

(1995) 11 MAD CK 0023
In the Madras High Court
Case No : H.C.P. No. 1172 of 1995

K. Sahara Banu

APPELLANT

Vs

State of Tamil Nadu and Another

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 22

Citation : (1996) 54 ECC 116

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

Bench : Division Bench

Final Decision : Allowed

Judgement

Arunachalam, J.—Petitioner Sahara Banu is the wife of Kaleel Rahman, who has been detained, in pursuance of an order dated 28.6.1995,

passed by the first respondent in 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), with a view to preventing the detenu from smuggling goods in future.

2. Facts in brief, which led to the passing of the impugned order will have to be stated. Detenu Kaleel Rahman, holder of Indian Passport, was

bound for Colombo by Flight IC 573 on 4.6.1995. At the Airport, on the basis of specific information, Intelligence Officers, intercepted the

detenu, while he was waiting in the passenger lounge, for boarding the aircraft, after immigration, customs and security check. The detenu was

questioned in the presence of witnesses, if he was in possession, of any foreign currency either in his baggage or on his person. The reply was in

the negative. Thereafter, detailed examination, of the baggages of the detenu, was conducted and the same resulted in recovery of various foreign currency and travellers cheques, totally valued at Rs. 54,97,606/-. The foreign currency and travellers cheques were concealed in between lungies kept inside the checked-in bag. The foreign currency and travellers cheques were seized along with 20 lungies used, for concealing. The detenu volunteered a statement on 4.6.1995 immediately after seizure. Since the detenu was not in possession of any valid documents for export of foreign currencies and travellers cheques, he was arrested and produced on 5.6.1995 before the Additional Chief Metropolitan Magistrate (E.O.I), Madras, who remanded him to judicial custody till 19.6.1995. After follow-up action, impugned order was passed.

3. Mr. B. Kumar, learned Counsel appearing on behalf of the petitioner, contended that the detaining authority, in the grounds of detention, had taken note of the fact that the remand of the detenu was extended upto 4.7.1995, in spite of absence of material before him to arrive at such a conclusion. He further submitted that such material was also not furnished, even after a demand for the said material, was made by the detenu through his representation. This ground forms part of paragraph 6 of the affidavit sworn to by the petitioner, which reads as here under:

The petitioner further states that the detaining authority had also averred in the grounds that on 19.6.1995 a petition was filed for extension of the remand of the detenu. The grounds further mentions that the remand of the detenu was extended and further extended upto 4.7.1995. But there is no document annexed to the grounds by which this factor could be gathered. The order of the Court had not been supplied along with the grounds.

This again amounts to making conclusions on uncommunicated material and therefore for the reasons in the said paragraphs the grounds would stand vitiated as the detention order has not been made in a manner provided by the Constitution.

It is apparent from paragraph 5 extracted above, that the grievance of the detenu is that conclusions have been arrived at on uncommunicated material and hence the grounds would stand vitiated, since the order of detention had not been made in the manner provided by the Constitution.

4. In reply to paragraph 6 of the affidavit, the first respondent has stated in paragraph 10 of his counter-affidavit as follows:

I am advised to state that the contention raised in paragraph 6 of the affidavit is not sustainable in law. The detenu was produced before the

Additional Chief Metropolitan Magistrate, Egmore Madras, on 5.6.1995 and he was initially remanded till 19.6.1995. On the basis of a petition

filed on 19.6.1995, the remand was extended upto 4.7.1995. It is incorrect to state that the Detaining Authority had no material for arriving at such

conclusion. The subject file thus contains material indicating that the Detaining Authority was fully aware of the extension of remand upto 4.7.1995.

In this view of the matter, it is incorrect to state that the conclusion of the Detaining Authority regarding the extension of remand is without any

material. Further, a copy of the petition for extension of remand had been furnished to the detenu along with the grounds and he had not suffered

any prejudice on account of non-supply of the order extending remand.

It is clear from the counter-affidavit of the first respondent that the subject file contained material indicating to the detaining authority about the

extension of remand upto 4.7.1995 and therefore it would be odd to contend that the conclusion of the detaining authority regarding extension of

remand was without any material.

5. We have carefully considered the inherent merits of the solitary contention urged on the basis of divergent arguments. Mr.B. Kumar has placed

reliance on two judgments of this Court by two different Division Benches. In *Jrudhi alias Irudaya Nathan & another v. State of Tamil Nadu* etc.

and *Anr. 1994 2 LW (Cri) 618*, this Court stated as hereunder:

The question to be decided is, whether the detenus are entitled to communication of material on which the Detaining Authority bases his

conclusion, if the detenu was either in remand or enjoying liberty, having been released on bail, or would it be sufficient, if the Detaining Authority

was aware of remand or bail of the detenu, on some material which he had taken note of while arriving at his subjective satisfaction though not

communicated to the detenu, which communication, according to the State, will not be necessary.

