Mst. L. M. S. Ummu Saleema

Vs

Shri B. B. Gujaral and Another

Writ Petition No. 1745 of 1981

(D. Chinnappa Reddy,A.P. Sen, Baharul Islam JJ)

04.05.1981

JUDGMENT

CHINNAPPA REDDY, J. –

1. In this application under Article 32 of the Constitution, we are concerned with the question of the legality of the detention of Jahaubar Moulana under the provisions of the Conservations of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. On August 6, 1980, a car in which the detenu Jahaubar Moulana was travelling was intercepted by Customs Officers near Perumber - Kandigal diversion road on Tiruchirappalli-Madras G.S.T. Road. On a search of the car, 768 wrist-watches of foreign origin and 1560 semi-precious stones were found ingeniously concealed in the panelling of the front doors and the cavity between the petrol tank and the steel plate covering the petrol tank. The goods which were valued at Rs. 2,95,188 were seized by the Customs Officers along with the car. On August 7, 1980 the detenu, Jahaubar Moulana, was interrogated and a statement was recorded which incriminated himself and others. He was taken before the Magistrate on August 8, 1980 and was remanded to custody. He was granted interim bail on August 12, 1980 and the bail was finally confirmed on August 16, 1980. On August 14, 1980 the detenu claims to have sent a communication addressed to the Assistant Collector of Customs, Cuddalore, in which, according to him, he retracted from the statement made by him on August 7, 1980 and claimed that the earlier statement had been obtained from him by torturing him. According to the case of the detenu this communication was sent by him under certificate of posting. Subsequently, on October 31, 1980 Shri B.B. Gujaral, Additional Secretary to the Government of India, Ministry of Finance made an order of preventive detention against the detenu Jahaubar Moulana under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act. The order of detention and the grounds of detention were served on Jahaubar Moulana on February 2, 1981. According to the respondent they could not be served earlier as Jahaubar Moulana was not available and was avoiding service and arrest. The detenu made a representation on February 4, 1981. The representation was rejected by the detaining authority, Shri B.B. Gujaral on February 19, 1981.

2. Shri Ram Jethmalani, learned counsel for the detenu urged that material documents upon which reliance was placed in the order of detention were not supplied to the detenu along with the grounds of detention and the detenu was thereby prevented from making an effective representation. He was thus denied the fundamental right afforded to him under Article 22(5) of the Constitution. The two documents which according to Mr. Jethmalani were not supplied to the detenu were (1) record of investigation revealing the trunk telephone calls booked from telephone No. 315 at Kila Karai to telephone No. 27115 at Madras on July 15, 1980, July 18, 1980, July 24, 1980, July 26, 1980, July 27, 1980, July 29, 1980, August 6, 1980 and August 7, 1980; and (2) record of investigation relating to the petrol which was put into jeep No. TMC 1850 owned by Shri Shamsuddin, brother of the

detenu.

3. In Paragraph 4 of the grounds of detention it is mentioned that when premises No. 66, Malayappan St. Mannady, Madras was being searched on August 7, 1980, a telephone call was received at telephone No. 27115 which was in the premises, from telephone No. 315 Kila Karai enquiring about the arrival of the detenu. The information about the call was verified with reference to the record of trunk-calls and it was found that on the various dates mentioned trunk-calls had been booked from telephone No. 315 at Kila Karai to telephone No. 27115 at Madras. The reference to the record of trunk-calls was made for the purpose of verifying the trunk-call which was received on August 7, 1980 at telephone No. 27115 in the premises No. 66, Malayappan Street when the Customs Officers were there. After carefully perusing the grounds of detention we find it impossible to hold that the record of trunk-calls was one of the documents upon which the detaining authority had relied in making the order of detention.

4. The reference in the grounds of detention to the petrol put into jeep No. TMC 1850 was made in the following circumstances. Paragraph 5 of the grounds of detention refers to a statement made by the detenu's brother Shamsuddin on September 20, 1980 in which he stated that his jeep No. TMC 1850 has not been used during the previous years and that it was kept locked up in a garage. Paragraph 5 then recites that the investigation showed that during the period between June 1, 1980 and August 5, 1980, on as many as 36 occasions petrol had been put into the jeep at various petrol-pumps. Here again we are unable to say, on a perusal of the grounds of detention, that the record of investigation relating to the petrol put into the jeep was in any manner relied upon by the detaining authority in making the order of detention.

