

Smt. Hemlata Kantilal Shah

Vs

State of Maharashtra and Another

Writ Petition (Criminal) No. 3662 of 1981 (Under Article 32 of the Constitution of India)

(A.P. Sen, Baharul Islam JJ)

30.10.1981

JUDGMENT

ISLAM, J. –

1. By this petition under Article 32 of the Constitution of India, Smt. Hemalata Kantilal Shah (hereinafter the 'wife') has challenged the detention of her husband Shri Kantilal Nagar Das Shah (hereinafter the 'detenu') who was detained by the State of Maharashtra (respondent 1) by Order dated June 3, 1981 under sub-section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter the 'Act'). The material facts on which the grounds of detention have been based may be briefly stated as follows :

2. On January 8, 1981, the detenu with his wife and their minor daughter, Miss Chaya Kantilal Shah, arrived in Bombay from Muscat by flight no. AI 838. The petitioner at the customs clearance counter of the airport appeared nervous and was hasty in clearing her baggage. The Intelligence Officer of the Air Customs unit who had been present at the counter on receipt of secret information kept a close watch on her. When the family reported at the customs counter, the Intelligence Officer approached them and asked for their passports. It was found that the detenu, the petitioner and their daughter were all holding Indian passports and were frequent travellers. When asked about the contents of the baggages and for declaration in respect of gold, watches, and other valuable items, the detenu replied in the negative. The wife was asked to present her purse which was kept in a corner of the customs counter covered with other pieces of baggage. In the said purse, one small tobacco tin marked "Three Nuns" was found. The tin appeared to be unusually heavy and as such the detenu was asked again to declare the contents. The declaration was that the contents were some coins and that the tin was to be delivered to one Torahim in Bombay. Not being satisfied with the reply, two independent panchas were called and in their presence and in presence of the detenu and his wife, the tin was opened and 48 slabs of "Palladium" metal each weighing one ounce were found. The baggage was then thoroughly examined in the presence of the detenu and his wife and the panchas. The examination resulted in recovery of 93 more slabs of "Palladium" concealed in cheese packets, and in thermocol. Thus altogether 141 slabs of "Palladium" valued at Rs. 3,54,192 were recovered. They were seized by the Customs Officer.

3. The detenu and his wife were then led to their residential premises of flat No. 194, 19th floor, Persepolis Apartment, Cuff Parade, Bombay 5, standing in the name of the wife. The premises were searched under a search warrant. The search resulted in the recovery of (1) Philips colour T.V. valued at Rs. 18,000; (2) Akai Video Cassette Recorder valued at Rs. 24,000; (3) Sharp 3-in-one model valued at Rs. 6000 and (4) General Air-Conditioner valued at Rs. 15,000. All these articles were also seized by the Customs Officer.

4. On the following day, the detenu made a statement which was recorded under Section 108 of the Customs Act. The detenu stated that he had been in Muscat for the last 40 years and had business of readymade garments there; and that he was a wealthy man with two wives named Hasumati and Hemlata (the petitioner). The two wives were staying in Bombay at Cuff Parade in separate apartments. The detenu further stated that two months ago he had come to Bombay where he had come to know from Zaveri Bazaar that smuggling of "Palladium" was a profitable business. He therefore had purchased the 141 slabs of "Palladium" of one ounce each for 9000 Omani riyals from one Pursottam Kanji in Muscat who was a dealer in precious metals. Before leaving Muscat for Bombay, he had packed the 141 bars of Palladium in the three containers aforesaid. The detenu also stated that the Sharp 3-in-one had been presented to him by His Highness Sultanbin Hamed-Al-Said of Muscat in October 1980, and that the other three articles had been purchased by him from the Omani Consul General, Mr. Salim Hakim. The detenu further stated that he took full responsibility for the 141 bars of Palladium seized and his wife had nothing to do with them.

5. Mr. Ram Jethmalani, learned counsel appearing for the petitioner makes the following submissions before us :

(i) The detenu asked for legal representation before the Advisory Board by letter dated July 31, 1981 but it was arbitrarily rejected on August 3, 1981, thereby causing serious prejudice to the detenu.

(ii) After his detention, the detenu asked for six particulars to enable him to make the representation; only one particular was furnished and five were refused by the authority by its letter dated July 21, 1981 (Ex. A), thereby depriving the detenu from making a proper representation.

