
(2022) 06 KL CK 0028

In the High Court Of Kerala

Case No : Writ Petition (CRL.) Nos. 107, 108, 109 Of 2022

Nushath Koyamu,D/o Mohammed Ali

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 03-06-2022

Acts Referred:

Constitution of India, 1950 — Article 22(4), 22(5)

Customs Act, 1962 — Section 108

Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 —
Section 8(c), 8(f)

Citation : (2022) 06 KL CK 0028

Hon'ble Judges : A.K.Jayasankaran Nambiar, J;Mohammed Nias C.P., J

Bench : Division Bench

Advocate : M.Ajay, V.P.Prasad, Jaishankar V.Nair, S.Manu, K.A.Anas

Final Decision : Dismissed

Judgement

Mohammed Nias C.P. J

1. Specific, confidential information received by the officers of the Directorate of Revenue Intelligence, Cochin Zonal Unit (hereinafter referred to as 'DRI') that a smuggling syndicate, in connivance with a G-card holder of Customs Broker, Cochin Sea Port, was engaged in smuggling of gold from Dubai, in a concealed unaccompanied luggage imported through container Freight Station (CFS), Willington Island, Kochi. The specific information conveyed that the gang had recruited one Althaf Moosan Mukri for whom unaccompanied baggage was sent from Jabal Ali Port of UAE, booked in the name of the said Althaf Moosan Mukri. It was conveyed that it contained huge quantity of concealed gold and would be cleared on 20-4-2021, in the guise of genuine unaccompanied baggage containing household items. Accordingly, the intelligence officers mounted surveillance in and around the port Container Freight Station. While so, the said Althaf Moosal Mukri arrived at CFS at about 2 p.m. for clearing the baggage. He was intercepted and the unaccompanied baggage addressed to him was

examined in the presence of Superintendent of Customs and two independent witnesses. The baggage declaration was signed by the proprietor of M/s. Mercantile and Marine Services which was the Clearing House Agency (CHA). The staff of the CHA, Mr. Biju v. Joy and two other representatives were present there. After identifying the baggage, the said Althaf was informed about the purpose of their visit and with his consent, items were checked. On a detailed examination, it was found that, huge quantity of gold was concealed in the compressor of a refrigerator, brought as an unaccompanied luggage. It contained 126 pieces of gold bars and one cut piece. A Gold Assayer was called who weighed it and found that, it was pure gold bars of 999 purity and it weighed 14763.300 gms. valued at market price of about Rs. 7.16 crores.

2. Apart from the passenger, the statements of one Mohammed Ali, Biju V. Joy and Abdulla S.S. were taken on 20.04.2021. On 21.04.2021 yet another statement was recorded from Mohammed Ali. They were arrested on 21.04.2021 and the bail applications were moved on 23.04.2021, which were dismissed on 30.04.2021. The second set of bail applications filed was dismissed on 5.5.2021 and finally bail was granted by the Sessions Court by its order dated 11.5.2021 as the DRI did not oppose the bail application on the ground of Covid 19 pandemic and thus bail was granted. Biju V. Joy alleges that he has retracted the statement on 29.5.2021, whereas, Mohammed Ali is said to have retracted his statement on 7.6.2021 and Abdulla.S.S on 8.6.2021. The DRI has issued a rebuttal letter to these persons on 15.6.2021. Further statements were also recorded and detention order, Ext.P1 was passed on 24.8.2021. Pursuant to the detention order passed on 24.08.2021, the detenus were detained at the Central Prison, Poojappura, Thiruvananthapuram on 1.9.2021. WP(CrI) No.107/2022 is filed Mohammed Ali, WP(CrI.)No.108/2022 is filed by Abdulla.S.S. and WP(CrI.)No.109/2022 is filed by Biju V.Joy.

3. The prejudicial activities alleged against the detenus and the contentions against the orders of detention are almost similar and hence all these petitions are heard together.

4. We have heard Sri.M.Ajay, the learned counsel for the petitioners and Sri.Manu.S, the learned counsel appearing for the DRI, Sri.Jaishankar V. Nair, learned counsel appearing for the Central Government and Sri.K.A.Anas, the learned Government Pleader.