5. Shri Jethmalani's submission was that the detaining authority was under an obligation to supply along with the grounds, copies of all documents to which reference was made in the grounds irrespective of whether such documents were or were not relied upon in making the order of detention. He submitted that the very fact that the documents were mentioned in the grounds established that the documents were relied upon in making the order of detention. We are unable to agree with the submission of Shri Jethmalani. True, it was observed in some cases that copies of documents to which reference was made in the grounds must be supplied to the detenu as part of the grounds (vide Shalini Soni v. Union of India ((1980) 4 SCC 544 : 1981 SCC (Cri) 38 : AIR 1981 SC 431)). But these observations must be read in the context in which they were made. In Shalini Soni case (((1980) 4 SCC 544 : 1981 SCC (Cri) 38 : AIR 1981 SC 431)), for example, the observations were made immediately after stating that "grounds" in Article 22(5) did not mean mere factual inferences but meant factual inferences plus factual material which led to such factual inferences. In Icchu Devi Choraria v. Union of India ((1980) 4 SCC 531 : 1981 SCC (Cri) 25 : AIR 1980 SC 1983) the Court observed : (SCC p. 540 : SCC (Cri) p. 34, para 6)

> It is difficult to see how the detenu can possibly make an effective representation unless he is also furnished copies of the documents, statements and other materials relied upon in the grounds of detention.
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> The stress was upon the words "relied upon". In Kudiram Das v. State of W.B. ((1975) 2 SCC 81 : 1975 SCC (Cri) 435 : 1975 2 SCR 832, 848, 849) the constitutional requirement of Article 22(5) was stated as insistence that basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to the making of the order of detention must be communicated to the detenu so that the detenu may have an opportunity of making an effective

> representation against the order of detention. It is, therefore, clear that every failure to furnish copy of a document to which reference is made in the grounds of detention is not an infringement of Article 22(5), fatal to the order of detention. It is only failure to furnish copies of such documents as were relied upon by the detaining authority, making it difficult for the detenu to make an effective representation, that amounts to a violation of the fundamental rights guaranteed by Article 22(5). In our view it is unnecessary to furnish copies of documents to which casual or passing reference may be made in the course of narration of facts and which are not relied upon by the detaining authority in making the order of detention. In the case before us we are satisfied that such were the two documents, copies of which were not furnished to the detenu. We are satisfied that the documents cannot be said to be documents which were relied upon by the detaining authority in making the order of detention. Therefore, the detenu could not properly complain that he was prevented from making an effective representation. There was no violation of the right guaranteed by Article 22 of the Constitution.

6. The next submission of the learned counsel for the detenu was that although the detenu had retracted from his alleged original statement dated August 7, 1980 long before the order of detention was made, the fact of such retraction was not considered by the detaining authority before making the order of detention. The plain and simple answer of the respondents was that there was no such retraction as claimed by the detenu. According to the detenu as soon as he was released on bail, on August 14, 1980, he addressed a letter to the Assistant Collector of Customs, Cuddalore, retracting from his former statement. This communication was sent under certificate of posting, a photostat copy of which was produced before us. In support of the claim that he had retracted from his former statement and had communicated the retraction under certificate of posting, the detenu invited our attention to the reply sent by him to the show-cause notice issued by the Collector of Customs under the Customs Act, and to the representation made by him to the detaining authority, in both of which he made a reference to the alleged retraction. One curious feature which we must notice is that the detenu sent to the detaining authority along with his representation a photostat copy of the certificate of posting but carefully refrained from sending a copy of the letter of retraction itself. This is indeed extraordinary. If the detenu was serious in his request that his retraction should be considered by the detaining authority while considering his representation one would expect him to send a copy of the letter of retraction along with his representation instead of a copy of the certificate of posting. One cannot help a suspicion that evidence was being brought into existence to support the assertion that a letter of retraction was sent on August 14, 1980. The detaining authority had stated in the counter that no such letter dated August 14, 1980 was received by the Assistant Collector of Customs. The entire file has been produced before us and on a perusal of the file we find that a thorough search was made, not once but several times, to find out if such a letter was received in the office of the Assistant Collector of Customs, Cuddalore but no such letter could be traced. The learned counsel urged that the detaining authority was not competent to state that the Assistant Collector of Customs had not received such a letter and that it was for the Assistant Collector to say so. There is no force in this submission. The file produced before us shows that the Assistant Collector of Customs had informed the detaining authority and the Collector of Customs that he had made a thorough search for the letter said to have been written on August 14, 1980 and that no such letter had been received in his office. We are satisfied that the alleged letter of retraction was only a myth. The certificate of posting might lead to a presumption that a letter addressed to the Assistant Collector of Customs was posted on August 14, 1980 and in due course reached the addressee. But, that is only a permissible and not an inevitable presumption. Neither

Section 16 nor Section 114 of the Evidence Act compels the court to draw a presumption. The presumption may or may not be drawn. On the facts and circumstances of a case, the court may refuse to draw the presumption. On the other hand the presumption may be drawn initially but on a consideration of the evidence the court may hold the presumption rebutted and may arrive at the conclusion that no letter was received by the addressee or that no letter was ever despatched as claimed. After all, there have been cases in the past, though rare, where postal certificates and even postal seals have been manufactured. In the circumstances of the present case, circumstances to which we have already referred, we are satisfied that no such letter of retraction was posted as claimed by the detenu.

