

The Commissioner Vs. Bala Handloom

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Court : Chennai

Decided On : Nov-28-2014

Judge : R.Sudhakar

Appellant : The Commissioner

Respondent : Bala Handloom

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS Dated:

05. 10.2009 Coram The Honourable Mr. Justice M.CHOCKALINGAM and The Honourable Mr. Justice R.SUBBIAH H.C.P.Nos.523, 640 and 711 of 2009 N.K.Jawahar Ali ..Petitioner in HCP.523/2009 Omari Iqbal ..Petitioner in HCP.640/2009 Kalaivani ..Petitioner in HCP.711/2009 ..Vs..

1. The State of Tamil Nadu, rep.by its Secretary, Public (SC) Department, Fort St.George, Chennai-600 009.

2. The Union of India, rep.by its Secretary, Ministry of Finance, Department of Revenue, (COFEPOSA Unit), Central Economic Intelligence Bureau, Janpath Bhavan, B Wing, 6th Floor, Janpath, New Delhi-110 001. ... Respondents in HCP.523/2009 1. The State of Tamil Nadu, rep.by its Secretary to the Government of Tamil Nadu, Public (SC) Department, Fort St.George, Chennai-600 009.

2. The Union of India, rep.by the Secretary to the Government of India, Ministry of Finance, (COFEPOSA Unit), Department of Revenue, New Delhi-110 001.

3. The Superintendent of Central Prison, Central Prison, Madras. ..Respondents in HCP640 and 711/2009 H.C.P.No.523 of 2009 filed under Article 226 of the Constitution of India to issue a writ of Habeas Corpus, calling for the records of the detention order in G.O.No.S.R.I./062-9/2009 and G.O.No.S.R.I.062-10/2009 both dated 09.03.2009 passed by the 1st respondent herein under the COFEPOSA Act and set aside the same and produce the detenu before this Court and set at liberty the detenu M.Amzath Khan, son of Mohammed Kasim, aged about 30 years, who is at present confined at Central Prison, Puzhal. H.C.P.No.640 of 2009 filed under Article 226 of the Constitution of India to issue a writ of Habeas Corpus, calling for the records of the detention order in G.O.No.S.R.1/062-11/2009 dated 09.03.2009 passed by the 1st respondent herein and quash the same and direct the respondents to produce the body of the person of the detenu namely Ahmed Saleem, son of Hameen Ali, aged about 30 years before this Court, now detained under section 3(1)(i) & 3(1) of the COFEPOSA Act in the Central Prison, Madras. H.C.P.No.711 of 2009 filed under Article 226 of the Constitution of India to issue a writ of Habeas Corpus, calling for the records of the detention order in G.O.No.S.R.1/62-07/29 dated 09.03.2009 passed by the 1st respondent herein and quash the same and direct the respondents to produce the body of the person of the detenu namely Ramesh, son of Packiri, aged about 31 years before this Court, now detained under section 3(1)(i) & 3(1) of the COFEPOSA Act in the Central Prison, Madras. For Petitioner : Mr.Habibullah Basha, Senior Counsel for Mr.V.S.Venkatesh For Respondents: Mr.Babu Muthu Meeran, Addl. Public Prosecutor -R1 Mr.S.Udayakumar, S.S.C.,-R2 COMMON

ORDER

(Order of the Court was made by R.SUBBIAH, J.,) Since the grounds of detention in all the petitions are identical, the same are heard together and disposed of by the following common order.

2. These three habeas corpus petitions are filed by the father-in-law, brother and wife of the respective detenues, to quash the orders of detention dated 09.03.2009

passed by the 1st respondent under section 3(1)(i) and (ii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA Act) (Central Act 52 of 1974).