(iii) The Government had framed guide-lines in regard to detention. The authority however did not follow these guide-lines in the case of the petitioner; so the order of detention was mala fide and discriminatory.

(iv) That the case of the petitioners particularly a case in which the prosecution was the normal remedy; and

(v) That the cause of detention arose on January 8, 1981 in the airport and there was no reason for the unusual delay in passing the order of detention on June 6, 1981.

6. We now proceed to examine the contentions one by one.

(i) Legal representation before the Advisory Board

7. Learned counsel for the petitioner has placed before us a copy of the letter dated July 31, 1981, addressed to the Secretary, Advisory Board by the detenu's counsel, Mr. G.L. Ajwani. Mr. Ajwani referred to an earlier letter dated July 10, 1981, wherein he had requested, inter alia, for permission to the detenu to be represented by an advocate before the Advisory Board. The Secretary of the Advisory Board sent a reply to Mr. Ajwani, who was informed that in view of Section 8(e) of the Act, the detenu "is not entitled to appear before the Advisory Board by any legal practitioner. The Advisory Board has not permitted legal practitioner to appear in any reference made to it under the aforesaid Act and hence your request cannot be acceded to".

8. Section 8(e) reads as follows :

For the purposes of sub-clause (a) of clause (4), and sub-clause (c) of clause (7), of Article 22 of the Constitution, -

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(e) a person against whom an order of detention has been made under this Act shall not be entitled to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, . . .

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9. Section 8(e) has not barred representation of a detenu by a lawyer. It only lays down that the detenu cannot claim representation by a lawyer as of right. It has given the Board a discretion to permit or not to permit representation of the detenu by counsel according to the necessity in a particular case. Certain cases may be complicated and assistance of lawyers may be necessary on behalf of the parties to explain the facts and law involved in the case. In the instant case, the submission is that the rejection of the request of the detenu's counsel by the Advisory Board on the ground that in the past no legal representation had been allowed on behalf of any detenu has been based on a misconception of the law. We are unable to accept the submission of learned counsel on two grounds : (i) the Advisory Board whose action is complained of is not a party before us; and (ii) our decision on the point would be merely academic. It would be academic because after rejection of the request, the Board reviewed the case of the detenu and gave its opinion whereupon the Government confirmed the detention.

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10. The second submission of learned counsel was with regard to non-supply of particulars. Mr. Ajwani aforesaid sent a letter (Ex. A) dated July 10, 1981 to the Assistant Secretary to the Government, Home Department (Special), Government of Maharashtra. In that letter he requested the Government to furnish six "informations" mentioned in the letter. They were as follows :

- (1) The name and designation of the officer on whose satisfaction the order of detention was made and relevant authority under the rules of business, enabling the said officer to pass detention orders on behalf of the Government.
- (2) The date on which the proposal to detain was received by the detaining authority.
- (3) Whether facts mentioned in Para 3 of the grounds of detention have been used against the detenu for making the order of detention.
- (4) The provision of law under which the import of Palladium is prohibited.
- (5) Whether the detaining authority has accepted or rejected my client's story about the acquisition of colour T.V., Akai Video Cassette Recorder, Air-Conditioner etc. If it has been rejected, then the material on the basis of which this decision was taken, and
- (6) Whether any inquiries, if any, were made from Oman consulate or from Consul General Mr. Salim Hakim.

11. Learned counsel submits that the "information" sought under item (1) of the letter has been furnished and he has no grievance about it. But none of the remaining five "informations" were furnished. The submission of learned counsel is that the Government is bound to disclose under which provision of law import of Palladium is prohibited; their failure to disclose this "information" deprives the detenu from making a proper representation.

12. Items (3), (5) and (6) are akin. With regard to item (3), whether the facts mentioned in Para 3 of the grounds of detention were used against the detenu for making the order of detention, Shri D.N. Cappor, Secretary to the Government of Maharashtra, Home Department, in his counter-affidavit, has stated in Paragraph 20 of the affidavit :

. . . I have not passed the order of detention on the ground that the four items seized from the detenu's house were smuggled. I say that I have mentioned the seizure of the said goods in the grounds of detention as narration of facts. I say that Paras 3 and 4 of the grounds of detention are the narrations of the fact and the same is not a ground for detention . . . .

