

(1999) 08 SC CK 0016

In the Supreme Court Of India

Case No : Criminal A. No. 779 of 1999

Sophia Gulam Mohd. Bham

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 13-08-1999

Acts Referred:

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

Citation : (1999) 2 ACR 1798 : AIR 1999 SC 3051 : (1999) AIRSCW 2985 : (1999) 2 ALD(Cri) 511 : (1999) CriLJ 4064 : (1999) 66 ECC 583 : (1999) 5 JT 577 : (1999) 4 SCALE 688 : (1999) 6 SCC 593 : (1999) 1 SCR 421 Supp : (1999) 7 Supreme 407

Hon'ble Judges : S. Saghir Ahmad, J;D. P. Wadhwa, J

Bench : Division Bench

Advocate : Suresh Gupta, Maksud Khan, Manoj K. Mishra and A. S. Bhasme, for the Appellant; J.G. Shah, S.S. Shinde and G.B. Sathe, for the Respondent

Final Decision : Allowed

Judgement

S. Saghir Ahmad, J.—Leave granted.

2. This appeal by special leave is directed against the judgment and order dated 21st of January, 1999, passed by the Bombay High Court, by which the Writ Petition in the nature of habeas corpus, preferred by the appellant, for the release of his brother Bham Faisal Gulam Mohammed, who was detained in jail in pursuance of the order dated 24th February, 1998, passed by Shri G.S. Sandhu, Secretary, Government of Maharashtra, Home Department (Preventive Detention), Mumbai, u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974) (for short, 'the Act'), was dismissed. The detention order reads as under:

No. PSA 1097/89 SPL.3(A).- Whereas I, G.S. Sandhu, Secretary to the Government of Maharashtra, Home Department (Preventive Detention), specially

empowered u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974) vide Government Order, Home Department (Special), No. PSA 2096/35/SPL.3(A), dated the 19th December 1996, am satisfied with respect to the person known as Shri Bham Faisal Gulam Mohammed (Age 22 years) residing at 24, Vasundra Apts., Warden Road, Mumbai 400026 that with a view to preventing him in future from smuggling of goods, it is necessary to make the following order:

In exercise of the powers conferred by Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974), I hereby direct that the said Shri Bham Faisal Gulam Mohammed be detained under the COFEPOSA Act.

2. In pursuance of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Maharashtra Conditions of Detention) Order, 1974 read with Government Order, Home Department No. SB.III/ISA-3974(V), dated the 18th December, 1974, I hereby further direct that the said Shri Bham Faisal Gulam Mohammed shall be detained in Mumbai Central Prison, Mumbai, for one week from the date of detention and in the Nasik Road Central Prison, Nasik thereafter and shall be subject to the conditions laid down in the said Conservation of Foreign Exchange and Prevention of Smuggling Activities (Maharashtra Conditions of Detention) Order, 1974.

Sd/- (G.S. Sandhu)

Secretary to the Government of Maharashtra Home Department (Preventive Detention) and Detaining Authority.

3. The grounds of detention as also the material in support of these grounds were also supplied to the detenu on the same day, namely, on 24th of February, 1998. A list of the copies of all documents (material) which were supplied to the detenu along with the grounds of detention was annexed with the grounds. This order of detention was challenged by the present appellant, who is the sister of the detenu, by filing a Writ Petition in the nature of habeas corpus in the Bombay High Court, but the same, as pointed out above, was dismissed. It is in these circumstances that the present appeal has been filed in this Court.

4. It appears that on 10.8.1997, the officers of the Air Intelligence Unit at Module I, Departure, Mumbai Airport, intercepted the detenu holding Indian Passport bearing No. A-3491330 issued at Ahmedabad on 30-6-97 valid till 7-2-1998 and also one old passport bearing No. E-2059399 issued at Bombay in his name on 8-2-1988. The detenu was found holding a Cathay Pacific Airline Passenger's ticket issued in his name for the flight No. CX-750 dated 10-8-97 BKK for the sector Mumbai-Bangkok, boarding No. 0281 Seat No. 31 H vide ticket No.6296:077:461:2 issued on 1-8-97 and an open ticket bearing No. 6296:077:462:3 issued by Cathay Pacific for the sector Bangkok to Yangon. The detenu was found to have checked in one Dark Blue Zipper suitcase bearing tag No. CX-437726. The suitcase was found to have false bottom in which one

cardboard rectangular shaped packet was found concealed. The examination of the packet resulted in the recovery of 90 polythene packets of cut and polished Diamonds of different shapes and colours, which were valued by the Government approved valuer at Rs. 2,43,63,096.25 LMV and the same were seized on the reasonable belief that they were to be smuggled out of India.

