

(1986) 01 MAD CK 0030
In the Madras High Court
Case No : Writ Petition No. 10933 of 1985

S. Ramanathan

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 28-01-1986

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 5A, 8, 9
Constitution of India, 1950 — Article 22
Customs Act, 1962 — Section 112, 135

Citation : (1987) 13 ECC 317

Hon'ble Judges : V. Ramaswami, J;E.J. Bellie, J

Bench : Division Bench

Judgement

V. Ramaswami, J.—This is a petition for the issue of a writ of habeas corpus to produce and set at liberty, one Raman detained under the

provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the Act) by an

order dated 18-7-1985. The petitioner is the father of the said detenu.

2. The detenu is a foreign national, a citizen of Singapore and is a Barrister practising at Singapore. His father, the petitioner, is stated to be a

retired Income Tax Officer. On the 25th day of May, 1985 the detenu who is a holder of Singapore passport arrived as a passenger from

Singapore by Air India flight at 10 P.M. at the Madras Airport. He arrived with one VIP green-colour suit case, another black colour Echolac suit

case and one brown carton with the description Akai-VS-3AV-VCR. When the Customs Officers took up the above packages for examination,

the detenu declared that those packages were his own and that he had one cassette recorder and other goods like textiles, chocolates, etc., worth

\$ 200. Thereafter, on the ground that the Echolac suit case was heavy, the Customs Officers asked the detenu to open the suit case. When he was not able to open with the key produced by the detenu, the suit case was broken open before the detenu. The suit case contained gold bars, 28 in number each one weighing one kg. with foreign markings wrapped with adhesive tape and a brown colour packing concealed in ready-made shirts. The value of the 28 gold bars is stated as Rs. 63,14,000. A statement is stated to have been recorded from the detenu in which it is alleged that he told the customs authorities that one Chandran of Singapore came to him with a suit case and asked him to hand over the same to his brother who would be at room No. 233, Hotel Taj Coromandel, Madras, that since the suit case was very heavy, the detenu asked this Chandran as to what it contained and that the said Chandran told him that the suit case contained 28 gold bars. It is said that in his statement the detenu further stated that though in the first instance, he was reluctant to take it, when he was promised that he would be paid Rs. 3,000 for his expenses at Madras, he had no other go and, therefore, accepted to carry the gold to Madras. The other part of the statement is not necessary to be referred to here.

3. In the follow up action in execution of a search warrant, the residential premises of one L. Sankaran, who is the detenu's younger brother's son-in-law was searched and an air mail letter addressed to him was found and seized under a mahazar. A statement also was recorded from him. The customs officials also searched the premises of one K.R. Srinivasan who is related to the detenu. When they made enquiries at Hotel Taj Coromandel with regard to one Shanmughanathan alias K.S. Nathan to whom the detenu was to hand over the package, it was learnt that the above person though checked in at the hotel on 23-5-1985 in the name of K.S. Nathan and room No. 233 was allotted, after staying in the hotel overnight vacated the room on 24-5-1985 at 6 A.M. On the ground that the detenu had no licence or valid permit to import the said 28 gold bars and by importing the same concealed in ready-made shirts, the detenu has committed an offence punishable u/s 135 of the Customs Act and by attempting to conceal them and clearing them without declaration to customs authorities he was also liable for penal action u/s 112 of the Customs

Act, 1962, he was arrested at 12 noon on 26-5-1985 and produced before the Additional Chief Metropolitan Magistrate, Economic Offences,

Madras and the Magistrate ordered the detenu to be kept under customs" custody and to produce him during Court hours on 27-5-1985. The

detenu was again produced in Court as ordered and he was remanded to judicial custody on 27-5-1985.

4. It appears that on 11-6-1985 the customs authorities, whom we may hereafter call as the sponsoring authorities so far as the detention is

concerned, sponsored invoking the provisions of the COFEPOSA Act and all the materials collected up to 11-6-1985 were placed before the

detaining authority for such action as he may consider it necessary under that Act. The detaining authority, taking into consideration all the facts and

materials which were placed before him as also the statement, mahazars, etc., accompanying thereto and being satisfied that it was necessary to

detain him under the provisions of the Act in order to prevent him from indulging in such activities directed the detention of the detenu u/s 3(1) of

the Act by his order dated 18-7-1985. The detenu was also informed that he had a right to. make a representation in writing against the order

under which he was kept in detention and the authority to whom such representation will have to be made. He was further assured by the order

that any representation made by him will be considered by the Government and will also be placed before the State Advisory Board for

consideration of his case u/s 8 of the Act. He was further informed that he would be entitled to be heard in person by the Advisory Board and that

if he wants to make written representation before the Advisory Board he may send the same to the Chairman of the Board through the

Superintendent, Central Prison, Madras. He was also informed that if he desired to have the assistance of a friend, other than a lawyer at the time

of personal hearing, he could keep his friend ready for the purpose The competent authority has also made a declaration u/s 9(1) of the Act as

amended.

