

(1989) 10 KAR CK 0013
In the Karnataka High Court
Case No : Writ Petition No. 108 of 1989 (H.C.)

M. Abdul Majeed	Vs	APPELLANT
A.K. Batabyal and Another		RESPONDENT

Date of Decision : 04-10-1989

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
(COFEPOSA) — Section 3 (1)
Customs Act, 1962 — Section 123, 2 (39)

Citation : (1990) CriLJ 766 : (1989) ILR (Kar) 3609

Hon'ble Judges : S.A. Hakeem, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : R. N. Narasimhamurthy, for J. Jeshtamal, for the Appellant; Ashok Hornahalli, Central Govt. Standing Counsel, C. Shivappa, General and J. Somayaji, Govt. Pleader, for the Respondent

Judgement

Shivashankar Bhat, J.—The petitioner who is a detenu challenges the validity of his detention made in pursuance of a detention order dated 24-2-1989 purported to have been made under S. 3(1) of COFEPOSA Act, 1974. The relevant facts can be stated by summarizing the grounds, in support of the order of detention supplied to the petitioner.

2. The Officers of Directorate of Revenue Intelligence, Regional Unit, Bangalore kept watch near Talpady Checkpost along with two independent witnesses on 12-2-1989 looking out for cars bound to Bombay, transporting contraband gold. Around 14.45 Hrs. on that day, a blue colour Maruthi car was noticed coming from Kasargad side. As it approached the checkpost, the officers signaled it to stop. The said car did not have any painted number plate on either side; however a number CRX 3676 in small letters was seen written. Beside the petitioner as the driver of the car, there was one more occupant in the car sitting on the back seat. At this point of time, one Ambassador car also approached the said checkpost, from Kasaragad side and immediately two officers rushed towards the detenu's car and managed to stop it. However, the person sitting at the back

seat escaped from the car. In the meanwhile, the other remaining officers stopped the grey colour Ambassador car bearing Registration No. CRX 3657 with only driver as the occupant. After questioning the petitioner and the driver of the other car, the officers on the reasonable belief that goods of foreign origin liable for confiscation under the provisions of the Customs Act, 1962 have been concealed ingeniously the said cars directed them to bring the cars to their office for further examination. Accordingly, the cars were taken to the DRI office, Mangalore after drawing a spot mahazar. On arrival at the said office, accompanied by the same witnesses, officers took personal search of the two drivers. No incriminating materials were found in their possession. Thereafter the officers thoroughly examined the Maruthi car and found in a cavity five cloth vest jackets weighing abnormally heavy. Totally eight such jackets were found in the said Maruthi car. Thereafter, the officers took thorough search of the Ambassador car bearing Registration No. CRX 3657 and finally recovered eight cloth jackets with stitched pouches/packets in the Ambassador car. Thus both the cars, in all, contained gold biscuits totalling 1600 gold biscuits. The usual investigation proceeded including the recording of the statement of the petitioner.

3. It is clear that the petitioner was only a driver, so was the person driving the other car. The person who owned the cars or responsible for the transportation of these gold biscuits has not been traced.

4. On 24-2-1989, the Government of India made the order to detain the petitioner under S. 3(1) of the COFEPOSA Act.

5. Several contentions, were urged by the learned counsel. It is not necessary for us to narrate them as we are of the view that the petitioner is entitled to succeed on the first ground urged by the learned counsel Sri R. N. Narasimhamurthy, appearing for the detenu. It is contended by the learned counsel that the grounds of detention do not disclose any satisfaction arrived at by the detaining authority to the effect that the detenu is likely to indulge in the prohibited activity in future and the reading of the ground in respect of the detention order gives an impression that the detention order was made as a substitute to the punitive, action. For this purpose three paras in the ground of detention were read :-

7. You were arrested on 14-2-1989 under the provisions of the Customs Act, 1962 read with Gold Control Act, 1968 and produced before the 1st Additional Chief Judicial Magistrate, Mangalore on the same day along with remand application. Before the Court you did not complain of any ill-treatment. No bail application was filed on your behalf. You have been remanded to judicial custody till 27-2-1989. However nothing prevents you from applying for bail and getting released.

