
(2014) 08 BOM CK 0108

In the Bombay High Court

Case No : Criminal Writ Petition Nos. 506 and 970 of 2014

Khushbu Sandeep Jain

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 01-08-2014

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3, 3(1)
Constitution of India, 1950 — Article 21, 22, 22(5), 226, 32
Customs Act, 1962 — Section 108

Citation : (2014) ALLMR(Cri) 3544 : (2014) 3 BomCR(Cri) 636

Hon'ble Judges : S.C. Gupte, J; Abhay Shreeniwas Oka, J

Bench : Division Bench

Advocate : U.N. Tripathi I/b. Jayshree Tripathi, Advocate for the Appellant; J.P. Yagnik, APP and A.S. Pai, APP, Advocate for the Respondent

Final Decision : Dismissed

Judgement

S.C. Gupte, J.—These Petitions, under Article 226 of the Constitution of India, seek to challenge orders of detention passed against two detenus u/s 3(1) of the COFEPOSA Act, 1974. The Petitioners had earlier filed writ petitions before this Court, being Criminal Writ Petition No. 3499 of 2013 and Writ Petition No. 3436 of 2013, challenging the validity of the orders of detention. These Petitions were rejected by this Court after hearing the Petitioners and the detaining authority. The present Petitions are on the footing that they raise fresh and new grounds of attack against the orders of detention and that successive petitions on such fresh and new grounds are not barred on the principles of res judicata or constructive res judicata and ought to be decided on their own merits. The controversy in these Petitions, thus, concerns the permissibility of successive habeas corpus petitions under Article 226 of the Constitution of India and the parameters to be considered by the Writ Court whilst entertaining such petitions.

2. Writ Petition No. 506 of 2014 concerns the detenu, Sandeep Jayantilal Jain ("Sandeep"), and is filed by his wife, whereas Writ Petition No. 970 of 2014

concerns Jayant Rikhabchand Mehta ("Jayant") and is filed by his mother. The orders of detention in cases of both the detenus have been passed under Clause (ii) of Sub-section (1) of Section 3 of the COFEPOSA Act, i.e. with a view to prevent the detenus from abetting smuggling activities in future.

3. The case of the detaining authority against the detenus is this: On specific intelligence received in that behalf, one Sagar Chheda, arriving from Dubai by flight at Chhatrapati Shivaji International Airport at Mumbai, and Uday Singh Meena, Sub-Inspector of CISE were apprehended at the Airport on 10 August 2012 in connection with smuggling of gold. A bag containing 5.804 kgs of gold jewellery and gold bars of an estimated value of Rs. 1.60 crores was found with Uday Singh Meena. Sagar Chheda, apprehended on the same day, was found to be carrying an identical bag. Next morning, i.e. on 11 August 2012, one more passenger Atul Mangilal Bafna, who arrived at the Mumbai Airport from Dubai, was apprehended with the same make of bag containing 4.717 kgs of gold jewellery. After investigations, the authorities claimed to have busted a smuggling racket with Sandeep as the kingpin of the syndicate and Jayant as a co-conspirator for smuggling of gold bars/gold jewellery from Dubai. Sandeep was found to be the financier of the smuggling activities, sending money through illegal channels, visiting Dubai and purchasing gold for carrying the same through his carriers. The carriers, who included Sagar Chheda, Jayant and others, would carry the contraband in bags of specified makes from Dubai to Mumbai and then exchange the same with identical bags with a CISF Officer (Uday Singh Meena, in the incident referred to above) who would clear the same through the staff gate. The syndicate was claimed to have smuggled around 120 to 140 kgs of gold bars/gold jewellery through this device over the last six months, i.e. from February 2012. All the Accused connected with the syndicate were apprehended and their statements recorded u/s 108 of the Customs Act, 1962. Based on the statements as also the material collected during investigations, a proposal for detention of the accused was placed before the screening committee on 19 November 2012. The proposal was received by the Sponsoring Authority on 23 November 2012 and forwarded to the Detaining Authority on 3 December 2012, who called for additional information. After screening all material, orders of detention were issued on 22 August 2013.

