Mrs. Tsering Dolkar

Vs

Administrator, Union Territory of Delhi and Others

Writ Petition (Criminal) No. 670 of 1986

(CJI R. S. Pathak, Ranganath Misra JJ)

18.02.1987

JUDGMENT

RANGANATH MISRA, J. -

1. By this application under Article 32 of the Constitution the wife of the detenu Wang Chuk assails the order of his detention under section 3(1) read with section 2(f) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the "COFEPOSA Act") made on July 21, 1986 by the Administrator of the Union Territory of Delhi. The detenu is of Ladakhi origin and has been residing at Delhi for some time. The grounds served on him along with the order of determination stated that on March 18, 1986, the customs authorities on the basis of previous information in their possession intercepted the vehicle in which the detenu was travelling and inquired of him if he was in possession of contraband or smuggled gold. He answered in the affirmative and disclosed that he was carrying smuggled gold packet in a piece of cloth. At the Customs House where he was taken, 36 pieces of gold with foreign markings valued at a little more than three lakhs and seventy-three thousand rupees (Rs. 3,73,000) were recovered from the cloth pack. When the detenu failed to produce authority in support of the possession of it, the same were seized under the Customs Act as also the Gold Control Act. As a follow-up action, the residential premises of the detenu were searched and from there 11 pieces of gold with foreign markings, 65 cut pieces of gold of foreign origin, fifteen thousand US Dollars and Indian currency of Rupees five lakhs sixty-two thousand the two hundred (Rs. 5,26,200) were recovered. The detenu failed to produce relevant papers though he claimed these articles. They too were seized.

2. The detenu admitted the recovery but maintained that one Puchung, owner of Hotel Kanchan in Nepal owned these articles and the detenu held them for him on the understanding that as and when Puchung asked for the whole or any part of them, the same would be delivered to him. Puchung had been visiting the detenu's house now and then for the said purpose. The detenu was arrested but was enlarged on bail. The detaining authority relying upon the materials available in the proceedings before the customs authorities made the order of detention. Alongwith the order of detention the grounds in support thereof were supplied to the detenu. Copies of 17 documents as indicated in Annexure 'C' were also supplied to him.

3. The detenu made a representation against the detention and the Advisory Board afforded a personal hearing to him on October 7 and 9, 1986. His detention has been confirmed.

4. In response to the rule, the respondents have made a return and in the affidavit justification for the order has been given. Rejoinder has been filed by the petitioner. Mr. Jethmalani appearing in support of the writ petition has advanced three submissions and they are :

(1) The detenu has been denied a fire and adequate opportunity of representing against his detention inasmuch as the grounds of detention and copies of the documents accompanying the grounds were not in English language and copies thereof have been furnished in Tibetan language while the detenu knew only Ladakhi; and copies of all the material documents shown in Annexure 'C' were not supplied to him.

(2) The representation made by him dated September 6/12, 1986 was not sent to the Advisory Board in good time and reached the Board either on the date of hearing or after the hearing which spread over two days had begun; and

(3) The order was vitiated as the detaining authority did not apply its mind to the relevant papers before making the impugned order.

5. Before we proceed to deal with the matter on merits, certain aspects which came to be noticed during the hearing though not specifically pleaded, may first be indicated.

6. The petitioner annexed to the writ petition a list of documents marked as Exhibit 'C' said to have been supplied to the detenu alongwith the grounds of detention. In all 17 items were shown therein, Learned Additional Solicitor General appearing for the respondents produced the record of the detaining authority during the hearing where in the office copy 18 items in all were mentioned.

7. In paragraph 4 of the counter-affidavit filed by Shri C. P. Tripathi on behalf of the detaining authority, it was stated that :

Letter dated 19.4.1986 of the petitioner, addressed to the Collector of Customs, Customs House, New Delhi, together with a list of persons, etc. was placed before the detaining authority and a copy of the same has been supplied to the detenu alongwith the grounds of detention.

In a subsequent affidavit Shri Tripathi stated that the correct contents of the said paragraph as per the record of the respondents should be read as under :

Letter dated April 19, 1986 of the petitioner addressed to the Collector of Customs, Customs House, New Delhi together with a list of persons along with the reply dated June 11, 1986 of the Collector of Customs to the petitioner was placed before the detaining authority.

The list of document does not mention the letter dated June 11, 1986 and the respondents' learned counsel has ultimately accepted the position that a copy of that document was not supplied to the detenu.

8. In the later affidavit filed by Shri Tripathi on behalf of respondents it has again been stated that :

That similarly in the said referred counter-affidavit, sub-para (ii) of page 5 reads as under :-

Letter dated 28.4.1986 from the petitioner to the Collector of Customs, along with affidavits of Smt. Tsering Wang Chuck, Mrs. Billa, Shri Nadak, Mrs. Pema, Shri Tse Wang, Mrs. Kalsang Dolma, Mr. Teeman were also placed before the detaining

> authority. I say that even the reply of the above referred letter from the Collector of Customs was considered by the detaining authority, a copy of which has also been supplied to the detenu along with the grounds of detention."
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> Whereas the correct contents of the said para as per the record of the respondents should read as under :-
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> Letter dated 28.4.1986 from the petitioner to the Collector of Customs, alongwith affidavit of the petitioner, Mrs. Billa, Shri Nadak, Mrs. Pema, Shri Tse Wang, Mrs. Kalsang Dolma, Mr. Teeman were also placed before the detaining authority. Even the reply dated 23.6.1986 of the Collector of Customs, to the detenu was also considered by the detaining authority and a copy of same has also been supplied to him along with the grounds of detention."

