
(1977) 11 MAD CK 0012
In the Madras High Court

Kanmal

APPELLANT

Vs

The State of Tamil Nadu and Another

RESPONDENT

Date of Decision : 15-11-1977

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1)
Customs Act, 1962 — Section 112

Citation : (1978) CriLJ 867 : (1978) ILR (Mad) 368

Hon'ble Judges : Ratnavel Pandian, J;Gokulakrishnan, J

Bench : Division Bench

Judgement

Gokulakrishnan, J.—This Petition has been filed by the brother of the detenu to issue a writ of habeas corpus or any other appropriate writ

and direct the production of the body of D. Gaverchand before this Court, now detained in the Central Prison, Madras, by virtue of the order of

detention passed by the first respondent in GO Ms No. S/1 863/1/75 Public S. C. Department dated 7-5-1975, and for directing the said detenu

to be set at liberty forthwith. The case of the petitioner is that the detenu is his brother, who was having a textile business at No. 4/13 Kasi Chetti

St, Madras under the name and style of Ambika Fancy Stores. In April 1974, the detenu went to his native place in Rajasthan and thereby he

incurred loss in his business also. On 23-6-1977, the detenu was arrested at Rajasthan and was brought to Madras on 6-7-1977 and detained in

the Central Prison, Madras. He was served with a detention order on 7-7-1977 and the grounds of detention were served on him on 8-7-1977.

2. The detenu was detained by the Government of Madras, by an order passed in G.O. No. S/1863/1/75 Public SC Department D/- 7-5-1975.

The order reads that the detenu has been detained u/s 3 (1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act,

1974, owing to the fact that the said detenu was dealing in smuggled goods otherwise than by engaging in transporting smuggled goods. In the

grounds of detention, the Government has enumerated two instances. One is that the Preventive Officers searched the shop of the detenu on 14-6-

1973 and recovered the goods of foreign origin like textiles, perfumes, sunglass, cassetes tapes etc valued at Rs. 2914. The detenu Gaverchand

was present during the search and he was not in possession of any bills or documents to prove the original or legal acquisition of the aforesaid

goods. Hence all the aforesaid goods were seized on a reasonable belief that they were smuggled into India. The detenu, in his statement dated

14-6-1973, given before the Customs Officers, admitted the recovery of the aforesaid goods from his shop and stated, among other things, that he

purchased the goods from various brokers coming to the market and he was not aware of their names and addresses and that the brokers did not

give him any details or names. A show cause notice was issued to Goverchand on 12-8-1973. Later all the goods under seizure were confiscated

as per Act 1962 (amended). A penalty of Rs. 1250 was also imposed on Goverchand u/s 112 of the Customs Act, 1972. Against this order,

Goverchand preferred an appeal, which was rejected for non-compliance with the provisions of Section 129 of the Customs Act 1962.

3. The second ground of detention is that on 6-3-1974, the Officers of the Customs department searched the shop of the detenu at No. 4/13 Kasi

Chetti St, Madras and recovered various goods of foreign origin, like textiles, watches, tapes, obscene films, etc, valued at Rs. 3272. The detenu

was not in possession of any documents or bills to prove the origin and legal acquisition of the aforesaid goods and as he had not intimated to the

Customs authorities for possession and sale of notified goods as required under the provisions of the Customs Act, 1962 (as amended), the

aforesaid goods were seized on a reasonable belief that they were smuggled into India In the statement dated 6-3-1974, given before the Customs

Officer, Gaverchand admitted the recovery of the aforesaid foreign goods from his shop and stated inter alia that his shop had no stock register

and the goods were therefore not duty entered, that during the past ten days, he had purchased all the foreign goods from four brokers on payment

of Rs. 1000, without bills and kept them in the shop for sale, that the four brokers informed him that they came from Bangalore and he did not know their names and addresses, that he did not obtain any receipts for all the foreign goods and that he knew that it was an offence to buy foreign goods without receipts and keep and sell them. He stated that the obscene pictures were brought and kept in his shop, the previous day evening by one Sundar whose address he did not know. A show cause notice was issued by the department which was received on 15-6-1974. He did not reply to the notice. An intimation was therefore sent to him asking him to appear for a personal hearing before the case was decided. Though this intimation was also received by him, he failed to turn up for the personal hearing. The case was, therefore, adjudicated ex parte on the basis of the evidence on record and all the goods were confiscated under the Customs Act 1962 (as amended). A penalty of Rs. 500 was also imposed on Gaverchand.

