

Tejmal Mehta Vs. State of Karnataka

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Court : Karnataka

Decided On : Oct-04-1991

Reported in : ILR1991KAR3891; 1992(1)KarLJ336

Judge : Venkatachala and Shivashankar Bhat, JJ.

Acts : [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) - Sections 3

Appeal No. : W.P. No. 88 of 1991

Appellant : Tejmal Mehta

Respondent : State of Karnataka

Advocate for Def. : B.J. Somayaji, HCGP

Advocate for Pet/Ap. : J. Jeshtmal, Adv.

Disposition : Petition rejected

Judgement :

ORDER

Shivashankar Bhat, J.

1. The petitioner is a detenu, detained under Section 3(1)(iii) of the [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#)

('COFEPOSA Act' for short), by an order dated 4-5-1991 made by the first respondent.

2, On 15-3-1991, Officers of the Directorate of Revenue Intelligence ('DRI' for short), Bangalore, along with two witnesses followed the petitioner to his premises, after he came out of an autorickshaw. Petitioner was shown the search warrant and his suitcase was searched. Thereafter, person of the petitioner was searched. A brownish cloth strip tied around the waist of the petitioner was removed; it was found to be a cloth pouch; it had a zip fastener and eight pockets, each containing a paper packet. These packets contained gold biscuits with foreign markings. In all, 17 gold biscuits were recovered from the cloth pouch. The total weight of the gold biscuits was 1982.200 gms. valued at Rs. 7,05,500/-. One of the witnesses who was an expert in gold trade opined the gold to be of foreign origin; each biscuit was tested for its purity. The petitioner had no explanation as to the legality of his possession of these gold biscuits; hence they were seized. Petitioner's statement was recorded. Petitioner stated that he had a jeweller's shop at C.T. Street, Bangalore. Petitioner also stated that on three earlier occasions he had been to Bombay and brought foreign marked gold. Those gold biscuits were given to him by one Rokhee at Bombay, who in turn collected them from the petitioner at Bangalore. The present 17 gold biscuits were also given to him by the said Rokhee at Bombay on 14-3-1991. According to the petitioner he was being paid Rs. 200/- as commission, per gold biscuit, for carrying them, in addition to the expenses. This statement shows that the petitioner had transported in all 23 gold biscuits on earlier three occasions.

3. Usual follow-up actions were continued. On 4-5-1991 the impugned detention order was made, which was served on the petitioner, on 9-5-1991 and ever since then he is under detention.

4. Mr. Jeshtmal the learned Counsel for the petitioner advanced the following contentions in support of the Writ Petition:-

I. There has been a delay of 27 days in considering the representation made by the petitioner on 13-6-1991, which is rejected on 9-7-1991 and the delay is not properly explained by the first respondent.

II. Search warrant, which is a material document was not placed before the detaining authority and its copy not served on the petitioner, with the grounds of detention.

III. Advisory Board did not afford opportunity to the petitioner's friend to present the case of the petitioner, before the Advisory Board. The Advisory Board also did not allow the petitioner to examine the witness, who was produced before the Advisory Board.

IV. Grounds of detention communicated in Hindi language, is in fact not in Hindi language; further, it is not in Devanagari script. The copies of documents furnished are illegible. In these circumstances, petitioner's right to make a proper representation against the detention order, was seriously affected.

5. RE: CONTENTION I:

The Writ Petition is dated 26-6-1991. As on that date, the representation of the detenu dated 13-6-1991 had not been considered. On 22-7-1991 petitioner filed I.A.I raising additional grounds. Nowhere, this contention was raised by the petitioner. In para 8 of the Writ Petition, as part of the narration of facts, while averring that the documents furnished to the petitioner were illegible, it was further stated, 'The petitioner had made a representation in this regard to the detaining authority on 13-6-1991 but the said representation has not been considered so far'. In the counter affidavit, this was traversed by pointing out that the said representation had been considered and a reply was sent to the petitioner on 9-7-1991.

