

(2016) 04 MAD CK 0176

In the Madras High Court

Case No : HCP. Nos. 2020 and 2053 of 2015

Shri Omprakash Triloki Chandwani

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 27-04-2016

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1)(i)
Constitution of India, 1950 — Article 22(5), 22(5), 226

Citation : (2016) 2 MadWNCri 522 : (2016) 3 MLJCriminal 701

Hon'ble Judges : Mr. S. Nagamuthu and Mr. K. Kalyanasundaram, JJ.

Bench : Division Bench

Advocate : Mr. B. Kumar, Senior Counsel for in both HCPs Mr. S. Palanikumar, Advocates, for the Petitioners; Mr. A.N. Thambidurai in both HCPs Public Prosecutor, for the Respondents; Mr. G. Rajagopal, SCGSC, for the Respondent No. 2

Final Decision : Allowed

Judgement

K. Kalyanasundaram, J.—The petitioners herein have been detained in the Central Prison, Puzhal, Chennai, in pursuance of the detention order passed by the 1st respondent under section 3[1][i] of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 [Central Act 52 of 1974] in G.O. No. SR. 1/65-3/2015 & SR. 1/65-7/2015 dated 22.07.2015. They have come up with the present Habeas Corpus Petitions, challenging the said detention orders.

2. The gist of the allegations made against the detenus is as follows :-

(a) On 22.06.2014, when the detenu Om Prakash Triloki Chandwani (hereinafter referred as detenu I) arrived Chennai Airport from Singapore by Air India, he was found carrying twenty three (23) numbers of one kilogram gold bar (23000 grams) into India without any valid document by way of concealment and non-declaration to customs authorities.

(b) The detenu I, Om Prakash gave a voluntary statement on 23.06.2014 stating

that the co-detenu Pritpal Singh Kalsi (hereinafter referred as Detenu II) is his friend and that the detenu I Om Prakash agreed for carrying 23000 grams of gold from Singapore to Chennai and handing over the same to detenu II, Kalsi at transit lounge payment for Rs. 50,000/-. He carried the gold by concealing in the handbag to evade customs duty and without mentioning in the declaration card.

(c) The detenu II Kalsi, in his statement admitted that he organised this smuggling of gold from Singapore to transit the same to New Delhi. As per the plan, the detenu Kalsi was waiting at common transit lounge, however, before taking possession of the gold to transit to New Delhi, detenu I Om Prakash was caught by the Customs officials.

(d) Based on the statements of detenus dated 23.06.2014, they were taken into custody and they were produced before the learned Judicial Magistrate, Alandur for remand. While in remand, the detenus filed application seeking bail on 24.06.2014. That was dismissed on 07.07.2014. Two separate bail applications were filed by the detenus on 11.07.2014, which came to be dismissed on 22.07.2014. Third such applications were filed before the learned Judicial Magistrate, Alandur on 24.07.2014, in which bail was granted on 04.08.2014. Finally, a show cause notice was issued to the detenus as to why the foreign currencies and gold bars/ornaments should not be confiscated. Even before a reply could be given to the said show cause notice, the impugned order of detention came to be passed on 22.07.2015. In pursuance of the said detention order, the detenus have been in the Central Prison, Puzhal, Chennai.

(e) In this regard, on 29.06.2015, the detenus made a representations to the State, Central & detaining authority by Regd. Post and contending that the detention order is arbitrary and the same should be withdrawn. The State Government, however, rejected the representation on 03.09.2015, thereby declining to withdraw the said order of detention. Yet another representation was sent to the Advisory Board on 29.09.2015 and the same was rejected by the State Government on 28.10.2015. The Central Government rejected the representation only on 18.11.2015. In those circumstances, the detenus have come up with the present Habeas Corpus Petitions.

3. Heard Mr. B. Kumar, learned Senior Counsel appearing for the petitioner ; Mr. A.N. Thambidurai, learned Additional Public Prosecutor appearing for the State/ first respondent ; Mr. G. Rajagopal, Additional Solicitor General of India appearing for Mr. Rabu Manohar, learned Senior Central Government Standing Counsel for the 2nd respondent. We have also perused the records carefully.

4. Mr. B. Kumar, learned Senior Counsel appearing for the petitioners assailed the orders of detention mainly on the following grounds.

[i] The detenus filed bail applications dated 24.06.2014, 11.07.2014 and 24.07.2014 wherein they had retracted their statements recorded before the officers. Though the bail petitions were enclosed in the booklet, the detaining authority, while passing orders, have not taken into consideration the retracted

statements and the same was not rejected by him.