4. The above said two instances, according to the State Government, would indicated that Gaverchand was engaged in dealing in smuggled goods otherwise than by engaging in transporting or selling or keeping the smuggled goods. Thus, according to the Government, the activities of Gaverchand had led the State Government to reasonably apprehend that unless the detenu is detailed forthwith under the provision; of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, Gaverchand would still continue to indulge in similar activities.

5. Accordingly, the detenu was ordered to be detained under the COFEPOSA Act with direction that he could make a representation, addressing the letter to the Chief Secretary, if he so desires, against the order of detention.

6. The petitioner submits that these two instances referred to above which are of the years 1973 and 1974, respectively, cannot form the basis for any reasonable citizen to detain Gaverchand under the COFEPOSA Act, that they are far remote to lead to any reasonable inference that the detenu is dealing in smuggled goods and that his detention was therefore necessary to prevent him from dealing in such smuggled goods. It is averred in the petition that the value of these goods is negligible and as such it cannot reasonably be presumed that Gaverchand was dealing in

smuggled goods for purpose of detention under the COFEPOSA Act and that the articles seized are not prohibited items in 1973 and 1974. The

petitioner has further alleged that mere possession of goods which were later found to be smuggled, will not call for any action under the

COFEPOSA Act, 1974 and that there is nothing to indicate that these goods were kept for sale which alone will lead to the inference that the

detenu was dealing in smuggled goods. The petitioner had further submitted that instance No. 2 is more than 14 months prior to the date on which

the detention order was passed and as such no reasonable person can come to any conclusion from this alleged seizure that the detenu

Goverchand must be detained under the COFEPOSA Act. So according to the petitioner, the instance is far too remote and bears no significance

with any activities on the part of the detenu shortly prior to the date on which detention order was passed in May 1975. It has been further alleged

by the petitioner that the detention order was passed arbitrarily taking advantage of the emergency and the authorities must have acted

mechanically and in artificial manner.

7. Apart from the said grounds, the petitioner has also inter alia mentioned that the detention order was not passed by proper authorities, and that

isolated cases that took place a long time ago should not be utilised for passing an order of detention or deprive the liberty of any citizen by taking

recourse to Prevention of Detention Act. The petitioner has also submitted that the detenu is a T B patient. With these allegations, the petitioner has

prayed for the release of the detenu.

8. To the above said affidavit the first respondent filed a counter-affidavit refuting the contentions raised by the petitioner and also inter alia

submitting that the COFEPOSA Act came into force on 19-12-1974, that since number of cases had to be scrutinised the detention order of

Gaverchand has passed only on 7-5-1975, that since the detenu had not intimated the Customs authorities about the shop dealing in notified goods

as required under the Customs Act, 1962 (as amended,) the goods were seized for contravention of the provisions of the Customs Act, that the

two grounds mentioned for detaining the detenu are valid, that the value of the goods seized was not the basis in arriving at the subjective

satisfaction in the matter of detention, that ground No. 2 is valid and bears

rational and tangible nexus with the object of the detention inasmuch as the two instances mentioned in the grounds afforded the basis in formulating the reasonable prognosis of future behaviour of the detenu in the matter of arriving at the subjective satisfaction by the detaining authority and that the detention order did not suffer from any vice or arbitrariness nor was it passed by the detaining authority mechanically nor in a casual manner. It has been further stated that the proclamation of emergency has nothing to do with the detention of the detenu.

9. In the reply affidavit filed by the writ petitioner it has been stated that U. S. Natarajan is not competent to file the counter-affidavit in respect of facts that took place in May 1975 since he could not have any personal information, that the failure to intimate the Customs authorities regarding the carrying on of the business will not make the detenu liable to be proceeded against under the COFEPOSA Act 1974, that there is nothing in the adjudication order from which it can be said that the textile goods alleged to have been seized are notified goods or that they were of foreign origin and that there is enormous delay in placing the detenu under detention in spite of the fact that the second incident was said to be as early as in March 1974. The petitioner further submitted that number of persons suspected as smugglers were detained even in September 1974 and therefore the contention that number of cases had to be scrutinised cannot be sustained. It has been further averred that the Government have not explained the delay between December 1974 and March 1975.

