

(1992) 09 MAD CK 0067

In the Madras High Court

Case No : Writ Petition No. 5729 of 1992

Mustaffa

APPELLANT

Vs

State of Tamil Nadu and Another

RESPONDENT

Date of Decision : 09-09-1992

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 6
Constitution of India, 1950 — Article 22, 226

Citation : (1993) 41 ECC 192

Hon'ble Judges : K.M. Natarajan, J;Arumugham, J

Bench : Division Bench

Final Decision : Allowed

Judgement

K.M. Natarajan, J.—This writ petition is filed by the detenu himself under Article 226 of the Constitution of India challenging the order of detention dated 12.3.1992 passed by the first respondent in exercise of the powers conferred u/s 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (as amended) (Central Act 52 of 1974) with a view to preventing the detenu from smuggling goods.

2. The facts insofar as they are relevant for the disposal of the writ petition can be briefly stated as follows:--On 1.1.1992 the detenu who travelled in the name of Kader Mohideen Kasim holding Indian Passport bearing No. H.150670 issued at Madras, arrived from Singapore, by Singapore Airlines Flight, carrying two pieces of hand baggage, namely, one DAI-ICHI TRADING multi colour polythene bag and one BALRIN blue colour hand bag, at the Madras Airport. The detenu declared to the Superintendent of Customs that he did not have gold/silver/VCR/CGP/TV and that the value of all other goods was Rs. 2,400/-. The Customs Intelligence Officer on suspicion that the detenu might be carrying gold or silver kept concealed either on his person or in his baggage, intercepted him. He was brought to the Air intelligence room along with the baggage and the baggage

was opened and examined in the presence of two witnesses. On examination of the DAI-ICHI TRADING multi colour plastic bag, it contained five white cellophane tape covered bundles and two numbers of crude gold rings. When the five white cellophane tape covered bundles were opened, they were found to contain silver granules weighing 25 kilograms and the two gold rings were found to weigh together 40 grams. Nothing incriminating was found in the other bag. The abovesaid silver granules as well as the two gold rings were recovered under mahazar. The travel documents which includes Singapore Airlines Air ticket, the boarding pass and the Customs Clearance card were seized under the same mahazar. The silver granules and the two gold rings were tested by a licensed goldsmith who testified to be pure silver and gold of 24 carat purity respectively. The detenu was examined on the same day and his statement was recorded. Again he was examined on 2.1.1992 in respect of the address given in the passport. His residence No. 45, Kachaleeswarar Garden Street, Madras-1, was searched by the Customs Intelligence Officers and nothing incriminating was recovered. The enquiry revealed that the detenu never lived in the address given in the passport, namely at No. 35, Krishnan Koil Street, Madras-1. The owner of the said premises, Mohana Sundram was also examined on 3.1.1992. The detenu was arrested on 2.1.1992 and produced before the Additional Chief Metropolitan Magistrate, E.O. II, on 3.1.1992 who remanded him to judicial custody till 14.1.1992. A bail application was filed and a counter to the same was also filed. However, the detenu was released on conditional bail on 8.1.1992. Subsequently the condition was also relaxed. It is only on the basis of the above materials and after follow-up action, the first respondent arrived at the subjective satisfaction to detain the detenu under the abovesaid Act, and accordingly, the impugned order was passed.

3. Though the learned Counsel for the petitioner, Mr. B. Kumar, challenged the impugned order on various grounds raised in the affidavit filed in support of the main writ petition as well as the supplementary affidavit raising grounds in W.M.P. No. 12382 of 1992, he mainly confined his submission to the following ground. In para 9 of the affidavit filed in support of the main writ petition it is contended that there is a serious violation of Article 22(5) of the Constitution. It is stated that one of the documents annexed to the grounds of detention and given to the detenu is the statement of Mohana Sundaram, which is to the effect that nobody by name Kasim or Mustaffa stayed in the house bearing door No. 34, Krishnan Koil Street, Madras-1. The said statement had been shown to the detenu and a further statement was recorded from the detenu on 3.1.1992. But what is given in the said statement by the detenu is totally ununderstandable. It is very illegible and the photostat copy given also white and therefore the detenu has not been able to understand nor anybody will be able to understand what has been written. There is therefore a serious infringement of the guarantee under Article 22(5) of the Constitution. This is more so when the grounds of detention has made heavy weather of the petitioner having been given an incorrect address. As such the order of detention has become unsustainable. It is