5. The learned counsel for the petitioner, Sri.M.Ajay reiterating his contention in the writ petition submits that the detaining authority has failed to consider that the sponsoring authority had not opposed the applications for bail filed by the detenus before the Sessions Court which shows that there was no necessity to detain the detenus and further that there was no apprehension raised at any stage by the sponsoring authority about the likelihood of the detenus to indulge in smuggling in further. The second contention is that certain documents requested for vide Ext.P12, which were needed for making an effective representation, were denied and the non-supply of those documents is fatal. The

detenus also contend that even if the documents requested for Ext.P12 was not granted to them, they should have been forwarded to the Central Government and also to the Advisory Board so that they could have independently considered the request made therein and passed appropriate directions. It is alleged that the rejection of Ext.P12 representation by Ext.P13 exhibits sheer non-application of mind as it was not a representation seeking release of the detenus but only for supply of the documents. It is also argued that the detaining authority has failed to give sufficient reason for rejection of Ext.P12. It is argued that the reference of the case of the detenus was to an advisory board constituted as per Ext.P9, but reference was not answered by the said advisory board but instead by a Board having different composition and thus the confirmation of the detention order is illegal. It is also argued that there has been non application of mind by the detaining authority in not considering the relevant aspects to find out whether the ordinary laws of the land was sufficient to deal with the detenus instead of adopting a harsh measure of preventive detention should be forced.

6. The learned counsel for the petitioners also cites the decisions in Varadharaj v. State of Tamil Nadu [(2002) 6 SCC 735] Aysha Nazreem v. Government of Kerala (2002 KHC 1016), Reshmi v. Union of India [2016(3) KHC 20 (DB)], Hajira N.K. v. Union of India [2019 KHC 914 (DB)], Beevikunju. v. Union of India [2020 KHC 167 (DB)], Waheeda Ashraf v. Union of India [2021 KHC 303 (DB)], Rahamath Nisha v. State of T.N (2010 SCC OnLine Mad. 221), Atma Ram Vaidya v. State of Bombay (AIR 1951 SC 157), Naresh Chandra Ganguli v. State of West Bengal (AIR 1959 SC 1335), Ganga Ramchand Bharvani v. Under Secretary to Government [(1980) 4 SCC 62] , Khudiram v. State of West Bengal (AIR 1975 SC 550), Pankaj Singh v. Adhikchak Janpad Karagar Unnao (2019 SCC OnLine All, 4089), Raishad K.T. v. Union of India [2021 (3) KHC 468].

7. A counter affidavit has been filed on behalf of the third respondent denying the allegation that the statements were not voluntary and that the confessional statements of the accused, other evidence and the findings of the investigation were all placed before the detaining authority. It is also urged that the detenu has no right and the authorities have no corresponding obligation to supply anything more than the relied upon documents. It is also stated that the accused were produced before the ACJM(EO) court, Ernakulam along with the remand application submitted by the DRI and the court remanded the accused to judicial custody adhering to the proceedings. The copy of the order of the learned magistrate was not separately issued to the DRI and therefore it was not available with the sponsoring authority. It is also pointed out that the alleged retraction comes after almost 48 days and that the same is only an after thought and that Althaf M.M., the passenger who brought the unaccompanied baggage has not retracted his statement and smuggling done by the gang in the previous instances were also revealed from the statements of the detenus and from the passengers employed by them and the material objects like refrigerators seized from the residential premises of Mohammed Ali proved the same.

8. Respondents 1 and 2 have filed a counter affidavit stating that the detaining authority had elaborated the active role of the petitioners in smuggling and that sensing the magnitude of the offence committed by the detenus and their likelihood to indulge in smuggling activity in future, the detaining authority had passed the orders of detention. The grounds of detention along with the relied upon documents were duly served on the detenus and that their voluntary statements also proved the previous instances of smuggling. It is also stated that the representation was duly considered and after a careful consideration of the facts and circumstances of the case, the nature of activity, the material collected, the potency and potentiality of the detenu to indulge in such activities in future all these were taken into account before passing the detention order. It is also stated that the law declared by the Supreme Court has also been followed by the detaining authority while arriving at the subjective satisfaction for passing the detention order.

9. After the interception of all the three detenues, statements under S. 108 of the Customs Act of Muhammed Ali were recorded on 20-4-2021, 21-4-2021 and 28-4-2021. Statements of Biju V.Joy were recorded on 20-4-2021 and 28-4-2021 and that of S.S. Abdulla recorded on 20-4-2021 and 28-4-2021. Muhammed Ali in his statement admitted that on clearing the goods sent through other persons, they were taken to his residence and after retrieving the gold, the household articles and the gold were sold. The proceeds were sent to Dubai for reinvesting in the gold smuggling.