5. It appears that after he was remanded to judicial custody on the same day, namely 27-5-1985 the detenu filed an application for bail through a

lawyer and that petition was dismissed. Again on 10-6-1985, he filed a second application for bail and that petition was dismissed on 11-6-1985.

He filed a third application on 22-6-1985 and in that application, by an order dated 25-6-1985, the Court directed him to be released on bail on

condition of his furnishing a cash security for a sum of Rs. 10,000 and reporting before the custom's authorities every day at 11 A.M. and to

fulfilment of those conditions he was actually released on bail On 26-6-1985.

6. It is further stated in his affidavit filed in support of the petition that the detenu was complying with these conditions of bail and reporting before

the customs authorities every day at 11 A.M. and during such period the customs officers used to ask him various questions relating to this incident

of smuggling and he was giving such information as was in his possession. He also stated that he got three photographs with a letter on 10-7-1985

and handed them over to the customs authorities. These three photographs are stated to be those of Chandran his brother Shanmugam and another

brother of Chandran who is stated to be the person who gave the suit case.

7. Mr. Govind Swaminathan, learned Counsel for the petitioner contended that the sponsoring authorities placed before the detaining authority only

those materials that were available up to 11-6-1985 and though the order of detention is dated 18-7-1985, the materials that were gathered from

11-6-1985 till 18-7-1985 were not placed before the detaining authority. In particular he contended that the three bail applications in which the

detenu claimed that he was innocent and was not guilty of smuggling had not been placed before the detaining authority. The fact that he was

released on bail on certain conditions and that he was strictly complying with those conditions and has been co-operating in the investigation by the

customs authorities without any demur and that he had also produced the three photographs above mentioned had not been placed before the

detaining authority. The learned Counsel further contended that the fact that the passport of the detenu had been seized by the customs authorities

had also not been intimated to the detaining authority. According to the learned Counsel these documents are material evidence which will have a

bearing on the satisfaction of the detaining authority to detain or not to detain the detenu under the the Act and that by not furnishing those

documents there was not a full disclosure of the material facts to the detaining authority and that had vitiated the order of detention itself. The

learned Counsel in fact graphically put it by saying that subjective satisfaction on

half of the facts is no satisfaction at all.

8. It was not disputed by the learned Public Prosecutor that only the facts that were available up to 10-6-1985 were placed before the detaining

authority. However, it was the contention of the learned Public Prosecutor that the materials in the form of bail applications, the conditions imposed

by the bail order and the production of the photographs could not be considered to be such material facts which would have a bearing on the

subjective satisfaction of the detaining authority and the materials available as on that date themselves are quite sufficient to invoke the provisions of

the Act and the non-furnishing of those particulars to the detaining authority does not, in any way, affect the order of detention. The learned public

prosecutor further contended that the passport was not seized by the customs authorities and that they were detained and produced before the

Magistrate at the time of remand and it is in the custody of the Magistrate.

9. At one stage there was a discussion as to whether these facts which were not placed before the detaining authority could be considered as

ground"" within the meaning of Section 5-A of the Act so that we can test the validity of the order with reference to the provisions of that Section.

That Section provided that where a person has been detained in pursuance of an order of detention under Sub-section (1) of Section 3 which has

been made on two or more grounds such order of detention shall be deemed to have been made separately on each of such ground and

accordingly such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are vague, non-existent,

not relevant, not connected or not proximately connected with such person, or invalid for any other reason whatsoever. The learned Counsel for

the petitioner contended that in this case there is only one such ground, namely, that the detenu is alleged to have attempted to smuggle into India

contraband gold and all those other material available are evidence or material facts relating to that ground and that, therefore, the provisions of

Section 5-A are not attracted. The learned Counsel's argument thus is that the word ""ground"" in Section 5-A would mean instances, though the

dictionary meaning of the word ""ground"" may include reasons or ""basis"" of justification for a decision or a conclusion. If we consider the word

ground"" in Section 5-A as meaning reasons or basis of justification, and if one

reason is bad it will not affect the decision ultimately arrived at.

There are several decisions interpreting Section 5-A which may be noticed now.

