

(1988) 10 RAJ CK 0021

In the Rajasthan High Court

Case No : Habeas Corpus Writ Petition No. 1994/88

Smt. Ramjot

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 06-10-1988

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 3(3), 8
Constitution of India, 1950 — Article 14, 22(5)

Citation : (1990) 50 ELT 349 : (1989) 1 RLW 176

Hon'ble Judges : R.S. Verma, J;K.S. Lodha, J

Bench : Division Bench

Advocate : M.M. Singhvi and Sandeep Mehta, for the Appellant; J.P. Joshi, A.A.G., for the Respondent

Judgement

K.S. Lodha, J.—This writ petition in the nature of Habeas Corpus has been filed by Smt. Ramjot, challenging the detention of her son Shri Ghanshyam under the Conservation of Foreign Exchange and Prevention. of Smuggling Activities Act, 1974 (for short COFEPOSA).

2. It is alleged in the petition that Shri Ghanshyam was arrested by Shri Ramchandra, Station House Officer, Police Station, Sadar Bazar, Jodhpur on 2-3-1988 and according to the police 3 Gold biscuits bearing foreign marking and two pieces of gold biscuits wrapped in pink paper were recovered from the pants worn by Ghanshyam. It is further alleged that Shri Ramchandra recorded the statement of Ghanshyam on 2-3-1988 and later he was handed over to the Customs Authorities where he was examined on 3-3-1988. Then Shri Ghanshyam was arrested formally on 4-3-1988 and produced before the learned C.J.M. Jaipur on 5-3-1988. He moved an application for bail before the C.J.M., Jaipur, which was rejected on 9-3-1988 thereafter he approached the learned Sessions Judge, Jaipur for bail and he was granted bail on 14-3-1988.

3. The case of the petitioner further is that an order was made by the

Commissioner and Secretary, Home Department, Government of Rajasthan on 23-4-1988, directing that Ghanshyam be detained u/s 3(1) of the COFEPOSA Act, with a view to prevent him from abetting the smuggling of gold and indulging in transporting, concealing or keeping smuggled goods. According to the petitioner, Ghanshyam was again arrested on 30th of April 1988 was locked in the Central Jail, Ajmer. The order of the detention as well as the grounds of detention were served upon him on 30th of April, 1988. Detenue Ghanshyam made certain representations to the detaining authority, the State Government and the Central Government through the Jail authorities but the same were rejected. He also made a representation before the Advisory Board but that also was rejected and his detention was confirmed by the order of the State Govt. dated 24-6-1988.

4. The detention of the detenue Ghanshyam had been challenged on various grounds in this petition, however, at the time of arguments three contentions were raised before us and therefore we shall deal with those contentions only. It may be added that Shri J.P. Joshi appearing for the non-petitioners-respondents has tried to justify the detention.

5. The first contention raised by the petitioner is that in the representation made before the Advisory Board the detenue had sought permission to be represented by his advocate Shri Sandeep Mehta as the department was being represented by the Assistant Collector of Customs and Central Excise and the Inspector of that department, but that permission was not granted and he was not allowed to be represented by a legal practitioner and thus a proper opportunity of representation was not awarded to the detenue and a discrimination between the two parties before the Advisory Board was clearly made in violation of Article 14 of the Constitution. In reply to this contention, in para 8 of the reply it was mentioned that "the detenue was not entitled to appear through any legal practitioner in the matter connected with the Advisory Board. Customs and Home Department were also not represented by any legal practitioner but by department Officials who did not have any legal qualifications" (emphasis added). "It was contended by Mr. Joshi that since the Department was not being represented by any legal practitioner or any person having legal qualifications the detenue was not entitled to appear through any legal practitioner and thus there was no discrimination. When at the time of arguments on 26-9-1988 it appeared that legal practitioner or person having legal qualifications have some wide connotation Mr. Joshi wanted time to file a further affidavit in this respect and then on 4-10-1988 an affidavit of Shri Kishan Singh, Addl. Collector, Customs and Central Excise, Collectorate, Jaipur was filed. In this affidavit in para 1, Shri Kishan Singh averred that at the time of meeting of the Advisory Board on 6-6-1988 Shri Pankaj, Dy. Secretary (Home), Govt. of Rajasthan, Shri Kishan Singh himself and Shri Rajesh Vasavada, Inspector Customs and Central Excise were present before the Board with all the relevant records. The detenue was brought before the Board and he was heard at length. The departmental officers did not advance any arguments in support of the detention Order against