6. Even though there was no specific plea urging that the representation was not expeditiously considered, Mr. Jeshtmal raised this contention and further urged that technical rules governing the pleadings are inapplicable to a Writ Petition challenging an order of detention. The learned Counsel contended that it was the duty of the first respondent to explain the delay in considering the representation of the detenu, and the factum of delay was pointed out in para 8 of the Writ Petition. Mr. Somayaji, the learned Government Pleader, pointed out that in the absence of a specific plea, the detaining authority thought it unnecessary to

burden the counter affidavit with any explanation regarding the alleged delay.

7. In these circumstances, we thought it fit to permit the detaining authority to file an additional counter affidavit which was filed on 24-9-1991. The Under Secretary to Government, Home Department (Cofeposa) who is personally acquainted with relevant facts has sworn to the affidavit. In this counter affidavit (dated 23-9-1991) the first respondent stated that the representation of the detenu was received in the Home Department on 14-6-1991. As it was in the Hindi language it was sent to the D.R.I- for translation and remarks on 17-6-1991, in view of the two intervening holidays on the 15th and the 16th. The representation was received by the D.R.I. on 18th June and on 19th it was entrusted to a translator; on 20th D.R.I. sent the representation along with the translated version and the remarks on the representation to the Home Department, which were received by the Home Department on 22nd; 23rd was a holiday. On 24th, the Under Secretary examined them and put up a detailed note and submitted the papers to the Deputy Secretary, who in turn forwarded the same to the Home Secretary on the same day; after examination of the papers by the Home Secretary, papers were sent to the detaining authority's office on the next day.

8. The practice of sending the representation for the comments of the sponsoring authority has been upheld by this Court very recently following a Decision of the Supreme Court on the said question. Therefore, the time taken for the representation to reach the detaining authority with the remarks of the D.R.I. between the 14th June to 25th June 1991 cannot be held as of no consequence; this period will have to be excluded while considering the question of delay. It is also clear that between 14th to 25th June 1991, papers moved quite fast and no officer concerned can be attributed as having caused any delay.

9. Mr. Jeshtmal very seriously challenged the delay involved in the office of the detaining authority. The learned Counsel contended that it was of utmost importance that the Home Minister should attend to the representation without any delay. As the liberty of an individual is involved, representation made by a detenu should be attended to in the same manner as any other urgent business of the State; therefore, the learned Counsel argued that the time taken for the disposal of

the representation from 25th June to 7th July 1991 cannot be excused for any reason.

10. In the additional counter affidavit, filed on behalf of the 1st respondent, it was pointed out that the period in question was closely proximate to the dates of elections to the Lok Sabha and the Home Minister was entirely busy with attending to the affairs connected thereto. The relevant statement reads thus:-

'I respectfully submit that the Minister for Home was away at Delhi between 19th and 22nd June 1991 along with the Chief Minister on the eve of the Constitution of the Central Ministry and had just returned. Further, the Home Minister was busy holding discussions and meetings with Senior Officers of Police, COD, as well as Prisons and Fire Force on law and order and other important matters after the declaration of Lok Sabha Elections.

The Home Minister was also fully busy in connection with finalisation of important State Schemes and in obtaining concurrence of the Finance Department and Chief Minister. Further, the Home Minister was out of Headquarters on tour in Gulbarga District between 2nd and 5th of July 1991 and returned to the Headquarters on 6-7-1991. The Home Minister considered the representation of the detenu on 7-7-1991 and rejected the same. It is further submitted that 29-6-1991 was a Saturday and 30-6-1991 was a Sunday, General Holiday.'

11. The representation of the detenu with other relevant papers were pending in the office of the Home Minister from 25th June to 6th July; 29th and 30th June 1991 are to be excluded while considering the question of delay. Therefore the detenu's representation was pending consideration of the Home Minister for about 9 days. From this again four days are to be excluded as the Minister was away in Gulbarga District. In such a circumstance, can it be said that there was an inordinate delay in considering the representation?

12. The learned Counsel cited several decisions of Supreme Court and pointed out that even a small delay of three or four days was made the basis to set aside the detention; according to the learned Counsel, liberty of a person cannot be lightly dealt with and the State cannot overlook its importance; the State should

attend to a detenu's representation with top priority keeping aside for a while any other business of the State.