3. The circumstances under which the orders of detention dated 09.03.2009 came to be passed by the 1st respondent are as follows: Pursuant to a specific information to the effect that Ketamine Hydrochloride was concealed in the export consignment covered under Shipping Bill No.3238829 dated 19.12.2008, the Officers of Directorate of Revenue Intelligence (DRI), Chennai, intercepted and examined the said export consignment at M/s.All Cargo Container Freight Station (All Cargo CFS), Ernavur, Chennai. The said export cargo container was booked in the name of exporter M/s.Kamadhenu Metal Stores, Chennai to Malaysia, containing household articles. The said examination was done by the DRI Officials in the presence of one Om Prakash and one P.Ramesh (detenu in H.C.P.No.711 of 2009). At the result of the search, the DRI Officials recovered and seized 201.600 kgs.of Ketamine Hydrochloride, the item which is not allowed to be exported without obtaining a licence issued by the Drug Control Authorities and a No Objection Certificate issued by the Narcotics Commissioner. The said Om Prakash and Ramesh were arrested by the DRI officials and Om Prakash in his statement implicated the detenu Amzath Khan (detenu in H.C.P.No.523 of 2009) stating that 125 kgs.of Ketamine Hydrochloride was handed over to him by the detenu in H.C.P.No.523 of 2009 for export. Based on the statement of Om Prakash, the detenu in H.C.P.No.523 of 2009 was taken into custody by the DRI officials and later, he was arrested after obtaining statement from him. Similarly, the detenu in H.C.P.No.640 of 2009, namely, Ahmed Saleem was arrested on 15.01.2009 based on the statement of a co-detenu. Thereafter, on 09.03.2009, the 1st respondent has passed separate detention orders against the detenus under section 3(1)(i) and (ii) of the COFEPOSA Act. Challenging the same, the present habeas corpus petitions have been filed.

4. Advancing arguments on behalf of the petitioners, the learned Senior Counsel, inter alia, would submit that the detention orders passed by the 1st respondent are seriously suffering from series of infirmities for the following reasons : (a) The learned senior counsel invited the attention of this Court to a letter dated

03.03.2009 written by the Special Public Prosecutor to the Assistant Director, Directorate of Revenue Intelligence and contended that the detenu in H.C.P.No.523 of 2009 filed a bail application on 02.03.2009 and got bail order on the same day itself. Though this fact was informed to the Assistant Director, Directorate of Revenue Intelligence by the Special Public Prosecutor, the vital documents pertaining to the grant of bail were not placed before the detaining authority while passing the detention order in H.C.P.No.523 of 2009. Similarly, in H.C.P.No.640 of 2009, the detenu was granted an interim bail on 15.02.2009 to attend his sister's marriage at Chennai, but the said interim bail application for interim bail and the order passed by the Magistrate concerned were not placed before the detaining authority nor they were supplied to the detenu and hence, non-placement of the relevant materials would vitiate the detention orders. In this regard, the learned senior counsel placed reliance on the judgments reported in 1999(3) Crimes 277 (Haji Ishabhai Agewan ..vs.. Union of India) and 1990(2) SCC1(M.Ahamed Kutty ..vs.. Union of India). (b) The learned senior counsel would further submit that the detenus have been charged under section 3(1)(i) and (ii) of COFEPOSA Act. Section 3(1)(i) of the Act deals with smuggling, whereas section 3(1)(ii) deals with 'abetment'. The only person who could be charged for smuggling is the person who had filed the shipping bill and not others. Therefore, there cannot be a single charge under two counts i.e., one for smuggling and another for abetment against the detenus, since none of the detenus filed the shipping bills for exporting the consignments. In this regard, the learned senior counsel invited the attention of this Court to the grounds of detention and submitted that the detaining authority has referred to Section 113 of the Customs Act in the detention orders. Section 113 of the Customs Act deals about the confiscation of goods attempted to be improperly exported. But in the instant case, none of the detenus was an exporter. None of the detenus neither filed the shipping bill nor claimed any drawback. It is further pointed out by the learned senior counsel that under section 51 of the Customs Act, only after filing the shipping bill, the export order would be given. In the instant case, shipping Bill was filed in the name of M/s.Kamadhenu Metal stores (IEC040100B71) and the export order was issued on 30.12.2008. So, the persons, who have tried to send the goods out of the country contrary to the provisions of Section 113 alone would be responsible for the act of illegal

