
(2010) 02 KAR CK 0099
In the Karnataka High Court
Case No : Writ Petition No. 133 of 2009 (HC)

Shanawaz

APPELLANT

Vs

Government of Karnataka and Others

RESPONDENT

Date of Decision : 11-02-2010

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
(COFEPOSA) — Section 3, 3 (1), 3 (1) (i)
Constitution of India, 1950 — Article 22 (5)

Citation : (2011) 4 KarLJ 42 : (2011) 4 KCCR 2510

Hon'ble Judges : V. Jagannathan, J; Manjula Chellur, J

Bench : Division Bench

Advocate : Kiran S. Javali, for Chandrashekara K, for the Appellant; K.M. Nataraj, A.A.G. and E. Indires, A.G.A., for the Respondent

Final Decision : Allowed

Judgement

Manjula Chellur, J.—This writ petition is filed challenging the order of detention dated 4-6-2009 in No. HD 5 SCF 2009 by the 2nd Respondent herein.

2. The writ petition is filed challenging the order of detention on several grounds.

3. The Petitioner herein is the brother of detainee by name Mr. Khaja Mainuddin Yusufji and the above said detention order came to be passed by the 2nd Respondent u/s 3 of the Cofeposa Act -(Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974) (hereinafter referred to for short "the Act"), preventing the detainee from acting in any manner from smuggling of Indian Currency notes. So far as detention order being served on the detainee on 4-6-2009 there is no dispute. According to the Petitioner the detention order referred to above is bad as the same is vitiated by several facts, which are detained below:

1. Delay in considering the representation addressed to the detaining authority by the detainee after service of detention order;

2. There is no application of mind by the detaining authority to the fact that there was no propensity to engage in any prejudicial activities as the passport of the detainee was seized;
3. The translation of order of detention in Urdu language is at variance with the English version of the order of detention;
4. The Advisory Board did not consider the representation of the detainee seeking assistance of a lawyer to represent the detainee before the Advisory Board;
5. Non-application of mind is reflected in the order of detention as it is not in conformity with the Act; and
6. There is no strict compliance of law, and in the absence of such compliance the order of detention is vitiated.

4. As against this, the State has filed objection statement parawise and according to the State, there is no violation of any procedural requirement and based on the facts of the case considering all the material evidence including the minute details brought on record, the detaining authority came to subjective satisfaction and then passed the order of detention. Therefore, the very writ petition deserves to be rejected. According to the State, the representation sent by the detainee in Urdu language was considered and there is application of mind to the facts of the present petition. Therefore, writ petition deserves to be dismissed.

5. The point that would arise for our consideration is:

Whether the Petitioner could make out a case for writ in the nature of habeas corpus declaring the detention of Mr. Khaja Mainuddin Yusufji as illegal and void ab initio?

Delay in considering the representation of the detainee:

6. In the case of *Jayanarayan Sukul Vs. State of West Bengal*, , a judgment by Constitutional Bench, it was held that the appropriate authority is bound to give an opportunity to the detainee to make a representation and such representation has to be considered by the appropriate authority and the same is independent of the opinion expressed by the Advisory Board. Similarly, the appropriate authority i.e., the Government has to exercise or base its opinion and judgment on the representation made by the detainee before sending the case along with the detainee's representation to the Advisory Board.

7. In the case of *Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others*, , it was held that in addition to his right to make representation to State Government or Central Government, he has a right under Article 22(5) of the Constitution and said right has to be informed to the detainee. Even non-information of such valuable right can vitiate the detention order. Therefore, the authority which can pass the order of detention has the power to revoke such order. Hence, the consideration of representation made by the detainee by the

said authority as expeditiously as possible is of utmost importance. Therefore, if there is lethargic disposal of such representation by the concerned authority, the order of detention would definitely vitiate the proceedings.

8. In the case of Pabitra N. Rana Vs. Union of India (UOI) and Others, : Pabitra N. Rana Vs. Union of India (UOI) and Others, , even 17 days of unexplained delay in considering the representation by appropriate Government, the Apex Court held that the same would vitiate the detention order resulting in the detention order being void.

