

E.P. Rajan Vs. State of Karnataka and Another

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Court : Karnataka

Decided On : Jul-12-1993

Reported in : 1993CriLJ3490; 1994(46)ECC225; ILR1993KAR2250; 1993(3)KarLJ364

Judge : K. Shivashankar Bhat and ;R.V. Vasanthakumar, JJ.

Appeal No. : W.P. Nos. 31, 32, 37 and 55 of 1993 (HC)

Appellant : E.P. Rajan

Respondent : State of Karnataka and Another

Advocate for Def. : B.V. Acharya, Advocate-General and ;B.J. Somayaji, Govt. Adv.

Advocate for Pet/Ap. : B. Kumar, ;C. Nagesh and ;Kiran S. Javali, Advs.

Judgement :

Shivashankar Bhat, J.

1. Writ Petition No. 31/93 pertains to the detention of one Venu, Writ Petition No. 32/93 pertains to the detention of Govindan Kutty, Writ Petition No. 37/93 pertains to K. K. Dinesh and Writ Petition No. 55/93 pertains to the detenu Ramesh Dhandiram Patil. For the sake of convenience the main facts are stated with reference to Writ Petition No. 32/93. An order of detention was made on 12-10-

1992 under S. 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ('the COFEPOSA Act' for short). The detenu Govindan Kutty was ordered to be detained under S. 3(1)(iv) of the COFEPOSA Act since the Government of Karnataka was satisfied that the detenu was likely to engage in the activity referred earlier, i.e. to say that the detenu was dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods. In the case of others the allegation is that the detenus were engaged in transporting, concealing and keeping smuggled goods. The respective orders of detention, invoked under S. 3(1)(iii) of the COFEPOSA Act.

2. On 11-6-92 Venu and Dinesh travelled together and got down at Kalasipalyam Bus Stand, Bangalore. They were apprehended by the officers of the Customs Department. Eight gold biscuits with foreign markings were seized from Venu and ten similar gold biscuits were seized from Dinesh. Both of them stated that they came from Calicut and they were being received by their friend Ramesh (detenu in W. P. 55/93). Out of the eight gold biscuits recovered from Venu, four had the marking 'CREDIT SUISSE-999.0 10 TOLAS-ESSAYER FOUNDEUR' (hereinafter referred as 'CREDIT SUISSE') and the

S other four has the markings 'UBS - G

UNION BANK OF SWITZERLAND 10 TOLAS-MELTER ASSAYER-999.0' (hereinafter referred as 'UBS-UNION BANK OF SWITZERLAND'). Nothing was found in the person of Ramesh. A mahazar was carried out, gold biscuits were seized, statements were recorded and follow-up action was also continued. According to Ramesh, Govindan Kutty called him on 9-6-92 and asked him to take some foreign marked gold biscuits to Bangalore and said that one Vijayan also would accompany him to Bangalore to sell the same. Accordingly five foreign marked gold biscuits were handed over to Ramesh and a similar packet containing five foreign marked gold biscuits were given to Vijayan. Ramesh and Vijayan had come to Bangalore on 10-6-92, and the gold biscuits were sold on the said date. The sale proceeds were handed over to Vijayan; however, Ramesh continued to stay at Bangalore to receive Venu and Dinesh. It is unnecessary to refer to other aspects of his statement.

3. Statement of Dinesh as summarised in the grounds of detention states that Dinesh admitted the seizure of gold biscuits from his possession and that Govindan Kutty called him on 10-6-92 and gave him 10 foreign marked gold biscuits along with a ticket to travel to Bangalore along with Ramesh. According to Dinesh eight foreign marked gold biscuits were also given to Venu who was an employee of Govindan Kutty. A piece of paper seized from Dinesh referred to some gold transactions he had made on earlier three occasions and summary of the statement states that Dinesh had carried five gold biscuits to Thrissur and on another occasion he had carried ten gold biscuits and on the third occasion that is on 22-5-92, he had brought five foreign marked gold biscuits to Bangalore. We are omitting other details summarised with reference to these statements. Venu also in his statement admitted the carrying of the gold biscuits; however, nowhere in the statement of Venu there is any reference to any prior carrying of gold biscuits by him or that he dealt with any foreign marked gold biscuits earlier. In the statement of Govindan Kutty he stated that, after 1-9-92 budget of Government of India, people used to approach him offering foreign marked gold biscuits for sale and that he was selling the said biscuits at a commission of Rs. 300/- per gold biscuit and some times people used to give duty paid papers and some people were not giving any such paper. He admitted having sent 18 foreign marked gold biscuits through Dinesh and Venu, out of which 15 were bought by him from one Ashraf and that he had on earlier occasions also purchased gold biscuits from Ashraf and that Ashraf had told him that he was having duty paid receipt. In the statement of Ashraf, recorded on the same day, he stated that his friend Basheer had given him 28 gold biscuits of foreign origin all of which were having marking 'CREDIT SUISSE'. Basheer had told Ashraf that duty had been paid on these gold biscuits and Ashraf thought of selling them through Govindan Kutty. Accordingly on 1-6-92 he sold five gold biscuits to Govindan Kutty and another eight gold biscuits were again sold to Govindan Kutty on 9-6-92 and thereafter on 10-6-92, 15 gold biscuits were given through Dinesh who was an employee of Govindan Kutty. Ashraf produced the baggage receipt dated 20-5-92 in support of the statement that the gold biscuits had suffered duty; however there was some correction made by him about his earlier statement and stated that Basheer had come to India through Trivandrum airport and not through Bombay as stated in the earlier statement.