13. No doubt, the proposition thus advanced is very attractive, and theoretically, unexceptional. But the Court cannot ignore the realities connected with the functioning of the State. The problems of the State are manifold and diverse and it is impossible to classify them in any particular order of priorities, for being attended to. In these matters, Court has to examine the question of delay bearing in mind the entire circumstances and the fact situation. The time taken for considering the detenu's representation cannot be analysed with a microscopic precision.

14. In *MADANLAL v. UNION OF INDIA*, : 1990 CriLJ659 the representation of detenu was received on 17-1-1989 and it was rejected by the Government on 20-2-1989. The Supreme Court noticed the movement of the papers through various authorities who had to examine them. At page 184, the Supreme Court held:

'In *Mst. L.M.S. Ummu Saleema v. B.B. Gujaral*, : [1981]3SCR647 , it has been observed that the time imperative can never be absolute or obsessive, and that the occasional observations made by this Court that each day's delay in dealing with the representation must be adequately explained are meant to emphasise the expedition with which the representation must be considered and not that it is a magical formula, the slightest breach of which must result in the release of the detenu.'

15. In *BHAWARLAL JAIN v. MAHENDRA PRASAD*, : ILR 1991 KAR454 the representation was pending in the office of the Minister for 7 days, which was held as not fatal.

16. There is no particular test applicable to consider the question of delay. It may be generally said that the purpose of probing the delay is to find out as to whether the authorities acted with full awareness of the detenu's rights and respected the freedom guaranteed under Article 22 of the Constitution. An attitude of callousness and indifference by the State to the representation of the detenu would vitiate the detention. Whether such an attitude was exhibited in a given case is purely a

question of fact in each case; no yardstick is available to measure the delay.

17. Mr. Jeshtmal questioned as to why the small representation of the detenu should be sent to the D.R.I. We have very recently upheld the longstanding practice of forwarding any representation of the detenu, for the remarks of the sponsoring authority, as a matter of course*. Hence, this contention is rejected.

18. RE: CONTENTION II:

The reference to the search warrant in the grounds of detention has no bearing on the seizure of gold biscuits in the instant case. Search warrant was referred as incidental to the initial action of searching the detenu. Mahazar also refers to this search warrant. It is only when there is a failure to furnish the copy of a material document, that the detenu's right to make effective representation, is affected.

19. The question is, whether a particular document is so material, that, its non-consideration by the detaining authority and failure to furnish its copy to the detenu results in denial of an adequate opportunity to the latter to make a representation. The Decision of the Supreme Court in *ASHADEVI v. K. SHIVARAJ AND ANR.*, AIR 1979 SC 447 the documents in question were the basis for 'Most natural and vital facts' and hence their non-consideration by the detaining authority vitiated the order. The instant case before us is quite different.

20. RE: CONTENTION III:

This plea is found in I.A.I filed by the petitioner. Petitioner contends that he was not allowed to have a proper assistance of his friend before the Advisory Board. The friend was allowed to act only as an interpreter; he was not permitted to cross-examine any witness. Petitioner was not allowed to examine the witness who was present before the Advisory Board. This last contention has no factual basis, since such a plea is not forthcoming in the pleading. The counter-affidavit of Smt Sharada, Under Secretary to the State Government, Home Department (who was present before the Advisory Board) states that the detenu never sought to examine any witness; he wanted to cross-examine one of the mahazar witness. This additional counter affidavit further states that the detenu wanted the

assistance of his friend to record the detenu's statement, who acted as an interpreter on his behalf. Apart from this additional counter affidavit, we had the benefit of perusing the records of the Advisory Board from which we gather that the detenu brought his friend to assist him to understand the proceedings, who acted as his interpreter; further, the detenu desired to cross-examine a witness which request was not granted. Therefore it is not possible for us to accept the petitioner's contention that he was denied the assistance of his friend; and it is not possible to accept the present contention that he wanted to examine a witness. A.K. ROY v. UNION OF INDIA, : 1982 CriLJ340 in no way helps the petitioner in the instant case. The right of the detenu is to examine a witness in rebuttal of the material which is against him, on record. At page 751, the Supreme Court held:

