
(1997) 11 MAD CK 0049
In the Madras High Court
Case No : H.C.P. No. 202 of 1997

P.N.A. Hyder Ali

APPELLANT

Vs

State of Tamil Nadu and Another

RESPONDENT

Date of Decision : 10-11-1997

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 11, 3(1)
Constitution of India, 1950 — Article 22(5)
Customs Act, 1962 — Section 135

Citation : (1997) 3 CTC 486

Hon'ble Judges : S. Thangaraj, J; C. Shivappa, J

Bench : Division Bench

Advocate : B. Kumar, for the Appellant; S. Anbalagan, Additional Public
Prosecutor and K. Kumar, for the Respondent

Judgement

1. The petitioner is the brother of the detenu. He has challenged the order of detention, dated 7.7.1995, passed by Respondent No. 1, detaining

the detenu u/s 3(1)(ii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974),

hereinafter referred to as the "Cofeposa" Act, in short.

2. The facts which led to the detention of the detenu are; that on 8.5.95 at about 10.00 hours, one Mrs. Mohamed Anwar Samsum Nihara, holder

of Sri Lankan Passport No. K. 0381763 dated 5.8.91 issued at Colombo who was a passenger bound for Colombo by Indian airlines Flight No.

IC 573 was intercepted by the Customs Officer, after clearance through Immigration and Customs. On suspicion that she might be carrying

contraband or currency concealed in her baggage, Mrs. Nihara identified one Olive green colour Zipper bag bearing Tag No. IC 0366123 and

one original Cardboard Carton of Jaipan Mixer and Grinder bearing Tag No. IC 0366124 and one Jute Hand Carry bag in the presence of the

witnesses. When the said Nihara was questioned in the presence of the witnesses as to whether she had any foreign or Indian currencies in her

aforsaid luggage, she replied in the negative. Thereafter, the passenger along with the checked in luggages and the hand luggage were brought to

Customs Export Visadex room situated in the Departure Hall of Airport wherein the luggages were opened and examined one by one in the

presence of two independent witnesses. The examination of the Olive green colour Cotton Zipper bag resulted in the recovery of 4 paper covered

packets wrapped in two sarees (two packets each). Further examination of the four paper packets resulted in the recovery of US \$ 73,000 and 8

numbers of Travellers cheques in American dollars of 500 denomination each totally worth 4000 US \$, 45,650 UAE Dirhams, 4,100 Qatar Riyals

and 1,76,950 Saudi Riyals. The said currencies were recovered and seized under a mahazar as per law. The examination of the hand luggage

disclosed only used cloths. The said Niharar did not declare the above said foreign currencies to the Customs at the time of Customs Clearance.

Further she was not in possession of any valid permit or licence issued by the Reserve Bank of India for the export of said currencies out of India

and also attempted to smuggle the same by way of smuggling. Since the said Nihar did not have any valid documents, the currencies were seized

under a mahazar for action under the Customs Act, 1962 read with Foreign Exchange Regulation Act, 1973 along with two Indian made nylon

sarees, and other documents such as Air ticket and baggage tag etc. The said Nihara, when questioned whether anybody accompanied her,

answered in the affirmative and volunteered to identify the person. At her request, she was taken to the first floor of the departure hall of the airport

and identified in the presence of witnesses the detenu Sultan Sulaiman, the holder of Indian Passport bearing No. R 346515 dated 11.5.94 issued

at Trichy who was bound for Singapore via Colombo by the same flight through Air Lanka ticket. The detenu was brought down from the Security

Lounge and he was questioned in the presence of the witnesses. The detenu admitted to two checked in luggages bearing No. IC 0376976 and IC

0373434 and one Blue Colour red stones hand bag and surrendered the respective tags. Both the checked in luggages were off-loaded from the

Aircraft IC 573 in the presence of the witnesses and brought to Export Visadex room for detailed examination. The luggage bearing Tag No. IC

0376976 was examined. The travel documents of the detenu viz. the boarding pass and the claim tag were seized under a mahazar. The detenu

gave a voluntary statement to the Customs officials and admitted that he was aware of the offence involved in smuggling the foreign currencies

without a valid permit, by not declaring it to Customs and by way of concealment and also admitted that he agreed to escort the lady by way of

reciprocation of the help given by one Ismail alias Shammu. Since the detenu was abetting the offence of smuggling, due to compelling necessity

and with a view to preventing him from indulging in abetting the smuggling of goods in future, the detaining authority passed the order of detention.