4. On the very day, i.e. on 11-6-92, statement of Basheer was recorded, who admitted having imported 28 gold biscuits on 20-5-92 by paying customs duty at Trivandrum airport though he could not remember the markings of the gold biscuits. It is unnecessary to refer to a few more statements summarised in the grounds since Ashraf stated that gold purchased by him were marked 'CREDIT SUISSE' and not 'UBS'. Obviously, Detaining Authority concluded that the gold seized on 11-6-92 could not have been the gold brought into India by Basheer by paying customs duty. Fourteen gold biscuits out of eighteen were having 'UBS' marking and not 'CREDIT SUISSE'. Thereafter the grounds proceed to read as follows :

'24. The eighteen foreign marked gold biscuits recovered from the possession of K. K. Dinesh and E. P. Venu as discussed above have been found to be of foreign origin. Sri. D. Ramesh was to collect these 18 gold biscuits from the above said two persons for further disposal at Bangalore. You are the main person who had sent foreign marked gold biscuits through these persons for sale; there is no nexus between these gold biscuits and the baggage receipt produced by P. R. Ashraf and the marks of the gold biscuits given by him. In view of this the said gold has been imported into India in contravention of the provisions of the Customs Act, 1962 as no valid permit issued by the Reserve Bank of India or a related baggage receipt has been produced. Hence, the said gold is deemed to be smuggled goods within the meaning of S. 2(e) of the COFEPOSA Act, 1974 (as amended) read with S. 2(39) of the Customs Act, 1962.

25. From the above facts and materials Government of Karnataka are satisfied that you were engaged in dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods. At present you are on bail as per the orders of the Additional Chief Judicial Magistrate, Ernakulam mentioned above. Considering your role and antecedents, the Government of Karnataka is further satisfied that you are likely to engage in such activity in future also. Therefore, notwithstanding the action that may be taken against you under the Customs Act, 1962 during the course of adjudication and prosecution proceedings, the Government of Karnataka is satisfied that it is necessary to detain you under the COFEPOSA Act, 1974 (as amended) with a view to

preventing you from dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods.' (underline is ours)

5. A perusal of the grounds of detention furnished to the other detenus repeat the same statement with slight modification regarding the sentences referable to the concerned detenu. The substance of paras 24 and 25 quoted above is the same.

6. Mr. Kumar, learned counsel for the petitioners, advanced several contentions, in firstly, the order of detention is vitiated by treating the entire 18 gold biscuits as having illegally brought into India when at least in respect of four gold biscuits the statement of Govindan Kutty was supported by the statement of Ashraf and the baggage receipt. The learned counsel elaborated this statement by stating that the basic fact in the instant case is the illegal importation of 18 gold biscuits which were being brought into India for disposal. However, if at least four gold biscuits were found to have been legally brought into India on the basis or the new policy of Government of India announced on 29-2-1992 the said fact should have been considered by the Detaining Authority. The Detaining Authority has not at all applied his mind and mechanically proceeded to hold that there was no nexus between the gold biscuits seized on 11-6-92 and the baggage receipt produced by Ashraf. Since there is an error on this basic fact the entire order gets vitiated.

7. It is not possible for us to accept this contention because the very case of Govindan Kutty and other detenus is that 18 gold biscuits were lawfully brought into India by payment of customs duty evidenced by the baggage receipt. The subject matter of the baggage receipt itself is 18 gold biscuits, is part of 28 gold biscuits covered by it. If 14 gold biscuits could not be connected to this group of gold biscuits, there is nothing wrong if the Detaining Authority rejects the case of the detenus in respect of the entire group. The question is whether the explanation of the detenus could be accepted in respect of the entire group of gold biscuits. It is a matter of appreciation of material before the Detaining Authority and it is not possible for the Court Authority and it is not possible for the Court to substitute its own views. The question is whether the circumstances are such that reasonably the Detaining Authority could have suspected the nature of the activity from which he could have inferred that a ground exists for detaining the detenus.