[ii] The detenu I submitted declaration form as required under Section 77 of the Customs Act. However, the declaration was neither placed before the detaining authority while passing the detention order nor format was not supplied to the detenu, despite asking for the same.

[iii] The detenus were arrested on 22.06.2014, but the detention order came to be passed only on 22.07.2015 and the same was executed on 04.08.2015, however there is no explanation for the inordinate delay of 13 months. There was no nexus between the date of incident and passing of detention order. Since the nexus is snapped, subjective satisfaction arrived at by the detaining authority is not genuine.

[iv] The passport of the detenus have been impounded by the authorities, hence there is no possibility of the detenus going out of India to indulge in smuggling activities. The detaining authority, without any material but only on suspicion, passed the order of detention in a causal and mechanical manner.

5. Mr. D. Rajagopal, learned Additional Solicitor General appearing for the 2nd respondent would submit that the bail applications containing retraction statements of the detenus were placed before the detaining authority and after considering the same, the detention order was passed ; that the detention order is not passed solely based on the inculpatory statements of the detenus, but also based on recovery of contrabands from the detenus ; that the detaining authority has supplied all the documents relied upon by him, so the contention that the documents were not supplied cannot be countenanced and that the detenus, by giving false and misleading statements have diverted the attention of the investigating officer. As the sponsoring authority could be able to complete the investigation only in the month of April 2015, he immediately sent proposals in the month of May 2015 and the detention order came to be passed by the authority in July 2015 and the delay is explained in the counter.

6. The learned Additional Public Prosecutor while adopting the arguments advanced by the learned Additional Solicitor General of India would further submit that the delay is explained in the counter and even assuming that there was a delay, the mere delay in passing the detention order itself would not vitiate the detention order. It is further urged that despite impounding of the passport, there are possibilities for the detenus to involve in similar activities and also relied on the following judgements in support of his contentions :-

(1) 1988 (1) SCC 296 [Smt. K. Aruna Kumari v. Govt. of A.P & Ors.]

(2) 2002 (10) SCC 448 [Sitthi Zuraina Begum v. Union of India & Ors.]

7. To appreciate the controversy in proper perspective, we may refer to Article 22 (5) of the Constitution of India, which would run thus -

"22. Protection against arrest and detention in certain cases.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

8. Section 3 of the COFEPOSA Act reads as follows -

"3. Power to make orders detaining certain persons.

(1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from -

(i) smuggling goods, or

(ii) abetting the smuggling of goods, or

(iii) engaging in transporting or concealing or keeping smuggled goods, or

(iv) dealing in, smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or

(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,

It is necessary so to do, make an order directing that such person be detained.

(2) When any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order.

(3) For the purposes of clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing not later than fifteen days, from the date of detention.

9. Article 22 of the Constitution contains substantive limitations and procedural safeguards. The COFEPOSA Act does not lay down any parameters for arriving at the subjective satisfaction by the detaining authority. The parliament, in its wisdom has not laid down any set of standards for detaining authority to decide whether an order of detention should be passed against a person. However, unbridled power shall not be exercised arbitrarily and while arriving at subjective

satisfaction, the detaining authority have to take into consideration all relevant facts, which shall reflect in the detention order. Further, the detenu should be afforded the earliest opportunity to make a representation against the order and to satisfy the mandatory requirement, the detaining authority ought to supply not only the detention order, but also the documents relied upon to arrive subjective satisfaction.

10. Mr. B. Kumar, learned Senior Counsel, while elaborating his submissions contended that, admittedly the detenus filed bail applications in the month of June and July 2014, wherein they retracted their statements given to the customs authorities. Though the bail applications were placed before the detaining authority, there are no materials to show that the detaining authority had independently applied its mind on the retraction while arriving subjective satisfaction.

11. The Division Bench of this Court, in 1992 LW CrL 170 [Arun Kumar Soni v. Union of India] observed that the awareness of the fact of retraction must get reflected in the grounds of detention. Para 9 would run thus -