Shri Ghanshyam and were present to make available the relevant records". Then in para 2 it was inter alia stated that "the Department officers did not argue the Case but were present before the Board only to present the records and to answer any query made by the Board. (emphasis added) Now, in this set of circumstances we have to consider whether the Advisory Board rightly refused permission to the detainee to appear through his Advocate. It may at once be stated that their lordship of Supreme Court, in A.K. Roy and Others Vs. Union of India (UOI) and Others, ; A.K. Roy v. Union of India and Anr., had observed as under:-

" We must therefore make it clear that if the detaining authority or the Govt. takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detainee must be allowed the facility of appearing before the Board through a legal practitioner. We are informed that officers of the Govt. in the concerned departments often appear before the Board and assist it with a view to justifying the detention orders. If that be so, we must clarify that the Boards should not permit the authorities to do indirectly what they cannot do directly; and no one should be enabled to take shelter behind the excuse that such officers are not "legal practitioners" or legal advisers. Regard must be had to the substance and not the form since, especially, in matters like the proceedings of Advisory Boards, whosoever assists or advises on facts or law must be deemed to be in the position of a legal adviser."

6. From this it is clear that if the department is allowed to have the facility of their officers appearing before the Advisory Board, the detainee must also be allowed the facility of appearing through a legal practitioner because according to this decision of the hon"ble Supreme Court the officers of the Customs and Central Excise Department must be deemed to be in the position of a legal advisor. Merely because they are not legal practitioners it cannot be said that the department is not represented by legal practitioner or legal Advisor. Further, it has also been clarified by hon"ble Supreme Court that whoever assisted or advised on facts or law must be deemed to be in the position of a legal advisor. Now in this case, of course, in the first para of the affidavit filed by Shri Kishan Singh, it has been stated that the officers present did not advance any arguments in support of the detention order and were present to make available the relevant records, it is further stated by Shri Kishan Singh in para 2 thereof that they were present before the Board only to present the records and to answer any query made by the Board. Now if officers of the rank of Addl. Collector, Customs and the Inspector of that department were present before the Board and had the opportunity of answering any query made by the Board, it, in our opinion, would tantamount to assist the Board on facts or law and therefore they will be deemed to be in the position of legal Advisors. It has not been stated by Shri Kishan Singh that as a matter of fact no query was made by the Board from Shri Kishan Singh, Shri Pankaj or from Shri Rajesh Vasavada. On the other hand in the reply filed to the writ petition it has clearly been stated in para 8 that Customs Department and Home Department were also not represented by legal

practitioners but by departmental officers who did not have any legal qualifications. It appears that till this reply was filed the department was of the view that the departmental officers could not be deemed to be legal practitioners or legal advisors. But when the decision of the hon"ble Supreme Court in A.K. Roy's case (supra) came to be cited they realized that these officers may be considered to be legal practitioners or legal advisors and therefore the department tried to take up the position that these officers were present only to produce the documents. But this position cannot be accepted. The word represented used in para 8 of the reply is of importance and when this averment in the reply is read with the statement of Shri Kishan Singh in the affidavit dated 27-9-1988 that the officers were present to produce the records and to answer any query made by the Board, it leaves no room for doubt that the department was represented by "legal practitioners" within the meaning given to this term by the hon"ble Supreme Court. Mr. Joshi however, placed reliance upon Suresh Bhojraj Chelani Vs. State of Maharashtra, and contended that the mere presence of the officers of the Customs and Central Excise Department would not tantamount to a representation of the department before the Advisory Board by a legal practitioner or legal advisor. We have carefully read these authorities but we are clearly of the opinion that they are not applicable to the facts and circumstances of this case. In 1 982 (2) SCC 389 ; Phillippa Anne Duke v. State of Tamil Nadu and Ors., Customs Officers were present only in the corridor with the files and documents. It was not a case where the Customs Officer either pleaded or argued the case on behalf of the Govt. before the Advisory Board. Similarly in Suresh Bhojraj Chelani Vs. State of Maharashtra, they were merely present before the Advisory Board on the directions of the Board , u/s 8(c) of the COFEPOSA Act. The presence of the officers in pursuance of the directions u/s 8(c) of the Act is quite different from representing the department at the time of the hearing of the matter by the Advisory Board. The distinction between the two would be clear from a bare perusal of Section 8(c) of the Act. According to it the Board has first to consider the reference and materials placed before the Board and if necessary it may call such further information as it may deem necessary from the appropriate Govt. or from any person called for the purpose through the appropriate Govt. or from the persons concerned. It is, therefore, thereafter that if it consider it essential so to do or if the person concerned desire to be present that it may hear that person and it is at this stage that the question of appearance and representation before the Board would arise. It is not the case of the respondents that these officials appeared before the Board on being directed for giving any further information deemed necessary by the Board. It will also be important to mention here that in the case of Suresh Bhojraj Chelani v. State of Maharashtra -1 983 (1) SC 382, an affidavit was filed by the Chairman of the Advisory Board to say that the Customs Officers were allowed to be present in the corridor only so as that they can produce relevant records but no such affidavit has been filed before us by the Chairman or any member of the Advisory Board. On the other hand the affidavit filed by Shri Kishan Singh is clearly at variance with the reply filed to the writ, petition, and it also indirectly

