
(1984) 07 BOM CK 0019

In the Bombay High Court

Case No : Criminal Writ Petition No. 82 of 1984

Smt. Madhurika C. Merchant

APPELLANT

Vs

K.S. Dilipsinghji and others

RESPONDENT

Date of Decision : 03-07-1984

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)

Citation : (1984) 86 BOMLR 421

Hon'ble Judges : V.A. Mohta, J;Shah, J

Bench : Division Bench

Judgement

Shah, J.—This is a petition for the Writ of Habeas Corpus under Art. 226 of the Constitution filed by Mrs. Madhurika Chandrakant Merchant challenging the detention of her husband Chandrakant Purshottamdas Merchant under S. 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, as amended (hereinafter referred to as "the Act"), by an order dated February 1, 1984, passed by respondent 1 on his being satisfied that the detention was necessary in order to prevent him from acting in any manner prejudicial to the augmentation of foreign exchange. Along with the order of detention the detenu was also served with the grounds on which the detention order is based.

2. The petitioner has urged several grounds before us to challenge the detention. The grounds urged are (1) gross and unexplained delay in passing the detention order; (2) non-consideration of representation of the detenu by the detaining authority; (3) non-consideration of detenu's letter of retraction dt. March 29, 1983, addressed to the Deputy Director, Enforcement Directorate, Bombay, (4) mis-reading of the retraction dt. March 16, 1983, which discloses non-application of mind by the detaining authority; (5) non-consideration of the statement of the detenu recorded on August 30, 1983, by the detaining authority while passing the order of detention and further not supplying a copy thereof to the detenu. It is not necessary, however, to consider in depth each one of these contentions

since in our view the two grounds viz. failure to consider the detenu's application by the detaining authority and the failure to take into consideration detenu's letter of retraction dt. March 29, 1983, are sufficient to dispose of the petition in favour of the petitioner. To appreciate these grounds it is necessary to state a few facts.

3. On February 1, 1984, an order was made by the first respondent Shri K. S. Dilipsinhji, Addl. Secretary to the Government of India, in the Ministry of Finance (Department of Revenue) New Delhi, in exercise of the powers conferred on him by sub-section (1) of S. 3 of the Act, for the detention of the detenu. Pursuant to the order of detention the petitioner was arrested and detained on February 17, 1984. At the time of his arrest he was served with the order of detention together with the grounds which were embodied in the communication dt. February 1, 1984, addressed to the petitioner. The grounds of detention served on the detenu disclosed six transactions of the year 1982 in which the detenu was involved. These transactions came to light on February 17, 1983. The Customs Officer recorded his statement on 17th, 18th and 19th of February 1983. It is stated in the grounds that the respondent 1 on a consideration of the material placed before him was satisfied that the detenu was found indulging in unauthorised transactions in foreign exchange and in making compensatory payments to persons in India in violation of the provisions contained in the Foreign Exchange Regulations Act. 1983, which has affected the foreign exchange resources of the Country adversely. On February 19, 1983, the detenu was produced before the Magistrate. On his production before the Magistrate the detenu complained about torture and ill treatment by the Enforcement Officers and retracted his statement. These allegations were repeated by the detenu in his letter dt. February 25, 1983, addressed to the Deputy Director of Enforcement wherein he alleged that none of his statements were voluntary and true, but were extracted from him under pressure and against his will. Thereafter, on March 16, 1983, the Enforcement Officers recorded a further statement of the detenu. In this statement he retracted from the allegations made by him before the Magistrate on February 19, 1983, and in the letter dt. February 25, 1983, to the Deputy Director stating that he was treated well and there was no torture. He added that "In my letter dt. 25th February 1983, I wrote I was manhandled and tortured, what I meant was mental torture." He also expressed regrets for making such allegations. This was followed by another letter dt. March 29, 1983, sent by the detenu to the Deputy Director. In his long letter, he retracted from his statement dt. March 16, 1983, wherein he had withdrawn his allegations against the officers and alleged that the statement of March 16, 1983, itself was obtained by force and torture was inflicted upon him for extracting the statement. It is admitted that this letter of March 29, 1983, was not placed before the detaining authority. Thereafter, before the date of passing the detention order further statements of the detenu was recorded on August 30, 1983, September 27, 1983, and January 6, 1984. Out of these statements the petitioner's grievance is that the detaining authority failed to

consider the statement dt. August 30, 1983. After detention, the detenu made separate representations to the Central Government and to respondent 1. Both the representations are dt. February 21, 1984. The representation made to the Central Government was considered and rejected by the Ministry of Finance (Department of Revenue) on March 7, 1984. The representation to respondent 1, who was the detaining authority was admittedly not considered by respondent 1 himself, but by Mr. M. V. N. Rao, Addl. Secretary (Anti-Smuggling) and was rejected by him on March 5, 1984. Accordingly, the detention order was confirmed.

