

(1983) 04 KAR CK 0023

In the Karnataka High Court

Case No : Writ Petition No. 14 (H.C.) of 1983

Ramachandrasa Jeevanasa Bakale

APPELLANT

Vs

State of Karnataka and Another

RESPONDENT

Date of Decision : 12-04-1983

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) — Section 2 (e), 3 (1) (iii)
Constitution of India, 1950 — Article 22 (5), 226
Customs Act, 1962 — Section 111 (d), 123

Citation : (1984) 2 ECC 296 : (1985) 5 ECR 199

Hon'ble Judges : M.N. Venkatachaliah, J;K.A. Swami, J

Bench : Division Bench

Final Decision : Allowed

Judgement

M.N. Venkatachaliah, J.—In this petition under Article 226 of the Constitution for issue of a writ of habeas corpus, the petitioner has challenged the order No. HD 81 SCF/82 dated 7th February, 1983, made u/s 3(1)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (the "Act" for short), by the detaining authority, viz., the State Government, for the detention of the petitioner's brother Janakusa Jeevanasa Bakale. Pursuant to the impugned order of detention, the detenu has been under detention in the Central Jail, Bangalore, from 17th February, 1983.

The impugned order says that the detaining authority is satisfied that the detention of the said Janakusa Jeevanasa Bakale has become necessary "with a view to preventing him from engaging in keeping smuggled goods".

2. It may be mentioned here that the detention was a sequel to certain proceedings of search and seizure conducted by the Income Tax authorities at the residential premises of the detenu, No. HDMC 22, Aralikatti Oni, Hubli, on 30th June, 1982. The said search by the Income Tax authorities is stated to have yielded, amongst other things, (i) currency notes of the value of Rs. 20,64,500;

(ii) gold ornaments of 2434 grames (iii) silver bullion of 7549 grames (iv) 59 pellets and two half pieces of gold with foreign marks and of foreign origin weighing 590 tolas and 115 grammes said to be of a value of Rs. 10,81,550 and (v) 53 pieces of primary gold (tejap) of a weight of 3289 grammes said to be of a value of Rs. 5,59,130. These valuables were said to have been secreted in the pooja room of detenu's residential premises. The Income Tax authorities appeared to have seized items (i), (ii) and (iii) and informed the Assistant Collector of Central Excise, Hubli, of the results of their search, upon which, the latter, along with his staff, went to the residence of the detenu and seized the 59 pellets and two half pieces of gold of foreign origin and the 53 pieces of primary gold (tejap), i.e., items (iv) and (v) referred to above. By his statement recorded by the Central excise authorities on 1st July, 1982, the detenu denied that the gold of foreign origin and the primary gold were his property and stated that the gold belonged to a certain Parashuramsa Ranganathasa Metrani of Hubli respecting whom a separate order of detention has been made. That order is challenged in W. P. No. 15 of 1983 before this Court. Later, however, it would appear, the detenu purported to retract from that statement.

3. This search and seizure was on 30th June, 1982. Thereafter on 7th February, 1983, the State Government, the detaining authority, passed the impugned order of detention on its satisfaction that such detention was necessary with a view to preventing the detenu from engaging himself in keeping smuggled goods.

In the grounds of detention furnished to the detenu, the detaining authority, after adverting to the circumstances attending the seizure of currency notes, gold ornaments, silver bullion by the Income Tax authorities, proceeds to refer to the aspect which in its opinion was germane to the satisfaction for the detention. Indeed the relevant portion of the grounds of detention would show that what was, apparently, considered by the detaining authority as the proximate and pertinent instance relevant to the subjective satisfaction in regard to preventing the detenu from "keeping smuggled goods" was the secreting by the detenu and the subsequent seizure from his residence of "59 pellets and two half pieces" of gold of foreign origin and markings of a value of Rs. 10,81,500. In the grounds the detaining authority says:

