
(1982) 10 MAD CK 0012
In the Madras High Court
Case No : Writ Pent. No. 4171 of 1982

M. Adaikalam (Detenu)

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 01-10-1982

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 3(1)
Constitution of India, 1950 — Article 166, 22, 226

Citation : (1983) CriLJ 1310

Hon'ble Judges : S. Ratnavel Pandian, J; M.N. Moorthy, J

Bench : Division Bench

Advocate : S. Pichai, R. Subramaniam and S. Sadaksharam, for the Appellant;
Public Prosecutor, for the Respondent

Judgement

M.N. Moorthy, J.—This is a petition filed by the brother under Art. 226 of the Constitution of India for issue of a writ of Habeas Corpus for

releasing the detenu by name M. Adaikalam detained by the State of Tamil Nadu u/s 3(1) of the Conservation of Foreign Exchange and

Prevention of Smuggling Activities Act, 1974, (hereinafter referred to as the Act.)

The order of the Government in G.O. No. SR/464-5/82 Public (SC) Dept. dt. 24-2-1982 reads as follows :-

Whereas the Government of Tamil Nadu are satisfied with respect to the person known as Thiru M. Adaikalam, son of Thiru Murugan Servai,

that with a view to prevent him from engaging in transporting smuggled goods, it is necessary to make the following order :

Now, therefore, in exercise of the powers conferred by Section 3(1)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling

Activities Act, 1974 (Central Act 52 of 1974) the Governor of Tamil Nadu hereby

directs that the said Thiru M. Adaikalam, be detained and kept in custody in the Central Prison, Madras.

2. There is a memorandum of the Public (SC) Department of the same date which contains the grounds on which detention order has been made,

as contemplated by the provisions of the Act, and the same has been served on the detenu. The basis on which the impugned order is passed are

that on 7-11-1981 at about 3 p.m. while the Customs Preventive Staff. Tiruchirapalli. Were conducting road check at Asur on Thanjavur-

Tiruchirapalli Road, a car bearing Registration No. MDU 8630 with three inmates sped past the picket towards Tiruchirapalli, ignoring the signals

given to stop. The officers gave a chase and the speeding car came to a halt at Tiruverambur near the Bharat Heavy Electricals Limited compound

and the inmates took to their heels. Two of them were chased and caught; one of them being the detenu and the other one A. Jeyaraj. The third

person who escaped was the cleaner Kuppuswamy. The car MDU 8630 was examined by the officers in the presence of witnesses and it was

found to contain four packages; two of them in between the front and rear seats and the other two inside the dicky. When questioned the

apprehended persons informed that the packages contained nylon zip fasteners of foreign origin. On examination, they were found to contain

Y.K.K. nylon zips of foreign origin. The gunny bags had the markings of having come from Sri Lanka. As they could not produce any customs

duty paid receipt or any other documents, the packages were seized along with the car under a mahazar. The total value of the articles seized

including the car came to Rs. 80,000/-. The detenu gave a statement before the Superintendent of Central Excise. Customs preventive Union.

Tiruchirapalli, on 8-11-1981 to the effect that he was working as a driver in the office of the Deputy Director, Animal Husbandry, Pattukottai, for

a period of three years, Pattukottai, for a period of three years, that at present he was under suspension for being involved in a smuggling case and

that when he was driving the car MDU 8630 on 7-11-1981 at 2-45 p.m. with contraband goods along with Jeyaraj, the owner of the car, and the

cleaner Kuppan alias Kuppuswamy, the customs authorities signalled the car to stop but with a view of escape he drove the car fast without

stopping and stopped it at the BHEL Township and took to his heels along with

the other inmates. He and Jeyaraj were caught and the contraband goods were seized along with the car by the officers. He stated that the zip fasteners were brought by Jeyaraj from one Dasan of Sri Lanka who was staying at Pattukottai for being delivered to one Mohideen at Tiruchirapalli. He used to get Rs. 150/- each time from Jeyaraj for his services he had transported contraband goods from Dasan to Mohideen in the same car twice previously along with Jeyaraj. When he was asked about his earlier involvement in a customs offence, he stated that in February, 1981 when he was transporting contraband goods valued at Rs. 1.5 lakhs belonging to one Kanda Thevar to Madras, his car was stopped but he managed to escape abandoning the car. later, he appeared before the Customs Authorities after obtaining anticipatory bail and admitted the offence. He also admitted that he transported smuggled goods from Kanda Thevar to Mohideen several times and that Mohideen had been buying smuggled goods. He stated he knew Dasan who was a citizen of Sri Lanka and he was staying in A. V. Lodge. Pattukottai. When Dasan wanted to transport contraband goods, he used to meet him or Jeyaraj at the Pattukottai taxi stand. He admitted the two instances, one before and one after Deepavali, of delivering smuggled goods to the men of Mohideen near the petrol bunk/milk project at Tiruchirapalli. One of Mohideen's man used to wear a green shirt and have a red handkerchief. He admitted that he knowingly committed the offence.

