

(1981) 04 BOM CK 0013

In the Bombay High Court

Case No : Criminal Application No. 348 of 1981

Mohmood Abubukar Marwari

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 23-04-1981

Acts Referred:

Constitution of India, 1950 — Article 22, 22(5), 226, 227

Citation : (1982) CriLJ 53

Hon'ble Judges : S.C. Pratap, J;Parekh, J

Bench : Division Bench

Judgement

Pratap, J.—This petition under Article 226 of the Constitution questions the validity of the order of detention dated July 1, 1975, u/s 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, against one Yusuf Abdulla Patel, the brother-in-law of the petitioner herein, against whom in turn a show cause notice was issued under the provisions of the Smugglers and Foreign Exchange Manipulators (Forefeiture of Property) Act, 1976.

2. Facts and circumstances, briefly stated are as follows :-

In September, 1974, an order of detention was made against the said Yusuf Patel u/s 3(1) of the Maintenance of Internal Security Act. This order was challenged under, Articles 226 and 227 of the Constitution. In the meanwhile, Parliament enacted the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (hereinafter the said Act). By virtue thereof, the above order lapsed and challenge thereto no longer survived. In december, 1974, another order of detention was made against the said Yusuf Patel this time u/s 3 of the said Act. This order was challenged in the Delhi High Court which, by its judgment dated, April 18, 1975, quashed the same and directed release of the detenu. Against the said judgment, appeal pursuant to fitness certificate under Art. 134 of the Constitution as also SLP (in which leave was granted) were filed in the Supreme Court, but both were later dismissed as withdrawn. On June 25, 1975, the President of India declared Proclamation of emergency. On July 1, 1975, the said

Act (COFEPOSA) was amended by an Ordinance which was later replaced by Amending Act No. 35 of 1975. On the same day, an order of detention (third in the series) was made against the said Yusuf Patel u/s 3 of the said Act. He was also served with a declaration that the Central Government was satisfied that the detention in question was necessary for dealing effectively with the emergency in respect of which the proclamation referred to in sub-section (1) of Section 12A of the said Act had been issued. This order was also challenged in a writ petition before the Delhi High Court. Though rule nisi was issued, the same could not be heard in view of the Supreme Court judgment in Additional District Magistrate, Jabalpur Vs. Shivakant Shukla, . Petition was dismissed as withdrawn. On March 23, 1977 the detenu Yusuf Patel was, on revocation of emergency released from detention.

Now, after the order dated July 1, 1975, against the said Yusuf Patel, notice under the provisions of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, (hereinafter SAFEMA) was issued to the petitioner herein (being the brother-in-law of Yusuf Patel), to show cause why properties in the schedule to the said notice should not be declared as illegally acquired and forfeited to the Central Government. Similar notice but relating to his own properties was issued also to Yusuf Patel. The petitioner contested this notice through his Attorney's letters dated April 7, 1976 and February 18, 1977 as also through his further letter dated January 22, 1981. The competent authority under SAFEMA did not decide the matter. Hence this petition under Article 226 of the Constitution challenging the validity of the impugned order of detention against the said Yusuf Patel but which order also constituted the foundation of SAFEMA proceedings against the petitioner.

3. Before coming to merits, we may deal with two preliminary objections raised by Mr. Govilkar. The first : This petition suffers from delay and should, on this ground itself, be, therefore, dismissed. Now, it is true that jurisdiction under Article 226 of the Constn. should be invoked expeditiously. But that is a flexible concept much depending on the facts and circumstances which vary and change from case to case. What then is the position here in that behalf ? As factual enumeration supra indicates, there has been against the detenu one order of detention after another, the first under MISA, the second under COFEPOSA and the third under COFEPOSA (as amended). Each of these orders was challenged. The first order, however, lapsed. The second was quashed by the Delhi High Court and the challenges to the third qua detention did not survive. It was after the third order of detention that show cause notice under SAFEMA was issued to the petitioner as a relation of the detenu. In this context, would it be unreasonable to infer that the petitioner may have reasonably expected that after revocation of emergency and release of the detenu, the order itself would be revoked and proceedings under SAFEMA - A consequence flowing from that order - would be dropped ? That, however, did not happen. Still further, to the show cause notice, as many as three replies were sent but none was replied to. Indeed, even as of now, the authority under SAFEMA has not adjudicated upon

the contentions raised in the said replies. Under such circumstances, where really is the purported delay ? And if there is, is it on the part of the petitioner or on the part of the SAFEMA authority in not hearing and deciding the matter ? That apart, mere lapse of time hardly means anything unless there has, in consequence, arisen or has accrued some equity or right which in justice should not be adversely affected by a delayed challenge. Contention on delay is thus rejected.

