

Hansmukh

Vs

State of Gujarat and Others

Writ Petition No. 449 of 1980

(R. S. Sarkaria, R. S. Pathak JJ)

04.08.1980

JUDGMENT

SARKARIA, J. –

1. This is a petition under article 32 of the Constitution for the issuance of a writ of habeas corpus.
2. On January 31, 1980, an order of detention dated January 30, 1980, under Section 3(1) of the conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1971 (for Short, called 'the COFEPOSA') issued by the second respondent Shri P. M. Shah, Deputy Secretary to the Government of Gujarat, Home Department, was served on Lallu Jogi Patel (hereinafter referred to as the 'detenu'). The order was expressed in the name of the Governor of Gujarat. On the same date (January 31, 1980), the grounds of detention were served on the detenu.
3. The grounds of detention served on the detenu are very elaborate and detailed. They also contain the introductory background, including the history of the detenu. It is stated herein that the detenu was previously detained by an order, dated September (sic), 1974, of the Government of India, under Section 3 of the Maintenance of Internal Security Act(MISA) On the repeal of MISA and the commencement of COFEPOSA, a fresh order, dated December 19, 1974, under the COFEPOSA, was served on the detenu.
4. The detenu's writ petition for a writ of habeas corpus was dismissed by the High Court of Gujarat on May 6, 1976 in view of the Presidential Order, dated June 27, 1975 made under Article 359(1) of the Constitution which had suspended the rights under Articles 14, 21 and 22 of the Constitution. The detenu was, however, released on March 21, 1977. As stated in the 'grounds', his activities were kept under surveillance by the Customs Department. In or about July 1979, the detenu attempted to smuggle gold, but he was not successful. Calls booked by the detenu to various telephone numbers of other suspected smugglers were, however, detected.
5. On November 21, 1979 (sic), the detenu hatched a conspiracy with one Umar Bakshi to smuggle wrist-watches and sliver out of the country to Dubai. In pursuance of that conspiracy, on October 9, 1979 (sic), the detenu and the said Umar Bakshi Smuggled about 45 slabs of silver in the vessel "Saraswati Prasad", registered in the name of Ravia Kalan on Deman.
6. On November 30, 1979, 23 slabs of silver weighing, in aggregate, 692-527 kgs. valued a Rs. 15,65,111, were seized by the officers of the Collectorate of Central Excise and Customs from a truck which was intercepted near village Pipodara. The occupants of the motor-truck disclosed their identified as (1) Kailashchandra Shantilal Jain, (2) Mohmed Hussain Hanif Mohmed Pathan, the

drive, and (3) Bahukhan Istiyarkhan Ahmed Pathan, the cleaner, all of Udaipur. The statements of these persons recorded under Section 108 of the Customs Act and the other circumstantial evidence collected, revealed that the detenu was engineering the whole process of attempting to smuggle the silver out of India in conspiracy with Umar bakshi and others. In para 35 of the 'grounds', it is mentioned : "The detaining authority, viz., the State Government considered it against the public interest to disclose the sources of the intelligence referred in paragraphs 3,4,6 and 30 and further considered it against public interest to disclose further facts contained in various intelligence reports referred to in the aforesaid paragraphs 3, 4, 6 and 30".

7. On February 15, 1980, the detenu sent a letter, through the Superintendent of Jail, requesting for the supply of copies of statements and documents relief upon the grounds of detention.

8. According to the counter filed by Shri Shah, Deputy Secretary to Government of Gujarat, this letter was received by the State Government on February 18, 1980. The State Government then on February 22, addressed a letter to the Sponsoring Authority (Collector of Customs, Ahmedabad), enquiring whether furnishing copies of documents would not prejudice public interest.

9. On February 25, 1980, the Collector wrote back to the State Government that it was to necessary to supply the copies of the statement and documents asked for by the detenu, "as the grounds of detention severed on him were quite elaborate to enable the detenu to make effective representation". The Collector sent copies of the required statement to the State Government and the latter received the same on February 29, 1980.

10. On March 4, 1980, the second respondent (deputy Secretary Home Department) arranged personal discussion with the Collector to solicit his considered view. As a result, on March 5, 1980, the Collector sent a letter to the State Government, stating that he had no objection to furnish the detenu with relevant documents.

11. As per letter, dated March 7, 1980, the Section Officer of the Home Department sent the relevant documents, running into 461 pages, to the detenu through the Superintendent, District Prison, Rajkot, by 'registered acknowledgment due '. The said documents were received by the detenu on March 11, 1980 at Rajkot. Thus, after excluding the time taken in transit, there was a delay of 17 days in furnishing copies to the detenu.