"8. On facts, a too detailed discussion, does not appear to be called for. The detaining authority obviously was aware of the enunciation of law, that he should be alive to the fact of retraction of confessions, when confessions were taken note of, to arrive at subjective satisfaction. That is exactly the reason why the detaining authority has specifically considered the retraction letter from another individual who was involved in the same transaction, in paragraph 14 of the grounds and has specifically observed in, paragraph 15, that after having taken into consideration the allegations contained in the aforesaid retraction and replies thereto he was satisfied that the allegations were devoid of merit. In paragraph 13 of the grounds of detention the detaining authority has referred to the bail application of the detenu, only in the context of his arrest, production before the concerned Magistrate, remand and his continuance in custody, in view of the rejection of the rejection of the bail plea. Bail application had not been taken note of in the context of the retraction contained in it. If the order of detention is based on the confessional statement of the detenu, it will be too difficult to comprehend, that only when the word "voluntary" is used, application of mind, to retraction would arise and not otherwise. Once the confession is sought to be used, detaining authority must be aware, if the confession is retracted. In spite of retraction, it may still be possible for the detaining authority to arrive at a subjective satisfaction to preventively detain the detenu, after being alive to the said fact.

12. In 2007 (1) MLJ (CrL.) 663 [G. Balaji v. State of Tamil Nadu], this Court has held as follows -

"4. It is not in dispute that at the time of arrest the detenu made a confession statement accepting the guilt, however, he retracted the same and sent a letter to the sponsoring authority highlighting the circumstances under which he was

forced to make such confession statement. A perusal of the grounds of detention clearly shows that the detaining authority failed to record his opinion on the inculpatory statement and the rejection of retraction letter. In similar circumstances, the Courts have repeatedly held the detention order is vitiated.

13. The Hon'ble Supreme Court in 2006 (4) SCC 792 [K.S. Nagamuthu v. State of Tamil Nadu and others] quashed the order of detention holding that the letter of retraction has not been considered by the detaining authority before passing the order of detention.

14. In the case on hand, it is not in dispute that the detenus, in their bail applications have retracted the inculpatory statements given to the authorities. But, in paras 11 & 12 of the counter affidavit filed by the first respondent, it is stated that the detenus have given voluntary statements and no retractions of statement have been made. No written retractions were made either when they were in jail or when they were out on bail or during the course of investigation, hence, the consideration of the retraction does not arise. Further, the detention order is silent about the retraction.

15. Mr. G. Rajagopal, learned Additional Solicitor General of India would contend that though in the detention orders, it is not explicitly stated that the retraction was considered and rejected, but before passing the detention order, the retracted statement in the bail petitions were placed before the detaining authority and they were considered before passing the order of detention. Keeping in mind the principles laid down in the above cited judgements and in the light of the stand taken by the respondents in the counter referred above and also the fact that grounds of detention do not reflect the detaining authority was aware of the fact retraction, we do not find force in the contentions of the counsel for the respondents.

16. Mr. B. Kumar, learned Senior Counsel would further submit that the detenus were arrested and the contrabands were seized on 22.06.2014. Two bail petitions of the detenus were rejected on 07.07.2014 & 22.07.2014. Eventually, they were granted bail on 04.08.2014. Show cause notices dated 17.11.2014 and 02.12.2014 were issued by the Customs Authorities to the detenus, however, the detention order was passed after a lapse of 13 months, i.e. on 22.07.2015. The learned Senior Counsel would further submit that there is no nexus between the incident and the order of detention and the live link is snapped, the subjective satisfaction arrived at by the authority is not genuine and hence the order of detention is liable to be quashed.

17. In the case of Rajeswari v. Joint Secretary of Govt., Ministry of Finance, Department of Revenue, New Delhi & another reported in 2000 CTC 92 (III) 97, this Court quashed the order of detention on the ground that there was 5 months delay in passing the detention order and the live link between the incident and the detention order is snapped.

18. In 2006 (4) SCC 796 [Rajinder Arora v. Union of India], the Hon'ble

Supreme Court set-aside the order of detention, as in that case delay was not satisfactorily explained, which would run thus-

"20. Furthermore no explanation whatsoever has been offered by the respondent as to why the order of detention has been issued after such a long time. The said question has also not been examined by the Authorities before issuing the order of detention.

21. The question as regards delay in issuing the order of detention has been held to be a valid ground for quashing an order of detention by this Court in T.A. Abdul Rahman v. State of Kerala stating : (SCC pp. 748-49, paras 10-11)

"10. The conspectus of the above decisions can be summarised thus : The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard-and-fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the causal connection has been broken in the circumstances of each case.

11. Similarly when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to preventing him from acting in a prejudicial manner."

22. The delay caused in this case in issuing the order of detention has not been explained. In fact, no reason in that behalf whatsoever has been assigned at all."