5. The matter was investigated by the Custom Authorities. During the course of the investigation by the Custom Authorities, various places were searched. One of the places searched was the premises No. B/13, Sikkanagar, V.P. Road, Mumbai - 400 004. Regarding search of this premises, it is stated in the grounds of detention as under:

6. The search of the premises No. B/13, Sikkanagar, V.P. Road, Mumbai - 400 004, was conducted on 11-8-97. Mr. Pramod was not available at the premises, but Mr. Pravinchandra Haridas Jogi was available. During the course of the search, a person by name Mr. Mohammed Salim Abdul Hameed brought Rs. 15,99,000/- to be handed over to Mr. Pramod. The search resulted in recovery of Rs. 15,99,000 under the reasonable belief that it may be the sale proceeds of the Diamonds seized and documents: 1) Super Delux Note Book - pages (1) to (82) (2) Super Delux Note Book Page (1) to (140) and 3) Loose Note Sheets Sr. No. (1) to (42) duly signed by the panchas which were also seized as they may be useful for the relevant proceedings under the Customs Act, 1962.

6. It was further stated in paras 13, 14 and 15 of the grounds of detention as under:

13. On verification of the diaries seized vide panchnama dt. 11.8.97 from the residence of Mr. Pravinchandra Haridas Jogi. It is revealed that there are in all various transactions in the last many years worth many crores of rupees with codes, names and figures. However, from the diaries it is seen that there are transactions totally over 50 lakhs each in the last few months in the names of Chhaganlal, Pratap Bhai, Yogesh Bhai, Ajmeri, Mukesh Bhai and Noohu besides many more transaction of over 2 to 5 lakhs each with Vinodbhai, Pradeepbhai, Pramodbhai, Prakash, Haribhai, Kaushik Bhai, Praveen, Preeti, Danjibhai and Rajeev bhai and other.

14. In spite of repeated summons issued to Mohamood Hussain, Dinakar Haridas Jogi, Pramod bhai, Ashra, so far they have not come forward to give the statements or to clarify the further details or extend their co-operation in the investigation. However, summons could not be served to Mr. Ajmeri as the said place was found locked in spite of various attempts.

15. From the record, it appears that Mr. Dinakarbhai Jogi is the King pin and along with Mr. Pramod, Ajmeri and Noohu are the main financers and organisers of the smuggling activities.

In para 18 of the grounds, it is stated as under:

18. From the prevailing circumstances it is apparent that you have knowingly

been working as a carrier for persons who were dealing in smuggling of goods. I am aware that you are on bail at present and I am satisfied that unless detained you are likely to continue to engage in similar prejudicial activities in future also and therefore it is necessary to detain you under the COFEPOSA Act, 1974.

7. Learned Counsel appearing on behalf of the appellant has contended that a large number of documents had been seized on the search of the premises No. B/13, Sikkanagar, V.P. Road, Mumbai - 400 004, conducted on 11.8.1997 and all these documents were considered by the Detaining Authority, as set out in paras 13, 14 and 15 of the grounds of detention (reproduced above), but copies of those documents were not supplied to the detenu with the result that an effective opportunity of hearing, as contemplated by Article 22(5) of the Constitution, was not provided and the detention order, for this reason, stands vitiated.

8. We have already reproduced above the relevant paras of the grounds of detention. In para 6, it is clearly stated that premises No. B/13, Sikkanagar, V.P. Road, Mumbai-400 004 was searched by the Custom Authorities on 11.8.1997 and besides the recovery of a sum of Rs. 15,99,000, documents (i) Super Deluxe Note Book containing 82 pages (ii) Super Deluxe Note Book containing 140 pages and (iii) Loose Note Sheets Sr. No. 1-42 were seized. These documents were duly signed by the "Punches" vide Panchnama dated 11.8.1997. It was on the basis of these documents as also on a consideration of the other documents, that the Detaining Authority came to the conclusion that Mr. Dinakarbhai Jogi was the kingpin while Mr. Pramod, Ajmeri and Noohu were the main financiers and organisers of the smuggling activities. The detenu was treated as a "carrier" for them. Two Super Deluxe Diaries as also certain loose sheets of papers seized from premises No. B/13, Sikkanagar, V.P. Road, Mumbai - 400 004 appear to have revealed to the Detaining Authority the link between the aforesaid persons. These documents which were considered by the Detaining Authority were, therefore, extremely material as they constituted, along with other documents, the basis of the satisfaction of the Detaining Authority that in order to prevent the detenu from carrying on his smuggling activities, it was necessary to detain him under the Act.

