Singapore

Passports were bound for Singapore by flight No. SQ 409, from Madras

International Airport. After immigration and customs clearance, while they were about to proceed to security check, near the escalator, on suspicion that they might be carrying Indian/Foreign currencies, either on their person or in their baggages, these petitioners were questioned in the presence of witnesses as to whether they were carrying any Indian/foreign currencies either in their baggages or persons. The reply was in the negative. Two black colour zipper hand baggages carried by the petitioner in H.C.P. No. 1118 of 1995, contained food stuffs and fruits. Examination of one black colour leather ladies hand bag carried by the petitioner in H.C.P. No. 1119 of 1995, was found to contain 19,800 US Dollars and one small dark/brown colour zipper bag, found kept inside that black colour leather ladies hand bag, was opened and it was found to contain 5100 US Dollars and 650 Singapore Dollars. Nothing incriminating was found on search of the persons of these two petitioners. Since foreign currency was not declared by either of them, and further, since they did not have valid documents to indicate legal possession of the said currency, the entire currencies stood seized for taking action under the Customs Act. Statements were recorded from the petitioners.

3. Petitioner in H.C.P. No. 1119 of 1995, immediately after seizure, stated that she had come down to Madras along with her father, the mother (the other detenu) and her younger sister. Each one of them carried 5 kgs. of gold and cleared them after paying customs duty in foreign currency, on 11.5.1995. Her father had given to her US Dollars and Singapore Dollars that were recovered at the Airport. She further stated that her father had told her that she need not have to declare foreign currency to the Customs as they did not have Reserve Bank of India permit for taking them out of India. She also stated that she was aware that it was an offence to carry foreign currencies without declaring to customs and without obtaining permission from the Reserve Bank of India.

4. Petitioner in H.C.P. No. 1118 of 1995 corroborated the statement of her daughter. On 28.5.1995 another statement was recorded from the petitioner in H.C.P. No. 1119 of 1995. Search of the residential premises of the petitioners in Madras did not yield anything incriminating. These petitioners were arrested on 28.5.1995 and produced before the Magistrate, who remanded them to judicial custody till 9.6.1995. In pursuance of

applications for bail, preferred by these petitioners before Additional Chief Metropolitan Magistrate, E.O.II, Madras, they were directed to be

release on bail, on certain conditions by an order dated 6.6.1995. After follow up action, the impugned orders were passed.

5. Mr. Habibulla Basha, learned Senior counsel appearing on behalf of the petitioners, in these two habeas corpus petitions, submitted, that

both the petitioners waived issue of show cause notices and then they were afforded a personal hearing in adjudication proceedings by the

Additional Collector, Customs, Madras on 15.6.1995. Petitioner in H.C.P. No. 1119 of 1995 stated, that she was a student of B.B.A. and was

anxious to get back to Singapore. Soon after conclusion of personal hearing, on 19.6.1995 sponsoring authority issued a warning to the petitioner

in H.C.P. No. 1118 of 1995, since nothing was recovered from her possession. However, a lenient view was taken in respect of the petitioner in

H.C.P. No. 1119 of 1995 by imposing a penalty of Rs. 10,000/-. This penalty was paid on 22.6.1995 and a receipt was duly passed on. The

impugned orders, as stated earlier, were passed on 30.6.1995. The contention of Mr. Habibulla Basha was, that commencement and termination

of adjudication proceedings on 15.6.1995, were not placed before the detaining authority and in that backdrop detaining authority has stated in the

grounds of detention as hereunder:

Even though adjudication proceedings and prosecution proceedings are likely to be initiated against you under the Customs Act, 1962, the State

Government are satisfied that in view of the facts stated herein above, it is necessary to detain you under the provisions of the Conservation of

Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (as amended) with a view to preventing you from indulging in smuggling goods

in future.

