

(1981) 01 BOM CK 0006

In the Bombay High Court

Case No : Criminal Application No. 1460 of 1980

Narinder Singh Saran Singh

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 21-01-1981

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(3)
Constitution of India, 1950 — Article 22(5)

Citation : (1981) CriLJ 772 : (1981) MhLj 547

Hon'ble Judges : Dharmadhikari, J;Bharucha, J

Bench : Division Bench

Judgement

Bharucha, J.—This is a habeas corpus petition.

2. The petitioner alleges that he is a citizen of Afghanistan and lives in Kabul. He alleges that he does not know English and that his knowledge of Hindi is limited; his mother tongue is a variety of Punjabi spoken in Kabul.

3. On 24th November, 1979 the petitioner arrived at the airport at Bombay by a flight from Bangkok. His baggage was searched by the Customs Authorities and 65 electronic watches and one calculator were discovered concealed therein. These articles were confiscated and a panchanama of the seizure was made. After the seizure the Customs Officer on duty recorded the petitioner's statement u/s 108 of the Sea Customs Act. On the same day he was produced before a Magistrate and was remanded. On 27th November, 1979 he applied for bail, the application was granted and the petitioner was released on bail on 28th November, 1979. The complaint filed against the petitioner by the Customs Authorities is pending. After release from bail the petitioner alleges that he has stayed in Delhi and has done nothing which would lead the respondents to suspect that he was engaged in smuggling activities. On 17th June, 1980 the petitioner had come to Bombay to attend the trial. Upon the adjournment thereof an officer of the respondent removed him from the Court. The petitioner alleges

that the officer did not disclose to him his identity. He was served in the office of that office with the impugned order of detention and the grounds thereof. In the affidavit made by that officer, a Sub-Inspector of Police Chavan, it is said that between the court building and his office the petitioner and he talked in Hindi and that after service of the order of detention and the grounds thereof, Chavan explained the same to the petitioner in Hindi. The order of detention is dated 3rd April, 1980. It states that the petitioner is detained under the Conversation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (now referred to as "COFEPOSA") with a view to prevent him from smuggling. The grounds of detention make reference to the fact of the said seizure and recite the petitioner's statement u/s 108 of the Sea Customs Act. On 8th July, 1980 the petitioner's Advocate wrote to the respondents asking that the petitioner be furnished with copies of the documents relied upon in passing the order of detention. The respondents replied to the petitioners advocate on 24th July, 1980 that they had relied upon the said panchanama and the petitioner's statement u/s 108 of the Sea Customs Act. A copy of the said statement was enclosed with the letter. In the meantime, on 17th July, 1980, the petitioner received intimation that the Advisory Board constituted under COFEPOSA were to review his detention and that he could make a representation and submit the same through the Jail Superintendent. On 24th July, 1980 the petitioner submitted such a representation. He alleges that, being detained in the Yeroda prison, he was not able to get in touch with his advocate in Bombay; that the representation was drafted by a fellow prisoner; and that when he made the representation a copy of his statement u/s 108 of the Sea Customs Act had not been received by him. This is not denied. On 21st August, 1980 the Advisory Board met. On 22nd September, 1980 the petitioner received an intimation that the Advisory Board had turned down his representation. He thereafter filed his petition.

4. The petition alleges several grounds on the basis of which the impugned order of detention is said to be bad. The learned counsel for the petitioner Mr. Pradhan, has addressed us upon several of these grounds. In view, however, of the clear position that emerges by reason of the fact that the petitioner was not supplied with a copy of his statement u/s 108 of the Sea Customs Act till much after service of the detention order and its grounds upon him and was not supplied with a copy of the said panchanama we do not feel ourselves called upon to enter into a discussion of the other grounds.

5. Mr. Pradhan drew our attention to the judgment of the Supreme Court dated 24th October 1980 in Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others, . The Supreme Court considered the obligation imposed by Article 22(5) of the Constitution and Section 3(3) of COFEPOSA and came to the conclusion that where, as here, there was an express statutory obligation to communicate not merely the decision arrived at upon the basis of subjective satisfaction but also the grounds upon which the decision was founded, it was a necessary corollary that the grounds made known to the detenu should comprise all the constituent facts and materials that went in to make up the mind of the detaining

authority and not merely the inferential conclusions. The Court observed :-

"From what we have said above, it follows that the grounds communicated to the detenu must reveal the whole of the factual material considered by the detaining authority and not merely the inferences of fact arrived at by the detaining authority. The matter may also be looked at from the point of view of the second facet of Article 22(5). An opportunity to make a representation against the order of detention necessarily implies that the detenu is informed of all that has been taken into account against him in arriving at the decision to detain him. It means that the detenu is to be informed not merely, as we said, of the inferences of fact but of all the factual material which have led to the inferences of fact. If the detenu is not to be so informed the opportunity so solemnly guaranteed by the Constitution becomes reduced to an exercise in futility. Whatever angle from which the question is looked at, it is clear that "grounds" in Article 22(5) do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences. The "grounds" must be self-sufficient and self-explanatory. In our view copies of documents to which reference is made in the "grounds" must be supplied to the detenu as part of the "ground". The Court cited with approval the observations in the case of Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, to the effect that it was not sufficient to communicate to the detenu a bare recital of the grounds of detention; but copies of the documents, statements and other materials relied upon in the grounds of detention had also to be furnished within the prescribed time, subject of course to Article 22, clauses 6, in order to constitute compliance with Article 22, clause (5) and Section 3(3) of COFEPOSA. The court was invited in Shalini Soni's case to reconsider the decision in Icchu Devi's case because, it was argued, the observations therein were inconsistent with the Supreme Court's earlier decisions, particularly that in Khudiram Das Vs. The State of West Bengal and Others, The Court declined to do so and opined that what had been stated in Icchu Devi's case was a further development and elaboration of what had been stated in Khudiram's case. Reference was also made by the court to observations of a similar nature in the judgment in Ganga Ramchand Bharvani Vs. Under-Secretary to The Government of Maharashtra and Others,

6. Mr. Pradhan contended that, inasmuch as the panchanama and the statement of the petitioner u/s 108 of the Sea Customs Act had not been supplied to him along with the grounds of detention and, in fact, had not been supplied to him in time for him to make an effective representation against the order of detention, the order of detention was rendered bad and must be struck down.