4. The next preliminary contention is that the petitioner has no locus standi to challenge the order of detention. Now, there is no dispute that the impugned order constitutes the foundation of the proceedings under SAFEMA. There is also no dispute that it is because of this order against the said Yusuf Patel that show cause notice was issued to the petitioner herein as his relations. Basically, therefore, it is this order that deals the first vital blow seriously jeopardising the rights not of the detenu alone but also of his relations such as the petitioner. It would, therefore, be difficult, though not literally impossible, to successfully challenge proceedings under SAFEMA without successfully challenging the foundational order, the corner stone, viz., the order of detention against the said Yusuf Patel. COFEPOSA and SAFEMA are virtual twins. An order of detention under the former Act has a clear nexus with proceedings under the latter enactment. The latter proceedings in a case such as this cannot survive but for a valid order of detention. The petitioner, therefore, would be virtually interested in contesting the validity of the detention order which faces him at the threshold in his challenge to the proceedings under SAFEMA. It is that vital interest that clothes him with a live locus. The objection qua locus thus fails.

5. Coming now to the merits, we will first deal with the contention on privilege. Submission is that the contesting respondents are not bound to disclose to the petitioner either the grounds of detention or the materials in support thereof. In support, affidavit of B. B. Gujral, Additional Secretary to the Government of India, Ministry of Finance, Department of Revenue, is relied upon. Undisputed position, however, is that the said Gujral is not the detaining authority nor was he, not even remotely, connected or concerned with the making of the order of detention. The detaining authority was the then Honourable Minister for Finance, Mr. C. Subramaniam. Apart from the said Honourable Minister, it was respondent No. 2 herein who was directly connected, concerned and dealing with the matter. He is, it is conceded, still very much in Government service and, therefore, available. It may be difficult to have affidavit of the detaining authority but, surely, nothing prevented an affidavit of the next best person viz., respondent No. 2. Therefore, at the outset itself the claim for privilege is not properly laid before the Court.

6. That apart, there is yet another difficulty. The privilege claimed by Gujral is not based on clause (6) of Article 22 of the Constitution but at the highest under, the Evidence Act. Claim founded on an ordinary law can hardly prevail over the constitutional mandate of disclosure under the fundamental law of the land, viz.,

Article 22(5) of the Constitution. Even if one were to assume that the privilege claimed was by virtue of clause (6) of Art. 22 the said claim is also not properly laid before the Court. As observed by the Supreme Court in *Lawrence Joachim Joseph D'souza Vs. The State of Bombay*, : "..... But the right of the detenu to be furnished particulars, is subject to the limitation under Art. 22(6) whereby disclosure of facts considered to be against public interest cannot be required. It is however to be observed that under Article 22(6) the facts which cannot be required to be disclosed are those "which such authority considers to be against public interest to disclose."

Hence it follows that both the obligation to furnish particulars and the duty to consider whether the disclosure of any facts involved therein is against public interest, are vested in the detaining authority, not in any other."

7. Besides, it is conceded before us that privilege is claimed not regarding all the materials, on the basis whereof the impugned order of detention was made, but only relating to material received during the short period of about two and a half months (April 18, 1975 to July 1, 1975). If that is the position it was expected of the respondents to satisfy us, while claiming privilege, as to what was the distinction or the difference between the material for which privilege is not claimed and the material received during the limited period supra for which it is claimed. Mr. Govilkar was unable to indicate any difference in that behalf. Consequently, if the other materials are not privileged and/or no privilege is claimed in that behalf, we see no good reason how a claim for privilege qua material not shown to be any different would succeed.

8. In this context, it was also contended that in view of Section 12A of the Act, there was no legal liability to disclose. That does appear to be correct. But the position is that Section 12A is no longer in force. It ceased to operate soon after the revocation of emergency. Submission, however, is that even so, the liability to disclose does not arise. It is, indeed, difficult to agree. The liability to disclose was always there. It was a constitutional liability enjoined by Article 22(5) of the Constitution. However, by virtue of Section 12A of the said Act, this liability was, for the time being, eclipsed or suspended. However, once the said Section 13A ceased to operate, the eclipse or the bar stood removed and the constitutional liability revived and sprang into existence. For more than one reason, therefore, the contention or privilege fails.