3. Jeyaraj, who was apprehended along with the detenu, gave a statement on 8-11-1981 before the Superintendent of Central Excise, Customs

Preventive Unit, Tiruchirapalli, corroborating the version given by the detenu.

4. In a petition sent by the detenu on 18-11-1981 to the Assistant Collector, Customs Division, Tiruchirapalli, he stated he was asked by Jeyaraj

to accompany him to Tiruchirapalli in the car on 7-11-1981. There was another person inside the car. One bag was found inside the car and he

was informed that the other goods were kept in the dicky. When the Customs Authorities signalled the car to stop, he tried to stop the car but he

was prevented and threatened by the person sitting behind him. When the car came to a halt all the inmates of the car took to their heels but he and

Jeyaraj were caught. He was made to sign a statement prepared by the officers and he was not aware of the contents of the same.

5. The statement of Jeyaraj who was apprehended along with the detenu confirmed the facts as per the detenu's original deposition that the goods were transported to Mohideen of Tiruchirapalli. The detenu's later retraction of his original statement, in a petition dt. 18-11-1981, was according to the respondent, obviously a motivated one.

6. As regards the involvement in the seizure of contraband goods valued at Rs. 1,17,520/- with the car TNO 7077 on 27-2-1981. The detenu had appeared before the Customs Officials and given a statement admitting the driving of the said car from Pattukottai to Tiruchirapalli, with contraband goods and two others. When he noticed the Customs Officials in the Gandarvakottai Cross Road, he reversed the car on instructions of one Kumar and drove fast to the Poultry Centre at Santhankadum in one of the staff quarters and the car was abandoned with the remaining goods. He and the other escaped. The Collector of Central Excise and Customs Madurai, in his order dt 23-2-1981 held that he was the driver of the said car and a penalty of Rs. 10,000/- was imposed on him.

7. Accordingly it is shown in the grounds of detention that the detenu had been engaging in transporting contraband goods from coastal areas to the interior towns and that his earlier involvement in customs offence had not deterred him from further engaging in prejudicial activities.

8. On the above materials set out in the grounds of detention it was concluded that the detenu's activities necessitated his detention under the Act in order to prevent him from engaging in transporting smuggled goods. To prevent him from engaging in such activities, it was felt absolutely essential and necessary to keep him under preventive detention. Hence, the impugned order was passed by the State Government which entertained a reasonable apprehension that unless the detenu was detained he would continue to indulge in such activities.

9. The petitioner filed an affidavit, in support of the writ petition, raising various contentions challenging the validity of the impugned order.

10. Countering the contentions of the petitioner, the Joint Secretary to Government, Public (SC) Department For St. George, Madras has filed a counter refuting the contentions of the petitioner and submitting that the impugned order does not suffer from any infirmity or illegality. This counter-statement has been supported by a supporting affidavit of the Inspector, Central

Excise and Customs, Customs Preventive Unit, Tiruchirapalli.

11. The petitioner has filed a reply affidavit, followed by a rejoinder affidavit by the respondent.

12. During the course of the arguments on behalf of the detenu Mr. S. Pichai, learned counsel for the petitioner raised three contentions which we

summarise as follows :

1. The counter-affidavit on behalf of the State of Tamil Nadu was sworn by the Joint Secretary and not by the detaining authority on the basis of

whose subjective satisfaction the detention subjective satisfaction the detention order was made. Therefore, it was illegal.

2. The impugned order was invalid and illegal because there was non-application of the mind by the detaining authority to the most material and the

vital fact of the retraction of the confession of the detenu being not brought to the notice which could have influenced the mind of the said authority.

The fact of the retraction of confession was neither placed before the detaining authority nor considered by it.

3. The detenu is alleged to have been in the pay as carrier driver to the smugglers. No action has been taken as against others and action being

taken only against him is mala fide or colourable exercise of power. No attempt has been made to link his action to satisfy the object to the

achieved by detention.