* * * * *

Our answer to the question posed is, that the basic factual material on which conclusions stood arrived at, about remand of the detenu at the time

when the impugned order was passed, must necessarily be communicated to the

detenu, failure of which would be sufficient to vitiate the order of

detention. Of course, those factual constituents need not have to be detailed in the grounds, for exhibition of awareness therein would suffice.

* * * * *

We have no hesitation in holding, that awareness of the detaining authority about the fact of remand need not have to be based, only on the remand

order, for such awareness can arise out of a remand warrant or the affidavit of the Sponsoring Authority or similar such material affirming the basic

fact of remand of the detenu concerned, on the day when the impugned order of detention stood passed.

* * * * *

We are of firm opinion, that communication of that basic fact, is altogether a different concept, which cannot be confused with expression in the

grounds of awareness and compelling necessity to detain, which altogether form a different concept. In other words, when a preventive order is

decided to be clamped, the take-off stage may arise in two contingencies, (1) the individual being in remand and still, in the opinion of the Detaining

Authority there being a compelling necessity to place him in preventive detention, to curb his future prejudicial activity, and (2) the individual being

already on bail and, in the opinion of the Detaining Authority, there was necessity to detain him preventively to prevent his indulging in future

prejudicial activity. In the first contingency, the basic material is the fact of remand and in the second contingency the basic material is the fact of

individual being on bail and enjoying liberty. In the second contingency, in the opinion of the Supreme Court, that basic material which indicted the

liberty of the individual, namely, the bail application and the bail order, have to be communicated to the detenu. If that be so, in the other

contingency, the basic material of fact of remand, must necessarily have to be communicated to the detenu. The object is, that the grounds of

detention need have to show only the awareness of those facts, while the material supplied to the detenu must show the basic facts on which such

conclusions have [been?] arrived at. In the grounds of detention, expression of awareness would be sufficient, of either facet. But, it does not

mean, that such awareness exhibited in the grounds alone, would suffice, without supply of basic material for they are primary conclusions which

led to take-off, in clamping of preventive orders. Let us visualise a case in which a person is arrested in the ground crime on the first of a particular month. Remand is asked for before the Magistrate for 15 days, which, in law, he can authorise. It cannot always be stated that in every case the entire period of remand requisitioned would be ordered by the Magistrate. Even if 15 days remand is ordered and there after no material is placed before the detaining Authority to show, that even subsequently the individual was on remand, more so when the order of detention stands passed after the expiry of initial 15 days" remand, can it be said that the Detaining Authority had material before him to take-off and pass the impugned order without any basis, if no documents were placed before him to show that the remand was extended further at least till the date when the impugned order of detention stood passed? It is quite possible to conceive, that the remand might not have been extended and the individual may have been released either on bail or due to non-asking for extension of remand. In that event, if there was no material before the Detaining Authority either way, both contingencies would get rolled into one and certainly at that stage of melting point, the Detaining Authority could not have been aware either about remand or bail, to there after decide on the compelling necessity or necessity, as the case may be.

6. In *Balaraman v. State of Tamil Nadu etc.* 1994 1 LW (Cri) 266, we have ourselves held, that the short ground of lack of material before the detaining authority to express his awareness that the detenu was in remand on the date on which the impugned order was passed, would alone suffice to hold in favour of the detenu concerned. We have further added, that it was not known, when there was no material available, as to how the detaining authority has stated in the grounds of detention, that he was aware that the detenu was in remand on a particular date. We then observed that if the said statement was correct, the detaining authority must have relied upon extraneous material not supplied to the detenu.

7. Mr. I. Subramaniam, learned Additional Public Prosecutor specifically argued that the detaining authority was very much alive to the factum of remand and that was the reason why he had sent a fax message to the Additional Collector of Customs, Customs House, Madras, on 20.6.1995 asking for immediate information, whether the detenu was still in remand or released on bail, since the proposal mentioned about judicial custody of

the detenu only till 19.6.1995. The fax message also asked the sponsoring authority to furnish information if the detenu was still in remand, and the date up to which such remand was extended. In reply to the fax message, a communication was forwarded on 23.6.1995, by the Assistant Collector of Customs (COFEPOSA), to the State Government, relevant portion of which reads as hereunder:

Remand of Thiru Kaleel Rahman has been extended upto 4.7.1995 and he continues to be under judicial custody till date. Since no formal written extension order is issued in this regard, it could not be supplied.