12. Earlier, on February 1, 1980 Shri P. K. Nair, Advocate had addressed a letter to the Chief Minister of Gujarat, asking for permission for an interview, with the detenu to seek instructions from him for drafting his representation. On February 12, 1980 the Secretary to Chief Minister wrote in reply to the advocate, that his request for having an interview with the detenu was being looked into by Government in the Home Department. This letter of the advocate, according to the counter-affidavit filed by Shri Shah, was received by him on February 30(sic), 1980 through the Chief Minister's Secretariat. On February 20, 1980, the State government informed the advocate that his request for interview with the detenu had been granted.

13. Mr. Soli J. Sorabjee, appearing for the petitioner, challenges the validity of the detention on these grounds :

(1) There has been impermissible delay in furnishing copies of the documents and statements relied upon in the grounds of detention.

(2) There was unreasonable delay of about 20 days in granting interview to the

detenu with his lawyer, as a result of which, the statutory right of the detenu under Rule 14(xii) of the Gujarat Conditions of Detention (COFEPOSA) order, 1975 has been rendered meaningless. The combined effect of these undue delays (Nos. 1 and 2) is that the detenu has been denied his constitutional right to be afforded the earliest opportunity of making an effective representation against this detention, and thus there has been a violation of Articles 21 and 22(5) of the Constitution.

(In support of Nos. (1) and (2), the learned counsel has referred to Khudiram Das; Jayanarayan Sukul v. State of West Bengal; Madhav Hayawadanrao Hoskot v. State of Maharashtra and Ramchandra A. Kamat v. Union of India.)

(3) The counter affidavit filed in response to the rule nisi issued by this Court, has not been affirmed by the detaining authority, but by another officer, on the basis of information derived from the record, only.

(4) Irrelevant matter has been taken into consideration.

In reply to these contentions, Mr. Nain, appearing for the respondent State has urged these points :

(a) (i) The 'grounds of detention' which were served on the detenu simultaneously with the order of detention, were elaborate and full and had apprised the detenu of all the information necessary for making an effective representation against his detention. "Grounds of detention", as held by this Court in *State of Bombay v. Atma Ram Sridhar Vaidya*, in Article 22(5) means only 'conclusions of facts' and not all the evidence or factual details considered by the detaining authority in passing the impugned order. What Article 22(5) obligates is that the 'grounds of detention' should be communicated to the detenu at the earliest. This constitutional obligation was fully discharged when the elaborate grounds of detention containing the substance of all the material facts, were served on the detenu.

(ii) In these circumstances, the detenu had no further constitutional right to be supplied with the details and sources of the information on which the order of detention was passed. Reference has also been made to *Vakil Singh v. State of J & K*.

(b) The detenu as is apparent from the grounds of detention is engaged in smuggling activity in a big way, having international ramifications. Investigations were going on to unravel the entire gang of international smugglers in league with the detenu. The detaining authority had, therefore, to consider as to whether the disclosure of this information asked for by the detenu, at that stage, would not be detrimental to public interest, and if no, whether it would be in the public interest to invoke Article 22(6) of the Constitution to withhold the copies asked for by the detenu, for some time. For this important purpose consultation with the collector who was supervising the investigations, was necessary. The documents of which the copies were asked for, also, run into several hundred pages. If these inter departmental consultations, preparation and despatch of the copies took 17 days in a case where the detenu has been indulging in smuggling activity of this magnitude, the delay in supplying the copies was neither inordinate, nor unreasonable. Reference has been made to the counter affidavit file on behalf of respondent 1 and 2.

(c) The period of delay in allowing the detenu to interview his lawyer, was of no consequence. First Article 22 in terms, denies to the detenu the right to consult a lawyer or to be defended by a counsel of his choice. This concession has, however, been conceded by the State Government under Rule 14(xii), and there also, it is not an indefeasible right as it is contingent upon the grant of permission by the State Government. There is a distinction between a constitutional right and a defeasible statutory right. Delay in grant of the interview with the lawyer in no way affects the constitutional right of the detenu to make a representation. Secondly, no written request for supply of copies of the documents, prior to February 18, 1980 had been received from the detenu and the lawyer's request for interview with the detenu was granted on February 20, 1980. The time taken for considering the lawyer's request for interview cannot be combined with or added to the period taken for supply of the copies.

(d) Lastly, the delay in supply of copies or in granting the interview with the lawyer did not in any way prejudice the detenu. The copies were demanded and the interview with the lawyer were sought, professing that these were required for the purpose of making an effective representation. But this professed purpose was merely a pretence because the copies were neither necessary, nor intended to be used for any such purpose. Despite the grant of these twin requests and the despatch of the copies on March 7 and their receipt on March 17, the detenu never filed any representation, although the Advisory Board was to meet shortly thereafter on March 24, 1980. This conduct of the detenu in not making any representation, despite opportunity, shows that no prejudice has been caused to him merely by the fact that the copies were despatch to him after 17 days of receiving his request.