...The said Assistant Collector of Central Excise and his staff then examined the said gold in the presence of the mahazar witnesses as well as in your presence and found that among other things there were 59 pellets and 2 half pieces of gold bearing foreign markings weighing 590 tolas and 115 gms. When the said Central Excise Officer demanded you to produce any document for the licit possession of the said 59 pellets and 2 cut pieces of foreign marked gold you stated that you had no such document. Thereupon the said Central excise officers seized the said gold of foreign origin valued at Rs. 10,81,550 in the reasonable belief that the same might have been imported into India illicitly in contravention of the provisions of the Customs Act, 1962. (vide para 2)

The said 59 pellets and 2 half pieces of gold seized have been tested by experts

who have opined it to be of foreign origin. The foreign marked gold under seizure attracts the provisions of Section 123 of the Customs Act, 1962, and as such the burden of proof that it had not been smuggled into India is cast on you and on Sri P.R. Metrani which burden you both have failed to discharge. Importation of gold has been completely prohibited Under the Foreign Exchange Regulation Act, 1973, except with the general or special permission of the Reserve Bank of India. Both of you have not produced any permission from the Reserve Bank of India for importation of the gold of foreign origin seized from your house. The said gold is, therefore, liable for confiscation u/s 111(d) of the Customs Act, 1962. The said gold is, therefore, smuggled goods within the meaning of Section 2(e) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, read with Section 2(39) of the Customs Act, 1962. (vide para 8)

From the above facts and materials and without prejudice to the action or proceedings that may be instituted against you under the Customs Act, 1962, and the Gold (Control) Act, 1968, the Government of Karnataka are satisfied that your detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act is necessary with a view to preventing you from engaging in keeping smuggled goods. (vide para 10)

(underlining supplied)

The above excerpts make manifest that the circumstances considered by the detaining authority as relevant to the grounds of detention and on which the subjective satisfaction was based was the instance relating to the said 59 pellets and 2 half pieces of gold with foreign markings and of foreign origin which, according to the detaining authority, was liable to be treated as smuggled. Indeed the avowed purpose of the detention was to prevent the detenu from "keeping smuggled goods".

4. Shri C. Chander Kumar, learned Counsel for the petitioner, has urged a number of contentions. Counter-affidavit of the Home Secretary, on behalf of the detaining authority, is filed. Learned Advocate-General who appeared and was heard for the detaining authority, made available, at the hearing, the records of the case.

5. One of the contentions urged by Sri Chander Kumar is that though the constitutional rights of the detenu under Article 22(5) would require the communication to the detenu of all the relevant material from which the subjective satisfaction is drawn so as to enable the detenu to make an effective and purposeful representation against the detention, the detaining authority, in this case, has failed to disclose and communicate to the detenu all the material on the basis of which it has reached its subjective satisfaction. The contention is that the unspoken part of what operated in the mind of detaining authority and influenced its subjective satisfaction in this case is so material and important that the non-communication of that material to the detenu has operated to deprive the detenu of a real and reasonable opportunity to make an effective and

purposeful representation against the detention and that there is, thus, a denial of the constitutional rights of the detenu under Article 22(5).

Elaborating this contention, Sri Chander Kumar submitted that though the grounds communicated to the detenu apparently refer to and rely upon only the seizure of 59 pellets and 2 half pieces of gold of foreign origin and foreign markings, respecting which an inference of its smuggled character is stated to have arisen in view of the failure of the detenu to produce valid documents evidencing its licit import and possession, it is clear, as made manifest in the counter-affidavit itself, that other material within the possession and knowledge of the detaining authority also influenced the subjective satisfaction. Learned Counsel says that in addition to the alleged seizure of 59 pellets and 2 half pieces of gold of foreign origin, the material that currency-notes of Rs. 20,64,500; gold ornaments, silver bullions of 7549 grammes, and more importantly, the seizure of 53 pieces of primary gold (tejav) of a value of Rs. 5,59,130 also influenced the subjective-satisfaction.

6. The two-fold submissions of Sri Chander Kumar on this point could be formulated thus:

(i) First, that the seizure of 53 pieces of primary gold by the Central Excise authorities was also considered one of the relevant criteria and influenced the subjective-satisfaction and that the omission to communicate to the detenu that circumstance results in a violation of the constitutional rights of the detenu under Article 22(5).