shows that the departmental officers did represent the department before the Advisory Board.

6A. It will also be worthwhile to mention here that in the writ petition in para 8 it was mentioned that the department was allowed to be represented by the Assistant Collector of Customs and Inspector of Customs. Here in the affidavit filed by Shri Kishan Singh who happens to be the Addl. Collector of Customs does not specifically mention that no Assistant Collector was present before the Advisory Board and that officer did not represent the department. It is not denied that these officials of the Customs department are legally trained officers on the subject. In these circumstances the conclusion is inevitable that the department was allowed to be represented by legal practitioners whereas the detainee was refused permission to be represented by an Advocate and therefore there is a clear violation of Article 14 of the Constitution as observed by their lordship of Hon''ble Supreme Court in A.K Roy v. Union of India's case (supra). It also amounts to refusal of an effective and proper opportunity of being heard.

7. The second contention raised by learned counsel for the petitioner is that in pursuance of Article 22(5) of the Constitution read with Section 3(3) of the COFEPOSA Act, it was incumbent upon the detaining authority that it shall communicate to the detainee the order of detention as soon as may be after the detention but ordinarily not later than 5 days and in circumstances to be recorded not later than 15 days from the date of the detention. The grounds of detention includes the documents on which reliance has been placed by detaining authority as has been held in 1982 Weekly Law Notes 394. In the present case the statement of Ghanshyam recorded by Shri Ramchandra S.H.O., Sadar Bazar, Jodhpur on 2nd of March, 1988, had not been supplied to the detainee alongwith the grounds of detention not even on his demand and since this vital document had not been supplied to the detainee the provisions of the Constitution under Article 22(5) as also Section 3(3) of the COFEPOSA Act have been violated which has resulted into a loss of proper opportunity to the detainee to make a proper and effective representation. It has been stated in para 4 of the writ petition that the detainee was taken to the police station immediately after his detention by Shri Ramchandra and his statement was also recorded. In para 4 of the reply it is stated that "the contention of para 4 of the writ petition are admitted, Shri Ramchandra S.H.O. Police Station, Sadar Bazar, Jodhpur had recorded the statement of Shri Ghanshyam soon after the recovery and the same has been relied upon in the grounds of detention." However, at the time of arguments Shri Joshi vehemently contended that as a matter of fact the statement of the detainee Ghanshyam recorded by Shri Ramchandra, S.H.O. Police Station, Sadar Bazar, Jodhpur was not at all relied upon in the grounds of detention. In this connection he referred to the ground of detention. It is urged by him that only those documents on which the detaining authority has placed reliance while making the order of detention have to be supplied alongwith the grounds of detention and it is not necessary that the copies of the whole of the records which had been placed before the detaining authority should be supplied to the

detenue. According to him therefore, non-supply of the copy of the statement of Ghanshyam dated 2-3-1988 does not constitute violation of Article 22(5) of the Constitution or Section 3(3) of the COFEPOSA Act.