19. Same view was taken in 2007 (1) SCC (CrI) 464 [Adishwar Jain v. Union of India and another]

20. The learned Additional Public Prosecutor urged that mere delay in passing detention order does not vitiate the detention order, in view of the judgement of the Apex Court in 1988 (1) SCC 296 [Smt. K. Aruna Kumari v. Govt. of A.P. and Ors.]. Indisputably, the incident had taken place on 22.06.2014, the accused were released on bail on 04.08.2014, however the orders of detention have been passed only on 14.08.2015. The only explanation offered by the respondents in

the counter is that there was delay in obtaining call details of mobile number 8898919006 and its subscriber from mobile operator. It is seen that except vague averment that the details were submitted to the department in the month of April 2015, no other particulars are available such as when requisition was made, follow up actions taken subsequently and the date of proposal of sponsoring authority and date of completion of investigation. With respect, we are not able to follow the decision in 1988 (1) SCC 296, in view of the principles laid down in the subsequent decisions relied on by the learned Senior Counsel for the petitioners referred above.

21. The next contention raised by the learned Senior Counsel for the petitioners is that the detention order is being passed as if the detenu I Om Prakash attempted to bring 23 kilograms of gold without proper declaration and it is also mentioned in the grounds of detention, however the declaration card was neither placed before the detaining authority nor supplied to the detenu despite asked for in the representation dated 29.09.2015. In the counter affidavit, it is stated that the documents relied upon were supplied to the detenu. However, in the rejection order dated 28.10.2015, nothing is mentioned about supply of declaration card.

22. It is settled law that the detaining authority should furnish all relevant and relied upon documents to the detenu to enable him to make effective representation. Further all documents which are relevant which would have bearing on the issue, which are likely to affect the mind of the detaining authority should be placed before it. In this case, the detention order would disclose that the detaining authority relies on the declaration card. However, it was neither placed before the detaining authority nor supplied to the detenu to make further representation to the advisory board.

23. In similar facts, in 2008 (2) MLJ CrL 379 [Remya and anr. v. State of T.N. and anr.], this Court, relying upon the earlier decisions of the Hon"ble Supreme Court made in 1999 SCC (CrL.) 213 [Pownammal v. State of T.N. & Anr.] and 2000 (7) SCC 148 [A. Sowkath Ali v. Union of India and Ors.], held as follows -

"11. It is not in dispute that a representation dated 4.8.2007 was made to the detaining authority for furnishing the copies of the above documents. However, the representation was rejected by order dated 22.8.2007 only by stating that all the documents which were taken into consideration for passing the detention order were supplied to the detenu. The explanation is so vague and the order does not mention as to which of the documents are referred to and which of the documents are relied upon to pass the order of detention. In the absence of any proper explanation and in the absence of specific denial of the averments made in the affidavit that these documents have been relied upon, in our considered view, the failure to supply the above documents, in spite of the request made on behalf of the detenu, has deprived the valuable right of the detenu to make a further representation to the Advisory Board and on this ground alone, the detention order is liable to be quashed.

In the considered opinion of this Court, the judgement referred above squarely applies to this case.

24. On behalf of the petitioners, it is next contended that the passports of the detenus have been impounded by the authorities after their arrest, so when there was no material placed before the detaining authority that there is likelihood of detenus indulging in smuggling activities in future, the subjective satisfaction arrived at by the detaining authority is based on no material.

25. In AIR 2010 SC 924 [Gimik Piotr v. State of T.N. & Others], the Hon''ble Supreme Court has quashed the order of detention, wherein it is observed as under -

In our considered view, the submission of the learned counsel for the appellant requires to be accepted. In the instant case as the facts reveal, that, there was no pressing need to curtail the liberty of a person by passing a preventive detention order. Foreign currency cannot be smuggled as the person cannot move out of the country on account of his passport being impounded. Merely because a person cannot otherwise survive in the country, is no basis to conclude that a person will again resort to smuggling activities, or abetting such activities by staying in the country. There is higher standard of proof required in these circumstances involving the life and liberty of a person. The material provided by the respondents is not enough to justify the curtailment of the liberty of the appellant under an order of preventive detention in the fact and circumstances of the case.

26. In 2012 (2) MLJ (Crl.) 721 [Shaik Rahamathullah v. Secretary to Government of T.N. & Ors.] this Court, following the decisions in AIR 2010 SC 924, cited supra, quashed the detention order.

"21. Therefore, we are of the considered view that there is no material placed before the detaining authority to show that even though the passport had been impounded there is likelihood of the detenu indulging in smuggling activities in future. In the absence of such acceptable materials to come to the subjective satisfaction the order of detention is vitiated and liable to be set aside.

