
(1988) 07 KL CK 0020
In the High Court Of Kerala
Case No : O.P. NO. 3471 of 1988

T. A. Abu

APPELLANT

Vs

Secretary to Government and Others

RESPONDENT

Date of Decision : 12-07-1988

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1)(i), 9(1)
Customs Act, 1962 — Section 108

Citation : (1988) 2 KLJ 173

Hon'ble Judges : U. L. Bhat, J; M. M. Pareed Pillay, J

Bench : Division Bench

Advocate : V. Radhakrishna Menon, for the Appellant; P. Sarthalingam, for the Respondent

Final Decision : Allowed

Judgement

Pureed Pillay, J.—Petitioner is the brother of the detenu under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The detenu was working in Das Island, U.A.E. He returned to India on 13-4-1987. On 27-5-1987, the detenu approached the office of the Kerala State Industrial Enterprises Ltd., attached to the Cochin Customs with the Air way Bill No. 098-4736 1904 dated 10-5-1987 for taking delivery of the consignment covered by the above air way bill. Out of the four cartons three cartons were found opened. The detenu was told by the officials of the Kerala State Industrial Enterprises that the cartons were received in such a condition and that they were not in any way responsible for it. The detenu obtained an endorsement from the Kerala State Industrial Enterprises to that effect. The cartons were produced before the Customs Officers for examination. The fact that the cartons were tampered with was also brought to their notice. The detenu gave a declaration in the prescribed form regarding the contents of the cartons and an application for condoning the delay in dispatching the goods from U.A.E." The Customs Officers examined the packages and assessed a duty of Rs. 19,680/- The detenu paid the

amount. The Customs Officers examined the packages once again and they recovered 47 gold biscuits and another small piece of gold from the air-conditioner. That happened on 27-5-1987. The search list is Ext. P-5. The detenu is alleged to have made a voluntary statement Ext. P-6 on 27-5-1987 to the Preventive Officer. In Ext. P-6 the detenu stated that he was working in U.A.E. since 1977 as a waiter in a canteen run by M/s. Spinnys in one of the Oil Rigs at Das Island that he was getting a monthly salary of U.A.E. Dhms. 4000/-, that on his return after leave from India in January 1987 he was informed by his employer that he need: join duty only if he consented to work for a salary of Dhms. 2000/- per month, that he decided not to work for the reduced salary and wanted to return to India, that he stayed with his brother at Abu Dhabi until he returned to India on 13-4-1987, that he had given Dhms. 5000/- to his four friends by way of loans, that he could not collect the same prior to his departure to India, that his friend Ismail agreed to collect the loan amounts due to him and also promised to purchase and send some, articles which the detenu wanted for his use, that Ismail had told him that he desired to send some articles for himself including an air-conditioner along with other articles which the detenu wanted for his use and that Ismail had also told him that he will be sending some gold biscuits concealed in the air-conditioner and wanted him to hand over the same to a person authorised by him in writing. He also stated that he received a letter from Ismail on 15-5-1987 stating that he had concealed 47 1/2 gold biscuits in the air-conditioner and that he had made arrangements to pay the detenu a reward of Rs. 25,000/-. He stated that he destroyed that letter. The detenu was produced before the Additional Chief Judicial Magistrate (economic Offences) Ernakulam on 28-7-1987 and was remanded to judicial custody. He was later released on bail by the Magistrate.

2. The detenu was further questioned by the Superintendent, Customs, Cochin on 16-6-1987 and a statement was recorded u/s 108 of the Customs Act, 1962. On 31-7-1987 the detenu was questioned again by the Superintendent, Cochin Customs and recorded a statement u/s 108 of the Customs Act, 1962. The Additional Collector of Customs" initiated adjudication proceedings against the detenu by issuing a show cause Notice No. S-14/161/87 Pr. Cuss. dated 15-9-1987. A true copy of the show cause notice has been marked as Ext. P-12. The detenu submitted a reply to Ext. P-12 show cause notice. The reply has been marked as Ext. P-13. In Ext. P-13 the detenu retracted his earlier statement Ext. F-6. In Ext. P-13 the detenu took the stand that he was forced to sign Ext. P-6 statement by the Customs Officials. He farther stated that he had no pre-arrangement with Ismail for smuggling the gold, that he did not receive any letter from Ismail in this regard, and that there was no promise by Ismail to pay any consideration to him. The Collector of Customs by order dated 22-12-1987 ordered confiscation of the gold and the air-conditioner and also imposed a penalty of Rs. 25,000/- on the detenu. The detention order was passed u/s 3(1) (i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act against the detenu. On 1-1-1988, the first respondent served on

the detenu the grounds on which the" detention was made with particulars of documents sought to be relied upon. A true copy of the memo dated 15-12-1987 forwarding the grounds of detention is Ext. P-16. True copy of the grounds of detention served on the detenu is Ext. P-17. Ext P-18 is me true copy of the list of documents furnished to the detenu along with the grounds of detention. The second Respondent issued the declaration u/s 9(1) of the Act and it was served on the detenu on 11-2-1988. The detenu submitted a representation before the first respondent and requested him to peruse the entire records relating to his detention and cancel it. The detenu was informed by the first respondent that his request has been rejected. On the basis of the Advisory Board's report the detention of the detenu was confirmed by the first respondent by order dated 23-3-1988 and also fixed the period of detention as two years effective from 31-12-1987.