10. To the above said reply affidavit, the State filed a counter, alleging that U, S. Natarajan who filed the counter-affidavit and counter reply affidavit is a competent person to represent the State and speak to the facts relating to the detention of the detenu J. Gaverchand and that the materials found in the grounds of detention justified the passing of the order of detention. It has been further averred that the detenu will squarely come under the category of dealing in smuggled goods and his possession of the goods contravened the Customs Law. Regarding the contentions raised in paragraph 5 of the reply affidavit of the petitioner, the State submitted that all the foreign goods displayed in and seized from the detenu's shop were only new and this fact was not contested by the detenu during the adjudication proceedings. The State further averred that the detenu

has purchased various goods without proper bills and the goods are of foreign origin and the contention as if he purchased them from various

brokers cannot be sustained. It is further stated that the order of detention was made on 7-5-1975 which is in close proximity to his last

involvement in a Customs case, that more than one instance has been shown in the grounds of detention to prove that the detenu daringly continued

to deal in foreign goods and that confiscation of goods and imposition of personal penalty had no effect on him. Therefore, it is stated by the State

that preventive detention was invoked in the interests of the nation.

11. Mr. K. Ramaswami, learned counsel for the petitioner, in view of the decisions rendered by this Court in various writ petitions and also by the

Supreme Court did not press before us the contention that the detention order was not passed by the competent authority. The learned counsel

made stress on the points i that there is no proximity in point of time with the detenu's last involvement in a Customs offence for passing the

detention order and that the ordinary law is enough to prosecute the detenu. The alleged acts of smuggling are said to be on 14-6-1973 and 6-3-

1974, while the detention order was passed as late as 7-5-1975. No doubt, the detenu was not available and he was arrested only on 23-6-1977.

On 7-7-1977, the order of detention was served on him and the grounds of detention were served on him on 8-7-1977. The learned counsel

points out the extent and the value of the goods seized on the two occasions, being respectively Rs. 2914 and Rs. 3272. Never before and after

the incidents, according to the learned counsel, was there any act of smuggling by the detenu, and the ordinary law could have been in all fairness

invoked to punish the detenu. Further, the goods have been confiscated and necessary penalty has been levied on the detenu and as such the order

of detention is arbitrary in nature.

12. Regarding the second point raised by Mr, K. Ramaswami, the learned counsel, the argument is that when the ordinary law is enough to

prosecute the detenu there is no need to invoke the provisions of the COFEPOSA Act. In *Srilal Shaw Vs. The State of West Bengal and Others*,

the Supreme Court has held that invoking the Maintenance of Internal Security Act to detain a person while he could have been easily prosecuted

under the punitive laws, cannot be sustained. In that case, the Supreme Court

after observing that the case against the petitioner in the ordinary court of law was dropped for the reason that he would have established that his possession of the goods was not unlawful, held that the State had invoked the preventive detention mala fide. In those circumstances, the Supreme Court has quashed the order of detention passed under the Maintenance of Internal Security Act. We do not think the said ruling of the Supreme Court lays down the principle on the subject. We have a decision rendered by five Judges of the Supreme Court reported in Haradhan Saha Vs. The State of West Bengal and Others, wherein principles on this aspect have been stated as follows (at p. 1485 of Cri LJ):

The principles which can be broadly stated are these. First, merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII Cr. P. U would not by itself debar the Government from taking action for his detention under the Act. Second, the fact that the Police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the Criminal Procedure Code, and even lodges a first information report may be no bar against the District Magistrate issuing an order under the preventive detention. Third, where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the state or the public order. Fourth, the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the, order. Fifth, the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances.

From the above said observations made by the Supreme Court, we do not think the contention of Mr. K. Ramaswami, the learned counsel appearing for the detenu, on the second point can be upheld.

13. Coming to the first point. In Sri Nagen Murmu Vs. The State of West Bengal, , the Supreme Court, while dealing with a case which arose

under the Maintenance of Internal Security Act 1971, discussed the meaning that has to be given to the word "public order" and also considered

the principle that has to be taken note of by the detaining authority when an order of detention is passed taking into consideration the past conduct

or antecedent history of the detenu. The Supreme Court, in the judgment, observed (at pp. 668-669 of Cri LJ):

The impugned order was made on 24-12-1971, while the incident happened on 13/14-10-1969. This, in our opinion, is far too remote for the

purpose of raising any rational and reasonable inference of any apprehension of a repetition of such an act so as to justify the petitioner's detention.

It may be pointed out that...the past conduct or antecedent history of a person can appropriately be taken into account in making a detention

order. It is indeed largely from prior events showing tendencies or inclinations of a man that an inference can be drawn whether he is likely in the

future to act in a manner prejudicial to the maintenance of public order. But in order to justify such an inference it is necessary to bear in mind that

such past conduct or antecedent history should ordinarily be proximate in point of time and should have a rational connection with the conclusion

that the detention of the person is necessary. No doubt, it is both inexpedient and undesirable to lay down any inflexible test as to how far distant

the past conduct or the antecedent history should be for reasonably and rationally justifying the conclusion that the person concerned if not

detained may indulge in prejudicial activities. In Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, after laying down what has just

been said the court observed that the detention of a person without a trial is a very serious encroachment on his personal freedom and so at every

stage all questions in relation to the said detention must be carefully and solemnly considered.

