

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO.4294 OF 2014

Mohammad Bilal Yunus Shah
Residing at 181, Sunshine Palace,
Patel Street, Post Kosamba,
Surat,
Gujrat

.. Petitioner.

Vs.

1.The State of Maharashtra
Through Addl. Chief Secretary to
the Government of Maharashtra
Home Department (Special)
Mantralaya, Mumbai 400 032.

..

2. R.A. Rajeev
The Principal Secretary to
Government of Maharashtra
World Trade Centre,
Mumbai 400 005

..

3. The Superintendent of Air
Intelligence Unit,
Chatrapati Shivaji International
Airport, Sahar, Mumbai

..

4. The Superintendent of
Prison, Nasik Road,
Maharashtra

.. Respondents.

Mrs.Aisha Mohammed Zubair Ansari a/w Mrs. N.S.K. Ayubi for the
Petitioner.
Mr.J.P. Yagnik APP for the Respondents.

CORAM : A.S. OKA & A.K. MENON, JJ.

DATED : 27TH JANUARY, 2015

ORAL JUDGMENT (PER A.K. MENON, J.)

1. This writ petition arises out of the detention order dated 30th September, 2014, by which one Ms.Salma Karolia of Surat was detained in exercise of the powers conferred by section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ("COFEPOSA") read with Government Order of Home Department dated 18th December, 2014. The said detenu is detained at Nashik Road Central Prison, Nashik. The petitioner is the nephew of the detenu and has filed the present petition for the life, welfare and personal liberty of the detenu.

2. On or about 30.9.2014, the Respondent No.2 Detaining Authority issued a communication containing the grounds of detention of the detenu. The facts set out in the said communication are as follows : On 20.12.2013 at about 8.30 am Emirates Flight EK 504 from Bahrain landed in Mumbai. The Customs Officers were keeping vigil on incoming passengers and in the course of surveillance officers of Air Intelligence Unit ("AIU") found the detenu moving about in a suspicious manner near Conveyor belt No.5, looking very nervous. She was talking to two other male passengers, whose movements also appeared suspicious. AIU therefore kept a watch.

3. After the detenu collected her baggage, she walked towards the baggage screening machine and opted for the green channel. After her luggage was screened, the AIU intercepted her and verified her passport and found that the passenger had arrived in India on numerous occasions and had short stays on each visit. Her name was shown as Salma Karolia. On being questioned, she stated that she was in business of purchasing burkhas from India and selling them in her country. On being asked whether she was carrying any gold or contraband, she replied in negative but her replies and general demeanor were unsatisfactory and she was extremely nervous. AIU then examined her baggage and noticed that on the rear side of her baggage trolley there were two metal boxes hooked onto the grill of the compartment. This alerted the AIU.

4. On interrogation she confessed that the boxes contained gold. She was intermittently looking towards her two male co-passengers, who had by then collected their baggage and were found waiting near the baggage claim area. On inspection of their trolleys it was noticed that they also had similar aluminium cases hooked on the rear part of the baggage trolleys. They were also intercepted. One of them was Sedu Arif Mohammad Yusuf and the another was Saleh Abubaker Ahmad Said. On inspection of all the six aluminium cases they were found to contain two gold bars of 1 kg each.

5. Thus in all 12 gold bars of one kg each collectively

weighing 12 kgs. were recovered from the six aluminium cases. The value of the aforesaid bars of 12 kilos was Rs.3,00,41,040/-. These gold bars were seized under the provisions of the Customs Act. The statement of Saleh Abubakar Ahmad Said was recorded in which he stated that he purchases rice and spices from Dubai and India and exports it to South Africa. He provided his addresses and contact numbers in Dubai and South Africa. He admitted to carrying gold bars and stated that the six aluminium rectangular cases concealing 12 bars of gold were handed over to him by one Mr.Shaukat of South Africa at Dubai Airport. Thereafter, he was to handover two aluminium rectangular cases to the detenu Ms.Karolia and two aluminium cases to the other co-passenger Mr.Sedu Arif Mohd. Yusuf.

6. The statement of the detenu was also recorded on 20.12.2013 under section 108 of the Customs Act, 1962. The detenu stated that she was 44 years old, had studied upto 9th standard in Gujarati medium from Gujrathi Prathamik Shala (Government School) Guna Kosamba Taluka Mangoran, Surat, Gujarat. She further stated that she can read, write and understand Gujarati. The detenu was accused of offences punishable under sections 135 (1)(a) and 135(1) (b) read with 135 (1)(d)(i) of the Customs Act, 1962 for his involvement in smuggling 12 kilos of gold bars into India along with associates. She was produced on 21st December, 2013 before 8th Court, Addl. Chief Metropolitan Magistrate Esplanade, Mumbai and

was remanded till 3.1.2014. On 21.12.2013 she retracted from her statement dated 20.12.2013 before the Court. The Department filed a rebuttal on 24-12-2013. Further statements of the detenu were recorded in the jail premises between 3.1.2014 and 6.1.2014.