10. The learned counsel for the third respondent also submitted that the confessional statements of the detenus clearly proved the previous smuggling activities as well as the method employed by them. The statements are all relied upon documents. It is also submitted that the scope of judicial review on the aspect of subjective satisfaction is limited. Regarding the allegation of non supply of materials it is submitted that there is no obligation on the detaining authority to supply materials other than the relied upon documents and that the documents which are merely referred need not be supplied. Only those copies of documents on which the detention order is passed must be supplied and not the every documents which the detenus is asking for. It is also submitted that all the materials available with the sponsoring authority need not be produced before the detaining authority. The allegation of the incompetence of the advisory board is also refuted. The argument that the request for documents was not properly considered is met by saying that there has been due application of mind while rejecting their request. The learned counsel also cites the following judgments in support of his contention.

State of Gujarat v. Adam Kasam Bhaya [(1981) 4 SCC 216]

Asha Keshavarao Bhossle v. Union of India [(1985) 4 SCC 361]

Gurudev Singh v. Union of India [(2002) 1 SCC 545]

Union of India and others v. Arvind Shergil and others (AIR 2000 SC 2924)

Saraswathi Seshagiri v. State of Kerala and others (AIR 1982 SC 1165)

Golam v. State of Weest Bengal [(1975) 2 SCC 4]

Icechu Devi Choraria v. Union of India (UOI) and others [(1980) 4 SCC 531]

Mangalbhai Motiram Patel v. State of Maharashtra and others [(1980) 4 SCC 470]

Madan Lal Anand and others v. Union of India and others [(1990) 1 SCC 81]

Abdul Hakeem v. State of Tamil Nadu [(2005) 7 SCC 70]

Sunila Jain v. Union of India and others [(2006) 3 SCC 321]

Vinod K.Chawla v. Union of India [(2006) 7 SCC 337]

Usha Agarwal v. Union of India (UOI) and others [(2007) 1 SCC 295]

Thahira v. State of Kerala and others [(2014 Cri. L J 684] L.M.S.Ummu Saleema v. B.B.Gujaral and others [1981 KHC 636: (1981) 3 SCC 317]

Radhakrishnan Prabhakaran v. The State of Tamil Nadu and others [2000 KHC 1427: (2000) 9 SCC 170: 2000 SCC (Cri) 1198]

State of Tamil Nadu and others v. Abdulla Kadher Batchs and others [2009 KHC 4268 : (2009) 1 SCC 333)

Syed farooq Mohammed v. Union of India (UOI) and others (1990 KHC 860 : (1990) 3 SCC 537]

State of Punjab & ors v. Jagdev Singh Talwandi [(1984 KHC 594 : (1984) 1 SCC 596]

Vakil Singh v. State of J & K [AIR 1974 SC 2337 , 2341]

Har Jas Dev Singh v. State of Punjab [1974 (1) SCR 281], 288 : AIR 1973 SC 2469]

11. The medical examination of all the accused were conducted and produced before the magistrate court. The detenus Abdulla.S.S and Biju V. Joy were tested for Covid 19 and as per the then existing Covid guidelines, all the accused were produced before the magistrate court through video conferencing adhering to the court protocol, and as directed by the court they were admitted to the Covid first line treatment centres and Mohammed Ali was remanded to the Sub Jail, Aluva. We do not find anything wrong in the procedure adopted when they were arrested or while producing the detenus before the jurisdictional magistrate. Appearance through video conferencing / through a whatsapp call, under the circumstances has to be taken as appearance before the magistrate and we do not think there is any illegality committed. The contentions to the contra are rejected as at any rate they are irrelevant to the present proceedings.

12. With respect to the contentions that at no stage of bail the sponsoring

authority had a contention that the detenus would further indulge in act of smuggling or that they had to be detained, cannot be accepted at all. The role of the sponsoring authority and the detaining authority are distinct and different. After the proposal for detention placed before the detaining authority, the Central Screening Committee consisting of senior officers from the different organisations will screen the entire proposal and make the recommendation and only after this stage the proposal goes to the detaining authority. Thus distinct, different and independent authorities are to examine the materials and it is thereafter that the detaining authority has to independently arrive at the subjective satisfaction to decide whether to detain or not. The detaining authority has also to satisfy itself about the propensity of the proposed detenus to indulge in prejudicial activities in future. Viewed in this background the contention on behalf of the detenus, that at the stage of bail, the sponsoring authority did not contend anywhere that the accused would indulge in prejudicial activities in future and therefore the detention orders are bad, cannot be accepted at all. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or to be launched. An order of preventive detention, may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.