13. We now consider the above contentions in seriatim :-

1. According to the learned counsel for the petitioner as the Joint Secretary is not empowered under the provisions of the Act to pass the

impugned order of detention and this order is signed only by the Joint Secretary, it must be held that the order has been passed by the authority

without any jurisdiction. In support of his contention he relied on the decision in Shaik Hanif and Others Vs. State of W.B., and in particular to the

following observations appearing at p. 262 (of SCR) : (at p. 608 of Cri LJ) :

As was pointed out by this Court in Niranjansingh Vs. State of Madhya Pradesh, , where in a habeas corpus petition a rule nisi is issued, it is

incumbent upon the State to satisfy the Court that the detention of the petitioner was legal and in conformity not only with the mandatory provisions

of the Act, but is also in accord with the requirements implicit in Clause (5) of Art. 22 of the Constitution. Since the Court is precluded from testing

the subjective satisfaction of the detaining authority by objective standards it is all the more desirable that in response to the Rule Nisi the counter-

affidavit on behalf of the State should be sworn to by the District Magistrate or the authority on whose subjective satisfaction the detention order

u/s 3 was passed if for sufficient reason shown to the satisfaction of the Court, the affidavit of the person who passed the order of detention u/s 3

cannot be furnished the counter-affidavit should be sworn by some responsible officer who personally dealt with or processed the case in the

Government Secretariat or submitted it to the Minister or other Officer duly authorised under the rules of business framed by the Governor under

Art 166 of the Constitution to pass orders on behalf of the Government in such matters.

Next, he drew our attention to the following observations of their Lordships of the Supreme Court in Jagdish Prasad Vs. The State of Bihar and

Another, :-

It is difficult to appreciate why in return to a rule nisi in a habeas corpus motion, it is not thought serious enough even where liberty of a person is

choked off, to get, the District Magistrate to explain his subjective satisfaction and the grounds therefor. Nor even why he is not available nor the

next best the oath of a senior officer in the Secretariat who had been associated with the handling of the case at Government level. Mechanical

affidavits. Miniaturising the files into a few paragraphs by some one handy in the Secretariat cannot be regarded as satisfactory. This is not a mere

punctilio of procedure but a probative requirement of substance. He also relied on a decision reported in Dulal Roy Vs. The District Magistrate,

Burdwan and Others, . It was contended before us that in a habeas corpus petition where a rule nisi is issued, the best informed person has to file a

counter-affidavit. Failure to furnish the counter-affidavit of the authority who had passed the order of detention is a valid ground to declare the

detention illegal.

14. Countering this argument, the learned Public Prosecutor drew our attention to the affidavit filed by the Joint Secretary to Government wherein

it was stated that the Joint Secretary was well acquainted with the facts and circumstances of the case from the records. Further, according to the

officer, the order of detention was made by the Government of Tamil Nadu and

he authenticated the order of detention as per the rules of business in force in the Government of Tamil Nadu. Even though the subjective satisfaction as regards the detention is arrived at by the State Government, the Government, have entrusted the entire work of detention under the Act to the Public L & O Dept. to which records of all detention cases are sent as it was found more expeditious and convenient to have the affidavit filed by the Joint Secretary to Government in charge of the case. He has further added that the Joint Secretary to Government in charge of the case He has further added that the Joint Secretary was familiar with the file and the order of detention was passed only after necessary subjective satisfaction was reached by the Government. We see much force in the learned Public Prosecutor's contention and hold that the first contention raised by the petitioners fails. The learned Public Prosecutor relied on the decision in Smt. Masuma Vs. State of Maharashtra and Another, for his contention that it was the State Government which made the order of detention and the Joint Secretary to Government who was authorised to act for and on behalf of and in the name of the State Government under the rules of business has authenticated the order. He also placed reliances on the decision reported in State of Gujarat Vs. Mohd. Ismail Jumma and Others, where the learned Judges held that, where the order of detention has been taken in the name of the Governor of Gujarat and validly authenticated by the Deputy Secretary concerned, the order tantamounts to an order by the State Government of Gujarat and therefore it cannot be said that the order of detention was not passed by the competent authority.

15. The Joint Secretary who has filed a counter-affidavit has only authenticated the order in question by virtue of the power under R. 12(1) coming u/s 1 of the Tamil Nadu Government. Business Rules and Secretariate Instructions framed in exercise of the powers conferred by the clauses (2) and (3) of u/s 3 of the Act the art. 166 of the Constitution of India u/s 3 of the Act, the order of detention can be passed either by the Central Government or by the State Government or by the prescribed officers of the respective Governments specially empowered for the purpose. In the instant case, the order is passed by the State Government through the Joint Secretary to the Government by virtue of Rules. The impugned order has been authenticated and communicated to the detenu in the name of the

Governor of Tamil Nadu. Hence, the impugned order of detention cannot be said to have been made by the Joint Secretary and we hold that there is no substance in the contention that the counter-affidavit is not filed by the detaining authority but only by the Joint Secretary.