(e) Under the statute even "grounds" of detention can be communicated to the detenu, in exceptional case within 15 days of the detention. If the "grounds" communicated within the prescribed period are elaborate then supply of further particulars only two days after the expiry of the fifteen days' period prescribed for communicating the "grounds" in exceptional cases, cannot be said to be unreasonably belated.

14. Contentions 3 and 4 canvassed by Shri Sorabjee need not detain us. Shri Nain has produced for the perusal of the Court the original official record from which it is clear that the detention order was passed by the Home Minister. It was authenticated and issued under the Rules of Business by Shri P. M. Shah, deputy Secretary Home Department (Special) who has sworn the counter affidavit in this case. No personal mala fides are alleged against the minister. It was, therefore not necessary for the minister to file the counter, himself. Contention 3 is, therefore, overruled.

15. What the learned counsel characterises as "irrelevant" matter incorporated in the grounds of detention are really introductory facts or history of the case. We, therefore, negative contention 4, also.

16. Indeed, the main arguments of the learned counsel are Nos. (1) and (2), that there has been unreasonable delay in supplying the copies of the material documents and statements relied upon or referred to in the grounds of detention. To appreciate these contentions, it is necessary to have a clear idea of the import and scope of the expression 'grounds' used in the context of 'detention' in Article 22(5) of the Constitution and in sub-section (3) of Section 3 of COFEPOSA. A democratic

Constitution is not to be interpreted merely from a lexicographer's angle but with the realisation that it is an embodiment of the living thoughts and aspirations of a free people."A Constitution" said Benjamin Cardozo, "states or ought to state not rules for the passing hour, but principles for an expanding future". The concept of "grounds", therefore, has to receive an interpretation which will keep it meaningfully in tune with the contemporary notions of liberty and fundamental freedoms guaranteed in Articles 19(1), 21 and 22 of the Constitution. It is not necessary to notice all the numerous cases in which this expression in the context of Article 22 (5) has come up for consideration. It will suffice to make a brief reference to a few of them which are in point. In *Golam Mallick v. State of West Bengal*, this court held that in the context of Article 22(5) 'grounds' does not merely mean a recital or reproduction of a ground of satisfaction of the authority in the language of Section 3 of the Act (MISA); nor is its connotation restricted to a bare statement of conclusions of fact. It means something more. That 'something' is the factual constituent of the 'grounds' on which the subject satisfaction of the authority is based. This decision was approved by a larger Bench in *Khudiram Das v. State of West Bengal*, wherein Bhagwati, J. speaking for the court, said (SCC p. 87 : SCC (Cri) p. 441, para 5) : "The constitutional imperatives enacted in Article 22(5) are two-fold : (i) the detaining authority must, as soon as may be, that is, as soon as practicable after the detention, communicate to the detenu the grounds of which the order has been made, and (ii) the detaining authority must afford the detenu the earliest opportunity of making a representation against the order of detention. These are the barest minimum safeguards which must be observed before an executive authority can be permitted to preventively detain a person." It was explained that 'grounds' under Article 22(5) mean all the basic facts and materials on which the order of detention is based; therefore, all the basic facts and materials which influenced the detaining authority in making the order of detention, must be communicated to the detenu. It was further clarified that such "basic facts and materials" would be different from "other particulars" spoken of in sub-section (3) of Section 3 of MISA.

17. Earlier in *Prabhu Dayal Deorah v. D. M., Kamrup, Mathew, J.*, SCC (L & S) pp. 27-28, para 16)

The detenu has a right under Article 22(5) of the constitution to be afforded the earliest opportunity of making a representation against the order of detention. That constitutional right includes within its compass the right to be furnished with adequate particulars of the grounds of the detention order.

From these decisions it is clear that while the expression "grounds" in Article 22(5), and for the matter, in Section 3(3) of the COFEPOSA, includes not only conclusions of fact but also all the 'basic facts' on which those conclusions are founded, they are different from subsidiary facts so further particulars of these basic facts. The distinction between "basic facts" which are essential factual constituents of the "grounds" and their further particulars or subsidiary details is important. While the "basic facts" being integral part of the "grounds" must, according to Section 3(3) of COFEPOSA "be communicated to the detenu, as soon as may be, after the detention, ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than 15 days from the date of detention", further particulars of those grounds, in compliance with the second constitutional imperative spelled out from Article 22(5) in *Khudiram* case, are required to be communicated to the detenu, as soon as may be practicable, with reasonable expedition. It follows, that if a case the so-called "grounds of detention" communicated to the detenu lack the basic or primary facts on which the conclusions of fact stated therein are founded and this deficiency is not made good and communicated to the detenu within the period specified in Section 3(3), the omission will be fatal to the validity of the detention. If, however, the grounds communicated are elaborate and contain all the "basic facts" but are not comprehensive enough to cover all the details particulars of the "basic facts", such particulars, also, cover all the details or

particulars of the "basic facts", such particulars, also, must be supplied to the detenu, if asked for by him, with reasonable expedition, within a reasonable time. What is "reasonable time conforming with reasonable expedition", required for the supply of such details or further particulars, is a question of facts depending upon the facts and circumstances of the particular case. In the circumstances of a given case, if the time taken for supply of such additional particulars, exceeds marginally, the maximum fixed by the statute for communication of the grounds it may still be regarded "reasonable", while in the facts of another case, even a delay which does not exceed 15 days, may be unjustified, and amount to an infraction of the second constitutional imperative pointed out in Khudiram case.