13. In our opinion the request of the detenu for the "information" whether the detention was inter alia based on the seizures of the four articles mentioned in Para 3 of the list of grounds and the reply of the authority to the request were irrelevant. When an order of detention together with the grounds of detention is served on a detenu, the detenu may ask for particulars on which a ground is based if they are not already there. When a document containing what are called "grounds" which often consist of the background of a case, narration of facts and instances of the detenu's activities, is supplied to the detenu, the detenu is not entitled to know which part or parts of the "grounds" was or were taken into consideration and which not. The Court may not take in to consideration any reply given by the detaining authority to such an enquiry; for, the reply may be an afterthought. It will be for the Court to judge whether the facts narrated constitute a ground of detention or which facts might possibly enter and influence the detaining authority in coming to its subjective satisfaction.

14. The information sought as per clause (4) of the letter, namely, the provision under which the import of Palladium is prohibited is equally untenable. Whether or not the import of Palladium is prohibited or not is an information on a question of law and can be obtained from statutes, rules or notifications. In our opinion, the Government is not under any liability to furnish the detenu with legal information available from legal literature. The liability of the detaining authority is only to comply with the requirement of sub-article (5) of Article 22 of the Constitution.

15. In this case, it appears from Schedule I, Appendix 2 to the Imports (Control) Order, 1955 (as amended up to March 31, 1980) that the articles mentioned against Item 71.09 as "Platinum and other metals of the platinum group, unwrought or semi-manufactured" appearing under Chapter 71 under which are mentioned "Pearls, precious and semi-precious Stones, precious Metals, Rolled Precious Metals, and Articles thereof; Imitation Jewellery, Coin." In the counter-affidavit the detaining authority has stated that Palladium is a precious metal belonging to the Platinum group. The submission of learned counsel is that the detenu even did not know whether Palladium was a precious metal belonging to the Platinum group and the Government's failure to furnish him which that "information" prevented him from filing a proper representation. We are unable to accept this submission, inasmuch as the plea is not permissible on the ground of public policy, for, any detenu may plead that he does not know whether gold or silver is a precious metal. Be that as it may, the detenu stated in his statement that he had purchased the Palladium from the shop of a dealer in precious metals at Muscat and that he had smuggled that metal to make profits. Though Palladium

may not be a prohibited article it is admittedly a dutiable article and it was admittedly smuggled by the detenu.

(v) Delay

16. The submission of learned counsel is that the detenu was arrested on January 9, 1981 but was detained on July 6, 1981. The submission is that this delay was fatal. In support of his contention, learned counsel for the petitioner cited before us three decisions of this Court, namely Lakshman Khatik v. State of W.B. [AIR 1974 SC 1264 : (1974) 4 SCC 1 : 1974 SCC (Cri) 289], Sk. Abdul Munnaf v. State of W.B. [AIR 1974 SC 2066 : (1975) 3 SCC 239 : 1974 SCC (Cri) 857] and Rabindra Kumar Ghosel v. State of W.B. [AIR 1975 SC 1408 : (1975) 4 SCC 111 : 1975 SCC (Cri) 365]. In Lakshman Khatik [AIR 1974 SC 1264 : (1974) 4 SCC 1 : 1974 SCC (Cri) 289] this Court held that in passing a detention order, the authorities concerned must have due regard to the object with which the order was passed. If the object was to prevent disruption of supplies of foodgrains prompt action should be taken. In the absence of any explanation regarding the delay, the order of detention, passed with a view to prevent disruption of supplies of foodgrains on the grounds based on incidents of removal of rice which took place about seven months earlier, was invalid. In Sm. Abdul Munnaf [AIR 1974 SC 2066 : (1975) 3 SCC 239 : 1974 SCC (Cri) 857], there was inordinate delay and no proximity in point of time between the alleged prejudicial activity of the petitioner and the order of detention. The Court found that a period of nine months had elapsed between the incident and the order of detention; and as the delay of nine months in the making of the order for detention after the alleged incident had not been explained, order of detention was held to be invalid. Delay ipso facto in passing an order of detention after an incident is not fatal to the detention of a person, for, in certain cases delay may be unavoidable and reasonable. What is required by law is that the delay must be satisfactorily examined by the detaining authority.