also contended by the learned Counsel for the petitioner in para 3 of the supplementary affidavit filed by the wife of the detenu that on behalf of the detenu a request had been made specifically pointing out the fact that the statement of the detenu himself said to have been recorded in answer to the statement recorded from Mohana Sundaram is very illegible and that the petitioner who knows only Tamil is not able to understand the same. A request has been made specifically in the representation of the detenu to furnish a copy of clear and correct statement. It is submitted that furnishing of a statement that is illegible amounts to non-communication in the eye of law. Further the non-furnishing of documents despite demand there for in the representation would equally vitiate the second constitutional imperative that could be spelt out from Article 22(5) of the Constitution of India as the documents have not been furnished. It cannot be gainsaid that the statement of Mohana Sundaram has been heavily relied upon in the grounds of detention. The detenu's answer to Mohana Sundaram's statement under the Customs Act assumes importance. The non-supply of the documents despite request there for has seriously handicapped the petitioner in making a meaningful and effective representation and as such the continued detention cannot be sustained.

4. In the counter-affidavit filed on behalf of the first respondents, it is averred in para 10 that one Mohana Sundaram, owner of the house bearing door No. 35, Krishnan Koil Street, Madras-1, gave a statement on 3.1.1992 stating that no person by name Kasim or Mustafa or Jalalbad stayed in his house in the last 30 years and the said statement was shown to the detenu and he had stated in his confessional statement that as a matter of fact, the detenu and other three persons mentioned above were residing, at the abovesaid address and that it might not have been known to Mohana Sundaram or out of fear he had not admitted this fact in his statement. Hence the Customs Officials have acted justifiably in showing the statement of Mohana Sundaram to the detenu and sought his explanation there for. The grievance of the petitioner that an illegible copy of his statement dated 3.1.1992 was furnished to him is incorrect. While it is true that in the representation he had asked for a legible copy of his statement dated 3.1.1992, inasmuch as the earlier copy furnished to him was quite legible it was not considered necessary to furnish another copy of the same statement. Further, the detenu did not, at the time when the grounds of detention and the documents were served on him complain that the copies were illegible. He had not made any such complaint before the Advisory Board. In para 15 of the counter-affidavit, while dealing with the allegations in para 3 of the supplementary affidavit filed in support of the Writ Miscellaneous Petition, it is contended that the Tamil version of the statement of the detenu, which is said to be illegible, is in the hand writing of the detenu himself. He can always make out what is stated therein. Besides, that, an English translation of the said statement was given to the detenu. A perusal of the signature of the detenu at various places would clearly show that he is a person having working knowledge of English also. Hence it cannot be said that the detenu was in any way prejudiced

by the non-supply of further copy of the statement.