9. Main contention of Mr. Ram Jethmalani is that the impugned order of detention must fail for the reason that the, grounds in support thereof were neither formulated nor framed much less signed by the detaining authority at about the time or contemporaneously with the making of the order in question. In support, reliance was placed on the observations of the Supreme Court in *Krishna Murari Aggarwala Vs. Union of India (UOI) and Others*, :

"..... the order of detention could be passed only if the grounds are in existence and are prepared contemporaneously, otherwise the order of detention

becomes purely illusory."

That grounds must be formulated or framed and signed is also one of the main ratios of a Division Bench (Sawant & Pendse JJ.) ruling of this Court in the case of Manoharlal Narang v. Union of India, Special Civil Appln. No. 2752 of 1975 (with Criminal Revn. Appln. No. 23 of 1980), decided on July 8, 1980 :

"..... It is not any material but only such material which spells out detention-prone activities which should be taken into consideration by the authority. There may be a mass of material relevant, irrelevant and innocuous before the authority. In the absence of the record of the conclusions drawn from such material, it will not be possible to know which of the material was taken into consideration by the authority. In fact, it will be difficult to find out whether the authority had at all applied its mind to any of the material before passing the order. Further, the satisfaction being subjective, one authority on the same material may come to one conclusion while the other may draw a different inference. The requirement of law, properly construed, therefore enjoins scanning of the entire material sifting the relevant from the irrelevant and drawing of conclusion spelling out the prejudicial activity, to prevent a person from engaging in which, detention order is made. The only guarantee, that the authority has in fact gone through this process and has not passed the order casually, is the record of his such conclusions. The satisfaction of the authority is to be based on such conclusions. The mere existence of material, however weighty, will not by itself indicate that the authority had reached the requisite satisfaction before passing the order."

This ratio in Narang's case supra was agreed to and accepted by another Division Bench (Dharmadhikari & Bharucha JJ.) of this Court, deciding on January 8, 1981. Criminal Application No. 545 of 1980. Thus, whether grounds should be formulated, framed and signed at about the time or contemporaneously with the making of an order of detention is no longer a question res integra. With respect, we are bound by the observations supra of the Supreme Court as also by the dicta of the aforesaid two Division Bench rulings of this Court.

10. It is thus not enough that there is material with the concerned authorities. Existence of material is one thing, sifting and scanning thereof is altogether different. Then again, sifting and scanning of material is one thing, drawing and formulating conclusions therefrom is again a process altogether different. Each stage is important. If a person's liberty is to be circumscribed and restrained, the authority intending to do is expected to take the minimal care and precaution in that behalf. It is not that liberty cannot be restrained. It can be. Paramount interest of the nation sometimes necessitates it. Our Constitution, therefore, permits preventive detention, but it has placed certain limitations in that behalf. Formulation, framing and signing of the grounds by the detaining authority at about the time of making of the order of detention is an important assurance and a safeguard inter alia on the question that there was material, that the said material was scanned and sifted; that the irrelevant, if any, was rejected and the

relevant only relied upon, that thereafter conclusions were drawn and grounds formulated therefrom : and there was thus, at the relevant time, a case for detention made out, although under the subjective but bona fide satisfaction of the detaining authority.

11. Submission of Mr. Govilkar, however, is that formulation of grounds is not necessary when material is there because the material itself constitutes the grounds. It is not easy to agree. Mere existence of materials cannot obviate the need to formulate grounds nor can it by itself or per se justify an order of detention. For ought one knows, the materials may be all a mixed basket of relevant and irrelevant, certain and uncertain, proximate and remote; statement, documents etc. The nature and quality thereof has, therefore, to be scanned and scrutinized, sifting the grain from the chaff. And only if the ultimate materials so justify, the authority may then proceed to formulate the grounds for making an order of detention. In this behalf, therefore, neither of the two decisions, viz., Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, and Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others, , to which our attention was invited by Mr. Govilkar, supports him. Neither of these obliterate the factual difference between grounds and materials. In our view, materials and grounds are factually not the same. These are not synonymous and identical. In fact, materials actually pre-exist the grounds. They are antecedent thereto. Materials constitute the genus from which the grounds are required to be formulated for making an order of detention. In default of formulation of grounds, the very order of detention is put in jeopardy.

12. In this context then, going through the files relating to the impugned order of detention, the same disclose a rather cryptic image. We have been unable to find therein any formulation or framing of grounds which is a prelude to the order of detentions. Fair inference, therefore is that grounds were not framed or formulated. Preventive detention is permitted on certain specific grounds only. These specific grounds must, on the basis of material relevant and pertinent thereto, specifically exist while making an order of detention. Then again, these grounds must also in terms be in accord with or fulfilment of the statutory conditions of the relevant law of detention. Article 22(5) of the Constitution itself, postulates, as its first guarantee, communication of the grounds on which an order of detention is made. This guarantee of communication, thus presuppose formulation of grounds required to be communicated. In this view of the matter, the impugned order renders itself liable to be declared null and void.