8. The gold biscuits under seizure have been tested by touch stone method by a certified gold dealer and goldsmith and opined to be of 24 carat pure and of foreign origin. The said gold attracts the provisions of S. 123 of the Customs Act,

1962 and, you have not discharged the burden of proof to the effect that this gold biscuits are not smuggled. Importation of gold into India has been prohibited under the provision of S. 13(1) of the Foreign Exchange Regulation Act (as amended) except with the general or special permission of the Reserve Bank of India and you have failed to produce any such permission of the Reserve Bank of India. Therefore, the gold biscuits of foreign origin, under, seizure as mentioned above are liable for confiscation under the provisions of the Customs Act, 1962 and deemed to be smuggled goods within the meaning of S. 2(e) of the COFEPOSA Act, 1974 (as amended) read with S. 2(39) of the Customs Act, 1962.

9. On the basis of above seizure, investigation and follow up action, I am satisfied that you were engaged in transporting of smuggled goods. Therefore, without prejudice to the action that may be taken against you under the Customs Act, 1962 and the Gold Control Act, 1968 in the course of adjudication and prosecution proceedings by the Local Customs Authorities, I am satisfied that it is necessary to detain you under the COFEPOSA Act, 1974 (as amended) with a view to preventing you from engaging in transporting smuggled goods."

6. It was contended by the learned counsel that the detaining authority no doubt was aware of the factum of the detenu being in custody already. That was infact the basis for making the impugned order. Para 7 extracted above says that there was nothing preventing the detenu from applying for bail and getting released. Thereafter, the statement proceeds to narrate the factum of seizure and the offence committed by the detenu and the presumption that is attracted to the petitioner's case under S. 123 of the Customs Act 1962. Thereafter the conclusion was stated in para 9. Nowhere it was stated that the detaining authority apprehended that the detenu was likely to repeat the act which is prohibited under the provisions of the Act. Nowhere it is stated that the detenu was likely to engage himself in transporting smuggled goods hereafter. The learned counsel emphasised the fact that the order of detention has to be made only on the satisfaction of the detaining authority that the detenu was likely to engage himself in transporting smuggled gold in future.

7. Two recent decisions of the Supreme Court were cited before us in support of the proposition advanced by the learned counsel i.e., (1) N. Meera Rani v. Govt. of Tamilnadu JT (1989) 3 478 (486) : 1989 Cri LJ 2190 and (2) Ahmedhussain Shaikhussain @ Ahmedhussain Shaikhussain @ Ahmed Kalio Vs. Commissioner of Police, Ahmedabad and Another, Almost similar contentions were raised therein and were upheld by the Supreme Court. In para 10 of Meera Rani's case, relevant facts are found. The detenu therein was held in custody in connection with a Bank decoity and the detention order also described the detenu as a person in custody in the prison. Hence there was no dispute that the detaining authority was conscious of the fact that the detenu was already in custody. At para 12, the question was posed as follows :

"12. The real question therefore, is whether after the above satisfaction reached

by the detaining authority and when the detenu was already in custody being arrested in connection with the Bank decoity, could there be any reasonable basis for making the detention order and seeing it on the detenu during his custody ?"

Thereafter, the Supreme Court referred to the decision in Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, and quoted the observations from which we extract the following here (para 13) :

"We have already seen the logical process which must be followed by the authority in taking action under S. 3(1)(a). The first stage in the process is to examine the material adduced against a person to show either from his conduct or his antecedent history that he has been acting in a prejudicial manner. If the said material appears satisfactory to the authority, then the authority has to consider whether it is likely that the said person would act in a prejudicial manner in future if he is not prevented from doing so by order of detention. If this question is answered against the petitioner, then the detention order can be properly made. It is obvious that before an authority can legitimately come to the conclusion that the detention of the person is necessary to prevent him from acting in a prejudicial manner, the authority has to be satisfied that if the person is not detained, he would act in a prejudicial manner and that inevitably postulates freedom of action to the said person at the relevant time. If a person is already in jail custody, how can it rationally be postulated that if he is not detained, he would act in a prejudicial manner ? At the point of time, when an order of detention is going to be served on a person, it must be patent that the said person could act prejudicially if he is not detained and that is a consideration which would be absent when the authority is dealing with a person already in detention. The satisfaction that is necessary to detain person for the purpose of preventing him from acting in a prejudicial manner is thus the basis of the order under S. 3(1)(a), and this basis is clearly absent in the case of the petitioner. Therefore, we see no escape from the conclusion that the detention of the petitioner in the circumstances of the case, is not justified by S. 3(1)(a) and is outside its purview."

Thereafter, the Supreme Court proceeded to state that the test to be applied would be the same as the one stated in Rameshwar Shaw's case and a few other cases and pointed out that when the detention order was made merely on the ground that the detenu was trying to come out of bail and there was enough possibility of his bail, such an order cannot be sustained. From the above observations of the Supreme Court, it is clear that after the first stage is over in which the antecedent history of the person to be detained and his conduct are examined, the detaining authority has to consider whether it is likely that the said person would act in a prejudicial manner in future if he is not prevented by doing so by an order of detention.