smuggling, as defined under section 2(39) of the Customs Act, and not these detenus. While so, the detaining authority, without application of mind, has clubbed the provisions of smuggling and abetment and passed the impugned orders, which are liable to be set aside. Added further, the learned senior counsel that the provision relating to section 77 of the Customs Act had been invoked in para (xxiii) of the grounds of detention which section had nothing to do with the export of goods and the said provision deals about declaration by the owner of baggage. The detaining authority had wrongly invoked the said section, which is yet another glaring example to show the non-application of mind on the part of the detaining authority. (c) The learned senior counsel would further submit that a perusal of the grounds of detention, would show that the detaining authority formulated the grounds for detention of the detenu or co-detenu and the word 'You' is deleted or added in each and every grounds of detention, which would also show that the orders have been passed mechanically without application of mind. (d) A letter dated 24.04.2009 from the Directorate of Revenue Intelligence, New Delhi addressed to one Shri P.Aari supplied to the detenu only on the previous working day of the hearing of the Advisory Board along with a covering letter. The said covering letter does not contain the particulars as to what purpose the said documents were supplied to them. On account of supply of this letter at the last moment, the detenus were kept in dark and deprived of the right from making an effective representation before the Advisory Board. Though the said letter dated 24.04.2009 was supplied to the detenu, the same was not placed before the Advisory Board. Hence, the orders under challenge are liable to be set aside on the ground of not informing the detenu for what purpose the document was supplied. In this regard, the learned senior counsel has relied upon the judgment reported in MANINDER SINGH ..vs.. STATE OF TAMIL NADU ((2009) 2 MLJ (CrI.) 913). (e) Further, by inviting the attention of this Court to the Notification No.67 dated 27.12.2007 (which is made available at page 327 of the booklet in HCP No.523 of 2009), the learned senior counsel would submit that in the said Notification, under the column 'Item/Description', it was mentioned that 'Ketamine', which item can be exported by obtaining No Objection Certificate from the Narcotics Commissioner. When the substance was mentioned as KETAMINE under the column Item/Description in the above said notification, the detaining

authority has travelled beyond the documents available before him and inferred that Ketamine Hydrochloride can be exported by obtaining No Objection Certificate since the document relied upon says only 'Ketamine'. Therefore, the said act of the detaining authority shows his non-application of mind while passing the impugned orders. (f) By inviting the attention to the grounds of detention, the learned senior counsel would further submit that the shipping bill was filed in the name of M/s.Kamadhenu Metal Stores Chennai for export of household articles, all packed in 155 packages, but in the mahazar relied on by the detaining authority, it is mentioned that besides 155 packages which were marked as 1 to 155, there were another 16 packages which were not numbered and which made the total as 171 packages. Further, it was mentioned in the mahazar that all the packages were serially numbered, with the markings 'PE/PKL'. There were no packages bearing Nos.131 to 145 and 154. Hence, if 16 unnumbered packages were deducted from 171 packages, there should be only 155 packages. But the department has arrived a peculiar figure of 163 packages. With regard to the difference of packages, the detaining authority has not taken any effort to arrive at the correct details by calling for an explanation. Hence, the orders are liable to be set aside. Further, there was a delay of four months in passing the detention orders and the same are passed on the basis of a single and solitary instance and hence, on these grounds also, the detention orders are liable to be set aside.

5. Per contra, the learned Additional Public Prosecutor made his submissions contrary to the submissions made by the learned senior counsel for the petitioners, by placing reliance on the judgments reported in STATE OF TAMIL NADU ..vs.. ALAGAR ((2006)3 SCC (CrI.)311, SUNILA JAIN ..vs.. UNION OF INDIA ((2006) 2 SCC (CrI.)90):(2006) 3 SCC321 C.AMALORPAVAM ..vs.. THE STATE OF TAMIL NADU (2005-1-L.W.(CrI.) 460) and STATE OF TAMIL NADU ..vs.. ABDULLAH KADHAR BATCHA ((2009) 1 SCC (CrI.)497).

6. The Court has paid its anxious consideration to the submissions made by the learned counsel on either side and perused the materials.