(iii) Secondly (a) that the circumstances that the Income Tax authorities seized currency notes of Rs. 20,64,500, gold ornaments of 2434 grammes, and 7549 grammes of silver bullion also influenced the making up of the mind of the detaining authority and the same not also having been referred to in the grounds of detention and communicated to the detenu there is a violation of Article 22(5); and

(b) that the said material relating to the said seizure of currency notes, gold ornaments and silver bullion was wholly irrelevant if the purpose was to prevent "keeping" of smuggled goods.

Sri Chander Kumar says that the material referred to in (i) and (ii) supra influenced the mind of the detaining authority as is clear from the counter-affidavit filed by the Home Secretary himself.

7. It is settled law that having regard to the paramount importance personal liberty has in the constitutional scale of values, the executive vested with this vast power of preventive detention which denies the personal freedom of an individual without trial and on a "jurisdiction of suspicion", should meticulously conform to the procedural requirements of the law of detention. The constitutional and statutory safeguards on the exercise of the power must be shown to have been strictly conformed to and complied with. The burden of

showing that the detention is in accordance with the procedure established by law has always been placed on the detaining authority. Once rule nisi is issued in a petition for issue of a writ of habeas corpus challenging an order of preventive detention, it becomes the duty of the Court to satisfy itself that all the procedural safeguards are met strictly. In this context the counter-affidavit of the detaining authority assumes particular materiality.

The counter-affidavit of the detaining authority should set out and fully disclose all the facts correctly; the counter-affidavit must broadly set out the prejudicial activities of the detenu and the material on which the subjective satisfaction is derived. Courts, in judicial review, cannot go into the truth and sufficiency of the material touching the prejudicial activities of the detenu on the basis of which the proclivities of the detenu for similar prejudicial activity in future is prognosticated. The factual material alleged against the detenu in the present case, no doubt, shows a serious and disturbing situation. But personal liberty being such a precious thing that we should keep the magnitude of the prejudicial activities alleged against the detenu and their deleterious effects on the economy aside while administering this "Great writ of Liberty". Such is the primordial and paramount importance of the concept of personal liberty in the constitutional scale of values.

8. We may now advert to the contention of Sri Chander Kumar in para 6(ii), viz., that the satisfaction of the detaining authority has been influenced by the material touching the seizure by the Income Tax authorities of the currency notes of Rs. 29,64,500, gold ornaments and 7549 grammes of silver bullion; and that this material is not disclosed and communicated to the detenu. We think that a careful scrutiny of the counter-affidavit of the Home Secretary would show that the seizure of currency-notes, silver bullion and gold ornaments by the Income Tax authorities was merely adverted to in the course of narration of events and not as material which influenced the formation of the subjective satisfaction. Therefore it cannot be said that this material did influence or could reasonably be expected to have influenced the subjective satisfaction and that its non-communication was violative of the rights of the detenu under Article 22(5). In this view we take of the matter the further contention in para 6(ii)(b) that this material was not relevant to the avowed purpose of detention does not also survive.

9. However, the first aspect of the contention, i.e., in para 6(i), bears serious examination. The basis and perhaps the inspiration for this argument is, ironically, the counter-affidavit itself by which, it must be said, the detaining authority has done itself no service.

In para 3 of the counter-affidavit of the Home Secretary, it is stated:

3...Accordingly the Assistant Collector of Central Excise, Hubli, proceeded to the house of the detenu (J.J. Bakale) along with his staff and seized 59 pieces of foreign marked gold weighing 590 tolas and 2 half pieces of gold biscuits

weighing 115 grammes valued totally at Rs. 10,81,550 and 53 pieces of primary gold pieces (tejap) valued at Rs. 5,59,130...Therefore, the locker/safe was in the actual possession of Sri P.R. Metrani and as such, he could not produce any vouchers or documents for the seized gold pellets and gold (tejap) for having imported them legally into this country. In the circumstances, the Assistant Collector of Central Excise, Hubli, had seized the gold pellets and gold (tejap) from the possession of the detenu as he failed to produce any documents to show its licit importation to India.