4. The detention orders were challenged by the Petitioners on behalf of the detenus by two writ petitions, namely, Criminal Writ Petition No. 3499 of 2013 on behalf of Sandeep and Criminal Writ Petition No. 3436 of 2013 on behalf of Jayant, as noted above. At the hearing of the two petitions, Counsel for the Petitioners made detailed submissions which were common in both the Petitions. It was inter alia urged that the retraction of inculpatory statement of Sandeep, which statement was used in both the cases, was not placed before the Detaining Authority; that the copy of the retraction was not furnished to the detenu; that there was gross delay in passing the orders of detention; that there was variance between the satisfaction of the Detaining Authority recorded in the detention orders and in the grounds of detention; that certain documents including the bail

order on which the detenu was released, and the reply of the detenu to the show cause notice, were neither furnished to the detenu nor placed before the Detaining Authority; and that there was denial of the right conferred on the detenu under Clause (5) of Article 22 of the Constitution and at the same time, non-application of mind on the part of the Detaining Authority.

5. After an extensive hearing, the Writ Petitions were rejected by this Court and the Rule in both Petitions was discharged.

6. The present Petitions urge five grounds to challenge the detention orders, which according to the learned Counsel for the Petitioners, are fresh and new. They are as follows:

(i) A representation of the detenu (representation dated 20.11.2013 in the case of Sandeep and dated 11.2.2014 in case of Jayant) was sent to the detaining authority, and the State and Union Governments through the Superintendent of Prison, but there was no response and the delay was not explained;

(ii) A fresh representation (dated 30.1.2014/11.2.2014) was sent to the detaining authority on behalf of the detenu on fresh grounds for consideration and revocation of the order of detention, where the detenu also requested to furnish certain vital documents (on which reliance was placed in the order) to enable the detenu to make a further representation, but there was neither any response nor any explanation for delay;

(iii) A similar representation sent to the Secretary to the Government of India (dated 31.1.2014/11.2.2014) also elicited no response;

(iv) Out of the compilation of 807 pages of documents furnished to the detenu along with the grounds of detention (which documents were relied upon), there were about 25 pages which were wholly and/or partially illegible and could not be understood by the detenu, depriving him of his right to make an effective representation against the detention under Article 22(5) of the Constitution of India; and

(v) The detaining authority did not go through the most vital and relevant document like Assay Report to determine the exact nature of the contraband, namely, whether they were gold or other materials and in the absence of an expert's opinion on the nature of the goods, the detention order was vitiated and liable to be quashed.

7. Let us first take the ground of illegible documents (25 pages out of 807) supplied to the detenus. These illegible documents are annexed to the petitions. It is submitted that supply of these illegible pages, on which the detention order is purportedly based, denies the opportunity of effective representation to the detenu, guaranteed under Article 22(5) of the Constitution. It is submitted this ground was not raised earlier and hence not considered by this Court in the earlier writ petitions. It is submitted that this being a fresh and new ground, is not barred by the principles of *res judicata* or constructive *res judicata*. The

learned Counsel for the Petitioners relies upon judgments of the Supreme Court as also of our court and contends that successive petitions for writ of habeas corpus lie to the High Court under Article 226 on fresh and new grounds of attack against the detention order. The learned APP for the Detaining Authority and learned Counsel for the Sponsoring Authority refute this contention and submit that firstly, the ground of illegible documents is raised in the earlier petition by including it in the synopsis and secondly, this ground was at any rate available to the detenu when the first petition was filed and there being no explanation why the same could not be urged or pressed earlier, the same cannot be made the basis of a subsequent petition and urged to challenge the same order of detention.

8. Before we examine the facts of the present case, the law in this behalf may be noted so as to understand whether, and if so to what extent, the writ court can entertain successive habeas corpus petitions challenging the same order of detention.