3. The detenu was arrested on 9.5.1995 and remanded to judicial custody till 23.5.1995. Later he filed bail applications before the Principal

Sessions Judge, Madras which were dismissed. Finally, he was granted bail on 6.6.1995. After getting bail, the detenu absconded and his

whereabouts were not known. He was again apprehended only on 23.12.1996. The Government issued intimation to the detenu to appear before

the Secretary to Government, Public (SC) Department, Fort St. George, Chennai-9 and the same was published in the Tamil Nadu Government

Gazette, on 3.7.1996. In spite of the publication, the detenu did not appear before the concerned authorities. Then, a publication was made in

newspapers and in other medias. Finally, he was arrested on 23.12.1996 at 16.30 hours at Pattinam Bus Stand and was remanded to the Central

Prison, Madurai on 24.12.96. The detention order was served on the detenu on 23.12.1996 itself.

4. The petitioner contended that he had not done any act in furtherance of any smuggling activity; that the grounds of detention are very vague and

confusing and there is no material to indicate that he abetted the smuggling which offence is punishable u/s 135 of the Customs Act. He further

contended that five copies of the representation were given to the Superintendent of Central Prison, Madurai, with a request to forward the same

to the authorities mentioned in the grounds of detention, but they were not sent and that there is non-consideration of the representation and delay.

5. In the counter affidavit filed on behalf of the Union of India-respondent No. 2, in paragraph 4, it is stated that as per the official filed no

representation from the brother of the detenu as contended in the petition seems to have been received in the Cofeposa section of the Department of Revenue.

6. The learned counsel for the petitioner, though urged several contentions, but confined his argument only to the non- sending of the representation

to the authorities for consideration. He relied on a decision of the Supreme Court in *Jai Prakash Vs. District Magistrate, Bulandshahar, U.P. and*

another, wherein also the detenu submitted his representation against the detention through the jail authorities without indicating whether to the

State Government or the Central Government. He had only mentioned "the Home Secretary" as the addressee without further indicating whether

he meant Home Secretary to the State Government or Central Government. In such a situation, the Apex Court held that the Superintendent of jail

is under an obligation to send one copy of the representation to the Central Government and the non-sending amounts to denial of the right of the

detenu to make effective representation. On that ground the order of detention was invalidated and set aside.

7. In *B. Alamelu v. State of Tamil Nadu and Ors.* AIR 1995 SC 539 the Apex Court followed *Jai Prakash Vs. District Magistrate, Bulandshahar,*

U.P. and another, referred to above, and held that the constitutional right of the detenu under Article 22(5) has got violated on account of non-

sending of the copy of the representation by the Jailer to the appropriate authority of the Central Government, as expeditiously as possible, after he

received it.

8. In *Hem Lall Bhandari Vs. State of Sikkim and Others*, it has been held thus:-

It is not permissible in matters relating to the personal liberty and freedom of a citizen, to take either a liberal or a generous view of the lapses on

the part of the officers. In matters where the liberty of the citizens is involved, it is necessary for the officers to act with almost expectation and in

strict compliance with the mandatory provisions of law. Expeditious action is necessitated upon as a safeguard against the manipulation.

9. In *Rattan Singh v. State of Punjab* AIR 1982 SC 1 the Apex Court has held thus:

...The failure on the part either of the jail superintendent or the State Government to forward the detenu's representation to the Central

Government deprives the detenu of the valuable right to have his detention revoked by that Government. As a result, the continued detention of the detenu is rendered illegal.