9. Admittedly, copies of the documents seized on a search of the premises No. B/13, Sikkanagar, V.P. Road, Mumbai -400 004 were not supplied to the detenu although they constituted extremely material document on a consideration of which the Detaining Authority felt satisfied that the detention of the appellant's brother, namely, Bham Faisal Gulam Mohammed was necessary and, therefore, passed the impugned order of detention under the Act.

10. In paras 21, 22 and 23 of the grounds of detention, it was stated as under:

21. I further inform you that you have a right to make a representation to the Detaining Authority against my Order of Detention. Should you wish to make such a representation, you should address it to the Secretary to the Government

of Maharashtra, Home Department (Preventive Detention) and Detaining Authority, Mantralaya, Mumbai - 400 032, through the Superintendent of the Jail where you are detained.

22. I further inform you that you have a right to make representation to the State Government against my Order of Detention. Should you wish to make such a representation you should address it to the Hon'ble Deputy Chief Minister (Home), Mantralaya, Mumbai - 400 032, through the Superintendent of the Jail where you are detained. To facilitate expeditious consideration of your representation, you may request the Superintendent of Jail where you are detained to forward your representation to the undersigned so that the Home Department can put up the case to the Minister along with your representation for his consideration.

23. I further inform you that you have also a right to make a representation to the Central Government against my order of detention and you may if you desire, make the representation and address it to the Secretary, Government of India, Ministry of Finance (Department of Revenue), New Delhi, through the Superintendent of the Jail, where you are detained.

11. The detenu was thus informed that he has a right not only to make a representation to the Detaining Authority against the order of detention but also to the State Government and the Central Government.

12. Now, an effective representation can be made against the order of detention only when copies of the material documents which were considered and relied upon by the Detaining Authority in forming his opinion that the detention of Bham Faisal Gulam Mohammed was necessary, were supplied to him. It is only when he has looked into those documents, read and understood their contents that it can be said that the detenu can make an effective representation to the Detaining Authority, State or Central Government, as laid down in Article 22(5) of the Constitution which provides as under:

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.

13. The above will show that when a person is detained in pursuance of an order made for preventive detention, he has to be provided the grounds on which the order was made. He has also to be afforded the earliest opportunity of making a representation against that order. Both the requirements have to be complied with by the authorities making the order of detention. These are the rights guaranteed to the person detained by this clause of Article 22 and if any of the rights is violated, in the sense that either the grounds are not communicated or opportunity of making a representation is not afforded at the earliest, the detention order would become bad. The use of the words "as soon as may be"

indicate a positive action on the part of the Detaining Authority in supplying the grounds of detention. There should not be any delay in supplying the grounds on which the order of detention was based to the detenu. The use of the words "earliest opportunity" also carry the same philosophy that there should not be any delay in affording an adequate opportunity to the detenu of making, a representation against the order of detention. The right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the grounds are based flows from the right given to the detenu to make a representation against the order of detention. A representation can be made and the order of detention can be assailed only when all the grounds on which the order is based are communicated to the detenu and the material on which those grounds are based are also disclosed and copies thereof are supplied to the person detained, in his own language.

14. The words "grounds" used in Clause (5) of Article 22 means not only the narration or conclusions of facts, but also all materials on which those facts or conclusions which constitute "grounds" are based. In *Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others*, , in which an order of detention was passed u/s 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, this Court, while examining the concept of "grounds" used in Article 22(5), observed that the word "grounds" has to receive an interpretation which would keep it meaningfully in tune with the contemporary notions. It was explained that the expression "grounds" includes not only conclusions of facts but also all the "basic facts" on which those conclusions were founded. The "basic facts" are different from subsidiary facts or further particulars.