13. It was next Contended by Mr. Jethmalani that the impugned order was vitiated by non-application of mind. However unfortunate it be, that indeed is so. The very absence of formulation of grounds would indicate non-application of mind. The signature of the then Honourable Minister for Finance (the detaining authority) also appears in such circumstances as to result in a reasonable inference that there had not been on his, part application of mind either to the materials or on the question of drawing of conclusions or formulation of grounds.

Indeed, as indicated we failed to discover any grounds having been formulated or framed. Our attention was invited to two decisions of the Supreme Court one in Shaik Hanif and Others Vs. State of W.B., and the other in Jagdish Prasad Vs. The State of Bihar and Another, , the relevant observation in the latter ruling being at P. 913 :

"Shri Anthony relied on the mental vacillation of the detaining officer as, disclosed in the affidavit in return filed by the State If this reflects the slippery satisfaction of the District act Magistrate it unfortunate. Here some Upper Divisional Assistant (Special), Home Department, has sworn an affidavit, not with personal knowledge but with paper wisdom. It is difficult to appreciate why in relation to a rule nisi in a habeas corpus motion, it is not thought serious enough even where liberty of a citizen is choked off to get the District Magistrate to explain his subjective satisfaction and the grounds therefore. Nor even why (if) 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." In the present case as already seen, no affidavit is filed by the detaining authority, the then Honourable Minister for Finance, but this one can understand in view of the under cabinet system of government resulting in, a Minister or Ex-Minister not being available at the relevant time. But it is difficult to appreciate as to why in that event care was not taken in filing affidavit of the next best viz., respondent No. 2 who was available and who, it is conceded, was the person concerned, connected, and dealing with this case at the relevant time. Affidavit as the one filed is obviously not with personal knowledge but one, as the Supreme Court puts it, - "with paper wisdom". What value can be attached thereto ? Nothing else is laid before the Court to show application of mind. The impugned order is thus vitiated by non-application of mind. It fails on this ground also.

14. It is also relevant to recall that the previous order of detention stood set aside by the judgment dated April 18, 1975 of the Delhi High Court. If so, in the very nature of things, it would be highly improbable, if not impossible, that the presently impugned order of detention, which is the third in the series, could be based upon any fresh activities, taking place within the short period of about two and a half months (April 18, 1975 to July 1, 1975) during which period the detenu was free. This inference is made almost conclusive by the dates and the history of the matter including the fact that the presently impugned Order was made exactly on the very first day on which the law was amended by removing, by virtue of Section 12A of the said Act, the obligation to disclose grounds. Besides, it was conceded by Mr. Govilkar that the impugned order was based not on any activity during the said short period of about two and a half months but only on some fresh material relating to activity prior to the making of the earlier order already quashed by the Delhi High Court. This thus is a case where the

third order of detention is based on a period already covered by the second order of detention. In this context, (though we do not propose to go into and adjudicate thereon), there is substance in the contention on behalf of the petitioner that once an earlier order is, on merits, set aside, it is not open to pass a fresh order of detention on the basis of material relating to a period already covered by the said earlier order of detention.

15. Now, pursuant to the impugned order, the detenu had in fact been detained and later, on revocation of emergency, released. Mr. Govilkar, after obtaining specific instructions in that behalf made a statement before us that the detaining authority had no intention to again detain the detenu pursuant to the same order. In this light, in view of a Division Bench (Dharmadhikari & Bharucha JJ.) ruling of this Court in Criminal. Application No. 1320 of 1975, decided on February, 23, 1981, the impugned order in this case must on this ground also be held to have been revoked, for all purposes and consequently it, was not open, to take any action under SAFEMA.

16. In one of its leading cases, on preventive detention viz., Khudiram Das Vs. The State of West Bengal and Others, , the Supreme Court has held (at page 556) that though it is clear that the exercise of power of detention is made dependent on the subjective satisfaction, of the detaining authority and though the Court cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction of the detaining authority is based, (still) that does not mean that the subjective satisfaction of the detaining authority is wholly immune from judicial reviewability and then :

"The Courts have by judicial decisions carved out an area, limited though it be, within which the validity of the subjective satisfaction can yet be subjected to judicial scrutiny. The basic postulate on which the courts have proceeded is that the subjective satisfaction being a condition precedent for the exercise of the power conferred on the executive, the Court can always examine whether the requisite satisfaction is arrived at by the authority : if not the condition precedent to the exercise of the power would not be fulfilled and the exercise of the power would be bad. There are several grounds evolved by judicial decisions for saying that no subjective satisfaction is arrived, at by the authority as required under the statute. The simplest case is whether authority has not applied its mind at all.