14. Observing as stated above, the Supreme Court, in that case, set aside the impugned order of detention and directed the petitioner to be set at

liberty forthwith.

15. In Gora Vs. State of West Bengal, , the Court has held at p. 432 of Cri LJ):

The test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the offending acts and

the order of detention. It is a subsidiary test evolved by the court for the purpose

of determining the main question whether the past activities of the detenu is such that from it a reasonable prognosis can be made as to the future conduct of the detenu and its utility, therefore, lies only in so far as it subserves that purpose and it cannot be allowed to dominate or drown it. The prejudicial act of the detenu may in a given case be of such a character as to suggest that it is a part of an organised operation of a complex of agencies collaborating to clandestinely and secretly carry on such activities end in such a case the detaining authority may reasonably feel satisfied that the prejudicial act of the detenu which has come to light cannot be a solitary or isolated act, but must be part of a course of conduct of such or similar activities clandestinely or secretly carried on by the detenu and it is, therefore, necessary to detain him with a view to preventing him from indulging in such activities in the future.

16. In *Jagan Nath Biswas Vs. The State of West Bengal*, the Supreme Court observes that the delay in passing the detention order will be fatal to the detention order itself and that there should be some proximity in time to provide a rational nexus between the incidents relied on and the satisfaction arrived at. On the facts and circumstances of that case, the Supreme Court was not satisfied about the bona fides of the subjective satisfaction of the District Magistrate owing to the delay in passing the detention order and therefore directed the release of the petitioner forthwith.

17. In *Sk. Serajul Vs. State of West Bengal*, , which was a case where the detention order purported to be based on certain wagon-breaking incidents and there was undue delay after the alleged incidents before the order of detention was passed and there was again delay after the order of detention and before the actual arrest of the detenu, the Supreme Court observed that the court can doubt the genuineness of the alleged "subjective satisfaction¹ of the detaining authority as to the necessity of detaining the detenu with a view to preventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to the community. The Supreme Court further held that "in a habeas corpus petition such delay must be satisfactorily explained in order to prove the genuineness of the "subjective satisfaction" alleged by the detaining authority."" Eventually the Supreme Court set aside the order of detention and directed the petitioner before it to be set at liberty forthwith.

18. From the above said decisions it is clear that there should be proximity in point of time to provide a rational nexus between the incidents relied on and the satisfaction arrived at, else it raises a doubt as regards the bona fides of the subjective. satisfaction arrived at by the authorities concerned. No doubt, the decisions referred to above, make it clear that each case has to be judged independently and there cannot be any hard and fast rule as to the duration of the time between the act alleged and the detention order passed. Inasmuch as each case has to be judged independently we are of the view that in the present case there is no act of smuggling as such alleged against the detenu prior to 1973, and subsequent to March 1974. Further the values of the goods seized from the shop of the detenu on the two occasions are respectively Rs. 2914 and Rs. 3272. According to the detenu, he purchased the same from brokers and as such he has not indulged in smuggling activities. The order of detention is dated 7-5-1975, which is nearly one year and two months subsequent to the last act of smuggling alleged against the detenu. The detention of a person without a trial is a very serious encroachment on his personal freedom and so at every stage all questions in relation to the said detention must be carefully and solemnly considered. The indiscreet use of the Act, in all cases, in our opinion, can be deemed only as a misuse of the Act when the Act itself is intended for extraordinary cases in the interests of the nation. Considering the act alleged against the detenu coupled with the inordinate delay in passing the detention order, we are of the view that there is no proximity in time to provide a rational nexus between the incidents relied on and the satisfaction arrived at by the competent authority. As such, we are not satisfied about the conclusion arrived at by the detaining authority in this case, to detain the detenu under the COFEPOSA Act. The stray acts alleged, the last of which being one year and two months prior to the detention order, will never lead to the conclusion that unless the detenu is detained under the COFE-POSA Act, he will indulge in smuggling activities. The delay in passing the detention order has not been properly explained and the detention order passed, in our opinion, is not based on a reasonable prognosis of the future behaviour of the detenu, based on his past conduct in the light of the surrounding circumstances,

19. In the result, the order of detention must fail as illegal. The petition is allowed, the rule nisi is made absolute and the detenu is directed to be released forthwith. No costs.