7. Another submission of the learned counsel was that there was considerable delay in the disposal of the representation by the detaining authority and this was sufficient to vitiate the detention. The learned counsel submitted that the detaining authority was under an obligation to adequately explain each day's delay and our attention was invited to the decisions in Pritam Nath Hoon v. Union of India ((1980) 4 SCC 525 : 1981 SCC (Cri) 19 : AIR 1981 SC 92) and in Shanker Raju Shetty v. Union of India (Writ Petition No. 640 of 1980, decided on June 26, 1980). We do not doubt that the representation made by the detenu has to be considered by the detaining authority with the utmost expedition but as observed by one of us in Frances Coralie Mullin v. W.C. Khambra ((1980) 2 SCC 275 : 1980 SCC (Cri) 419 : (1980) 2 SCR 1095) "the time imperative can never be absolute or obsessive". 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. Law deals with the facts of life. In law, as in life, there are no invariable absolutes. Neither life nor law can be reduced to mere but despotic formulae. Considered in that light, can it be said that there was any unreasonable delay in the present case ? The representation was despatched on February 5, 1981 and was received in the office of the detaining authority on February 13, 1981. Apparently it was in postal transit from 5th to 13th. It was put up before the detaining authority on February 19, 1981 and disposed of that very day. From the records produced before us we notice that the detaining authority, Shri. B.B. Gujaral, was not available from 13th to 16th as he had gone abroad. He returned on 16th and considered the matter on 19th. The learned counsel for the detenu urged that the absence of the detaining authority from India cannot be allowed to violate the fundamental right of the detenu to have his representation considered with the utmost expedition. We agree that in such cases appropriate arrangements must be made for considering the detenu's representation. Apparently, it was not thought necessary in the present case as Shri Gujaral was returning on 16th, that is, within a few days. After the 16th the delay, if any, was for a period of three days only. It can hardly be described as delay though one wishes there was no room for even for that little complaint. We are of the view that there has not been any unaccountable or unreasonable delay in the disposal of the representation by the detaining authority.

8. The learned counsel for the detenu further submitted that the detaining authority did not apply his mind to the representation. He argued that the representation made express reference to the retraction and yet the detaining authority did not enquire or send for the retraction which admittedly was not available with him. We have already found that no letter of retraction was sent to the Assistant Collector of Customs. A perusal of the note file shows that the detaining authority also considered the question whether the alleged letter of retraction was posted. In the circumstances we are unable to hold that there was non-application of mind by the detaining authority.

9. Shri Jethmalani then submitted that the detaining authority had failed to consider the question

whether a prosecution under the ordinary criminal law would not suffice to prevent the detenu from indulging in the alleged activities and whether preventive detention was necessary in the circumstances of the case. Reliance was placed upon the observations made by this Court in Kanchanlal Maneklal Chokshi v. State of Gujarat ((1979) 4 SCC 14 : 1979 SCC (Cri) 897 : (1980) 1 SCR 54). In the counter-affidavit filed by the detaining authority, Shri B.B. Gujaral, it has been stated :

> Having regard to the nature of the activities in which the detenu was engaged and after having applied my mind very carefully to all the facts and circumstances of the case and the material placed before me, I arrived at the subjective satisfaction that it was necessary to detain Shri Jahaubar Moulana for preventing him from engaging in transporting smuggled goods. The adjudication of the case under the Customs Act and the prosecution of the detenu are entirely on a different footing. I say that the detention order was passed by me with due care and after careful consideration of all the materials placed before me.
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> The deponent may not have stated in express words that when he made the order of detention he also considered the question whether a prosecution under the ordinary criminal law would not meet the situation and would not be sufficient to prevent Jahaubar Moulana from engaging himself in the objectionable activities. But a reading of the entire counter-affidavit makes it clear that in the opinion of the detaining authority, prosecution or no prosecution, the only effective way of preventing Jahaubar Moulana from engaging himself in objectionable activities was to detain him.

10. Some other ground was mentioned by the learned counsel for the detenu but they were not pressed before us. In the result the writ petition is dismissed.

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