17. In the case in hand in the counter-affidavit filed on behalf of the detaining authority, it has been stated in Paragraph 16 as follows :

. . . the detenu was arrested on January 9, 1981 and was detained on July 6, 1981. Thereafter the Customs Authorities carried on further investigation and as can be seen from the list of the statements and documents annexed to the grounds of detention, 11 statements of the detenu including the statement dated April 7, 1981 were recorded by the Customs Authorities . . . I therefore say that there is no delay in passing the order of detention as alleged by the petitioner . . . the present order of detention has been issued after completing the investigation.

18. From the foot of the document containing the grounds of detention, it appears that the 11 statements of the detenu and his wife were recorded on various dates between January 9, 1981 and April 7, 1981.

19. The submission of learned counsel is that his grievance is not so much on the time lag or delay between the date of arrest and the date of detention; his real grievance is in not furnishing with the information as to the cause of the delay so as to enable the detenu to file a proper representation before the Advisory Board for its consideration. In our opinion, the submission is untenable. The detaining authority is in no legal liability to tell or satisfy the detenu as to the causes of delay; it is under an obligation to satisfy the court as to the causes of delay to show that there was no infraction of the constitutional provisions laid down under sub-article (5) of Article 22 of the Constitution. In our opinion, the delay has been satisfactorily explained by the authority in its affidavit and it has not

vitiating the detention.

(iv) Prosecution

20. The next point urged by Mr. Ram Jethmalani is that in the instant case, the proper course for the Government was to prosecute and convict the detenu for the offence, if any, for violation of the provisions of the Customs Act. In support of his contention he cites a decision of this Court in *K.M. Chokshi v. State of Gujarat* [(1980) 1 SCR 54 : (1979) 4 SCC 14 : 1979 SCC (Cri) 897]. In that decision, the Court after reviewing a number of cases summarised the law as follows : (SCC p. 18, Para 8)

The ordinary criminal process is not to be circumvented or short circuited by ready resort to preventive detention. But, the possibility of launching a criminal prosecution is not an absolute bar to an order of preventive detention. Nor is it correct to say that if such possibility is not present to the mind of the detaining authority the order of detention is necessarily bad. However, the failure of the detaining authority to consider the possibility of launching a criminal prosecution may, in the circumstances of a case, lead to the conclusion that the detaining authority had not applied its mind to the vital question whether it was necessary to make an order of preventive detention. Where an express allegation is made that the order of detention was issued in a mechanical fashion without keeping present to its mind the question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose, the detaining authority must satisfy the Court that that question too was borne in mind before the order of detention was made. If the detaining authority fails to satisfy the Court that the detaining authority so bore the question in mind the Court would be justified in drawing the inference that there was no application of the mind by the detaining authority to the vital question whether it was necessary to preventively detain the detenu.

21. The rule laid down is that a prosecution or the absence of it is not an absolute bar to an order of preventive detention; the authority may prosecute the offender for an isolated act or acts of an offence for violation of any criminal law, but if it is satisfied that the offender has a tendency to go on violating such laws, then there will be no bar for the State to detain him under a Preventive Detention Act in order to disable him to repeat such offences. What is required is that the detaining authority is to satisfy the Court that it had in mind the question whether prosecution of the offender was possible and sufficient in the circumstances of the case. In some cases of prosecution it may not be possible to bring the culprit to book as in case of a professional bully, a murderer or a dacoit, witnesses do not come forward to depose against him out of fear, or in case of international smuggling, it may not be possible to collect all necessary evidence without unreasonable delay and expenditure to prove the guilt of the offender beyond reasonable doubt.

22. In the instant case it has been submitted by Mr. Jethmalani that on the facts of this case, the prosecution under the ordinary law would have been sufficient; resort to preventive detention on the face of it was manifestly unreasonable. In the counter-affidavit it has been stated by the detaining authority that it was aware that the detenu was being prosecuted under the ordinary law; but it was satisfied that the prosecution under the ordinary law was not sufficient for preventing the detenu from indulging in similar activities in future. This statement of the authority satisfies the requirement of the rule laid down by this Court in the *Chokshi* case [(1980) 1 SCR 54 : (1979) 4

(iii)