And in the next para 10 :

"There is also one other ground on which the subjective satisfaction reached by an authority can successfully be challenged and it is of late becoming increasingly important. The genesis of this ground is to be found in the famous words of Lord Halsbury in *Sharpe v. Wakefield*, 1891 AC 173 :

..... When it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and Justice, not according to private opinion according to law and not humour it is to be not arbitrary, Vague, fanciful, but legal and regular." And then

(after relying upon certain English rulings) the Court observed :

"..... the authority has come to a conclusion so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere." And still further :

"..... It is true that this ground in a sense tends to blur the dividing line between subjective satisfaction and objective determination but the dividing line is very much there. However faint or delicate it may be, the courts have never failed to recognise it" And :

"This discussion is sufficient to show that there is nothing like unfettered discretion immune from judicial reviewability. The truth is that in a Government under law, there can be no such things as unreviewable discretion. Law has reached its finest moments", said Justice Douglas,

"When it has freed man from the unlimited discretion of some ruler, some official, some bureaucrat Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions."

"And this is much more so in a case where personal liberty is involved. That is why the Courts have devised various methods of judicial control so that power in the hands of an individual officer or authority is not misused or abused or exercised, arbitrarily or without any justifiable grounds."

Ratio of this authority is not overruled by any subsequent decision of the Supreme Court. Even the ruling in Additional District Magistrate, Jabalpur Vs. Shivakant Shukla, , does not really reverse, in its entirety or in a manner irreversible, the trend of judicial evolution till then on the law of preventive detention. Indeed, the imprimatur of judicial decisions and the growth of constitutional law in this field in post-ADM Jabalpur years in the highest Court of our Country has been, in good measure, if we be permitted the liberty to observe, a reiteration and reassertion of the doctrine of judicial review in matters of preventive detention and the intimately allied field of liberty and equality.

17. In this context, the observations of Bernard Schwartz in his article. "The Amendment in Operation : a Historical Overview", published on the occasion of the Centennial of the Fourteenth Amendment to the American Constitution appear apt :

"In its recent decisions protecting individual liberties, the Supreme Court (of the United States) has been responding to the felt necessities of the mid-twentieth century. The society today suffers from ever-growing malaise, linked directly to recurring doubts about the survival of, individual personality in a community The current concern of the Supreme Court for personal rights represents a direct judicial reaction to the vast concentrations of power confronting the individual in the urbanized industrial society. In such a society, the justices place a countervailing emphasis upon preserving an area of personal right consistent with the maintenance of individual development. Such emphasis,

they feel, is vital if man is to continue to possess the essential attributes of humanity "lacking which", as William Faulkner puts it "he cannot be an individual and lacking which individuality he is not worth the having or keeping".

Even so, however, it is not without reluctance that relief is being granted on this petition. But for the lacunae in fulfilling the minimal constitutional requirement and mandate, the present petition would have failed. Unfortunate though it very much is, that a likely smuggler, a possible hoarder or a suspected black-marketed also gets benefit, such result is but a consequence of a live rule of law which, in a democracy, operates equally. That such persons, whose respect for law and love for the country is based on quid pro quo, get freed is not in the least any credit to them. They, whose nefarious activities and notorious manipulations have been eating into the very vitals of the nation's economy, are the worst stigma of dismaying dimensions on the country. Enraptured as they are by their secreted profits and ignoble affluence, they evoke no mercy and no sympathy. Undeterred, as they seem to be, by the normal laws of the land, they deserve nothing less than what the special laws enacted in that behalf rightly and justly contemplate and envisage. But and yet so if it is better that nine guilty are acquitted than one innocent convicted, equally so it is but meet that an otherwise unworthy person gets an undeserved release on a correct interpretation of the law than a worthy citizen or patriot suffers and languishes in detention on a wrong interpretation thereof. The scales of justice act even-handed. Relief, as in this petition, is the price which the nation as a whole pays at the altar of rule of law and democracy.

18. In the result, this petition is allowed. The impugned order of detention dated July 1, 1975 made against Yusuf Abdulla Patel is hereby declared to be ab initio null and void, invalid and inoperative in law. The respondents are ordered and directed to forbear from taking any steps under the said order of detention and/or to act thereunder in any manner whatsoever.

19. Rule earlier issued on this petition is made absolute in terms aforesaid.

20. Petition allowed.