9. According to the Petitioner, the detainee had submitted representation in Urdu language to the detaining authority which came to be forwarded through the third Respondent and the same was not considered by the detaining authority till the writ petition came to be filed. Therefore, non-consideration of the representation itself vitiates the detention. The records would reveal that there was delay at every stage, i.e., consideration of representation and when the decision was arrived at and so also the time when it was handed over to the detainee in the prison. The authority without any loss of time has to consider the representations, which were given from stage to stage to different authorities and the failure, would vitiate the proceedings. According to the State, the representation in Urdu was given on 14-7-2009 and the same was received on 23-7-2009. After receipt of the said Urdu representation it was forwarded to the Screening Committee or Sponsoring Committee for their parawise remarks on 27-7-2009. It was received on 30-7-2009 and the date of rejection of the said representation by the Respondent is 7-9-2009. Simultaneously, on 23-7-2009, the representation was made to the Advisory Board and the same was sent to the Sponsoring Authority for comments on 25-7-2009. Similarly, the Sponsoring Authority sent the reply on 30-7-2009, the meeting of the Advisory Board was held on 12-8-2009, the decision of the Advisory Board was received on 14-8-2009 and the same was communicated to the Respondent.

10. It is further contended on behalf of the Petitioner that each authority, which acts under the Act at different stages, is required to consider the representation independently and arrive at independent opinion after applying its mind to the facts placed before the concerned authority without any delay. But on facts, in the present case, we note that the representation in Urdu language is dated 14-7-2009 and the comments of Sponsoring Authority were sent within a week to the Detaining Authority. However, the detaining authority rejected the representation only on 7-9-2009. Whether, this would vitiate the proceedings?

11. Then coming to the delay in considering the representation, though the order of detention came to be made on 4-6-2009 and a representation was given on 23-7-2009, only on 7-9-2009 the detaining authority considered the representation and rejected the same. There is no explanation why almost 7 weeks time was taken by the detaining authority to consider the representation of the detainee. As a matter of fact, after submission of report the opinion of the Advisory Board was sought and the Advisory Board gave its opinion in the month

of August 2009 itself. After an inordinate delay from the date of the opinion of the Advisory Board the detaining authority considered the representation of the detainee. Therefore, there is inordinate delay on the part of the authority concerned in considering the representation.

12. The learned Additional Advocate General contended that there was no procedure to consider the representation of the detainee by the detaining authority as such representations given to the State and Central Government were considered by the concerned authorities.

13. As already stated above, it is incumbent upon the authority, which passes the detention order to consider the representation as the said authority can even revoke the detention order passed by it.

Therefore, non-consideration of the representation in time or inordinate delay in considering such representation would also result in vitiating the order of detention. Therefore, when the authority was required to act in a particular manner without any delay and when such compliance is not made, the result would be vitiation of the order of detention.

Non-application of mind:

14. So far as this ground of non-application of mind to the fact about the absence of propensity on the part of the detainee to repeat the alleged activities as the passport was seized, the learned Counsel for the Petitioner relies on:

1. Rajesh Gulati Vs. Govt. of N.C.T. of Delhi and Another, ;
2. T. Mukesh and Ors. v. Government of Karnataka, Bangalore and Ors. 2007(3) Kar. L.J. 442 (DB); 2006(5) AIR Kar. R 13 (DB); and
3. Gimik Piotr Vs. State of Tamil Nadu and Others, , Cri. A. No. 2121 of 2009 (arising out of SLP (Cri.) No. 6201 of 2009).

15. The gist of the above cases is detention law must be strictly followed both substantively as well as procedurally because the object of such law is not to punish but to prevent certain crimes. If the appropriate detaining authority is satisfied that with a view to prevent such person from carrying on any of the offensive activities enumerated therein, it is necessary to detain such person. The satisfaction of the detaining authority is not a subjective one based on its emotions, beliefs or prejudices. There must be a real likelihood of the person being able to indulge in such activities, therefore such detention was necessary. When the passport of the detainee was seized, question of the detainee likely to travel clandestinely for the purpose of alleged illegal activities would not arise. This would only indicate despite the absence of his passport the detainee could or would be able to continue his activities and such opinion is based on no material but was a pure speculation. This is nothing but non-application of mind.

16. What needs to be proved is the potentiality of the propensity of the person engaged in future prejudicial activities. Even single solitary act can prove the

propensity and potentiality of the detainee to carry on similar activities in future. When once the passport is retained by the authorities concerned, the likelihood of the detainee indulging in smuggling activities was effectively foreclosed. When once the chances of the person to move out of the country is curtailed, the chances of detainee engaging in such activities in the future is bleak. Therefore on speculation the life and liberty of a person cannot be interfered with.

17. According to the Petitioner, when once the passport of the detainee was seized, the detaining authority ought to have considered the fact that there was practically no possibility of repetition of such act by the detainee.

18. Coming to the facts of the present case, the very order of detention is based on the facts available as on the date of passing of detention order. The authority which passed the said order must have convincing material indicating that there is likelihood of the Petitioner indulging in such smuggling activities in spite of seizure of the passport. In other words, such orders cannot be on the basis of pure speculation but there has to be some material before the authority. In the present case, the concerned authority did not have any material indicating that the present detainee is having more than one passport in his name; he is an imposter and there is likelihood of continuation of such activities. Therefore, definitely there is non-application of mind by the detaining authority so far as propensity to engage in similar activities by the detainee.