7. The detenu filed an application under section 437 of the Cr.P.C. and on 6.1.2004 the Court released her on bail on personal bond of Rs.1,00,000/- and solvent surety of the like amount.

8. The grounds of detention further state that the detenu in connivance with Mr.Shaukat had smuggled gold into India and attempted to evade customs duty. She had made twenty seven visits to India in the past and was aware that bringing gold to India without declaring it and paying customs duty is an offence. She had thus committed offence by violating section 77 of the Customs Act. Furthermore, existing foreign trade policy also had been violated. The order further recorded that the detenu admitted that she had been promised Rs.20,000/- per trip for carrying goods which was to be paid after delivering the same in India. That she carried the gold and attempted to evade customs duty despite knowing the rules and regulations of the customs. She admitted that she brought the gold to earn some quick money.

9. After having considered the rebuttal to the Detaining Authority issued on or about 30-09-2014 several months after rebuttal

of retraction, the Detaining Authority observed that considering the gravity of offence and well organised manner in which it was done it is imperative that the detenu should be detained under the provisions of section 3(1)(i) of COFEPOSA with a view to prevent the detenu from smuggling goods in future. It is material to note that while passing the order, the Detaining Authority relied on the 23 documents, some of them illegible listed in Annexure "A", the copies of which are said to have been provided to the detenu.

10. In the present petition, the detention has been challenged on the various grounds, however, Mrs. Ansari, learned Advocate for the petitioner has laid emphasis on ground no.(iv) which refers the detenu statement dated 20.12.2013 to the following effect :

"I have studied upto 9th standard in Gujarati Medium from Gujrathi Prathamik Shala (Government School), Guna Kosamba, Taluka Mangoran, Surat, Gujrat. I can read, write and understand Gujrathi. I can speak and understand Hindi, Gujarati and English language."

11. The petitioner further contends that although in the statement it was recorded that the detenu was able to read English language, her statement incorrectly record that she can understand English language. According to the petitioner, she was not able to read or understand English and the Detaining Authority supplied the documents in Gujarati but at the time of detention, the detenu has not

been supplied with the grounds of detention, list of documents translated in Gujarati language. The Detaining Authority has supplied to her various documents. A copy of the order of detention, grounds of detention and list of documents in English language were supplied to detenu though she is unable to read or understand English. The respondents were duty bound to provide the translations of the same to the detenu in the language known to her. It is contended that the failure to submit translated versions has resulted in violation of the detenu's right to make an effective representation at the earliest opportunity and therefore, it is contended that the respondents have violated Article 22(5) of the Constitution of India. Mrs. Ansari therefore, contends that the detention order is liable to be set aside and the detenu be set at liberty forthwith on this ground alone. It is further submitted by the learned Advocate for the detenu that the order of detention, grounds of detention and list of documents not having been communicated has resulted in infringement of the detenu's right.

12. Mrs. Ansari, learned advocate for the detenu also submitted that the Detaining Authority has not considered the fact that the detenu's passport had been retained by the Sponsoring Authority and in absence of the passport, it would not be possible for the detenu to carry on any smuggling activity. The order of detention was therefore also challenged on the basis that this shows non application of mind and subjective satisfaction has been vitiated.

13. On behalf of the Sponsoring Authority, an affidavit of Shri Veersinha M. Patil, Deputy Secretary, Home Department Government of Maharashtra, Mumbai dated 8th January, 2015 has been filed. An affidavit of Dr.Kiran Kumar Karlapu, Assistant Commissioner of Customs has been filed on behalf of the Customs dated 9.1.2015. In the affidavit of Shri Veersinha Patil it is contended that since the Detaining Authority who has issued the detention order has been transferred on deputation to the Government of India, the same is affirmed by him on the basis of records and files of the department and facts within his knowledge which are believed to be true.

14. We need not refer to the various statements in this affidavit save and except in response to ground No.(iv) in paragraph 5 in view of the fact that this is the real ground that is being pressed into service by the Advocate for the petitioner. The affidavit in reply deals with this ground in paragraph 6. In paragraph 6 it is stated that "the translated copies of the relied upon documents were served to the detenu along with the Detention Order". This does not appear to be a correct statement in view of the fact that perusal of the detention order and the grounds of detention itself does not record that any such translated copies were provided. Moreover, in the petition it is the net case of the Respondent that when the documents duly translated were handed over the grounds of detention, the order of detention and list of documents were also translated and given to

the detenu. Only the English versions appear to have been given. In paragraph 6 of the reply, there is a clear statement that "Hence the relied upon documents based on which the Grounds of Detention were formulated were supplied to the detenu which was necessary and at no point of time the detenu right was prejudiced to make effective representation". From this, it is evident that there is no express denial of the fact that the order of detention, grounds of detention and list of documents were duly translated and handed over to the detenu. The affidavit of Dr.Kiran Kumar Karlapu of behalf of the Customs does not throw any light on this aspect since in paragraph 6 it is clearly stated that he had no comments to offer vis-a-vis the contents of paragraph 5 (iv).