8. It was then contended that the presumption under S. 123 of the Customs Act cannot be invoked to the gold seized on 11-6-92. According to the learned counsel, gold is no more a prohibited commodity after the new policy announced on 29-2-92. According to the learned counsel no gold having a foreign marking or of foreign origin can be presumed to be a smuggled gold.

9. We don't find anything in the grounds of detention wherein specifically S. 123 of the Customs Act was invoked by the Detaining Authority against any one of the detenus. To what extent a particular presumption could be invoked is for the authority to consider depending upon the circumstances of the case. No doubt, S. 123 of the Customs Act creates a statutory presumption but the circumstances of a particular case themselves may create a presumption which does not require the backing of any particular statute. In fact in *Latha v. State of Karnataka*, (1988) 3 Kant LJ 71 the same contention, worded in a different manner, was considered and negatived. We are of the view that the next ground urged by Mr. Kumar, learned counsel for the petitioner substantially affects and vitiates the entire order. In para 25 of the grounds, in all the cases, the common sentence reads : 'Considering your role and antecedents, the Government of Karnataka is further satisfied that you are likely to engage in such activity in future also.' This sentence is the actual basis of making the order of detention. In the case of Govindan Kutty, he was ordered to be detained because of his role, obviously in sending the 18 gold biscuits for sale and his antecedents. The present role and the antecedent activity of the detenu were both considered together and had a cumulative impact on the mind of the Detaining Authority leading to his satisfaction that the detenu should be detained. The detention was not ordered only because of the present incident as contended by the learned Advocate-General but because of the interaction of those two aspects referred to in the above sentence. The present and past both reacted strongly on the mind of the Detaining Authority. If any one of them is found to be irrelevant or non-existent the entire sentence will have to be erased from the order because conclusion reached by the Detaining Authority also could not have been read after ignoring this sentence. The approach we have adopted finds support from decision of the Supreme Court in *Khudiram Das v. State of West Bengal*, : [1975]2SCR832 the Court pointed out that :

'..... It is elementary that the human mind does not function in compartments. When it receives impressions from different sources, it is the totality of the impressions which goes into the making of the decision and it is not possible to analyse and dissect the impressions and predicate which impressions went into the making of the decision and which did not. Nor is it an easy exercise to erase the impression created by particular circumstances so as to exclude the influence of such impression in the decision-making process. Therefore, in a case where the material before the District Magistrate is of a character which would in all reasonable probability be likely to influence the decision of any reasonable human being, the Court would be most reluctant to accept the ipse dixit of the District Magistrate that he was not so influenced and a fortiori, if such material is not disclosed to the detenu, the order of detention would be vitiated, both on the ground that all the basic facts and materials which influenced the subjective satisfaction of the District Magistrate were not communicated to the detenu as also on the ground that the detenu was denied an opportunity of making an effective representation against the order of detention.'

The law according to the learned Advocated General has undergone a change after the introduction of S. 5A of the COFEPOSA Act and the principle is stated by the Supreme Court in *Prakash Chandra Mehta v. Commr. and Secretary, Government of Kerala*, : 1986 CriLJ786 . In the said decision the grounds of detention were more than one. The attack against the detention order was that the satisfaction was reached by the Detaining Authority without reference to the retraction of the confession. This contention was negated by the Supreme Court and it was found that the Detaining Authority has arrived at his satisfaction independently of each other amongst several grounds. In this connection the scope of Art. 22(5) was considered, which has a bearing on the present contention. At page 698 (of AIR) : (at p. 798 of Cri LJ) the Court observed thus :

'71. Article 22(5) of the Constitution has two elements : (i) communication of the grounds on which the order of detention has been made; (ii) opportunity of making a representation against the order of detention. Communication of the grounds pre-supposes the formulation of the grounds and formulation of the grounds requires and ensures the application of the mind of the detaining authority to the

facts and materials before it, that is to say, to pertinent and proximate matters in regard to each individual case and excludes the elements of arbitrariness and automatism.