It was urged, that once adjudication proceedings stood concluded, the afore stated statement in the grounds of detention would indicate non-

application of mind as well as suppression, by the sponsoring authority, of relevant material, before the detaining authority, to facilitate proper

arrival of subjective satisfaction. This ground has been taken as ground 4(b) as well as part of ground 5, which reads as hereunder:

(b) A personal hearing was given on 15.6.1995 which has not been placed before

the Detaining Authority. The Notes of personal hearing have also not been placed before the Detaining Authority. The orders were passed on 19.6.1995. A lenient view was taken against me and only a warning was issued and no personal penalty was levied. A sum of Rs. 10,000/- was levied as personal penalty on the other detenu Ms. Saira Banu, my daughter. The penalty was paid by the other detenu, Saira Banu on 22.6.1995. The Adjudicating proceedings have not been placed at all before the Detaining Authority.. The fact that no personal penalty was levied against me and only a sum of Rs. 10,000/- was levied on the other Detenu are very important factors which would have influenced the subjective satisfaction of the Adjudicating Authority if adjudication proceedings had been placed before informed about the adjudication order having been passed and the warning order being issued and the penalty being imposed. This is a vital flaw which vitiates the entire detention order. The subjective satisfaction has been vitiated by not placing all these vital documents.

5. It is most respectfully submitted that the Detaining Authority has not applied its mind as is clear from the fact that in para 3, it is slated that adjudicating proceedings are likely to be initiated against me when the adjudication proceedings were already initiated and had also been finished. This was done long prior to the orders passed by the Detaining Authority. The Detaining Authority has chosen to consider even a letter, dated 23.6.1995 which was sent to the Secretary to the Government, Public Department but has failed to consider the earlier proceedings, viz., adjudicating proceedings.

6. First respondent has sworn to a counter-affidavit in reply to this specific ground, in paragraphs 9, 10 and 11. They read as hereunder:

I am advised to state that the contention raised in paragraph 4(b) is not sustainable in law.

At the outset, it is significant to point out that the order of adjudication was issued only on 24.8.1995 and despatched on 25.8.1995 while the order of detention was passed as early as 30.6.1995 on the basis of the materials placed by the Sponsoring Authority. It is further submitted that the record of personal hearing, being a document in relation to Departmental proceedings, the same need not be placed before the detaining

authority and the non-placement of this document does not impinge upon the subjective satisfaction arrived by the Detaining Authority.

I am further advised to state that the non-placement of the records relating to the adjudication proceedings does not vitiate the order or detention

which is challenged in this proceedings.

I am advised to state that the contentions raised in paragraph 5 of the affidavit are not sustainable in law. The mere fact that in the grounds of

detention, it has been stated that adjudication proceedings are likely to be initiated against the detenu whereas they had actually been initiated at the

time of passing the order of detention, is of no consequence. The Apex Court has clearly laid down that where there is voluminous materials for

arriving at the subjective satisfaction by the Detaining Authority, such minor mistakes do not vitiate the order of detention. It is further submitted

that the non-placement of the records relating to adjudication proceedings before the Detaining Authority has not infringed the right under Articles

21 and 22 of the Constitution of India.

I am advised to state that the contention raised in paragraph 6 of the affidavit is not sustainable in law. As already submitted, an erroneous

statement in the grounds of detention to the effect that adjudication proceedings are likely to be initiated against the petitioner whereas it had

actually been initiated at time of passing the order of detention, does not in any way impinge upon the validity of such order.

7. Mr. I. Subramanian, learned Additional Public Prosecutor also placed for our scrutiny the decision of the Supreme Court in Birendra Kumar Rai

alias Virendra Kumar Rai Vs. Union of India (UOI) and Others, .

8. We have carefully considered the contentions urged by counsel on the opposite side. It cannot be denied, that adjudication proceedings, which

had commenced and terminated in respect of the very ground crime will be vital material, which must have passed through the process of arrival of

subjective satisfaction, to detain the petitioners preventively. The impugned orders were passed only on 30.6.1995 and long prior to this date, not

only adjudication proceedings were terminated, but also penalty imposed on one of the petitioners, stood paid and acknowledged. We have

already narrated the facts in detail, which include particulars of the confession statements made by these two petitioners. It is on the basis of the

confession statements, as well as explanations offered, during personal hearing, apparently in the same pattern, that the adjudicating authority

deemed it fit to release one of the petitioners after a warning and impose a lenient penalty on the other. If the detaining authority had before him

these details about adjudication proceedings, in our opinion, it would have certainly affected arrival of subjective satisfaction, either way. It will not

be open to the sponsoring authority to pick and choose documents to be placed before the detaining authority for, the detaining authority is bound

to consider all material available till the date of passing of the impugned order and only then, on an overall picture, a proper subjective satisfaction

can be arrived at. That not having been done in this case, we are satisfied that the petitioners will have to succeed on the solitary ground urged.