10. In *State of Gujarat v. Chamanlal* AIR 1981 SC 1484 with reference to the scope of Section 5A, the Supreme Court observed:

What the Act provides is that where there are a number of grounds of detention covering various activities of the detenu spreading over a period or

periods, each activity is a separate ground by itself and if one of the grounds is irrelevant, vague, or unspecific then that will not vitiate the order of

detention. The reason for enacting Section 5-A was the fact that several High Courts took the view that where several grounds are mentioned in an

order of detention and one of them is found to be either vague or irrelevant then the entire order is vitiated because it cannot be predicated to what

extent the subjective satisfaction of the authority could have been influenced by the vague or irrelevant ground. It was to displace the basis of these

decisions that the Parliament enacted Section 5A in order to make it clear that even if one of the grounds is irrelevant but the other grounds are

clear and specific that by itself would not vitiate the order of detention.

This decision of the Supreme Court shows that each of the activities of the detenu would constitute a separate ground.

11. In *Shakul Hammed A.M.S. v. The Union of India* (1982) Law Weekly CrI 136 a Division Bench of this Court has stated with reference to

Section 5-A as follows:

Section 5A was referred to in argument. It is a new provision in the COFEPOSA. It says that where two or more grounds exist for a detention,

the order will stand even if the Court should think that one of them or some of them are wrong and untenable. The order will stand, that is, so long

as there is at least one ground left. This provision is obviously intended to neutralise the effect of the earlier case law on the subject. Previous

decisions of Courts were to the effect that given the subjective satisfaction of the detaining authority on the grounds stated, the failure of even one

ground will vitiate the detention order irretrievably. For, it was thought that a detention order is one and indivisible, so that if one ground is lost, the

whole thing goes. The grounds, it was said are not severable. Section 5A says that they can be. The grounds are now severable. That is the word

the marginal note to the section employs.

* * * *

If there are several pieces of evidence which are referred to in support of a ground of detention, and that happens to be the one and the only

ground for detention, and the Court finds that one piece of evidence relied on by the detaining authority is non-existent or irrelevant or

misconceived or misunderstood, then, that would tarnish the subjective satisfaction of the detaining authority as a whole. This is the principle and

which we have, in fact, applied.

If we apply this test to this case, it is clear that there is only one ground though there are number of facts relating to the same ground. Section 5-A

is therefore of no assistance for validating the order on non-consideration of the material or not placing the material facts above referred to.

12. The question whether a particular fact which was not placed before the detaining authority is a material fact or a fact of inconsequential nature

is one that could be decided on an objective basis by this Court, though, if it was a material fact, what influence it could have had on the detaining

authority is not open for any assessment by this Court, the detention order being the subjective satisfaction of that authority. Therefore the learned

Public Prosecutor may be right in asking us to go into the question whether it is a material fact or a matter of inconsequential nature. The learned

Public Prosecutor then contended that the detenu had at no stage retracted from the statement given by him at the time of his arrest in which he had

confessed his knowledge of the contents of the box and he was transporting at the instance of one Chandran on his promising to pay a sum of Rs.

3,000. She also contended that the bail application cannot be taken as a statement of the detenu especially when that was not signed by the detenu

himself but signed only by his advocate. In the first bail application, on 27th May, 1985 itself there was not even a denial of the voluntary nature of

the statement given by the detenu and it was only stated that the detenu was innocent and had not committed any offence as is alleged in the

complaint. In the second and the third bail applications there is a further statement that the confessional statement recorded from the detenu was

not voluntary and it was not admissible and that he did not have knowledge of the contents of the suit case in which gold bars were found. As

already stated, these applications were signed only by the advocates and they

are in the nature of petitions and not even affidavits. The learned Public Prosecutor also drew a contrast between the civil and criminal cases and the importance of pleadings in such types of litigations. There can be no doubt that these petitions could not be taken as a retraction of the confessional statement made by the detenu. At best they amount to a statement that the detenu had informed the advocate that the statement was not given by him voluntarily and that he was innocent, because we cannot assume that the advocate had made the statement without instructions from his client, the detenu. Even assuming that these statements would not strictly amount to a retraction of the confessional statement made by the detenu, the question for consideration is whether they are material facts which should have been placed before the detaining authority.