27. The learned Additional Public Prosecutor urged that the Hon''ble Supreme Court in 2002 (10) SCC 448 [Sitthi Zuraina Begum v. Union of India & Ors.] rejected the contention that the factum of seizure of passport would be a handicap for the detenu for his activities. In view of the subsequent decision of the Hon''ble Supreme Court in Gimik Piotr's case, cited supra, this Court, with great respect, is not able to follow the decision in Sitthi Zuraina Begum 's case.

28. In the case on hand, the respondents have not placed any materials before the detaining authority to arrive subjective satisfaction that the detenu would indulge in smuggling activities in future. So the irresistible conclusion is that the subjective satisfaction is vitiated and the order is liable to be quashed.

29. The learned Senior Counsel, placing reliance on the order of this Court in HCP

No. 2259 of 2013 dated 14.07.2013, contended that the Habeas Corpus Petitions are to be allowed, as only factum of rejection of the representation has been supplied to the detenus and the order of rejection was not supplied.

30. Resisting the said submission, it is contended by the learned Additional Solicitor General of India that a speaking order need not be passed by the Government or by the Advisory Board, however the order of rejection should indicate that there has been subjective satisfaction by the authority to reject the representation and that the non-communication of the order of rejections would not be a violation of the constitutional mandate under Article 22 (5) of the Constitution of India, relying on the decision reported in AIR 2016 SC 641 [Union of India v. Saleena] wherein it is held as follows -

"30. From the aforesaid analysis, it is quite limpid that whatever has been stated in Bhut Nath Mete (supra) has been explained in John Martin (supra) and it has reiterated the principle that a speaking order need not be passed by the Government or by the Advisory Board. It has also been explained that the observations made in Bhut Nath Mete (supra) were not meant to lay down a legal requirement that the order of the State Government must be a speaking order. Reliance was placed on the Constitution Bench decision in Haradhan Saha (supra) to lay down that Bhut Nath Mete (supra) is not a binding precedent. The said delineation makes it absolutely clear that the Court should be guided by the principles stated in Haradhan Saha (supra) and not by Bhut Nath Mete (supra). Thus the principle behind "real and proper consideration" would only mean as has been stated in John Martin (supra), the representation cannot be rejected in a casual and mechanical manner. Overemphasis cannot be placed on "real and proper consideration". What has to be seen by the competent authority is that the materials are placed before him and such materials come within the purview of the statute and it must show that there has been subjective satisfaction. The word "satisfaction" need not be used while rejecting the representation. To elaborate, the consideration by the competent authority the Government is to ascertain essentially whether the order is in consonance with the power conferred under the law and the allegations made against the detenu come within the purview of the said law. The real and proper consideration by the appropriate Government means the order of rejection should indicate that there has been subjective satisfaction by the competent authority to reject the representation. As has been held in John Martin (supra), there cannot be zealous scrutiny of the representation for the purpose of deciding whether the detention of the petitioner is justified. In the said case, analysing the principle stated in Haradhan Saha (supra), it has been reiterated that the order need not be a speaking order and non-speaking order does not amount to failure of justice. The said controversy, as has been observed by the three-Judge Bench, should be given a quietus. That being the legal position, on a careful perusal of the file, we find that there has been subjective satisfaction on the basis of the materials placed before the competent authority along with the representation. It cannot be said that the subjective satisfaction is not discernible from the order passed.

In view of the analysis, the decision in *Lekha Nandakumar* (supra) by the Division Bench of the High Court stating the principle that the order passed by the competent authority should be communicated failing which there will be a violation of the constitutional command engrafted under Article 22(5) is not correct. The Court can always call for the file and peruse whether there has been rejection of the representation as required under the law."

31. This Court perused the file produced by the second respondent and it reveals that each and every point raised by the detenus were considered and rejected. At this juncture, the learned Senior Counsel for the petitioners submitted that the petitioners are not pressing this ground. Therefore, this ground is rejected.

32. For the reasons assigned above, we are inclined to allow the Habeas Corpus Petitions. Accordingly, both the Habeas Corpus Petitions are allowed and the detention orders passed by the 1st respondent dated 22.07.2015 in G.O. No. SR. 1/65-3/2015 & SR. 1/65-7/2015 are hereby set aside. The detenus, viz., Omprakash Triloki Chandwani and Pritpal Singh Kalsi, who are now confined at the Central Prison, Puzhal, Chennai, are hereby directed to be set at liberty forthwith, unless their detention is otherwise required in connection with any other case.