4. In *Vimalchand Jawantraj Jain Vs. Shri Pradhan and Others*, , it has been held that the power to preventively detain a person cannot be exercised except in accordance with the constitutional safeguards provided in Cls. (4) and (5) of Art. 22 of the Constitution and if any order of detention is made in violation of such safeguards, it would be liable to be struck down as invalid. The constitutional imperatives enacted in this article are two-fold : (1) the detaining authority must, as soon as may be, that is, as soon as practicable after the detention, communicate to the detenu the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detenu the earliest opportunity of making a representation against the order of detention. These are the barest minimum safeguards which must be observed before an executive authority can be permitted to preventively detain a person and thereby drown his right of personal liberty in the name of public good and social security. The Supreme Court further pointed out that this safeguard under Art. 22 is that the authority making the order of detention must afford the detenu the earliest opportunity of making a representation against the order of detention. This requirement would become illusory unless there is a corresponding obligation on the detaining authority to consider the representation of the detenu as early as possible. In that case the detaining authority merely forwarded the representation of the detenu to the Advisory Board and the Advisory Board considered the representation and then made a report expressing itself in favour of detention. The Supreme Court struck down the order of detention holding that notwithstanding the opinion of the Advisory Board the detaining authority is bound to consider the report of the detenu on its own and keeping in view all the facts and circumstances relating to the case, come to its own decision whether to confirm the order of detention or to release the detenu.

5. In *Smt. Pushpa Vs. Union of India (UOI) and Others*, representation made by the detenu were dealt with and rejected by the Chief Secretary who had passed the detention order. The contention was that these representations of the detenu could have been dealt with and decided only by the appropriate Government, which in that case was the Administrator, Union Territory, Delhi. In this context the provisions of Sections 3 and 11 of the Act were considered by the Supreme Court. The contention that the failure to submit the representation addressed to the detaining authority and considered by the State Government was rejected. While rejecting this contention the Supreme Court observed -

"It is not in dispute the Chief Secretary to the Delhi Administration third respondent herein, was specially empowered for the purpose of S. 3, to make a detention order. In exercise of this power the Chief Secretary made the impugned detention order. Clause (5) of Art. 22 casts a duty on the authority making an order of detention to communicate to the detenu the grounds on which the detention is ordered and also affords him the opportunity of making a representation against the order. There is nothing in the scheme of Art. 22 or the provisions of the COFEPOSA which requires that the representation ought always to be considered by the appropriate Government notwithstanding the fact that the order of detention has been made by an officer specially empowered in that behalf. Undoubtedly the power to revoke the detention order under S. 11 is conferred on the State Government and the Central Government whenever an order of detention is made by an officer of the State Government but that does not imply that the initial representation which a detenu has a right to make after the grounds of detention are furnished to him, must of necessity be made and considered by the State Government. In fact, the representation can and ought to be made to the detaining authority because it is he who has to apply his mind to the facts of the case and it is he who has furnished the grounds of detention on which he has acted and it is he who has to be convinced that the action taken by him is justified and requires reconsideration. After all the purpose of a representation is to convince the authority to reconsider its decision which has resulted in the detention of the detenu. The representation is not in the form of an appeal to the higher authority and, therefore, ipso facto it must go to the State Government. Undoubtedly it would be open to the detenu to make a representation under S. 11 requesting either the State Government or the Central Government, as the case may be, to revoke the order of detention. But the initial representation that a detenu has a right to make on receipt of the grounds of detention would ordinarily be addressed to the detaining authority because it is that authority which has taken a decision adverse to the detenu and which has to be persuaded to reconsider the same. Therefore, if the detenu made the representation to the third respondent who had passed the detention order it was open to him to consider the same and after applying his mind to accept or reject the same."