7. Mr. Kotwal, the learned Government Pleader, placed reliance on the judgment of the Supreme Court in Hansmukh Vs. State of Gujarat and Others, decided on 4th August, 1980. In that case the court drew a distinction between basic or primary facts that had to be mentioned in the grounds of detention and details or particulars of the basic facts, which included copies of the documents and statements relied upon in the grounds of detention. The court said that if the

basic or primary facts on which the conclusions of facts stated in the grounds of detention were not communicated to the detenu within the period specified in Section 3(3) of COFEPOSA the omission was fatal to the validity of the detention. If, however, the grounds communicated contained the basic facts but were not comprehensive enough to cover all their details and particulars, those details and particulars had to be supplied to the detenu if asked for by him with reasonable expedition. What such expedition was, was a question of fact depending upon the facts and circumstances of each particular case. If, in the circumstances of a given case, the time taken for supply of such additional particulars exceeded marginally the maximum fixed by the statute for communication of the grounds it might still be regarded as reasonable; while, in the facts of another case, even a delay which did not exceed 15 days might be unjustified and amount to an infraction of the constitutional imperative.

8. Mr. Kotwal submitted that the grounds of detention in the instant case contained all the basic and primary facts, that when the petitioner asked for copies of the documents relied upon in the grounds he asked for particulars of the basic or primary facts, and that these had been supplied to him within a reasonable time. He submitted that we should follow the decision of the Supreme Court in Hansmukh's case (1980 Cri LJ 1286) and not in Shalini Soni's case (1980 Cri LJ 1487). He also referred to the judgment of the Supreme Court in Bankatlal Vs. State of Rajasthan, wherein non-communication of particulars of a previous conviction of the detenu had been held to be not fatal to his detention. The Court held in that matter that what constituted the substance of the grounds was the factum of a raid and the discovery of adulterated chilly powder. Mr. Kotwal submitted, relying upon this judgment, that nonsupply to the petitioner of a copy of his own statement did not contravene the constitutional imperative. He sought thus to distinguish Shalini Soni's case. He pointed out that a copy of the panchanama relied upon in the grounds of detention had been supplied to the petitioner on the day of the seizure and submitted that non-supply thereof upon the petitioner's advocate's demand was of no consequence.

9. Shalini Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others, was decided by a bench of the two learned Judges of the Supreme Court some months after a bench of two learned Judges of that court had decided Hansmukh Vs. State of Gujarat and Others, .It appears to us that, when confronted with two irreconcilable decisions of the Supreme Court delivered by benched of equal strength, we should follow the later of the two decisions. It seems to us that the later judgment would be a statement of the further development and elaboration of the law. We are strengthened in this view by a judgment of the Full Bench of the Karnataka High Court in Govindanaik G. Kalaghatigi Vs. West Patent Press Co. Ltd. and Another, A majority of three Judges therein came to the conclusion that if two decisions of the Supreme Court could not be reconciled and if the benches that had delivered these judgments consisted of equal numbers of Judges the later of two decisions should be followed.

10. A perusal of the grounds of detention makes it patent that the order of detention is based exclusively upon the said panchanama and the petitioner's statement u/s 108 of the Sea Customs Act.

11. We are not impressed by the argument of Mr. Kotwal that it is only if copies of statements made by parties other than the detenu are not furnished to him that the defect would be fatal to his detention, but not if copies of statements of the detenu himself are not sent. In our view, the detenu is entitled to know precisely what he has stated and should not be expected to rely for that purpose solely upon his memory. For making an effective representation recourse by him to his statement would, in our view, be imperative. What we have just stated applies with particular force in a case such as this where the detenu is unfamiliar with the language and where the representation is drafted for him by someone else. It is conceivable that had a copy of the petitioner's said statement been available to the draftsman of his representation something appreciably different might have been the result.

12. We are also not impressed by Mr. Kotwal's argument that, since a copy of the said panchanama was furnished to the petitioner on the day of the seizure, it was not necessary to furnish it again. The petitioner was detained on 17th June, 1980; he had been supplied with a copy of the said panchanama on 24th November, 1979, more than 6 months earlier. He could not be expected to have that copy with him while in detention. The re-supply of a copy of the said panchanama was, in our view, necessary.

13. Following, as we think we must, the judgment in Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others, we conclude that the failure to supply to the petitioner a copy of his statement u/s 108 of the Sea Customs Act and a copy of the said panchanama is fatal to the petitioner's continued detention.

14. In the result, we hold that the continued detention of the petitioner is invalid and bad. The petitioner would be entitled to be released forthwith were it not for the act that he is yet an under-trial prisoner. He is at liberty to apply for bail in those proceedings. He shall be detailed in the Bombay Central Prison pending further orders in these proceedings. Rule absolute.

15. Petition allowed.