Improper translation of the order from English to Urdu:

19. Then coming to the third ground of argument, according to the Petitioner when the order of detention is made in the language not known to the detainee, a duty is cast on the concerned authorities to get the said order of detention translated to the language known to the detainee. Apparently, in the present case the detainee was Urdu speaking person and as a matter of fact, translation of English version of detention order was made to Urdu version and the same was served. According to the Petitioner, comparison of English version of detention order with Urdu version there is variance. Therefore, the order of detention is vitiated. Reliance is placed on:

1. Vijay Kumar Dharna alias Koka Vs. Union of India and others, ;
2. Writ Petition (HC) No. 8 of 2006 (on the file of Karnataka High Court);
3. Smt. Bablabai Vs. Union of India, .

20. When the detention order and the grounds of detention are in one language and are at variance apart from they being at variance with the English version also, such discrepancy would come in the way of making effective representation against the impugned detention order. If variance leads to confusion in the mind of the detainee whether he should represent against the grounds in the detention order or the satisfaction recorded in the grounds of detention, it would lead to a situation where the detainee would be unable to make an effective representation against the order of detention. If the translated version in Urdu and the English

version of the grounds of detention are at variance, it would come in the way of effective representation, detention deserves to be set aside.

21. In the present case. The order of detention is at Annexure-A, which reads as under

GOVERNMENT OF KARNATAKA

No. HD 5 SCF 2009

Karnataka Government Secretariat, Vidhana Soudha, Bangalore, dated 4-6-2009

ORDER

Whereas, I, A.K.M. Nayak, IAS, Additional Chief Secretary to Government, Home Department, Government of Karnataka specially empowered u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974) am satisfied that, with a view to preventing Sri Khaja Mainuddin Yusufji from acting in any manner from smuggling of Indian Currency notes, it is necessary to make the following order.

2. Now, therefore, in exercise of the powers conferred by Section 3(1) and Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974), I hereby direct that said Sri Khaja Mainuddin Yusufji be detained and kept in custody in Central Prison, Bangalore, on the grounds annexed herewith.

(A.K.M. Nayak) Additional Chief Secretary to Government, Home Department

To

Sri Khaja Mainuddin Yusufji, Holder of Indian Passport No. G8552551/A 0457104
No. 50, Safwan Mansion, New Madeena Colony, Heble Bhatkal, North Canara-581 320

And also at the following address

Sri Khaja Mainuddin Yusufji, Holder of India Passport No. G8552551/A 0457104
No. 354, Yusuffi House, 3rd Cross, Madeena Colony, Bhatkal, North Canara-581 320

(Through C.O.D., Bangalore)

Copy to:

1. The Inspector General of Police, Economic Offences, Bangalore.

2. The Additional Director, Directorate of Revenue Intelligence, Bangalore Zonal Unit, "Rajarajeshwari Krupa", No. 503, 3rd "A" Main, OMBR Layout, Bangalore-560 043 - Copies of the order, Grounds of Detention, Relied upon documents also to be served on the detainee through the COD, Bangalore in the language known to the detainee.

3. The Deputy Secretary (COFEPOSA), Government of India, Ministry of Finance, Department of Revenue, 6th Floor, "B" Wing, Janpath Bhawan, Janpath, New Delhi.

4. The Additional Director General of Police, Prisons, Sheshadri Road, Bangalore.

5. The Chief Superintendent, Central Prison, Bangalore.

6. The Competent Authority, SAFEMFOPA, No. 64/1, G.N. Chetty Road, T. Nagar, Chennai-600 017.

22. The reading of the above order clearly indicates that such detention order was made with a view to prevent the detainee from smuggling of Indian currency notes in any manner. Therefore, the detention order was made as per the powers conferred u/s 3(1) and 3(1)(i) of the Act. When we look at the translation of Annexure-A at A1 and A2, viz., the Urdu version is at Annexure-A1, translation of Urdu version is at Annexure-A2, the Urdu version has used the word "taskari". In other words the true translation of the Urdu version indicates that in order to prevent the detainee from stealing Indian currency the order of detention came to be passed u/s 3(1) of the Act. There is lot of variance between the two activities i.e., smuggling and stealing. It is nobody's case that the detainee indulged in the crime of stealing Indian currency and if that is so, the very application of the Act would not arise. Therefore, unless the detainee was served with a proper and meaningful order or true version of the detention order, there is no question of detainee understanding what exactly was the order passed against him to prevent him from what activities. Therefore, in the present case apparently the translated order imports entirely different meaning from the original detention order, which is at Annexure-A.