5. Now we have to consider whether the document in respect of which illegible copy is alleged to have been given is a relevant and material document; whether the copy of the document furnished to the detenu is in fact illegible and what is the effect of non-furnishing the same even though the same was asked for in the representation made by the detenu. The learned Counsel for the petitioner, Mr. B. Kumar, drew our attention to grounds of detention, para (iii), (iv), (v) and (vi) and submitted that the detaining authority very much relied on and referred to the statement of the detenu in respect of the residential address given in the passport as No. 35, Krishnan Koil Street, Madras-1. A further statement was recorded from the detenu on the same day (2.1.1992). Further enquiry was made, and the owner of the said premises one Mohana Sundaram was examined on 3.1.1992 and his statement was recorded. It is seen from paras 4 and 5 of the grounds of detention that it has been specifically stated that the detaining authority took into consideration all the facts and materials referred to and relied upon in the grounds mentioned in the grounds of detention and also the statements, mahazars etc. accompanying thereto. The learned Counsel for the petitioner produced before us a copy of the statement of Mohana Sundaram and on the back of the statement, the detenu has given an explanation to the statement given by Mohana Sundaram. Hence, it cannot be said that the statement of the detenu which forms part of the documents furnished to the detenu along with the grounds of detention is irrelevant and immaterial. Further, as rightly contended by the learned Counsel for the petitioner it is not open to the respondents to contend, in view of the specific averments in para 4 of the grounds of detention that they relied on statement in passing the impugned order, that the said statement cannot be said to be one which was not taken into consideration while passing the impugned order. According to the learned Counsel for the petitioner, the grounds include every other facts which were taken for arriving at subjective satisfaction especially when it is specifically stated that those documents were very much relied on and referred to. The learned Additional Public Prosecutor, Mr. I. Subramaniam, fairly conceded that it cannot be said that the document in question, namely, the statement of the detenu by way of answer to the statement recorded from the owner of the house cannot have any bearing on the subjective satisfaction arrived at in this case. The very copy which was furnished to the detenu was produced before us and on a perusal, we find that it is illegible and we are unable to read the same. We gave the same to the learned Additional Public Prosecutor and asked him to read. He also expressed difficulty to read the same. We have no hesitation in holding that the document, namely, the statement of the detenu recorded on the back of the statement given by Mohana Sundaram is illegible and not readable. In this connection, the learned Counsel for the petitioner drew the attention of this Court to the decision of the apex court in *Bhupinder Singh v. union of India and Ors.* : (1987)2SCC234 . That was a case where the detenu made a complaint before the Advisory Board that copies of documents which were supplied to him

along with the grounds of detention were not legible and he also placed before the Advisory Board a copy of a representation said to have been made by him for supply of legible copies of documents. It was held in the above case that the detenu was clearly denied the opportunity of making a representation and there was therefore a clear contravention of the right guaranteed by Article 22 of the Constitution. The above view was affirmed by the apex Court in the subsequent decision reported in *Smt. Dharmista Bhagat Vs. State of Karnataka and Another*, wherein it was held:--

It is imperative that the detaining authority has to serve the grounds of detention which include also all the relevant documents which had been considered in forming the subjective satisfaction by the detaining authority before making the order of detention and referred to in the list of documents accompanying the grounds of detention in order to enable the detenu to make an effective representation to the Advisory Board as well as to the detaining authority. Hence the refusal on the part of the detaining authority to supply legible copies of the said relevant document to the detenu for making an effective representation infringed the detenu's right under Article 22(5) of the Constitution. The order of detention is, therefore, set aside and the detenu is directed to be released forthwith.

In W.P. No. 12657 of 1988 dated 18.7.1989 (*Amid Kalanchiam v. K.L. Verma*, Joint Secretary to Government of India, Ministry of Finance, Department of Revenue, New Delhi) a Division Bench of this Court in similar circumstances held;

7. Courts have held that the law of preventive detention by which suspects are deprived of the personal liberty, without the safeguards available in a judicial trial, ought to be construed with greatest strictness. Courts must therefore be vigilant to ensure that the detenu is not deprived of the modicum of rights and safeguards which the preventive law itself, affords to him. If that is so, an effective opportunity has to be furnished to the detenu to make his representation, meaningful and worth-while. Though it is possible to hold that the petitioner cannot complain of the illegibility of the documents for the exact xerox copies of the originals had been furnished to him, it cannot be overlooked that English translation of those documents had been placed before the detaining authority, which influenced his mind to pass the impugned order. The detenu, therefore, has a valuable right accrued for supply of those translated copies of the chits. This not having been done can be taken to have prejudiced the detenu in making an effective representation.