6. In the case before us the impugned order has been passed by the respondent 1. By an order dt. September 20, 1983, which has been published in the Government Gazette, the Central Government in exercise of the powers conferred by sub-section (1) of S. 3 of the Act specially empowered Shri K. S. Dilipsinhji (respondent 1) for the purpose of the said section. It is respondent 1, who was armed with these powers, passed detention order dt. February 1, 1984. In his affidavit dt. June 8, 1984, the respondent 1 admitted that the detenu's representation was received by him on February 29, 1984, and the Government of India on March 1, 1984. However, instead of considering the representation and passing the appropriate order thereon himself, the papers were put up by him to another detaining authority viz. M. V. N. Rao. It is true that Shri M. V. N.

Rao also was specially empowered by the Central Government under sub-section (1) of S. 3 of the Act by issuing an order dt. November 12, 1982. The mere fact that various officers are specially empowered by the Central Government under sub-section (1) of S. 3 does not mean that any one of them can exercise these powers at subsequent stages such as consideration of representation made by the detenu and taking the decision as to whether the detention order should be revoked or confirmed. The pertinent observations in Pushpa's case clearly show that it is the detaining authority viz. respondent 1 who has reached the subjective satisfaction of the necessity of the detention on the basis of the materials placed before him, must apply his mind to the detenu's representation made to him and take a decision. The provisions of S. 11 of the Act which expressly refers to the powers under S. 21 of the General Clauses Act that where, by any Central Act, a power to issue orders is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any) to rescind any orders so issued, also supports this view. It is clear that the detenu has a right to make representation both to the officer passing the detention order and the Central Government and each of these two authorities are bound to independently consider and take a decision on the representations made to them. Now there might be situations where the consideration of representation of the detenu by the detaining authority who passed the order becomes impossible for various reasons such as death or retirement of the detaining authority who passed the order at the time when representation is received. Such a situation may arise even when the detaining authority has gone abroad or is seriously ill and it is not possible to dispose of the representation expeditiously. In such case it may be permissible for the matter being dealt with by another officer who has been invested with powers under sub-section (1) of S. 3. Admittedly, such compelling reasons for the representation being dealt with by another officer do not exist in this case. In fact, the representation was duly received by respondent 1 himself and it was he who forwarded the same to another officer. The explanation offered in that Mr. M. V. N. Rao, who has considered and rejected the representation functions as a detaining authority under the Act with effect from September 12, 1982, when the order specially empowering him was passed by the Central Government and he was away from Government duty for some time in September 1983 and February 1984. It was during this period that respondent 1 who was also authorised to discharge the functions under the order dt. September 20, 1983, that the order of detention was passed by him. He has explained that whenever Mr. M. V. N. Rao assumed his duty the respondent 1 was relieved of his duty and that he looks after the administration. This explanation is without any substance. Both the officers were specially empowered by different orders and as far as the present case is concerned it was the respondent 1 who had passed the order and it was he alone who could have considered and passed necessary orders on the representation of the detenu. Further there is nothing to show that the powers conferred on the respondent 1 were revoked or withdrawn before the representation was received.

7. Reference may also be made to the decision of the Supreme Court in *Santosh Anand v. Union of India*, (1981) 2 SCC 420 . The facts of that case were that the Chief Secretary, Delhi Administration, who was the detaining authority considered the detenu's representation on receipt of comments of Secretary, Law and Justice, but instead of himself rejecting it, he submitted the same to the Administrator with an endorsement to the effect "the representation may be rejected." The Administrator made an endorsement below that of the Chief Secretary to the effect that he had considered the representation as well as the comments of the Customs Department and after examination thereof he agreed that the representation had no merit and must be rejected. The Supreme Court held that it was clear that the representation had only been considered by the detaining authority at the highest but he did not take the decision to reject the same himself and as such the constitutional safeguard under Art. 22(5) had not been strictly observed or complied with, with the result that the continued detention of the detenu was illegal.

8. In the present case there is a clear abdication of power on the part of the first respondent to consider and dispose of the representation. He was bound to consider the same himself and the consideration by another officer, Mr. M. V. N. Rao, is not a consideration in the eye of law and renders the continued detention of the detenu illegal.