16. It was contended by the learned counsel for the petitioner that the alleged confession by the detenu on 8-11-1981 before the Superintendent of Central Excise, Customs Preventive Unit, Tiruchirapalli, wherein he had admitted his complicity in the offence had been retracted by him by a petition dated 18-11-1981 and this fact of the retraction of the confession was not brought before the authority and hence the impugned order is vitiated. He submitted that when the detaining authority was aware of the confession retracted there was a possibility of the authority not being subjectively satisfied for passing the order. This retraction of the confession is a vital matter which could have authority. This fact was not placed before the authority for consideration and the subjective satisfaction of the detaining authority is vitiated in the absence of this material fact. This fact is so, material or vital which could have swayed the mind of the detaining authority one way or the other. In support of this contention, the learned counsel relied on the decision rendered in *Ashadevi Mehta (Detenu) Vs. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat and Another*, . He also brought to our notice a decision of our High Court reported in *Kediya Vanaspati Pvt. Ltd. and Others Vs. The State of Andhra Pradesh*, wherein it was held, if the detaining authority was not told the full facts about the petitioner's detention and the further fact of the statements being obtained from him, which ought to have been placed before the detaining authority it would be difficult to say how the ultimate decision making authority could have reacted if those factors were taken into consideration. Selective omission or non-disclosure of relevant facts renders the decision making authority's decision vitiated in law.

17. The learned Public Prosecutor, brought to our notice the fact the confession given by the detenu on 8-11-1981 was retracted on 18-11-1981 by a petition, was in fact brought to the notice of the detaining authority as the grounds of detention make it abundantly clear. In the grounds, we find the following statement :-

In view of the above, the version given by you in your petition dt. 18-11-1981 is

only an afterthought with a view to exonerate yourself and also

shield Thiru Mohideen of Tiruchirapalli, whom, you have implicated in your statement given voluntarily on 8-11-1981.

On this, we have no hesitation that the confession given by the detenu on 8-11-1981 which was retracted on 18-11-1981 was in fact brought to

the notice of the detaining authority and we find it unable to accept the contention of the learned counsel for the petitioner on this aspect.

18. The only surviving point for consideration by us is the contention that the detenu was only a carrier driver in the pay of the smugglers and as no

action has been taken against the others his detention is mala fide. It was contended before us, he being merely a driver acting on behalf of the

others in transporting the contraband goods, he could not come within the purview of the Act for preventive detention. It is seen from the grounds,

the detenu was involved in previous smuggling cases. In February, 1981, he was transporting smuggled goods valued at more than Rs. 1 lakhs

belonging to one Kandu Thevar alias Kandasamy Thevar of Thambikottal to Madras in an Ambassador Car TNO 6077. Even though he was able

to abandon the car and escape, he gave a statement, later admitting the offence, before the Customs Officials. It is also seen that he was acting for

Dasan for transporting smuggled goods. He has been using the Car MDU 3630 on more than one occasion to deliver smuggled goods to the

henchmen of Mohideen Jeyaraj, the owner of car MDU 8630 has corroborated the confession made by the detenu on 8-11-1981 about the

transport of smuggled goods on the previous day. About the smuggling on 27-2-1981 in TNO 6077, the detenu has stated, he was imposed a

penalty of Rs. 10,000/- by the Collector of Central Excise and Customs, Madurai. It is evident from the records that the detenu has been

engaging himself in transporting smuggled goods on more than one occasion and he was involved in customs offences. The contention that the

accused is merely the driver of the car which was used to transport smuggled goods and is not liable to be detained under the Act is not acceptable

Section 3(1)(iii) of the Act refers to three activities, namely, transporting concealing and keeping. These three are inter-related. For the detaining

authority to detain a person to prevent him from engaging in any of the activities like transporting there of course need not be material to show,

like in the present case, that the person concerned has engaged himself in transporting smuggled goods in the past. Past will certainly give an indication for being satisfied that the person should be detained to see that he does not engaged himself in such activities in future. We are of the opinion that, considering the past conduct of the detenu, it is not unreasonable to inter that he will indulge in further smuggling activities. We are unable to find any mala fide in the action taken by the detaining authority.

19. Thus, on a consideration of the entire facts and circumstances of the case, we are of the view that the detaining authority was justified in drawing the subjective satisfaction on the basis of the materials placed before it and passing the impugned order of detention.

20. In the result, the various contentions raised by the learned counsel for the petitioner having failed, this writ petition is dismissed.

21. Petition dismissed.