9. We are bound to make a reference to the judgment of the Supreme Court, brought to our notice by the learned Additional Public Prosecutor.

That was a case, where the detenu was already in jail in connection with certain offenses under the Arms Act and Motor Vehicles Act. It was not

brought before the court, where a complaint under Narcotic Drugs and Psychotropic Substances Act stood filed against him. Detaining Authority

had mentioned in the grounds of detention, that proceedings under N.D.P.S. Act were likely to be initiated against the detenu. In that context,

based on sufficient material, regarding detenu indulging in illicit trafficking of narcotic drugs, Supreme Court stated that such statement in the

grounds did not amount to non-application of mind. Certain portions of the judgment of the Supreme Court need extraction. In the grounds of

detention, detaining authority had stated as follows:

Even though prosecution proceedings under Narcotic Drugs and Psychotropic Substances Act, 1985 are likely to be initiated against you, I am

satisfied that there is compelling necessity, in view of the likelihood of your indulging in illicit traffic of narcotic drugs, as is evident from the trend of

your activities, to detain you under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988.

It was pointed out therein by detenu's counsel, that though the complaint under the NDPS Act had already been filed on 7.11.1990, yet the

detaining authority had mentioned that prosecution proceedings under Narcotic Drugs and Psychotropic Substances Act, 1985 are likely to be

initiated against the detenu, in the preventive order dated 4.12.1990. It was further submitted, that though a warrant of arrest had also been issued

by the Court dealing with cases under the NDPS Act and a bail application also stood moved, statement in the grounds of detention, that

prosecution was likely to be initiated, was sufficient to indicate non-application of mind. While observing that they did not see any force in the

above contention, Supreme Court stated about the detenu therein having already been arrested and detained on 21.11.1990 in the cases under the

Arms Act and Motor Vehicles Act and detained in District Jail, Ghazipur on the basis of warrant of arrest issued from Varanasi Court in Cr.No.

195/50, which was never executed, nor had the detenu been brought from District Jail, Ghazipur to the concerned Court at Varanasi. In such

circumstances, when the petitioner was not taken into custody under Cr.No. 195/50 under the NDPS Act, and continued to remain in District Jail

at Ghazipur in Cr.No. 402/90 under the Arms Act and Motor Vehicles Act, till the passing of the detention order on 4.12.1990, it was stated by

the Supreme Court, that there was nothing wrong in mentioning in the grounds of order of detention that the prosecution proceedings under the

NDPS Act are likely to be initiated against the petitioner. Expatiating the observations, Supreme Court further stated that it was no doubt correct

that the word "likely" used in the grounds of detention may [not] be fully appropriate, but this could not be meant, that the detaining authority was

not aware of the case pending under the NDPS Act, 1985 at Varanasi. The explanation offered by the learned Additional Solicitor General in that

regard that till the warrant of arrest issued by the Varanasi Court was executed and the detenu was brought and produced before the concerned

Court at Varanasi, the detaining authority was justified in considering that the prosecution proceedings under NDPS Act, 1985 were likely to be

initiated, was correct, stated the Supreme Court.

10. The principle laid down by the Supreme Court will not attract the instant facts. Here is a case where adjudication proceedings were not only

commenced, but stood terminated as well, long before the impugned orders were passed. In the case decided by the Supreme Court, trend of

activities of the detenu therein, detailed in the grounds of detention, in the opinion of the Supreme Court, were sufficient enough to arrive at the

subjective satisfaction. Here is a case, where except the arrest at Madras International Airport, nothing else has been mentioned against these two petitioners. In such a context, the result, in the terminated adjudication proceedings, would have certainly affected the arrival of subjective satisfaction on the part of the Detaining Authority, either way. As already stated, on that sole ground detenus are to succeed.

11. The impugned orders of detention shall stand set aside. The detenus are directed to be released forthwith, unless their detentions are otherwise required. These habeas corpus petitions are allowed.