It did amaze us, as to how a remand could have been extended without a formal written order. If such remand had been ordered, prima facie, on

the face of it, it would not be in accordance with law. We then wanted to satisfy ourselves, if in fact the sponsoring authority, had taken steps to

obtain a copy of the remand extension order, and place it before the detaining authority, or even at a later point of time, before the State

Government, prior to disposal of representation forwarded by the detenu. We were made aware, that no steps were taken to apply for a copy of

the remand-extension order. Such inaction is in consonance with the communication sent to the State Government that no formal written extension

order was issued. It cannot be disputed that if the fact of extension of remand is based on this dubious communication dated 23.6.1995, then such

communication on which reliance was placed, to make an observation in the grounds of detention that the detaining authority was aware that the

detenu was in remand upto 4.7.1995, should have been supplied to the detenu. On such supply, it would have been easily possible for the detenu

to place his grievance before the Advisory Board, that even without a formal written extension order, the sponsoring authority had made the

detaining authority, to believe as though remand stood extended. Such non-supply of basic material, at least from the fact available, would clearly

permit us to held, that the detenu had been denied a reasonable opportunity of making an effective representation to have the impugned order

viced.

8. We do not intend to reiterate the importance of communication, of basic material relied upon, on this aspect. It need not be in a particular form,

but there must be material on that factum, which must stand communicated and

that is the law laid down more than once by this Court.

9. It was sought to be contended by the learned Additional Public Prosecutor, that the observations of the Supreme Court in Abdul Sathar Ibrahim

Manik Vs. Union of India and others, , may be relevant on this aspect. He referred to paragraphs 2-3 and 4, wherein the submission made has

been stated as hereunder:

The next main and important submission is that the copies of the bail application filed by him and the order refusing bail, which are relevant

documents, were suppressed and not placed before the detaining authority nor they were supplied to the detenu and therefore there is non-

application of mind and the petitioner also is denied a reasonable opportunity under Article 22(5) of the Constitution of India.

The Supreme Court answered as hereunder:

We see no force in the first submission namely that there was no compelling necessity for passing the detention order. It is true that when the

detention order was passed on 7.11.1990, the detenu was in jail and his bail application also was rejected and his passport also was seized. But

the detaining authority has mentioned in the grounds that I am aware that you are under judicial custody and possibility of your release on bail in the

near future cannot be ruled out^{1/2}.

In that context, the Supreme Court observed that it cannot be said that the detaining authority did not apply his mind to that aspect as to whether

there were such compelling circumstances or not. It was also made known to the Supreme Court, through the counter-affidavit that the remand

period of the detenu was to expire on 10.11.1990 and that was also a ground which impelled the detaining authority to think that he was likely to

be released on bail. Facts stated in paragraph 1 by the Supreme Court would show that the impugned order therein was passed on 7.11.1990 and

served on the detenu on 8.11.1990, during the period when there was material before the detaining authority of the factum of remand. The

Supreme Court was nor considering in Abdul Sathar Ibrahim Manik Vs. Union of India and others, about the need for communication of basic fact

of remand. This decision will not help the State, more so on the peculiar facts available in the instant habeas corpus petition.

10. It was then pointed out that in M. Mohd. Sultan v. Joint Secretary to Govt, of

India, Finance Dept. AIR 1990 SC 2222 the Supreme Court

has observed, that non-consideration of application for relaxation of conditions and the order relaxing conditions, are not material documents,

especially when the detaining authority had considered the order granting bail, subject to conditions and hence non-supply of copies thereof, would

not deprive the detenu of his right of making representation. It is apparent that the detenu therein was enjoying liberty with certain conditions. It

was in that context, the Supreme Court pointed out the non-material nature of the bail relaxation petition and the order passed on that petition. As

a Division Bench of this Court has observed in Intdhi Alias Imdaya Nathan's case 1994(2) LW (Cri) 618, the concept of a person in remand

against who a preventive order could be passed and equally the possibility of a preventive order being passed against a person who was in

enjoyment of liberty, will stand attracted on the facts therein.

11. Finally, learned Additional Public Prosecutor referred to the observations made in Inulhi alias Imdaya Nathan's case 1994 2 LW (Cri) 618 in

paragraph 25, wherein the decision rendered by the Supreme Court in Bal Chand Bansal Vs. Union of India (UOI) and Ors, stood referred to,

and submitted that the awareness need not be in the grounds of detention, for that could be based on the detention file or the counter-affidavit

preferred before Court by the detaining authority. The Division Bench then observed as follows on this contention:

It is apparent from these factual details that when the impugned order of detention was passed, there was material placed before the Detaining

Authority of the pending bail application of the detenu and the fact of the detenu being in remand. In this case, Supreme Court had not considered

the aspect of communication of that basis material, to the detenu, for the process related to compelling necessity. To reiterate, the factual details

mentioned in the grounds, obviously must have been communicated to the detenu, and hence there was no ground urged on the question of

communication. This decision cannot help the case of respondents.

12. We are unable to accede to any of the contentions advanced by the learned Additional Public Prosecutor. The ground taken by Mr. B.

Kumar, Petitioner's learned Counsel, will have to be necessarily up-held in law as well as on facts.

13. Impugned order of detention shall stand set aside. The detenu is directed to be set at liberty forthwith unless his detention is otherwise required.

This habeas corpus petition is allowed.