7. So far as the first ground is concerned, the learned senior counsel would submit that the bail application filed by the detenu in HCP.No.523/2009 and the bail order

dated 02.03.2009 as well as the interim bail granted in favour of the detenu in HCP.No.640/2009 were neither placed before the detaining authority nor supplied to the detenu. In this regard, the learned senior counsel has placed the judgments reported in 1999(3) Crimes 277 (HAJI ISHABHAI AGEWAN ..vs.. UNION OF INDIA) and 1990 Vol.2 SCC1(M.AHAMED KUTTY ..vs.. UNION OF INDIA) in support of his submission. On going through the same, we find that in the decision reported in 1999(3) Crimes 277, only the operative portion of the bail order was forwarded by the sponsoring authority to the detaining authority. In that case, a Division Bench of the Bombay High Court has held that if a reasoned bail order is passed the entire order should be placed before the detaining authority and a copy of which also should be furnished to the detenu and not the operative part of the bail order alone, because in a such a situation the detenu could not make an effective representation under Article 22(5) of Constitution Of India, especially when the bail order is relied upon in the grounds of detention. In the other reported decision, i.e. 1990 Vol.2 SCC1 the Hon'ble Supreme Court, after considering the facts in that case, has held that the bail application and bail order are vital materials for consideration and if those materials are not considered, the satisfaction of the detaining authority itself would have been impaired. But in the instant case, as stated by the learned Additional Public Prosecutor, the letter dated 03.03.2009 addressed by the Special Public Prosecutor to the Assistant Director, Directorate of Revenue Intelligence would reveal that the detenu in H.C.P.No.523 of 2009 had been granted only a statutory bail. Further, from the said letter, it could be seen that no detailed bail order had been passed in the bail application. So far as H.C.P.No.640/2001 is concerned, only an interim bail was granted to the detenu, to attend his sisters marriage at Chennai.

8. In this regard, an useful reference could be placed in the judgment relied on by the learned Additional Public Prosecutor reported in (2006)3 SCC321 wherein the relevant paragraphs are extracted as follows:

"2. As in the fact of this case, we are satisfied that the application for bail was not a vital document, copy whereof was required to be supplied to the detenu, in our opinion, the order of detention is not vitiated. A Division Bench of this Court in K. Varadharaj v. State of T.N.((2002)6 SCC735 upon noticing some of the decisions

relied upon by Mr Mani inter alia held: (SCC p.738, para 6) "6. From the above observations, it is clear that placing of the application for bail and the order made thereon are not always mandatory and such requirement would depend upon the facts of each case".

23. In *Radhakrishnan Prabhakaran v. State of T.N.*((2000)9 SCC170 this Court clearly held that only such documents are required to be supplied which are relevant, stating: (SCC p. 173, para 8) "8. We may make it clear that there is no legal requirement that a copy of every document mentioned in the order shall invariably be supplied to the detenu. What is important is that copies of only such of those documents as have been relied on by the detaining authority for reaching the satisfaction that preventive detention of the detenu is necessary shall be supplied to him. It is admitted by the learned counsel for the petitioner that the order granting bail has been supplied to him. Application for bail has been submitted by the detenu himself when the order of detention was passed which was subsequent to the order granting bail. We cannot comprehend as to how a prior order rejecting bail would be of any relevance in the matter when it was later succeeded by the order granting bail". Therefore, in our opinion, the principle of furnishing of the bail application and the bail order in all the cases under all circumstances need not be considered and cannot be applied as a straightjacket formula, as held in the above said judgment and it depends upon the facts and circumstances of each case. In the instant case, the detenu in H.C.P.No.523 of 2009 was granted only statutory bail and the detenu in HCP.No.640 of 2009 was granted only interim bail and so the non-furnishing of bail order cannot be said to have handicapped the detenu in making an effective representation and the non-supply of bail application and bail order cannot be considered as a ground for vitiating the order of detention. But, in the instant case, only a statutory bail and an interim bail were granted and under such circumstances, this Court is not inclined to accept the submission made by the learned senior counsel that the non-furnishing of the bail application and the bail order in the present case would vitiate the order of detention. Further, in our view the reason assigned by the Learned Additional Public Prosecutor that the bail application is a document emerged out only from the side of the detenu and moreover, the order passed in the instant case is only a statutory bail and an interim bail.