9. In support of his contention that the representation made by the detenu could be considered by another officer specially empowered under S. 3(1) of the Act. Mr. Govilkar relied on a decision of the Supreme Court in *Nabani alias Alani Saha Vs. State of West Bengal*, We are unable to see how this decision is relevant to the question that arises before us. In *Nabani's* case in answer to Rule Nisi issued by the Supreme Court in respect of the District Magistrate who passed the order of detention, it was the Deputy Secretary, Home (Special) Department, Government of West Bengal, who filed the affidavit. His affidavit shows that the District Magistrate of Midnapore who passed the order of detention was not available for affirming the affidavit as he was transferred to another District. The Supreme Court held that as far as the filing of the affidavit in reply is concerned each matter has to be examined separately in the light of its own facts and it would not be appropriate to evolve a rule of universal application to cover every such matter. The Supreme Court further held that considering the facts of that case no prejudice was caused to the petitioner by reason of the fact that the affidavit in reply has not been filed by the District Magistrate himself. It is clear that the aforesaid decision of the Supreme Court turns on the facts of that case and in any event, as far as this case is concerned, reading S. 3(1) and S. 11 of the Act it is clear that it is the officer who passed the detention order who ought to have considered the representation and decide whether the order of detention should be revoked.

10. Again in re *In Re: Maganlal Jivabhai Patel*, which is a Division Bench decision of this Court relied on by Mr. Govilkar, the grounds of detention were furnished

by an officer other than the detaining authority making the order. It was argued that communication of grounds by another officer would not be a compliance of the provisions of Art. 22(5) which shows that the authority making the order has got, to communicate to the detenu the grounds for his detention. Negating this contention the Court held that -

"It could not have been that "the authority making the order", the individual who made it and what is meant by the words "the authority making the order" is, if the order is made by the District Magistrate, the District Magistrate, if the order is made by the Government of a State, the State Government; if the order is made by the Central Government, then, necessarily the Central Government."

11. These observations must be read in the light of the facts of that case viz. that the individual who had passed the order of detention was transferred. The following observations of the Division Bench make the position clear -

"We do not think that we would accept the interpretation that the grounds must be furnished by the individual who made the order and in case the individual is transferred or in case anything happens to the individual, new grounds could not be furnished by the person who is appointed to succeed him."

12. The order of detention is also invalid by reason of non-consideration of the detenu's letter of retraction dt. March 29, 1983. In his letter to the Deputy Director he retracted from what he had admitted in his statement dt. March 16, 1983. The grounds of detention show that the detaining authority did take into consideration the retraction in the application made to the Magistrate on February 19, 1983, and in the letter to the Deputy Director dated February 29, 1983. In both these documents allegations of torture and ill treatment and the statements being involuntary and not true were made. In the statement of March 16, 1983, which has been considered by the detaining authority the detenu retracted from his allegations against the officers and stated that he was treated well and there was no torture, but instead stated that the statement was the result of mental torture. This retraction has been referred to and relied on in the grounds of detention. By his letter dt. March 29, 1983, the detenu retracted from his statement of March 16, 1983. This was relevant material which ought to have been placed before the detaining authority and considered by him before making the order of detention. It is well-settled that non-consideration of relevant material by the detaining authority renders the order invalid.

13. It was urged by Mr. Govilkar, the learned counsel, appearing for the respondents that it is not the law that the detaining authority must consider each allegation which is repeatedly made by the detenu from time to time and where the same allegations are repeated, only the substance is to be considered and in the present case the retractions of February 17, 1983, and February 25, 1983, have been taken into consideration by the detaining authority. We are not impressed by this submission for the simple reason that the retraction of March 29, 1984, is not a repetition of what has been alleged earlier, but is a retraction

of earlier admission of the detenu having been treated well by the officers which itself constituted retraction of his earlier allegations. The retraction of March 29, 1983, was relevant material to which the respondent 1 ought to have applied his mind, particularly because he took into consideration the statement dated March 16, 1983, withdrawing the allegations made by him against the Customs Officers. Since admittedly this was not done the detention order is rendered invalid on that count. In the result, the petition is allowed. The impugned order of detention is quashed and set aside. Rule made absolute accordingly.

14. Petition allowed.