15. The order of detention, in the instant case, is based only on one ground which is to the effect that Bham Faisal Gulam Mohammed was, on 10.8.1997, held at the Mumbai Airport and on his search being taken, he was found in possession of Diamonds which he was trying to smuggle out of India.

16. As pointed out earlier, copies of the documents which were seized on a search made at premises No. B/13, Sikkanagar, V.P. Road, Mumbai-400 004, admittedly considered by the Detaining Authority, were not given to Bham Faisal Gulam Mohammed. On a perusal of the documents referred to in the grounds of detention, the Detaining Authority had come to the conclusion that Bham Faisal Gulam Mohammed was acting as a "carrier" for persons who were the king-pins, financiers and organisers of the whole smuggling activities. This inference was drawn by the Detaining Authority on the basis of the documents referred to in grounds 13 and 14 of the detention order. The Bombay High Court, before which the question of non-supply of documents was raised and the order of detention was challenged on grounds, inter alia, that requirements of Article 22(5) were not complied with, relied upon the affidavit of the Detaining Authority and found that the documents referred to in Paras 13 and 14 of the grounds were not to be supplied to the detenu and there was no infraction of Sub-clause (5) of Article 22

of the Constitution. The relevant portion of the affidavit relied upon by the Bombay High Court in the impugned judgment is to the following effect:

9. With reference to para 4(v) of the petition, I say that though the copies of the diaries have not been supplied to the detenu, the copy of panchanama dated 11.8.97 has been supplied to the detenu which appears at Sr. No. 26, page Nos. 79-85 of the list of documents. I say that the diaries referred in para 13 of the grounds were seized on 11.8.1997 from the residence of Mr. Pravinchandra Haridas Jogi. I say that the present Detention Order is in no way based on the said diaries or the entries therein. I have made a passing reference to the diary entries to complete the narration of facts in the said case. These diary entries are in no way concerned with the detenu. His name does not figure in any of the entries in the said diary. Hence I have not placed any reliance thereon, for issuing the order of detention against the present detenu. I reiterate that the said diaries and the entries therein did not constitute the basic facts upon which I had arrived at my subjective satisfaction while passing the order of detention. I say that the said diaries and the entries therein were not vital documents for the purpose of passing the order of detention against the detenu. In the circumstances, the non-supply of the said diaries or entries made therein, does not vitiate the order of detention. I deny that I have been influenced by the contents of the said diaries adversely or otherwise and the question therefore of furnishing the copies thereof to the detenu would not and did not arise. I deny that non-supply of the diaries or the entries therein amounts to non-communication of the grounds of detention as alleged. I deny that the detenu has been denied the earliest opportunity to make an effective representation. In view of this, it is denied that the order of detention is mala fide, ab initio null and void, as also it violates the facets of Article 22(5) of the Constitution of India.

10. With reference to para 4(vi) of the petition, it is stated that the proposal along with the documents mentioned in the list of documents was placed before me, after considering the same, I came to the conclusion as stated in para 13 of the grounds of detention. It is true that though the diaries seized under panchnama dated 11.8.1997 were not placed before me, it is submitted that the panchnama dated 11.8.1997 had been placed before me and the copies thereof have been supplied to the detenu alongwith the other documents with annexure 'A' and 'B' which is at pages 79-85 of the list of documents. It is, therefore, denied that the conclusion drawn by me is based on non-existing and illusory facts and materials.

17. On the basis of the above averments, the Bombay High Court recorded its findings as under:

In the light of the above elucidating explanation given in paras 9 and 10 of the reply affidavit and the rival contention made by the learned Public Prosecutor basing upon the legal ratio above referred, we are of the considered view that mere referring of paragraphs 13 and 14 of the grounds of detention, is a mere extraction of recovery of the diaries and the relevant entries contained therein,

however, which has no bearing at all to the detenu but as a matter of sequence it has been done so and that, therefore, it does not amount to any importance or vital thing taken to formulate the grounds of detention and that, therefore no copies need be given to the detenu and failure to furnish the same does not violate fundamental rights conferred under Article 22(5) of the Constitution of India to the detenu. Therefore this ground also must fail.