8. The next decision referred to by the learned counsel for the petitioner was Ahmedhussain @ Ahmed Kalio v. Commr. of Police Ahmedabad JT(1989) 3 689 : 1989 Cri LJ 231 wherein again it was observed that the fact that a person was

likely to be released on bail cannot be a basis for detaining the person under law. In the said case, infact the detaining authority had observed that the person was likely to continue his antisocial activities after his release on bail from the Court. In spite of such an inference, stated specifically in the ground of detention, the Supreme court found it not possible to sustain the detention order. These two recent decisions of the Supreme Court lay greats emphasis on the need for cogent and relevant material to exist to make an order of detention in respect of a person already in custody.

9. Mr. Ashok, learned standing counsel for the Central Government tried to sustain the order by referring to a few other decisions. He referred to Ayya alias Ayub Vs. State of U.P. and Another, . Reference was made to the statement in the ground of detention in the said case to the effect that "At present, you are confined in District Jail, Meerut and you are trying to get released on bail and there is every possibility of being released on ball". After referring to this passage, the learned counsel referred to para 11 in support of his contention that even though the person is in custody, still an order of detention could be made. A reading of para 11 of the aforesaid decision does not entirely support the proposition canvassed by the learned counsel. The sentences in para 11 are extracted below :

"In the present case, we are not however impressed with the submission of Sri Garg that the detention was solely for the purpose of rendering nugatory the order of bail, the grant of which the detaining authority had then considered quite imminent. It is true that if the only ground or justification for the detention is the apprehension that the detenu was likely to be enlarged on bail, the detention might be rendered infirm."

Thereafter, in the subsequent passage it was pointed out that "even a single instance of activity tending to harm "public order" might in the circumstances reasonably supply justification for the satisfaction as to a legitimate apprehension of a future repetition of similar activity to the detriment of "public order". However, it is stated that it all depends upon the circumstances of each case and it was observed that it was necessary for the detaining authority to resist the temptation to prefer and substitute, as a matter of course, the easy experience of a preventive detention to the more cumbersome one of punitive detention. Similarly, the citation reported in Vijay Kumar Vs. Union of India (UOI) and Others, also is of no avail to the contentions of the learned standing counsel. A reading of paras 34 and 35 of the citation shows that it all depends upon the facts and circumstances of the case.

9A. At the time of making a detention order, the authority should arrive at a proper satisfaction and the said satisfaction should be reflected clearly and in categorical terms in the order of detention. It is not possible for us to agree with the contentions of the learned standing counsel that the satisfaction can be inferred by the very making of the order which says that it was necessary to prevent the detenu from acting in a manner prejudicial falling within the mischief

of S. 3 of the Act. This is an indirect way of asserting that the satisfaction has to be inferred by the very exercise of power.

10. The detaining authority will have to justify the detention order from the material that existed before him and the process of considering the said material should be reflected in the order of detention by an expression of the satisfaction.

11. The learned counsel for Central Government also tried to justify the order by referring to the statement of objections filed by the detaining authority (which is referred as the counter-affidavit). The detention order is a statutory order. The grounds are to be supplied to the detenu as a matter of constitutional requirement and the order is a public order affecting the right of a person. The justification for such an order should exist in the very ground furnished in support of the detention order. It cannot be explained subsequently by substituting further reasons as held in *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, , (Commr. of Police v. Govardhan Das). The citation referred in 1981 Cri LJ 106 (Kant), (*Smt. T. M. Sabira v. State of Karnataka*) has no bearing on the proposition advanced in the context of this case. The facts were entirely different therein and the issue was whether the Chief Minister in the said case had approved the detention order.

12. It is not necessary to refer to other cases cited by Mr. Ashok. We are bound by the decisions of the Supreme Court. The detention results in the deprivation of the personal liberty and the legal requirements should be strictly complied with by the detaining authority. Since it is a subjective satisfaction, the very satisfaction is an integral part of the grounds. The satisfaction has to be a natural culmination of the consideration of the relevant facts. The detaining authority should expressly state about such a satisfaction, or at any rate, the grounds should clearly disclose the existence of such a satisfaction.

13. In the instant case, no such ground exists in the grounds supplied to the petitioner and hence we are constrained to allow this writ petition. Accordingly, the order of detention is set aside. The detenu is directed to be set at forthwith.

14. Petition allowed.