9. It is conceded by the learned counsel for the respondents that the letter of the Collector of Customs dated 23.6.1986 to the detenu was not in reply of the detenu's letter dated 28.4.1986 as mentioned in the affidavit.

10. The facts narrates above clearly indicate that the respondents have acted in a casual manner and have failed to realise what amount of care has to be taken in making a return to the rule in a matter involving challenge to preventive detention. Mr. Jethmalani has rightly commented that when the allegation was that there was no application of mind in the making of the preventive detention, the return should have come either from the detaining authority or a person who was directly connected with the making of the order and not by Shri Tripathi who filed the affidavit on the basis of the record of the case.

11. The detenu has contended that he understands only Ladakhi language but he can hardly write, read or converse (sic) in that language. Admittedly his wife who is the petitioner before us in a Tibetan refugee and apparently is conversant with both Tibetan as also English. It is the case of the respondents in the affidavit of Shri Tripathi filed on January 13, 1987 that :

> It is thus apparent that the detaining authority while passing the detention order has fully considered all the 17 documents running to pages 1 to 45 which have been supplied to and received by the detenu along with translation thereof in the Tibetan language as admitted in the writ petition.

It is not disputed that the law as laid down by this Court requires the detaining authority to provide the material to the detenu in a language which he understands in order that an effective representation against his detention may be made. A Constitution Bench of this Court in the case of Hadibandhu Das v. District Magistrate, Cuttack ((1969) 1 SCR 227, 231 : AIR 1969 SC 43 : 1969 Cri LJ 274) has indicated :

Mere oral explanation of a complicated order of the nature made against the appellant without supplying him the translation in script and language which he understood would, in our judgment, amount to denial of the right of being communicated the grounds and of being afforded the opportunity of making a representation against the order.

This view has been reiterated in several decisions of this Court (See Harikisan v. State of Maharashtra (1962 Supp 2 SCR 918 : AIR 1962 SC 911 : 1962 (1) Cri LJ 797) and Binod Bihari Mahato v. State of Bihar ((1975) 2 SCR 215 : (1975) 3 SCC 328 : 1974 SCC (Cri) 936).)

12. The learned Additional Solicitor General relied upon the feature that the petitioner-wife knew both English and Tibetan languages and an effective representation as a fact had been made. There can be no two opinions that the requirement of law within the provisions of Article 22(5) of the Constitution is that the detenu has to be informed about the grounds of detention in a language which he understands. The fact that the detenu's wife knew the language in which the grounds were framed does not satisfy the legal requirement. Reliance was placed by the learned Additional Solicitor General on a decision of this Court in Prakash Chandra Mehta v. Commissioner and Secretary, Government of Kerala ((1985) 3 SCR 679 : 1985 Supp SCC 144 : 1985 SCC (Cri) 332), in support of his contention that unless the detenu was able to establish prejudice on account of the fact that the grounds of detention and the documents accompanying the grounds were not in a language know to the detenu the order would not be vitiated. There is no clear indication of the test of prejudice being applied in that case. On the facts relevant before the Court, a conclusion was reached that the detenu was merely feigning ignorance of English and on the footing that he knew English, the matter was disposed of. We must take it clear that the law as laid down by this Court clearly indicates that in the matter of preventive detention, the test is not one of prejudice but one of strict compliance with the provisions of the Act and when there is a failure to comply with those requirements it becomes difficult to sustain the order. (See Babu Das v. State of W. B. ((AIR 1975 SC 1513 : (1975) 4 SCC 108 : 1975 SCC (Cri) 359), Khudiram Das v. State of W. B. ((1975) 2 SCR 832 : (1975) 2 SCC 81 : 1975 SCC (Cri) 435), Fogla v. State of W. B. (AIR 1975 SC 245 : (1974) 4 SCC 501 : 1974 SCC (Cri) 537).)

13. The remaining contention of the petitioner is about the representation made to the Advisory Board. It is a fact that the representation made on 12.9.1986 though received immediately thereafter in the office of the detaining authority had not been sent to the Advisory Board until hearing began. But in the report of the Advisory Board which has been produced before us during the hearing of the matter we find reference to the representation. In the absence of any clear material as to when exactly the representation reached the Advisory Board we propose to accept the submission of the learned Additional Solicitor General that the representation was before the Advisory Board when the matter was heard and the detenu was afforded an opportunity of personal hearing.

14. The net result is that the order of detention cannot be supported for the defects and shortcomings indicated above. We allow the application. The order of detention is quashed and we direct that the detenu be set at liberty forthwith.

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