10. In H.C.P. No. 1065 of 1996, a Division Bench of this Court, in an identical situation, has held as follows:-

... Despite the fact that there was no request emanating from the detenu, for the onward transmission of the representation to the competent

authorities entitled to revoke the order of detention, the Superintendent Central Prison, Trichy opted after retaining one copy of the representation,

to forward, by way of onward transmission, the rest of the six copies of the representation to the 1st respondent State Government for

consideration and disposal. We are at a loss to understand as to why he had not opted to send one copy of the representation to the second

respondent-central Government, an authority competent to revoke the order of detention u/s 11 of the Cofeposa Act in such circumstances.

Discussing the factual aspects of the case, the Court has further held thus:

....failure to send a copy of the representation to the second respondent-Central Government is a colossal neglect of his official duty and the fact

that he did not send any such copy of the representation to the Central Government, will greatly affect the valuable right inhering in favour of the

detenu of making an effective and purposeful representation to the Central Government, under Article 22(5) of the Constitution of India. The fact

that the 2nd respondent Central Government was unable to consider and dispose of the representation as a consequence of such copy of the

representation not having been forwarded to it is no answer at all, and non-consideration of the representation, for whatever be the reason, by the

second respondent - Central Government will serve as a factor, vitiating the impugned order of detention.

11. An attempt was made by the learned counsel for the respondent to distinguish the judgment in Jai Prakash Vs. District Magistrate,

Bulandshahar, U.P. and another, , on the ground that the detention was under National Security Act, and there were more number of copies and

relying on the decision in Noorjehan Sarver Khan Vs. State of Maharashtra and others, .

12. Liberty of an individual being a precious right cherished under the

Constitution, encroachment of such right has to be guarded cautiously. Even in *Aslam Ahmed Zahire Ahmed Shaik Vs. Union of India and Others*, , the Apex Court has deprecated the supine indifference, slackness and callous attitude on the part of the Jail Superintendent, who delayed in transmitting the representation. On the contrary, the grounds of detention themselves as furnished to the detenu had rightly indicated that the detenu could represent to the Central Government, keeping in view the nature of right involved, the Jail Superintendent ought to have been more alert in transmitting the representation. In the facts and circumstances of this case, we see no merit in the distinction drawn by the learned counsel relying on the decision in *Noorjehan Sarver Khan Vs. State of Maharashtra and others*, .

13. In the instant case, five copies of the representation were given to the Superintendent of Central Prison, Madurai, with a request to forward the same to the authorities mentioned in the grounds of detention. But the representation was not sent to the Central Government. When there were five copies, the Superintendent of Jail should either have forwarded the representation to the Government concerned, or he should have forwarded them to the State Government, with a request for the onward transmission of one representation to the Central Government. Wherever copies of the representation are insufficient, the jail authority may make a request to the State Government to take sufficient number of copies and to forward the same to the authority empowered to revoke the order of detention. This, not only prevents the lapse on the part of the officers but also promotes the safeguard to the valuable right of liberty of the detenu. If this course is not resorted to for the lapse of an Officer, with or without an ulterior motive, may enable an anti-social element to get over the clutches of law. May be, the detenu is a smuggler whose tribe deserves no sympathy since his activities have paralysed the Indian Economy. But the law of preventive detention afford only a modicum of safeguards to persons detained under them and if freedom and liberty are to have any meaning in our democratic set up, it is essential that atleast those safeguards are not denied to the detenu. Section 11(1) of the Cofeposa Act confers upon the Central Government the power to revoke an order of detention even if it is made by the State Government or its Officer. That

power, in order to be real and effective, must imply the right in a detenu

to make a representation to the Central Government against the order of detention.

14. The failure, in this case, on the part of the Jail Superintendent or the State Government to forward the detenu's representation to the Central

Government amounts to deprivation of the right of the detenu to have his detention revoked by the Central Government. Thus, there is infraction of

Article 22(5) of the Constitution of India and the detention has to be held illegal.

15. For the aforesaid reasons, the impugned order of detention is set aside. The detenu by name Sultan Sulaiman alias Hassan Ali, is directed to

be set at liberty forthwith, unless he is required to be detained in connection with any other case.