Right to seek assistance of a lawyer:

23. Then coming to the next contention, whether the detainee had right to seek for assistance of a lawyer. According to the Petitioner, even denial of assistance of a lawyer to represent his case properly before the Advisory Board would vitiate the proceedings. According to him such representation was made but the Advisory Board had only permitted non-lawyer or next friend of the detainee to present the case on behalf of the detainee. As a matter of fact, an opportunity was offered to the detainee to submit his case by the next friend who is a non-lawyer. Therefore, it is not a case where there is denial of opportunity to the detainee. Even otherwise there is no provision in the State of Karnataka to give assistance of a lawyer to represent the detainee before Advisory Board like in Bombay and Chennai. Therefore, so far as this ground of the Petitioner we have to hold the same in the negative.

Variance of the words used in the detention order:

24. The next ground urged was that the order of detention was not in conformity with the words used in the Act. The learned Counsel relies on the following citations:

1. Dr. Ram Manohar Lohia Vs. State of Bihar and Others, ;
2. Kishori Mohan Bera Vs. The State of West Bengal, ;
3. Akshoy Konai Vs. State of West Bengal, ; and
4. R. Prakash v. State of Karnataka 1980(1) Kar. L.J. 252 (SC): 1980 Cri. L.J. 165 (DB).

25. The gist of the above cases is that if the order of detention is not in conformity with the words in the Act, it vitiates the detention order. Strict compliance with the letter of the rule is the essence of the matter. If the words used in the order of detention results in variance between the activities complained of and the words used in the order of detention, it would not be in conformity with the provision or the clause under which the detention order was made. The words used in the order of detention should indicate that the authority passing the order was sure in his mind about the precise grounds for detaining the detainee and he should not mechanically or loosely use the words of the section. The order of detention must speak out the necessary words why such order was made and it should not give scope for wrong interpretation.

26. According to the learned Counsel for the Petitioner, a reading of Section 3(1) of the Act clearly indicates, what words exactly the order of detention should contain when such an order is made. Reading of Section 3(1) with other Sub-sections makes it clear that it contains two parts, first part is to prevent a person from acting in any manner prejudicial to the conservation or augmentation of foreign exchange and the second part refers to smuggling of goods, abetting the smuggling of goods, or engaging in transporting or concealing or keeping smuggled goods, etc.

27. In the present case, the authority concerned was intending to make an order of detention to prevent the detainee from smuggling Indian currency. But when we look at the words in the order of detention, the words used by the detaining authority refers to first portion of the section with reference to foreign exchange and the next portion is with reference to smuggling of Indian currency. Therefore, when the detention order is made the detaining authority did not even understand what exactly was the order it wanted to make. Therefore, such mistake has crept in, in the order of detention.

28. The order of detention in question at Annexure-A refers to an order pertaining to conservation and augmentation of foreign exchange and not smuggling of Indian currency. In other words, whenever a detention order is made, the detainee must be able to understand for what changes such detention order was made and what act he is prevented from doing. In the absence of making clear why exactly the detention order is made against the detainee, definitely it would lead to confusion in the mind of the detainee whether the detention was in view of preventing him from acting in any manner prejudicial to the conservation and augmentation of foreign exchange or with a view to prevent

him from smuggling Indian goods including currency. Therefore, the order of detention in question definitely is defective.

29. It is well-settled that procedure contemplates a particular manner, the requirement should be in strict compliance of law and the authority concerned has to act in strict conformation of procedure. When the detaining authority has not properly applied its mind to the facts of the present case, to understand what exactly was the complaint against the detainee, why such detention order has to be made and to prevent him from doing what, it would not be a proper order of detention in accordance with law.

30. In the present case as noted above, translation of the detention order itself was at variance when the Urdu version was given to the detainee which is the language of the detainee. Even the English order of detention does not indicate whether the detaining authority was preventing the detainee from doing an act with regard to the first portion of Section 3(1) or second portion of Section 3(1). Therefore, there is absolutely no application of mind whatsoever to the facts on record and the detaining authority did not know what order it was making.

31. The entire discussion made above would indicate that apart from inordinate delay in passing the order of detention, there was no application of mind regarding propensity of the repetition of the activities by the detainee and so also the actual words used in the order preventing the detainee from carrying out such activities.

32. Having regard to the above discussion, so far as the present detainee is concerned, we are of the opinion that the detention order dated 4-6-2009 is bad in law and is required to be set aside.

33. Accordingly, the petition is allowed. The detention order dated 4-6-2009 is set aside. We direct the detainee to be set at liberty forthwith if not required in any other case.