9. The question of *res judicata* as applicable generally to writ proceedings was considered by the Supreme Court in one of its early decisions in *Daryao and Others Vs. The State of U.P. and Others*, In that case, the High Court had dismissed a writ petition under Article 226 of the Constitution after hearing the matter on merits, on the ground that no fundamental right was proved or contravened and that its contravention was constitutionally justified. The Petitioner in that case did not appeal from the decision of the High Court but filed an independent petition under Article 32 to the Supreme Court on the same facts and for the same reliefs. The Supreme Court held the petition to be barred by the general principles of *res judicata*.

10. *Daryao's* case (*supra*) was cited before the Supreme Court in *Ghulam Sarwar Vs. Union of India (UOI) and Others*, where the Court was concerned with the question of maintainability of a second writ petition for habeas corpus. In that case, a habeas corpus petition of the petitioner, a Pakistani National who entered India without any travel document and who was detained in connection with smuggling of gold, was dismissed by the Delhi High Court and the petitioner had come to the Supreme Court by way of a petition under Article 32. The Supreme Court noted that in *Daryao's* case, the writ of habeas corpus was treated as a separate class and the question as to whether repeated applications for habeas corpus could be filed under our constitution, was kept open. That question fell to be decided in *Ghulam Sarwar's* case. The Court noted that on the question of *res judicata*, the English and American Courts were unanimous that the principle of *res judicata* was not applicable to a writ of habeas corpus, though they came to the conclusion on different grounds. The English Courts initially held that a decision in a writ of habeas corpus was not a judgment and hence, would not operate as *res judicata* and successive petitions before different judges of the same High Court were permissible. Later the English Courts accepted that one division court spoke for the entire court and could not set aside the order of

another division of the same court. The English Administration of Justice Act, 1960 placed this principle on a statutory footing inasmuch as under the Act no second application could be brought before the same court except on fresh evidence. The American Courts reached the same conclusion, but by a different route. The American view was that it is of the very essence of the writ of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void, and hence the familiar principle that *res judicata* is inapplicable in habeas proceedings. The Supreme Court then noted that insofar as the High Courts in India are concerned, the same principle accepted by the English Courts would equally apply. When a High Court functions as a Division, it speaks for the entire court and therefore, cannot set aside the orders made in a writ of habeas corpus earlier by another Division Bench. But the Supreme Court said that this principle would not apply to different courts. The Supreme Court in *Ghulam Sarwar* (*supra*) stated the law as follows:

9. But unlike in England, in India the person detained can file original petition for enforcement of his fundamental right to liberty before a Court other than the High Court namely, this Court. The order of the High Court in the said writ is not *res judicata* as held by the English and the American Courts either because it is not a judgment or because the principle of *res judicata* is not applicable to a fundamentally lawless order. If the doctrine of *res judicata* is attracted to an application for a writ of habeas corpus, there is no reason why the principle of constructive *res judicata* cannot also govern the said application, for the rule of constructive *res judicata* is only a part of the general principles of the law of *res judicata*, and if that be applied the scope of the liberty of an individual will be considerably narrowed. The present case illustrates the position. Before the High Court the petitioner did not question the constitutional validity of the President's order made under Art. 359 of the Constitution. If the doctrine of constructive *res judicata* be applied, this Court, though is enjoined by the Constitution to protect the right of a person illegally detained, will become powerless to do so. That would be whittling down the wide sweep of the constitutional protection.

11. Thus, in *Ghulam Sarwar's* case (*supra*), the Supreme Court, dealing with the plea of an order of the High Court in a habeas corpus petition under Articles 226 operating as *res judicata* for a petition under Article 32 before the Supreme Court, negatived the plea and held that the Supreme Court would have to decide the matter on merits. But it still accepted the English principle of a Division Bench of a High Court not entertaining a fresh habeas corpus petition in a matter decided by another Division Bench of the same High Court except on a fresh evidence. Besides, in his concurring judgment in *Ghulam Sarwar's* case, Bachawat, J. made it clear that the petitioner would not have the right to move the Supreme court under Article 32 more than once on the same facts.