18. In the instant case, the grounds supplied to the detenu were elaborate and full and contained all the "basic facts", although they did not set out all the details or particulars of those "basic facts" relied upon or referred to there in. There was thus no breach of the first constitutional imperative embodied in Article 22(5). The short question, therefore, for consideration is : Was the period of 17 days (exclusive of the time taken for communications in transit) for the supply of the further particulars of the basic facts to the detenu "unreasonable" in the circumstances of the case? In the instant case, several causes contributed to this "delay". Firstly, this a case in which the detenu was according to the allegations in the grounds of detention and the averments in the counter-affidavit filed by Shri. P. M. Shah, Deputy Secretary (Home) to the Government of Gujarat, indulging in smuggling out silver from India and exporting it to the gulf countries in a big way. This silver which was the subject of this illegal activity, was of huge value. The smuggling activity attributed to the detenu had international ramifications. The Collector of Customs was supervision the investigations that were going on at several places, in several countries to unearth and detect all the persons who were involved in this large-scale organised smuggling of international dimensions. It was, therefore, not unreasonable for the detaining authority to consult the Collector of Customs as to the possible detrimental effect of the supply of the copies, at that stage, on the investigations which were still going on. Such a query from or consultations with the collector was necessary, to enable the detaining authority to make up its mind as to whether so not, it would be advisable to withhold in the public interest the supply of the copies asked for by the detenu of any part thereof under Article 22(6). Indeed, at one stage, the Collector wrote back that the supply of the copies, at that stage, would be detrimental to the investigations which were in progress and it also might endanger the safety of the witnesses and informants. The government, therefore, summoned the Collector and discussed the matter at a high-level meeting and then directed the Collector to supply the copies. Secondly, the documents so statements of which copies were sought covered more than 461 pages. Preparation of such a bulky record could be time-consuming, if the aid of some appliance like XEROX machine were not available to prepare the copies by mechanical process.

19. The third reason for delay-which is in the nature of an explanation-given by the respondent is that it has not caused any prejudice to the right of the detenu to make an effective representation, since the grounds of detention communicated to him were elaborate and full. Indeed, in the counter-affidavit an alternative stand taken by the respondent is, that the detaining authority was not under any constitutional or statutory obligation to supply copies of these additional materials because the grounds communicated to the detenu were elaborate. Shri. Nain has also tried to support this reasoning.

20. In view of the law enunciated in Khudiram case, this stand taken by the respondent is utterly unsustainable.

21. Be that as it may, in the totality of the circumstances of this present case, we do not think that

the period of about 17 days taken in considering the supply of the copies was an unreasonably long period which could amount to a denial of the detenu's right to make an effective representation. In considering the reasonableness or otherwise of the time taken in supplying the copies, the circumstance that the grounds of detention already communicate to the detenu were very elaborate and full, is not altogether irrelevant. The copies were dispatched to the detenu by registered post on March 7, 1980 and were received by him on March 11, 1980 at Rajkot. The Advisory Board was scheduled to meet shortly thereafter on March 24, 1980. The detenu was also allowed by an order dated February 20, 1980 to be interviewed by his lawyer. Although the government took more than two weeks to consider the lawyer's request to interview the detenu, the fact remains that this permission was granted only two days after the dispatch of the detenu's application for obtaining copies of the additional documents or materials. In spite of the grant of the detenu's request for interview with his lawyer and the supply of the copies, the detenu did not make any representation to the detaining authority or the consideration of the Advisory Board. This is also a relevant circumstance to be taken into account for determining whether the delay in supplying the copies, has, in fact, prejudiced the detenu's right to make a speedy and effective representation.

22. According to the petitioner his lawyer by a letter dated February 1, 1980, sought an interview to enable him to draft his representation. But no application for obtaining copies of the material documents had been made by the detenu till February 15/18, 1980, when it was put in a course of communication to the government, while permission for interview with the lawyer was granted on February 20.

23. In short, on a consideration of all the circumstances of this particular case, we are of opinion that the delay of 17 days in question, was not so unreasonable as to amount to an infraction of the constitutional imperatives in Article 22(5) of the Constitution.

24. These, then, are the reasons in support of our order dated May 9, 1980 by which we dismissed the writ petition.

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