13. With respect to the contention that the detenus retracted the statements made under section 108 of the Customs Act, it has to be noted that the sponsoring authority had already issued the rebuttal statement and the detaining authority has considered the retraction as well as the rebuttal of the sponsoring authority in the grounds of detention which is done in the orders of detention in these cases. There is no further requirement on the part of the detaining authority as far as the retractions are concerned except to consider the confessional statements, the retraction and the rebuttals if any of the sponsoring authority. As a matter of fact, even after the retractions, fresh statement has been given on 29.7.2021 stating that all the previous statements were true wherein the previous acts of smuggling were also admitted. The contention on this count are also accordingly rejected.

14. The further contention on behalf of the detenus that though the bail of the accused was opposed by the magistrate court, the sponsoring authority had conceded to the grant of bail in the Sessions Court does not appear to be factually correct. The reason why bail was not opposed in the Sessions Court was only because of the Covid pandemic and the same is noticed in the order granting bail. It is also to be noted that the detenus had also tested positive for Covid 19 while in judicial custody and the directions of the Hon'ble Supreme

Court regarding the interim bail granted to the remand persons for offences punishable for 7 years or less was also a factor which the sponsoring authority took note of. The decision in Varadharaj (supra) is therefore clearly distinguishable and inapplicable to the facts of the case.

15. The learned counsel for the petitioner submits that in W.P. (Crl) No. 107 of 2022, the detenu had filed Ext. P12 request for supply of the documents mentioned therein, particularly, a screen shot taken from the detenus phone which was relied upon by the detaining authority. It is mentioned in Ext. P12 that there were at least six voice messages visible on the screen shot which were relied on and those messages appear to be of 19th April 2021, a day before the detenus in this case were taken into custody by the DRI. It is the contention that from the screen shot, the contents of the whatsapp chat cannot be understood and unless the chats in electronic form is provided, an effective representation cannot be made. Thus, the whatsapp chat in electronic form which was to be given on a pen drive or such other media to facilitate them to hear them and understand the content and offer the explanation has been deprived of the right under Article 22(5) of the Constitution of India.

16. Similar request is made as Ext. P12 in W.P.(Crl). 108 of 2022. In W.P(Crl).109 of 2022, Ext.P12 has been made which relates to the documents pertaining to the transactions of the smuggled gold recorded from the mobile phone of Abdulla S.S. was sought for, since it was alleged that a "Syndicate" was formed, the contents of the mobile phones of, whatsapp and the other media of the phones etc. is very much necessary for making an effective representation seeking release. It is the contention of the learned counsel for the petitioners that these details sought for were absolutely crucial as the same has been relied upon by the detaining authority for arriving at the subjective satisfaction to detain and resultantly the non-furnishing of which renders the detention order bad. The learned counsel for the respondents on the other hand contends that though there has been narration in the detention order about the screen shots/ whatsapp, they had not been relied upon and hence there is no duty on them to give copies in electronic form to the detenus.

17. On a consideration of the rival submission on this aspect, we notice that there has been reliance made in the detention order regarding the documents mentioned above which might have forced the detaining authority to reach the conclusion about the previous smuggling activities and which necessitated the present order of detention. In spite of a specific request, as seen from Ext. P12 in the above cases, we find copies were not given. In as much as the contents of the above being relied upon and they have not been given despite asking for them, we feel there has been infringement of the right of the detenus to make an effective representation seeking release.

18. The learned counsel for the petitioner is right in stating that the detaining authority ought to have furnished the said materials as their right to make an effective representation has been impaired. It is relevant to note in the decision

of the Supreme Court in *Atma Ram Vaidya v. State of Bombay* [AIR 1951 SC 157]. The Hon'ble Supreme Court held that :

Para 10. "To put, it in other words, the detaining authority has made its decision and passed its order. The detained person is then given an opportunity to urge his objections which in cases of preventive detention comes always at a later stage. The grounds may have been considered sufficient by the Government to pass its judgment. But to enable the detained person to make his representation against the order, further details may be furnished to him. In our opinion, this appears to be the true measure of the procedural rights of the detained person under Article 22 (5)."