12. In a Full Bench decision of the Punjab High Court, which purports to follow the English decisions considered in *Ghulam Sarwar's* case and the decision of the

Supreme Court in Daryao's case, it was held as follows:

7. No second petition for writ of habeas corpus lies to the High Court on a ground on which a similar petition had already been dismissed by the Court. However, a second such petition will lie when a fresh and a new ground of attack against the legality of detention or custody has arisen after the decision on the first petition, and also where for some exceptional reason a ground has been omitted in an earlier petition, in appropriate circumstances, the High Court will hear the second petition on such a ground for ends of justice. In the last case, it is only a ground which existed at the time of the earlier petition, and was omitted from it, that will be considered. Second petition will not be competent on the same ground merely because an additional argument is available to urge with regard to the same.

13. All these decisions were surveyed by the Supreme court in the case *Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others*, where the court was concerned with the application of the doctrine of constructive res judicata to a subsequent petition for a writ of habeas corpus. In that case, a petition filed by the detenu was rejected by the Supreme court. But between the dates of dismissal and furnishing of reasons, additional grounds were filed by the detenu. He was, however, informed that he may, if so advised, file a fresh petition on these grounds. That is how the subsequent petition came to be filed. The argument advanced before the Supreme Court on behalf of the detenu was that the court cannot deny a writ of habeas corpus on a fresh ground which could not, for good reasons, be taken in the earlier writ petition, on the ground that it is barred by any doctrine of estoppel or constructive res judicata. In this connection, a reference was made to the Full Bench decision of the Punjab High Court quoted above. The Supreme Court held as follows:

13. The position that emerges from a survey of the above decisions is that the application of the doctrine of constructive res judicata is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Article 32 of the Constitution on fresh grounds, which were not taken in the earlier petition for the same relief.

In *Lallubhai's* case, the new and additional grounds included the following:

(i) Non-supply of all the documents relied upon by the detaining authority. It was submitted that after the rejection of the Petitioner's first petition, the Petitioner learnt about this fact from an order passed in an allied writ petition filed on behalf of other detenus. (In particular, it was submitted that 236 documents were not supplied at all.) This fact had been admitted in the counter of the detaining authority;

(ii) A representation was made on behalf of the detenu after his first petition was dismissed, which was not disposed of. No counter was filed by the Central Government, showing that this representation was considered and disposed of;

(iii) No translation of grounds in Gujarati (the language of the detenu) was given to the detenu. The court found that translations were in fact not supplied.

The Supreme Court found these to be contraventions of constitutional imperatives and the continued detention of the detenu was held to be illegal. It is pertinent to note that the Supreme court was dealing with the case of an Article 32 petition and particularly, whilst dismissing the first petition, the court had granted liberty to the detenu to raise additional grounds in a subsequent petition. Secondly, it needs to be noted that two of the three additional grounds urged in the subsequent petition were not available to the Petitioner when the earlier petition was filed in that case.

14. In Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI) and Others, the detenu had in the first instance filed a petition for habeas corpus in the High Court of Gujarat, which was dismissed by that court. The detenu preferred an SLP against the order of the High Court as well as an Article 32 petition before the Supreme Court. The Supreme Court after discussing the law of applicability of the principles of res judicata to habeas corpus petitions, observed as follows:

10. Apart from the cases discussed above there is another ground on which the argument of Mr. Phadke for respondents must be rejected. The doctrine of finality of judgment or the principles of res judicata are founded on the basic principle that where a Court of competent jurisdiction has decided an issue, the same ought not allowed to be agitated again and again. Such a doctrine would be wholly inapplicable to cases where the two forums have separate and independent jurisdictions. In the instant case, the High Court decided the petition of the detenu under Article 226 which was a discretionary jurisdiction whereas the jurisdiction to grant relief in a petition under Article 32 filed in the Supreme Court is guaranteed by the Constitution and once the Court finds that there has been a violation of Article 22(5) of the Constitution then it has no discretion in the matter but is bound to grant the relief to the detenu by setting aside the order of detention. The doctrine of res judicata or the principles of finality of judgment cannot be allowed to whittle down or override the express constitutional mandate to the Supreme Court enshrined in Article 32 of the constitution. In a recent decision in the case of Smt. Santosh Anand v. Union of India W.P. No. 1097/79 (decided on 31-10-1979) this Court has pointed out that the concept of liberty has now been widened by Maneka Gandhi's case where Article 21 as construed by this Court has added new dimensions to the various features and concepts of liberty as enshrined in Articles 21 and 22 of the Constitution. For these reasons, therefore we overrule the preliminary objection taken by the respondents.