8. We have given our careful consideration to this contention. Apart from the fact mentioned in para 4 of the reply that the statement of Ghanshyam recorded on 2-3-1988 has been relied upon in the grounds of detention, it is again mentioned in sub-para (iv) of para 10 of the reply that "the statement of the detenue recorded by the SHO Police Station, Jodhpur was placed before the detaining authority. Hence, it cannot be said that order of detention was inviolated since the detaining authority had applied his mind to the relevant material". It was added however "supply of documents not relied upon in the grounds of detention cannot be said to constitute denial of opportunity of making of effective representation". The latter assertion on the face of it appears to be inconsistent. When in para 4 it has specifically been mentioned that the statement of Ghanshyam dated 2-3-1988 had been relied upon in the grounds of detention and again it has been reiterated that the detaining authority already had applied his mind to this particular document, it cannot be said that this document was not relied upon in the grounds of detention merely because it does not find a special mention in the grounds. It may also be added that this controversy had also been pointed out to Shri Joshi when the matter was first heard on 26-9-1988, but no further affidavit of the detaining authority clarifying the position in this respect has been filed nor the affidavit of Shri P. Dayal Sharma Officer Incharge on behalf of the respondents who had filed the reply has been filed. Not only this it may be mentioned that it is not denied that statement of Ramchandra S.H.O. had been relied upon in the grounds of detention and a copy of this statement of Ramchandra had also been supplied to the detenue. In that statement Ramchandra had stated that he had recorded the statement of Ghanshyam on 2-3-1988 and that he was handing over the copy of that statement to Superintendent of Customs, Jodhpur. Therefore, in order to appreciate the statement of Ramchandra reference to the statement of Ghanshyam recorded by him on 2-3-1988 was also necessary and therefore that statement did form a part of the statement of Ramchandra and in its turn it also became a part of the documents relied upon by the detaining authority. That being so the detaining authority was bound to supply the copy of the document to the detenue as envisaged by Article 22(5) of the Constitution and Section 3(3) of the COFEPOSA Act.

9. The further contention of the learned counsel for the petitioner that in the absence of this vital document the detenue did not have an opportunity of making a proper and effective representation appears to be correct and it is supported by the authority relied upon by him viz Ibrahim Ahmad Batti alias Mohd. Akhtar Hussain alias Kandar Ahmed Wagher alias Iqbal alias Gulam Vs. State of Gujarat and Others, In this case their lordship have laid down two propositions after the resume of cases (1) documents statement and other materials incorporated in the grounds of references and which have influenced

the mind of the detaining authority in arriving at the requisite subjective satisfaction must be furnished to the detainee alongwith the grounds within 5 days or in exceptional circumstances for reasons to be recorded in writing not later than 15 days from the date of his detention and (2) All such materials must be furnished to him in a language he understands and failure to do either of the two things would amount to a breach of the two duties cast on the detaining, authority under Article 22(5) of the Constitution. We are therefore clearly of the opinion that this duty of the detaining authority to supply a copy of the vital document has not been carried out and therefore it has resulted into violation of Article 22(5) of the Constitution,

10. Although in view of our findings on the first two contentions the 3rd contention need not be gone into but since it has been raised it will be appropriate for us to mention it also. This third contention of the learned counsel for the petitioner is that in order to find out whether the recovered Gold was foreign Gold, the sponsoring authority did not get the purity of gold tested and the mere foreign marking on the gold does not gives rise to a presumption that the gold was of foreign origin. In reply it was mentioned in para 9 (v) that "the gold recovered from the detainee on 2-3-1988 was correctly held to be foreign mark in view of the marking had purity indicated on them. The gold at the time of seizure by Customs on 3-3-1988 was got tested by a certified goldsmith and found to be of 24 carats purity. Thus, the satisfaction arrived by the detainee authority before the orders of detention was clearly subjective and was correctly arrived at". In view of this reply the learned counsel for the petitioner further contended that the copy of the report of the goldsmith who certified the purity of the Gold had not been supplied to the detainee and therefore, also there is a further breach of Article 22(5) of the Constitution. It is not denied by department that the copy of the report of the certified Goldsmith was not supplied to the detainee. As this satisfaction regarding foreign gold was certainly based on this report it was a vital document, a copy of which must have been supplied to the detainee. Since this has not admittedly been done this also appears to be of further violation of Article 22(5) of the Constitution, and Section 3(3) of the COFEPOSA Act.

11. In view of this the detention of Shri Ghanshyam under the COFEPOSA Act cannot be said to be justified and he is entitled to be set at liberty. He, therefore, be released forthwith if not required in any other case.