In *Ramesh Gupta v. Union of India* 1990 CrL LJ 2494 the Delhi High Court held as follows:--

Held further that with a view to enable him to make an effective representation against the order of detention, under Article 22(5) of the Constitution, earliest opportunity of making representation has to be afforded to the detenu. The representation or request for supply of relied upon or of relevant documents etc.,

is a step in aid of detenu's constitutional right to make an effective representation against the detention order. It cannot be held that procedural safeguards will not apply to such a representation or request. In the representation the detenu has asked that he may be supplied with the documents, information and clarification with a view to enable him to make an effective representation. So long as such request is in respect of relied upon or relevant document the procedural safeguards as applicable to representations seeking revocation of the detention order will equally apply, to such a request. (1951) 52 Cri. LJ 373 Rel.on.

In Siraj Khan v. L. Himagliana 1989 Cri. LJ 392, the Bombay High Court, held;

We are fully satisfied that the order of the Magistrate is unreadable and illegible. Mr. S.S. Ahmed Submitted that a part of the order which is not readable dealt with the conditions on which bail was granted and since the detenu availed of the bail by complying with the conditions, there was no question of any prejudice to the detenu. This in our view, is no answer to the argument of Mr. Kotwal that the DOCUMENT WHICH WAS SUPPLIED TO THE PETITIONER WAS ILLEGIBLE AND unreadable and hence it would amount to non-supply of document. In this connection Mr. Kotwal invited our attention to the observations of the Supreme Court reported in Mehrunissa Vs. State of Maharashtra, the relevant portion of which reads thus:--

? but Shri O.P. Rana learned Counsel for the State of Maharashtra, urged that the copies of the documents were not supplied to the detenu as the detenu was already aware of the contents of the document. That is hardly an answer to the submission made on behalf of the detenu. The detenu was entitled to be supplied with copies of all material documents instead of having to rely upon his memory in regard to the contents of the documents.

In Vikramsinh Pravinsinh Rana and etc. Vs. State of Gujarat and Another, it was held;

Detention order was passed against the two detenus on the ground that they were dangerous persons involved in activities prejudicial to the maintenance of public order. Detenus were supplied with the copy of the order, but some of the pages of the said order were not legible at all. Held that the same amounted to non-communication of the grounds for detention. Therefore the order of detention and the continued detention were both vitiated. The grounds of detention being not communicated to detenus also violated Article 22(5) of the Constitution of India and Section 6 of the Act could not be invoked in such situation of non-communication of grounds.

The learned Counsel for the petitioner in this connection invited the attention of this Court to the copy of the representation where documents were asked, and also to the order of rejection of the representation wherein there is absolutely nothing to show that the request of the petitioner to supply documents had been considered. We also perused the same and find that except rejecting the

representation, there is nothing to show that the request for supply of documents was considered nor any reason given for not supplying the documents. In this connection the learned Counsel for the petitioner drew the attention of this Court to a decision of a Division Bench of this Court in W.P. No. 19891 of 1990 dated 26.6.91 (M. Mohammed Mohideen v. Mahendra Prasad, Joint Secretary to Government of India, Ministry of Finance, Department of Revenue, New Delhi and Anr.) wherein it was held;