18. We must say that we do not agree with the reasoning and findings recorded by the High Court.

19. The grounds of detention indicate that the smuggling activities were not being carried on by the detenu individually but he was acting as a "carrier" for a group of persons, namely, Mr. Dinakarbhai Jogi as the king-pin with Mr. Pramod, Mr. Ajmeri, Mr. Noohu, who were the main financiers and organisers of the smuggling activities. The nexus between the detenu and the aforesaid persons was sought to be established on the basis of the documents recovered from premises No. B/13, Sikkanagar, V.P. Road, Mumbai 400 004, which was searched on 11.8.1997. It was at this place that the diaries as also loose note sheets were recovered. These diaries indicated transactions between the detenu as also other persons, including those named above, inter se. The documents recovered from the said premises, namely, B/13, Sikkanagar, V.P. Road, Mumbai 400 004, were, undoubtedly, considered by the Detaining Authority and it was, thereafter, that he proceeded to say in Para 13 of the grounds of detention that:

On verification of the diaries seized vide panchnama dt, 11.8.97 from the residence of Mr. Pravinchandra Haridas Jogi, it is revealed that there are in all various transactions in the last many years worth many crores of rupees with codes, names and figures. However, from the diaries it is seen that there are transactions totally over 50 lakhs each in the last few months in the names of Chhaganlal, Pratap Bhai, Yogesh Bhai, Ajmeri, Mukesh Bhai and Noohu besides many more transaction of over, 2 to 5 lakhs each with Vinodbhai, Pradeepbhai, Pramodbhai, Prakash, Haribhai, Kaushik Bhai, Praveen, Preeti, Danjibhai and Rajeev Bhai and others.

20. Having thus stated in the grounds that the documents were taken into consideration, he Detaining Authority in his affidavit could not legally say that the diaries were not considered by him and only the 'Panchnama', which was placed before him, was considered. The affidavit, instead of supporting the grounds of detention, contradicts the recitals and, therefore, on this ground alone, the High Court should have rejected the affidavit. Moreover, the two paragraphs of the affidavit extracted above, are self-contradictory. In para 9 of the affidavit, the Detaining Authority says, inter alia, as under:

I say that the present Detention Order is in no way based on the said diaries or the entries therein. I have made a passing reference to the diary entries to complete the narration of facts in the said case. These diary entries are in no way concerned with the detenu. His name does not figure in any of the entries in

the said diary. Hence I have not placed any reliance thereon, for issuing the order of detention against the present detenu.

It is further stated in this Para as under:

I deny that I have been influenced by the contents of the said diaries adversely or otherwise and the question therefore of furnishing the copies thereof to the detenu would not and did not arise. I deny that non-supply of the diaries or the entries therein amounts to no communication of the grounds of detention as alleged.

21. These quotations indicate that the diaries were considered and looked into by the Detaining Authority and only then he came to know that the diary entries were, in no way, concerned with the detenu, or that the name of the detenu did not figure in any of the entries in the said diary. The further recital that, "I deny that I have been influenced by the contents of the said diaries adversely or otherwise..." also indicates that the Detaining Authority had looked into the diaries. In the face of this averment, the averments made in Para 10 of the affidavit to the effect that "It is true that though the diaries seized under panchnama dated 11.8.1997 WERE NOT PLACED BEFORE ME, it is submitted that the panchnama dated 11.8.1997 had been placed before me and the copies thereof have been supplied to the detenu...", positively contradict the recitals in Para 9 of the affidavit. The self-contradictory affidavit could hardly have been relied upon by the High Court. The fact remains that the diaries seized under 'Panchnama' dated 11.8.1997 positively established the link between the detenu and the persons mentioned in Paras 13 and 14 of the grounds of detention and it was on the basis of these, as also other documents, that the Detaining Authority came to the conclusion that the detenu was a "carrier". These documents were, therefore, extremely material documents which were taken into consideration by the Detaining Authority and it was on the basis of these documents, together with other materials, that the Detaining Authority felt satisfied that an order of detention was required to be passed u/s 3(1) of the Act for preventing the detenu from carrying on his prejudicial activities. Admittedly, copies of these documents were not supplied to the detenu, which resulted in violation of the Fundamental Right guaranteed to him under Article 22(5) of the Constitution under which he had the right to make an effective representation against the order of detention to other authorities for setting aside the order of detention. This right was denied to the detenu.

22. For the reasons stated above, the appeal is allowed. The order of detention dated 24.2.1998 passed u/s 3(1) of the Act is quashed with the direction that Bham Faisal Gulam Mohammed (the detenu) shall be set at liberty forthwith unless his detention is required in some other case.