9. With regard to the next submission, it is clear that the detention orders were passed covering sections 3(1)(i) and (ii) of the COFEPOSA Act. Section 3(1)(i) deals about 'smuggling' and section 3(1)(ii) deals about 'abetment'. Now, it has to be seen, whether the clubbing of these two different charges in the detention orders would amount to non-application of mind on the part of the detaining authority. To deal with the question it would be appropriate to look into the definition of smuggling and other related provision from the Customs Act. Section 2(39) of the Customs Act defines 'smuggling'. "2(39) "Smuggling", in relation to any goods means any act or omission which will render such goods liable to confiscation under Section 111 or Section 113". Section 50(1) of the Customs Act deals with entry of goods for exportation which reads as follows: "The exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form". Section 51 of the Customs Act deals with Clearance of goods for exportation, which reads as follows: "Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation".

10. In the instant case, no shipping bill was filed by any of the detenus. But in the grounds of detention, the detaining authority (in para (xxiii) of the grounds of detention in HCP No.523 of 2009) has dealt with the provisions under section 113 of the Customs Act and stated that the acts of rendering the goods liable to confiscation under Section 111 or 113 would amount to smuggling. As contended by the learned senior counsel for the petitioners that a combined reading of all the provisions would show that only on filing of shipping bills, clearance will be given for exportation. Under such circumstances, only if any goods for exportation is liable to be confiscated under section 111 or 113, then only it would amount to smuggling, as defined under section 2(39). But in the instant case, no shipping bill was filed by any of the detenus, as stated supra. Therefore, the question of confiscating the goods meant for exportation contrary to the provisions of section 111 or 113 does not arise, so as to bring the act of the detenu within the meaning of smuggling, as defined under section 2(39). Under such circumstances, this

Court is of the view that the clubbing of two different charges under the COFEPOSA Act, namely, one for smuggling as defined under section 2(39) of the Customs Act and another under abetment under section 3(1)(ii) COFEPOSA Act, would show that there is non-application of mind on the part of the detaining authority. Though the judgment reported in 2005 (1) Law Weekly 460 in the case of C.AMALORPAVAM VS THE STATE OF TAMILNADU AND OTHERS was relied upon by the learned Additional Public Prosecutor to counter the submission made by the petitioners with regard to the clamping of order under section 3 (1) (i) and (ii) of COFEPOSA Act, the Court is of the opinion that the said judgment will not be helpful to throw away the grounds raised by the detenus, attacking the clamping of orders under section 3 (1)(i) and (ii) that is one for smuggling and another for abetting. The facts of the above cited case would show that one Murugan had brought the contrabands from Singapore and concealed the same in the toilet of the Air Craft and the detenu in that case, who was an Assistant Officer Security, Air India, made an attempt to hand over the same outside the airport for consideration by concealing the contraband in a specially stitched Khaki cloth belt with two pouches on his waist underneath his uniform trousers and he was intercepted by the DRI officers and arrested him. When a ground was raised in that case that the contrabands were brought only by Murugan from Singapore and the act of the detenu in that case would not amount to smuggling, the said ground was rejected by the Court holding that merely because the other detenu, namely, Murugan, had brought the contraband and concealed the same in the toilet of the aircraft, the smuggling of goods, as referred to in sub-clause (i) of the Act cannot come to an end. Likewise, on reaching the destination, somebody i.e., other than the person who brought the goods, deal with the contraband to avoid confiscation either under section 111 or 113 of the Customs Act , undoubtedly, the authority empowered to make orders detaining him in prison 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 smuggling the goods, or abetting the smuggling of the goods.

11. But in the cases on hand such a situation does not arise. Here, the question is whether the invoking of provisions of section 3(1)(i) and (ii) of COFEPOSA Act for clamping the detention orders would amount to non-application of mind when the

detenus are not exporters. Therefore, we are not inclined to accept the submission of the learned Additional public prosecutor by relying upon the abovesaid decision. Further, the Court is of the opinion that while passing the order of preventive detention, the detaining authority should meticulously go through all the vital materials which would influence the mind of the detaining authority to pass the order within the frame of the Constitutional mandates; otherwise, the order would lead to a conclusion that the authority has mechanically and arbitrarily passed the order with non-application of mind.