15. In Abdul Sattar Abdul Kadar Shaikh Vs. Union of India (UOI) and Others, the detenu had filed an Article 32 petition which was dismissed. A second petition was filed for the same relief, but on the basis of some grounds which, according to the petitioner, were not urged in the first petition. The Supreme Court referred to the merits of the contentions while rejecting the second petition, observing as

under:

We may also point out that though the principle of *res judicata* or constructive *res judicata* cannot be made applicable to a case of detention yet there should be some finality. The petitioner having failed in his earlier attempts has now again come forward with the present petition with a highly belated plea that some documents, though he made a request, have not been supplied. This request, as we find from the records, was made after this Court dismissed the Habeas Corpus Petition No. 302 of 1989. He, however, justifies the filing of the present petition on a plea that he was unaware of the existence of these documents. But as noted above his petition itself shows that he was aware of all these documents. Therefore, we do not see any *bona fides* in this plea of his. Under these circumstances, we are unable to say that the refusal to supply the documents requested by him amounts to violation of Article 22(5).

16. On a review of the law stated by the Supreme Court in the above mentioned judgments, which mostly dealt with Article 32 petitions, as also the Punjab High Court Full Bench decision, and the various judgments of the High Courts in India and the English authorities referred to in Ghulam Sarwar's case (*supra*), a Division Bench of our court in the case of Deepesh Mahesh Zaveri Vs. The Union of India and others, whilst dealing with the maintainability of a second petition under Article 226 after dismissal of an earlier petition, held as follows:

In our view, a second petition for the writ of habeas corpus at the instance of a detenu, who is in custody, would lie to the High Court under Article 226 when (i) fresh and new ground of attack against the legality of the detention or custody has arisen after the decision on the first petition and (ii) where for some exceptional reason, the ground has been omitted in an earlier petition. In either of these two circumstances, in appropriate circumstances, the High Court will hear the second petition on such a ground for ends of justice. It is also clear to us that in the second case mentioned above it is only the ground which existed at the time of earlier petition and which was omitted for some exceptional reason that will be considered in the second petition but the second petition will not be competent on the same ground merely because an additional argument is available to urge with regard to the same.

17. Our court in Deepesh Zaveri's case (*supra*) noted the clear distinction between the discretionary jurisdiction under Article 226 and the fundamental right guaranteed under Article 32 of the Constitution made in Kirit Kumar's case (*supra*) by the Supreme Court, and finally held as follows:

45. The law laid down by the Apex Court in Kirit Kumar's case, makes a clear distinction between the discretionary jurisdiction under Article 226 and the fundamental right guaranteed under Article 32(1) of the Constitution which must be borne in mind since we are dealing with a second petition to the High Court under Article 226 of and that too at the instance of a detenu who has been released and who has alleged no fresh ground whatsoever nor has he pleaded

any exceptional circumstance which prevented him from raising the ground earlier at the time of hearing of the first petition though the same was very much available to him in the facts of the present case. Indeed, the approach of the Apex Court in Mrs. Godawari Parulekar's case decided on 5th December, 1952 and in Abdul Sattar's case (supra) decided on 24th January, 1990 clearly indicates that even a second petition under Article 32 of the Constitution would not be maintainable on the ground of public policy that there should be finality to the proceedings.