23. The last submission of learned counsel was that the detention was mala fide and discriminatory. The submission was that it was opposed to the guide-lines laid down and publicised by the Government; under the said guide-lines, it was submitted, detention was not ordered except when the activities of the person concerned were a part of an organised crime involving conspiracy and continued activities; the guide-lines did not permit or envisage detention for an isolated act of contravention of the customs law. In reply it has been stated in the counter-affidavit that the detaining authority was aware that the detenu came to the adverse notice of the customs authorities for the first time in the smuggling incident dated January 8/9, 1981; that the activities of the detenu on the basis of which prognosis was made was reasonably suggestive of a repetitive tendency or inclination on the part of the detenu to act likewise in further; that the order of detention was essentially a precautionary measure and was based on the reasonable prognosis of the future behaviour of a person based on his past conduct judged in the light of the surrounding circumstances. It has further been stated : "Such past conduct may consist of one single act or of a series of acts. I say that large quantum of Palladium metal brought, the nature in which it was concealed coupled with the detenu's conduct in not disclosing the fact when questioned by the customs authorities clearly demonstrate potentiality for continued criminality and indicate previous practice, experiment and expertise. In the given case even the first act of this kind can be termed to be the beginning of continuing criminal activity. I say in the present case the nature of the act and its magnitude clearly justify an inference that if the detenu was not detained he is likely to indulge in commission of such acts in future. I say that the detenu admitted in his statement dated January 9, 1981 that he wanted to smuggle the goods under seizure as he wanted to sell the same in Bombay market and earn profit."

24. The past conduct or antecedent history of a person can appropriately be taken into account in making a detention order. It is indeed largely from prior events showing tendencies or inclinations of a person that an inference can be drawn whether he is likely in the future to act in a manner prejudicial to the maintenance of supplies and services essential to the community or his act of violation of foreign exchange regulations and his smuggling activities are likely to have deleterious effect on the nation economy.

25. With regard to the confidential guide-lines, the averment of the detaining authority in the counter-affidavit is that the guide-lines given by the Government were secret and confidential instructions which had no binding force; but yet they were taken into consideration while passing the order of detention.

26. The guide-lines were necessarily of a confidential nature and were intended to guide the Customs or Intelligence Officers as to how to act and what to do in the detection and apprehension of smugglers. They do not have any force of law; and there cannot be any valid complaint of discrimination, if any, in arresting and bringing to book a particular offender under the Customs Act or under any preventive detention law.

27. With regard to the inquiry of the detenu as to whether the facts narrated in Paragraph 3 in the document containing the grounds of detention were taken into consideration, it may be said with justification that although Paragraph 3 may not constitute an independent ground of detention, there cannot be any objection if this fact possibly entered into the subjective satisfaction of the detaining

authority before passing the order of detention. The detaining authority had of necessity to take into account all the relevant material placed before it and after due consideration thereof might justifiably come to the conclusion that the activities of a particular person were such that he had a tendency to repeat his illegal activities. In the case in hand, the detenu himself admitted in his confession that he has his home in Bombay and business in Muscat. His passport disclosed that he was frequently shuttling between Muscat and India. Admittedly he smuggled the Palladium in question in order to make profit by selling it to customers in India. The detaining authority would be within its jurisdiction to take into consideration all these facts and subjectively come to a satisfaction whether or not the offender may be repeating his activities.

28. It is needless to say that the High Court under Article 226 of the Constitution and the Supreme Court either under Article 32 or under Article 136 of the Constitution do not sit on appeal on the orders of preventive detention. The normal law is that when an isolated offence or isolated offences is or are committed, the offender is to be prosecuted. But, if there be a law of preventive detention empowering the authority to detain a particular offender in order to disable him to repeat his offences, it can do so, but it will be obligatory on the part of the detaining authority to formally comply with the provisions of sub-article (5) of Article 22 of the Constitution of India. The High Court under Article 226 and the Supreme Court under Article 32 has to see whether the formalities enjoined by Article 22(5) have been complied with by the detaining authority. If the formalities have been complied with, the Court cannot examine the materials before it and find that the detaining authority should not have been satisfied on the materials before it and detained the detenu under the Preventive Detention Act, for, that is the function of an appellate court.

29. In the instant case, we are not satisfied that the detaining authority has violated either the relevant provisions of the Constitution or any of the provisions of the Act. This petition has no merit and is rejected.

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