12. In this context, we would also like to point out that the detaining authority while formulating the grounds of the detention has used the word you which the authority has subsequently deleted or thereafter added in each and every ground of the detention without properly applying his mind.

13. The next submission of the learned senior counsel for the petitioners is that the detenus were kept in dark and deprived of from making an effective representation before the Advisory Board by merely serving only the letter dated 24.04.2009 from the Directorate of Revenue Intelligence, New Delhi to one Shri P.Aari, but without furnishing the vital particulars. The said letter was furnished to the detenu in H.C.P.No.523 of 2009 only on the previous working day of the hearing of the advisory board. It is the contention of the petitioners that it was not known to the detenu whether the said letter was in connection with issue of hearing by the Advisory Board.

14. In this regard, the learned senior counsel also relied upon the judgment reported in (2009) 2 MLJ (CrL.) 913, wherein it has been held as follows: "The manner in which the documents were served on the detenu did cause confusion to the detenu as he was kept in the dark about the purpose of furnishing the documents and far from giving him the earliest opportunity to make an effective representation, it deprived him of the chance of making a representation which resulted in infringement of the right guaranteed under Article 22(5) of the Constitution of India". The said principle is applicable to the cases on hand. Hence, the Court is of the view that when a document was given to the detenu at the last moment before the hearing of the Advisory Board, the same should be

given with full particulars to the effect that for what purpose, the document was supplied to him; otherwise, the detenu would be put in deprivation from making an effective representation and under such circumstances, the detention orders are liable to be set aside.

15. Further, as contended by the learned senior counsel for the petitioners, in the 'Item/Description' column of the Notification, it was mentioned only 'Ketamine', which item can be exported by obtaining No Objection Certificate from the Narcotics Commissioner. The said document does not contain the word 'Ketamine Hydrochloride', which is said to have been exported without obtaining permission from the authorities concerned. Though a submission was made by the learned Additional Public Prosecutor that the Ketamine Hydrochloride is nothing but the derivative of 'Ketamine', there is no document filed in support of the submission made by the learned Additional Public Prosecutor. Under such circumstances, the Court is of the view that the detaining authority has travelled beyond the averments of documents available before him and inferred that Ketamine Hydrochloride can be exported by obtaining No objection Certificate, when the document relied upon by him says only Ketamine. Therefore, the said act of the detaining authority shows his non-application of mind in passing the impugned orders.

16. With regard to the submission relating to the packages, as could be seen from the records, besides 155 packages which were marked as 1 to 155, there were 16 packages which were not numbered with marks. If 16 packages were deducted, then the balance would be only 155. But the department has arrived at the figure as 163 packages in the mahazar. Under such circumstances, the Court is of the view that there is a confusion with regard to the number of packages and the detaining authority ought to have called for an explanation from the authorities concerned to get himself satisfied. But without doing so, the detaining authority passed the detention orders mechanically. Further, as contended by the learned senior counsel for the petitioners, there was inordinate delay of four months in passing the detention orders and they have been passed only on the basis of single and solitary instance. Hence, looking at from any angle, the detention orders passed by the detaining authority are against the cardinal principles which

have to be observed while passing the detention order. Under such circumstances, the detention orders have got to be set aside. Accordingly, all the habeas corpus petitions are allowed, setting aside the orders of detention passed by the 1st respondent. The detenus are directed to be set at liberty forthwith unless their presence is required in connection with any other case. gl To 1. The Secretary to Govt., State of Tamil Nadu, Public (SC) Department, Fort St.George, Chennai-600 009.

2. The Secretary, Union of India, Ministry of Finance, Department of Revenue, (COFEPOSA Unit), Central Economic Intelligence Bureau, Janpath Bhavan, B Wing, 6th Floor, Janpath, New Delhi-110 001.

3. The Superintendent of Central Prison, Central Prison, Madras.

4. The Public Prosecutor, High Court, Madras

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