18. The principles of law discussed in the foregoing paragraphs make it clear that as far as the High Courts are concerned, a division bench of the court cannot ordinarily entertain a second petition for the writ of habeas corpus against a detention order when another division bench has already dismissed a challenged to the same detention order unless (i) fresh and new ground of attack against the legality of the detention or custody, which was not available to the Petitioner earlier, has arisen after the decision on the first petition or (ii) a ground, which was available earlier, could not be taken or urged in the earlier petition for some exceptional reason.

19. Let us now examine if the present petition merits a consideration on the touchstone of the law explained above. The case of the Petitioners is that 25 out of 807 pages of documents supplied to the Petitioners were fully or partly illegible. This ground was certainly available to the Petitioners when the earlier petitions were filed. In fact, in the synopsis to one of the petitions, the ground that illegible documents were given to the detenu was in fact raised. There is absolutely no reason even alleged in the petition-leave aside any exceptional reason-why this ground could not be urged in the earlier petitions. The ground, thus, does not fall within the two exceptions noted above. There is no reason why the ordinary principle of public policy concerning finality to be attached to a decision of the court, should not be applied to the present case.

20. So also the ground of non-availability of Assay Report was a ground very much available to the detenus when the earlier petitions were filed and there is no reason-much less an exceptional reason-why it could not be urged earlier. No reason is either alleged or established.

21. As for the subsequent representations to the detaining authority and the Central Government, there being no new ground or fresh material placed before the authorities in the subsequent representations, which was either not available earlier or being available could not be placed due to some exceptional reason, the detaining authority or the government is not bound to consider the new representation and pass separate order disposing of the same. In Abdul Razak Dawood Dhanani Vs. Union of India (UOI) and Others, the Supreme Court held as follows:

8. It thus appears from the aforesaid judgment that even the statutory power vested in the Central Government to revoke the order of detention may be

exercised in its discretion only in cases where "fresh materials" or "changed or new factors" call for the exercise of that power, and there is no right in favour of the detenu to get his successive representations based on the same grounds rejected earlier to be formally disposed of again. This principle finds affirmation in a judgment rendered by a constitution bench of this Court in *Makhan Lal Gokul Chand Vs. The Administrator Union Territory of Delhi and Another*, in which this Court found that the petitioner challenged the order of detention and failed thrice, and yet filed another representation which did not disclose any fresh material, nor were any subsequent events pointed out which may have warranted a "fresh" consideration of the representation made by the detenu. It was only a change in the language of the representation. The Delhi Administration was, therefore found, justified in rejecting the representation since there were no "fresh grounds" nor any "fresh material" or "subsequent events" brought out in the last representation. There was, therefore, no obligation on the part of the State to get that representation considered by a "fresh Advisory Board" and, therefore, the exercise of this discretion by the State in rejecting the representation and not constituting a "fresh" Advisory Board could not be faulted. The writ petition was accordingly dismissed.

9. Faced with this situation counsel for the appellant submitted that even if a detenu does not have a constitutional right to make a second representation, in the facts of this case it must be held that since the first representation was pending when the second representation was received, it was a part of, or continuation of the first representation. In any case, it was material before the Central Government which it was bound to consider.

10. The learned Additional Solicitor General submitted that the principle is well established that there is no constitutional right of a detenu to make successive representations, nor is there a corresponding obligation on the competent authority to consider and dispose of such representation by a separate order, unless the subsequent representation discloses "fresh grounds" or "fresh material" or any "subsequent event" which may justify the consideration of another representation. A mere reiteration of the same grounds on the same material is not sufficient, and in such a case there is no legal obligation even to consider such a representation. He further submitted that Article 22(5) speaks of "a representation" and therefore another representation can be considered only if new grounds based on fresh materials are brought to the notice of the competent authority. Having regard to the authorities, we find considerable force in the submission urged by the learned Additional Solicitor General.

There is no "changed or new factor" in the present case and "fresh materials" cannot be those that were available earlier and could very well have been brought to the notice of the authorities earlier.

22. There is, thus, no merit in the petitions. The petitions are dismissed. There shall be no order as to costs.