On the peculiar facts of this case, as fairly pointed out by the learned Advocate General, the ultimate objective of the constitutional mandate of speedy consideration of the representation of the detenu by the authority concerned had not been complied with. There is not only no explanation for the delay in the forwarding of the representation of the detenu to the appropriate authority by the Advisory Board, but also non-application of the mind of the detaining authority to the representation of the detenu is so patent for, no answer had been given, with regard to the documents requested by the detenu. The order of rejection of the representation reads, that the representation of the detenu had been carefully, considered and the same had been rejected. This only shows that the appropriate authority did not even bother to read the representation and apply his mind to the contents found therein. It is clear that the representation had been casually dealt with. In the only representation documents which, according to him, were important, which would enable him to make a further and proper representation. If the authority had read the representation, he would have either informed that the document does not exist or it had not been taken into consideration by the detaining authority or it had already been supplied to him or it will be supplied soon thereafter. As rightly observed by the Delhi High Court in Ramesh Gupta Vs. Union of India and Others, what will the detenu "understand from such a reply, which is so bald? Instead of getting the information, documents and clarification, he is certainly likely to get more confused. The representation or request for supply of relied upon or relevant documents etc., is step in aid of detenu's constitutional right to make an effective representation against the detention order. It cannot be held, that procedural safeguards will not apply to such a representation or request. In the representation revocation of the order of detention and setting at liberty of the detenu has been pleaded. On facts, the manner in which the representation of the detenu had been dealt with, will lead us to hold, that the petitioner could not have had the satisfaction of having made an effective representation which was the minimum guarantee and, which had been admittedly denied to him. We are prepared to hold, that the customs clearance as well as the order in the bail application would be relevant documents in the background of the contents of the order of detention. If there was a bail order and the detaining authority had not looked into it, it would certainly vitiate the satisfaction arrived at.

Ultimately the impugned order in the abovesaid case was quashed on this ground also.

6. It is contended by the learned Additional Public Prosecutor that the alleged document is in the handwriting of the detenu and since he was aware of the contents, the failure to supply legible copy would not in any way prejudice the detenu in making effective representation. In this connection, our attention was drawn to the observations in the decision of the Supreme Court in *Mehrunissa Vs. State of Maharashtra*, (which has been referred to in *Siraj Klian v. L. Hmingliana*, 1989 Cri LI 392, quoted above) wherein their Lordship's observed as follows:--

...but Shri O.P. Rana learned Counsel for the State of Maharashtra, urged that the copies of the documents were not supplied to the detenu as the detenu was already aware of the contents of the document. That is hardly an answer to the submission made on behalf of the detenu. The detenu was entitled to be supplied with copies of all material documents instead of having to rely upon his memory in regard to the contents of the documents.

7. Next it was contended by the learned Additional Public Prosecutor that the detenu was supplied with the English translation of the copy of the document and as such the failure to supply legible copy of the Tamil translation of the document cannot be complained of and that it will not in any way be a ground to invalidate the grounds of detention. There is absolutely nothing to show that the detenu is well versed in English language also. From the mere fact that the detenu put his signature in English, we cannot infer or presume that he knows English, especially when the detenu has specifically stated that he does not know English, that he had studied only a few classes in Tamil and is barely able to speak and write Tamil, that he does not know English and that he stopped his studies nearly 42 years back. Except the fact that the detenu put his signature in English, there is no material to show that he knows English. Even otherwise when the copies of the documents came into existence only in Tamil and they were illegible and when the same is asked for, it is no answer to say that English translated copies were given. Unless a legible copy of the statement in the language in which it was given was furnished to the detenu, he cannot make out anything. It is to be noted that all these reasons which are now put forward in the counter-affidavit were not given in the order of rejection of the representation wherein supply of legible documents have been asked for. The learned Counsel for the petitioner vehemently argued that statutory orders are to be judged according to the tenor and recitals therein and cannot be explained by any subsequent affidavit or otherwise. In support of his contention the learned Counsel drew the attention of this Court to the decision of the Supreme Court in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, , which was rendered in pursuance of the earlier decision of the Constitution Bench reported in *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, . Applying the ratio in the abovesaid decisions to the facts of this case, and in view of the finding that illegible copy of the document supplied along with the grounds of detention has a vital bearing on the subjective satisfaction arrived at by the detaining authority and by the failure to supply the same even after the same was asked for in the

representation the detenu was denied of the opportunity of making effective and purposeful representation against the order of detention, the impugned order of detention is vitiated by the infringement of constitutional safeguards provided under Article 22(5) of the Constitution of India.

8. In the result, we allow the writ petition, quash the impugned order of detention and direct the respondents to set at liberty the detenu forthwith unless his presence is required in connection with any other cause.