3. Mainly on two grounds the detention order is assailed. The first ground is that the first respondent has relied on Ext. P6 statement of the detenu in its entirety and that too on the assumption that the same is voluntary overlooking what he had stated in Ext. P-13. In Ext. P-13 the detenu had explained the circumstances under which he took delivery of the consignment including the air-conditioner. It is alleged that the customs officials had forced him to make Ext. P6 statement. Counsel for the petitioner submitted that the material fact relating to the issue was not made available to the first respondent and therefore the order of detention is totally vitiated by non-application of mind by the first respondent on material particulars and consequently it is vitiated and hence liable to be quashed. It is pointed out that the third respondent was really aware of the existence of Ext. P-13 and therefore the third respondent should have placed that fact before the first respondent and as it has not been done it amounted to wilful suppression of a material fact relating to the issue from the attention of the first respondent and hence the order of detention is violative of established principles of law.

4. The fundamental legal principle that cannot be lost sight of is that when liberty of the subject is involved whether it is under the Preventive Detention Act or Maintenance of Internal Security Act or COFEPOSA or any other law providing for preventive detention, it is the duty of - the Court to satisfy itself that all the safeguards provided by the Law have been scrupulously and honestly observed and that the subject is not deprived of his personal liberty otherwise than in accordance with law: In Mangalbai Motiram Patel Vs. State of Maharashtra and Others, the Supreme Court held that the community has a vital interest in the proper enforcement of its laws, particularly in an area such as conservation of foreign exchange and prevention of smuggling activities and in dealing effectively with persons engaged in such smuggling and foreign exchange racketeering by ordering their preventive detention and at the same time, in assuring that the law is not used arbitrarily to suppress the citizen of his right to life and liberty. Though there cannot be any dispute that smuggling and other antisocial activities have to be dealt with by an iron hand by the State, any action taken against a

subject I must conform to established legal principles. In *Narendra Purshotam Umrao v. B.B. Gujral* (1979-2-SCR 315) the Supreme Court observed that the Court must zealously safeguard the liberty of the subject and should definitely see that the subject is not deprived of his personal liberty otherwise than in accordance with law.

5. The failure of the sponsoring authority to forward to the first respondent Ext. P-13 wherein the detenu retracted Ext. P-6 confession has resulted in the detaining authority proceeding to make the impugned order of detention without due application of mind. In *Asha Devi v. K. Shivraj* (AIR 1979 S.C. 447)-(1979-1-SCR 210) the Supreme Court held:

It is well settled that the subjective satisfaction requisite on the part of the detaining authority, the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order. The principle that could be clearly deduced from the above observations is that if material or vital facts which would influence the mind of the detaining authority one way or the other on the question whether or not to make the detention order, are not placed before are not considered by the detaining authority it would vitiate its subjective satisfaction rendering the detention order illegal. After all the detaining authority must exercise due care and caution and act fairly and justly in exercising the power of detention and if taking into account matters extraneous to the scope and purpose of the statute vitiates the subjective satisfaction and renders the detention order invalid then failure to take into consideration the most material or vital facts likely to influence the mind of the authority one way or the other would equally vitiate the subjective satisfaction and invalidate the detention order."

In *Mohd. Shakeel Wahid Ahmed Vs. State of Maharashtra and Others*, the Supreme Court had occasion to consider the failure on the part of the sponsoring authority in furnishing the relevant materials to the detaining authority and the Court held that it was a vitiating factor. The indubitable position is that if materials and vital facts which would influence the mind of the detaining authority one way or the other on the question whether or not to make the detention order are not placed before it, that would-vitiate the subjective satisfaction rendering the detention order illegal.

6. As Ext. P-13 is a relevant material in issue, it would have been possible to the detaining authority to consider the same in its true perspective and its own conclusion. The detaining authority could have probably rejected it on the ground that it is the result of after-thought or belated deliberations but we cannot make any such assumptions. Admittedly the detaining authority could not consider Ext. P-13 as it was not placed before it by the sponsoring authority. This has resulted in the detaining authority not getting a chance to consider a crucial material. The

question whether Ext. P-6 confession statement was voluntarily and freely made or was obtained from him under duress or whether the subsequent retraction in Ext. P-13 was in the nature of after-thought, was essentially for the detaining authority to consider before deciding to issue the order of detention but since admittedly the vital document Ext. P-13 which would have influenced the mind of the detaining authority one way or the other was neither placed before it nor considered by it, it is apparent that there was non-application of mind on an important and vital fact vitiating the requisite satisfaction of the detaining authority. The resultant position is that the impugned order of detention is invalid and illegal. We hold so. Counsel next contended that there was inordinate delay in ordering detention and as the order of detention was passed several months after the prejudicial activity it creates doubts regarding the subjective satisfaction of the detaining authority and hence the detention is illegal. As the petitioner has succeeded on the first ground we do not consider it necessary to advert to this aspect of the matter.

The petitioner's brother (detenu) is directed to be set at liberty if not wanted to be detained for any other cause. The Original petition is allowed. No costs.