72. The 'grounds' under Art. 22(5) of the Constitution do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences.'

In subsequent paragraphs Supreme Court pointed out that the satisfaction was arrived at as inferences from several factors and these have been separately mentioned in the grounds (vide page 699 (of AIR) : (at pp. 798-99 of Cri LJ)). It is in such a situation S. 5A of the COFEPOSA Act would govern the fact situation to sustain the detention orders, when one of the grounds cannot be relied upon. This Court had an occasion to consider the ratio of this decision in *Aktar Sakeena v. Govt. of India*, : ILR 1989 KAR2373 the Bench held as follows :

'In this case, it will have to be noted that the basic fact for the investigation and the subsequent detention is the alleged seizure of five gold biscuits from Praveen Kumar Shetty. This alleged seizure and the assumption of the Detaining Authority that the burden was on the detenu to show that the said gold biscuits were not smuggled, pervades the grounds of detention. The statement of the detenu made under S. 108 of the Customs Act had been retracted. It is not possible to infer as to what would have been the reaction of the mind of the Detaining Authority if there were no other factors in this case, except the sole statement of the detenu made under S. 108 and the detenu's retraction of the said statement. To what extent the Detaining Authority would have re-acted to the retraction is anybody's guess and it cannot be said that in such a simple situation the Detaining Authority would have acted only on the statement under S. 108. The formation of the situation though subjective, has to be preceded by an objective approach in the mind. A bona fide exercise of the power, always calls for an honest, efficient and faultless consideration of the factors that would lead to a satisfaction for acting in a particular manner even though the said satisfaction is termed as a subjective satisfaction. This principle is different from the principle stated in *Prakash Chandra Mehta's* case where there were several grounds out of which any one of the

grounds independently could sustain the detention order. Each ground was the result of a proper application of the mind and therefore each ground could have sustained the detention order. But in this case the test is whether there was an application of the mind to the vital facts of the case and in case there was no application of the mind to the vital facts of the case, can it be said that the subjective satisfaction was the real satisfaction ?'

After referring to Prakash Chandra Mehta's case (1986 Cri LJ 786) it was concluded that 'no detention can be valid unless the Detaining Authority had applied his mind to the pertinent and proximate matters' and if there was no such application of the mind the order would get vitiated.

10. If a particular idea pervades the grounds of detention that idea would affect every ground of detention. That is implied in the observation quoted above. While testing the validity of detention order at least two principles shall have to be borne in mind; (1) Whether it can be inferred that the Detaining Authority had applied his mind to all the facts and circumstances, and (2) Whether the grounds supplied to the detenu are sufficient so as to enable him to make an effective representation.

11. If the non-application of the mind is manifest or at least substantially disclosed in the grounds of detention then it will not be possible to sustain the order of detention.

12. In the instant case, we find that the alleged antecedents of the detenus in each of these cases pervaded the grounds on which the orders of detention were made by the Detaining Authority. If such an antecedent did not exist, the order of detention shall have to fall because it is not possible to infer that Detaining Authority would have directed the detention if Detaining Authority had before him only the present incident other than the alleged antecedents.

13. Whatever may be the statements of Govindan Kutty, the statement of Dinesh as summarised in the grounds obviously contributed to the inference of the Detaining Authority as to the antecedents of the detenu. Para 4 of the grounds of detention which summarises the statement of Dinesh repeatedly proceeds as if on earlier occasions also Govindan Kutty had given foreign marked gold biscuits to

Dinesh but in the actual statement of Dinesh recorded, the reference was only to gold biscuits and not to foreign marked gold biscuits. From this it is clear that the Detaining Authority had not actually gone through the statement of Dinesh or at least it has misread the statement of Dinesh. Since this mistaken reading of the statement is repeated in every detention order, we are constrained to infer that the Detaining Authority has not applied his mind to all the relevant materials in the manner in which he was expected to consider. Secondly, a mere sale of gold biscuits other than foreign marked gold biscuits on earlier occasions cannot give rise to an antecedent indicative of the propensity of the detenu in to indulge in illegal activity. In the instant case the detention order in one case cannot be read in isolation while considering whether the Detaining Authority had applied his mind 'dispassionately and non-mechanically'. Each of the detenu has been attributed with the term 'antecedent'. Undisputedly there is no antecedent as far as Venu is concerned. In the case of Dinesh antecedent is attributed to him because of the alleged statement that he had carried foreign marked gold biscuits earlier, whereas in his statement actually recorded there is no reference to foreign marked gold biscuits governing all the transactions. We may also note that the detenus were detained on 19-11-92 and they have been substantially prevented from indulging in the alleged activities all these months.

14. In these circumstances, we have no other option but to infer that the order of detention was made mechanically based on a substantial infirmity referred above.

15. Writ petitions are allowed. All the orders of detention are accordingly set aside. The detenus are directed to be released forthwith unless any one of them is required to be detained under any other valid order.

16. Petitions allowed