Para 12 . "The conferment of the right to make a representation necessarily carries with it the obligation on the part of the detaining authority to furnish the grounds, i.e., materials on which the detention order was made. In our opinion, it is therefore clear that while there is a connection between the obligation on the part of the detaining authority to furnish grounds and the right given to the detained person to have an earliest opportunity to make the representation, the test to be applied in respect of the contents of the grounds for the two purposes is quite different. As already pointed out, for the first, the test is whether it is sufficient to satisfy the authority. For the second, the test is, whether it is sufficient to enable the detained person to make the representation at the earliest opportunity".

Para 13 "But when grounds which have a rational connection with the ends mentioned in section a of the Act are supplied, the first condition is satisfied. If the grounds are not sufficient to enable the detainee to make a representation, the detainee can rely on his second right and if he likes may ask for particulars which will enable him to make the representation. On an infringement of either of these two rights the detained person has a right to approach the court and complain that there has been an infringement of his fundamental right and even if the infringement of the second part of the right under Article 22 (5) is established he is bound to be released by the court".

19. In the light of the above, we cannot accept the contention of the learned counsel for the respondents that there was no duty to supply the documents mentioned above to the detenus. The decisions relied on by the learned counsel for the respondent for the proposition that the documents sought for in the instant cases need not be granted cannot be accepted as the same are rendered on different sets of facts. In as much as the documents sought has been relied upon in the detention orders, the same ought to have been furnished to the detenus when they requested for the same. The learned counsel for the petitioners is also right in relying on the following judgments for canvassing the same position that the relevant electronic info to be provided in the same format:

1. 2016 (3) KHC – *Reshmi v. Union of India*
2. 2019 KHC 914 – *Hajira N.K. v. Union of India*

3. 2020 KHC 167 – Beevikunju v. Union of India

4. 2021 KHC 303 - Waheeda Ashraf v. Union of India

In the light of the discussion above, we are convinced that the non-supply has vitally affected the right of the detenus under Article 22(5) of the Constitution of India. We, accordingly, hold that the detention order is bad for the non-supply of these documents sought for in Ext. P12.

21. The learned counsel for the petitioner also argues that the confirmation of the detention order by the Central Government following the opinion of the Advisory Board is also completely illegal in as much as the reference of the case of the detenus was to an Advisory Board consisting of a Chairman and two members addressed by name as disclosed from Ext. P9 but the reference was answered by an Advisory Board consisting of judges different from those notified in Ext.P9. Thus, the learned counsel argues that the constitution of the Board was wrong and that it must be taken that the Advisory Board to which the case of the detenus were referred did not answer such reference by rendering an opinion under Section 8 (c) and as such it is the violation of the constitutional mandate under Article 22(4) as well as violation of statutory mandate under Section 8 (c) of the COFEPOSA Act rendering the confirmation order under Section 8 (f), null and void.

22. We are afraid that the said contention cannot be accepted. The requirement under Section 8 of the COFEPOSA Act in the background of the Constitutional provision is for a reference to an Advisory Board duly constituted and it is not the petitioner's case and the board which answered the reference in the instant case had any member who was not qualified or competent to hear the reference. The constitution of the Board was changed owing to the retirement of the Hon'ble Judges after issuance of Ext. P9. It is true that the retired Judges also could be members of the Advisory Board but extra care was given to see that the serving Judges were included in the Advisory Board. It has to be presumed, when an Advisory Board is constituted, comprising of high constitutional functionaries, that the case of the detenus will be considered with objectivity, fairness and competence, reassuring the Constitutional and statutory safeguards while expressing their opinion on the sufficiency of the cause of detention. In such circumstances, the question of detenus being put to any prejudice much less any actual prejudice does not normally arise. The interest of the detenus were sufficiently taken care of both in the constitution of the Board and while answering the reference. We find no error, much less, any illegality in the constitution of the Board or while it answered the reference and contention on that count made on behalf of the detenu is accordingly rejected.

In view of our finding on the issue of non-supply, Ext.P1 orders of detention are quashed and the detenus are forthwith set at liberty provided they are not wanted in connection with any other case.