13. The bail petitions do not stand by themselves. There was an order on the third of those petitions granting bail to the detenu on certain conditions. The fact that the detenu was on bail on certain conditions and till the date of detention order he had been strictly complying with the same is, in our opinion, certainly a material fact which could have been placed before the detaining authority. The fact that he had to report to the customs authorities every day combined with the fact that the passport had been detained by the criminal Court may, to a certain extent, establish that the detenu might not escape criminal proceedings or, to a large extent, it will prevent him in acting in further smuggling activities. The fact that he was cooperating with the customs authorities and he was furnishing whatever material he was in possession of and in fact he produced the photographs of three brothers who are supposed to be involved in this smuggling activity is also relied on by the learned Counsel for the petitioner.

These are also, in our opinion, material facts and circumstances which should have been placed before the detaining authority. Whether it was a deliberate omission to place these materials before the detaining authority or the customs authorities are guilty of any such intentional withholding of the material makes no difference. Nor does the magnitude of the offence could protect any such violation of the safeguards provided under Article 22(5) of the Constitution and under the COFEPOSA Act.

14. In *Ashadevi v. K. Shivaraj* AIR 1979 SC 447, the Supreme Court observed: It is well settled that the subjective satisfaction requisite on the part of the

detaining authority, the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order.

The non-placing of material facts before the detaining authority, therefore, would vitiate the order of detention.

15. It is then contended by the learned Counsel for the petitioner that the order of detention refers only to the facts up to 11-6-1985 and as on 11-

6-1985 the detenu was kept in central prison under a judicial order and the detaining authority had not considered this fact that he was in judicial

remand and that in spite of that fact he considered it necessary to detain him under the Preventive Detention Act and that vitiates the order. Though

on the date of the detention order the detenu had been released on bail, that fact was not known to the detaining authority and he should have,

therefore, proceeded on the assumption that the detenu was still in detention under a remand order in these circumstances there was a clear

necessity for the detaining authority to consider whether in spite of his being in jail under a remand order, there should be a separate order under

the COFEPOSA Act. In this connection, the learned Counsel relied on two decisions of the Supreme Court reported in Vijay Kumar Vs. State of

Jammu and Kashmir and Others, and Biru Mahato Vs. District Magistrate Dhanbad, . In the first of those cases, the detaining authority was not

aware of the fact that the detenu was held in jail and he had also not stated that keeping in view that fact that the detenu was held locked up in jail

yet it was considered necessary for preventing him from acting in a manner prejudicial to the security of the State to pass the detention order. On

these facts the Supreme Court observed:

Preventive detention is resorted to to thwart future action. If the detenu is already in jail charged with a serious offence he is thereby prevented

from acting in a manner prejudicial to the security of the State. May be, in a given case there yet may be the need to order preventive detention of

a person already in jail. But in such a situation the detaining authority must disclose awareness of the fact that the person against whom an order of

preventive detention is being made is to the knowledge of the authority already

in jail and yet for compelling reasons a preventive detention order needs to be made.

In the case before them, there was nothing to indicate the awareness of the detaining authority that the detenu was already in jail and yet the impugned order was required to be made. In these circumstances, the Supreme Court held that ""clearly exhibits non-application of mind and would result in invalidation of the order."" In the other decision reported in *Biru Mahato Vs. District Magistrate Dhanbad*, , the Supreme Court made the following similar observations:

One can envisage a hypothetical case where a preventive detention order may have to be made against a person already confined to jail or detained. But in such a situation as held by this Court it must be present to the mind of the detaining authority that keeping in view the fact that the person is already detained a preventive detention order is still necessary. The subjective satisfaction of the detaining authority must comprehend the very fact that the person sought to be detained is already in jail or under detention and yet a preventive detention order is a compelling necessity. If the subjective satisfaction is reached without the awareness of this very relevant fact the detention order is likely to be vitiated. But as stated by this Court it will depend on the facts and circumstances of each case.

Number of decisions have been rendered by this Court following these two decisions of the Supreme Court which are not necessary to be referred. Suffice it to say that in this case the detention order has not mentioned that the impugned order was required for any compelling reason even though the detenu is already in jail. On the ratio of the judgments of the Supreme Court, on this ground alone the detention order is liable to be set aside.

16. The learned Counsel for the petitioner also contended that there was a delay in consideration of his representation. We are not persuaded to hold that there was any non-consideration of the representation continuously and the order could not be stated to be vitiated on that ground.

However, for the reasons stated earlier, the detention order is not in conformity with law and, therefore, is liable to be set aside and accordingly it

is set aside. The respondents are directed to set the detenu at liberty forthwith. We, however, make it clear that the conditions on which the bail

was granted shall continue till the proceedings under the Customs Act and the prosecution if any taken under that Act are completed and the judgment is delivered by the criminal Court. Till such time the passport also shall not be handed over to the detenu.