(underlining supplied)

In Para 5 it is stated:

...The grounds in support of the detention are clear and based on the facts of seizure of gold of foreign origin and that the said grounds have clear nexus with the object of detention....

What emerges from these statements in the counter-affidavit is that not only the "59 pellets and two half pieces" of gold but also the "53 pieces of primary gold (tejap)" were presumed to be smuggled and the process of the formation of the subjective satisfaction was informed by both these factors. At all events, it would be reasonable to hold that the seizure of 53 pieces of primary gold (tejap) was reasonably capable of influencing the subjective satisfaction.

If that be so, it would, indeed, become the clear obligation on the part of the detaining authority to disclose in the grounds of detention this pertinent and proximate circumstance, viz., the seizure of 53 pieces primary of gold (tejap) which also influenced the subjective satisfaction in the grounds of detention. The ground of detention should refer to all the basic material on the basis of which the subjective satisfaction was arrived at.

In Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others, , adverting to the obligation of the detaining authority to disclose and communicate the material on the basis of which subjective satisfaction was reached, the Supreme Court observed thus:

7...It is an unwritten rule of the law, constitutional and administrative, that whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote. Where there is further an express statutory obligation to communicate not merely the decision that (but also) the grounds on which the decision is founded, it is a necessary corollary that the grounds communicated, that is, the grounds so made known, should be seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went in to make up the mind of the statutory functionary and not merely the inferential conclusions....

10. But as seen earlier, so far as the grounds of detention are concerned, they

rely upon the material relating to seizure of "59 pellets and 2 half pieces" of gold of foreign origin as the pertinent and proximate material for deriving the subjective satisfaction. There is no reference to the circumstance that seizure of 63 pieces of primary gold (tejav) was also one of the circumstances taken into account in arriving at the subjective satisfaction as to the need for detention. The detenu must be held to have been unable to make an effective and purposeful representation against this pertinent and proximate criterion which influenced the mind of the detaining authority.

11. Learned Advocate-General, however, sought to contend that the circumstance that 53 pieces of primary gold (tejav) was also seized could be gathered from the copies of documents furnished to the detenu along with the order of detention. We think, in the facts and circumstances of this case, the mere fact that there has been an advertence to this material in the documents furnished to the detenu or in some other stray or indirect manner would not be sufficient to discharge the obligation of the detaining authority in the matter of communication of pertinent grounds. The detaining authority must specifically advert to and disclose this material explicitly as a circumstance which was amongst those from which the subjective satisfaction was derived. A stray reference to the seizure of the 53 pieces of primary gold will not, by itself, show whether the detaining authority considered it as a pertinent and proximate factor in reaching the satisfaction. A specific disclosure of this primary and basic material in the grounds of detention is specifically necessary so that the detenu is made to know unmistakably that this material was in the mind of and treated by the detaining authority as material--at once proximate and pertinent--going into the formation of the satisfaction. The disclosure and communication of the relevant and proximate material ought to be in such manner and in such terms as would make manifest that that material went into and had influenced the decision-making. There is, in this case, no communication of the material touching the effect of the seizure of 53 pieces of primary gold and there is accordingly a denial of the constitutional right of the detenu under Article 22(5) of the Constitution.

In view of this legal infirmity in the impugned order of detention it is not necessary to consider the other contentions urged by Sri Chander Kumar.

12. Accordingly, we make the rule absolute, quash the impugned order of detention and direct that the detenu be set at liberty forthwith. Ordered accordingly.

Before parting with the case we think we ought to express some concern at the unsatisfactory manner in which attention has been bestowed on the preparation of the grounds of detention and the counter-affidavit resulting in the invalidation of the detention. The prejudicial activities attributed to the detenu are, indeed, of disturbing proportions which might justify serious apprehensions as to their propensities for the future and grim implication for the country's economy. We were constrained to invalidate the detention in view of the differences in the

stands made manifest as between the grounds of detention communicated to the detenu on the one hand and the counter-affidavit on the other respecting the significance and relevance of the seizure of 53 gold pieces of primary gold. This is a matter for some introspection at the appropriate official quarters.