'The loss of the three rights for which Sri Jethmalani contends is the right of the detenu to lead evidence in rebuttal before the Advisory Board. We do not see any objection to this right being granted to the detenu. Neither the Constitution nor the National Security Act contains any provision denying to the detenu the right to present his own evidence in rebuttal of the allegations made against him. The detenu may therefore offer oral and documentary evidence before the Advisory Board in order to rebut the allegations which are made against him. We would only like to add that if the detenu desires to examine any witnesses, he shall have to keep them present at the appointed time and no obligation can be cast on the Advisory Board to summon them. The Advisory Board, like any other tribunal, is free to regulate its own procedure within the constraints of the Constitution and the statute. It would be open to it, in the exercise of that power to limit the time within which the detenu must complete his evidence.'

In the earlier para, the Supreme Court has categorically denied any right in the detenu to cross-examine a witness. The Supreme Court stated thus:

'We are therefore of the opinion that, in the proceedings before the Advisory Board, the detenu has no right to cross-examine either the persons on the basis of whose statement the order of detention is made or the detaining authority.'

In HEMALATA KANTILAL SHAH v. STATE OF MAHARASHTRA AND ANR., : 1982 CriLJ150 the contention was that the Advisory Board did not permit the

detenu to have legal representation before the Advisory Board. This was repelled; one of the reasons given by the Supreme Court was that:

'The Advisory Board whose action is complained of is not a party before us.'

Same reasoning applies to the instant case also, as the Advisory Board is not a party to the present. Writ Petition.

21. The learned Counsel for the petitioner read a few observations of the Supreme Court from *STATE OF PUNJAB v. SUKHPAL SINGH*, to the following effect:

'....it can be said that the gravity of the evil to the community resulting from anti-social activities, cannot furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The protection of personal liberty is largely through insistence on observance of the mandatory procedure. In cases of preventive detention observance of procedure has been the bastion against wanton assaults on personal liberty over the years. Social security is no doubt the most important goal of the State but it is not the only goal of a good society. There are other important values in a society. One of the foremost and fundamental rights guaranteed in the constitution is personal liberty and one cannot be deprived of it except by the procedure prescribed by law. Liberty inestimable res est. Liberty is an inestimable thing above price. Liberties omnibus rebus favorably est. Liberty is more favoured than all things (anything). It would be ironic if, in the name of social security, we would sanction the subversion of this liberty. When a certain procedure is prescribed by the Constitution or the laws for depriving a citizen of his personal liberty, we think it our duty to see that that procedure is strictly observed.'

We are fully conscious of the invaluable right of personal liberty and the drastic nature of the power to detain preventively under COFEPOSA Act. The limited procedural right available to the detenu cannot in any way be further narrowed down and any breach of the procedural right is sufficient to release the detenu. But this generous attitude required of the Courts towards detenu's procedural right cannot be a basis to uphold every kind of contention that may be put-forth on behalf of a detenu.

22. RE: CONTENTION IV:

Pages 33 and 74 of the papers served on the detenu (comprised of the detention order, grounds and other documents) were relied to urge that the documents were illegible and that the script was not Devanagari. No doubt, on 13-6-1991, in the representation, the detenu stated that the translated documents purported to be in Hindi, were not legible and the script was different from Devanagari script. This representation was rejected. The papers served on the detenu were placed before us for perusal. We don't find any illegibility in them. At page 33, statement of the petitioner recorded on 15-3-1991 is found. Admittedly it was written by the petitioner himself. The xerox copy furnished along with the grounds of detention, of this statement, can reflect the same script in which it was written by the detenu. Page 74 is the last page of a representation dated 19-3-1991 made by the detenu. This document commences at page 71. This again, is in the handwriting of the detenu and its xerox copy was enclosed along with other documents served on the detenu, with the grounds for detention. If the petitioner could not read his own script, others cannot be found fault for it. The contention of the petitioner is accordingly rejected.

23. No other contention survives for consideration.

24. For the reasons stated above, we reject this Writ Petition. Rule discharged.