15. We have heard Mrs.Ansari learned Advocate appearing for the Petitioner and learned AGP appearing for the Respondents at some length. It is contended by Mrs.Ansari and in our view correctly, that furnishing translations of the order of detention, grounds of detention and list of documents in Gujarati language was imperative in order to afford the detenu a reasonable opportunity of making an effective representation. Mrs. Ansari relied upon a decision in case of *Raziya Umar Bakshi Vs. Union of India and Others AIR 1980 SC 175* in which the Apex Court held that the service of the grounds of detention on the detenu is a very precious constitutional right and where the grounds are couched in a language which is not known to the detenu, unless the contents of the grounds are fully

explained and translated to the detenu, it will tantamount to not serving the grounds of detention to the detenu and would thus vitiate the detention *ex facie*. So also in case of *Hadibandhu Das vs. District Magistrate, Cuttack (1969) (1) SCR 227*, it was clearly held that oral explanation of the grounds of detention order without supplying the detenu with translations in the script and language which the detenu understood amounted to denial of right of being made aware of the grounds.

16. The Apex Court in yet another case of *Powanammal Vs. State of Tamil Nadu and Anr. AIR 1999 SC 618* observed as under :

“8. The law relating to preventive detention has been crystalized and the principles are well neigh settled. The amplitude of the safeguard embodied in Art.22(5) extends not merely to oral explanation of the grounds of detention and the material in support thereof in the language which is understandable to the detente. Failure to do so would amount to denial of the right of being communicated the grounds and of being afforded the opportunity of making a representation against the order.”

17. In the present case, apart from the bare statement in the affidavit, there is no contemporaneous record to show that the grounds and detention order were translated into Gujarati and provided to the detenu. The non supply of the translated copies of

the order of detention and grounds of detention vitiates the order of detention.

18. Mr. Ansari, learned Advocate for the Petitioner then relied upon the judgment of the Hon'ble Supreme Court in case of *Rajesh Gulati Vs. Government of NCT of Delhi and Anr. (2002) 7 SCC 129* in which the Apex Court had observed that the law of preventive detention must be meticulously followed, substantially and procedurally. In that case, the Detaining Authority had noted that the Appellant's passport was with the Customs and yet he said that Appellant was likely to travel clandestinely for the purpose of smuggling. It is obvious that without a passport, the Appellant could not continue his smuggling activities. Such circumstances are sufficient to vitiate or invalidate the impugned detention order. In the instant case also, the passport of the detenu was with the Sponsoring Authority and the order of detention was purportedly made for preventing the detenu from carrying out smuggling activities. In the light of fact that the passport was not in her possession, there was no possibility of her travelling out of country for the purpose of indulging smuggling.

19. The aspect of the detenu being deprived of her passport was considered in a leading case to which reference was made by the learned counsel for the detenu viz. *Gimik Piotr Vs. State of Tamil Nadu and Others (2010) 1 SCC 609* in which it is clearly laid down

that the order of preventive detention could not have been passed with a view to prevent a detenu from indulging in smuggling in the cases where the Customs Department has retained the passport and the likelihood of detenu indulging in smuggling activities was effectively foreclosed. In the case of *Gimik Piotr* (supra) it was held that merely because a person cannot otherwise survive in the country, is no basis to conclude that a person will again resort to smuggling activities, or abetting such activities by staying in the country. There is a higher standard of proof required in cases involving the life and liberty of a person. As observed in the case of *Rajesh Gulati* (supra), the contention that despite the absence of a passport, the Appellant could or would be able to continue smuggling activities is based on no material but was a piece of pure speculation. This aspect has also been considered time and again in various other judgments including of this Court.

20. On behalf of the Respondents Mr.Yagnik, learned APP contended that the detenu ought not to succeed on these grounds of challenge since the contents of the documents were already explained to the detenu. He relied upon the statement in the affidavit in reply to effect that the translated version had been supplied. After the matter was partly heard on 13th January, 2015, we allowed the learned APP to place a further affidavit on record explaining how and when the translated copies were furnished to the detenu. Accordingly, he filed and also referred to the further

affidavit of the Executing Authority Mr.Pradeep Shejul Superintendent of Police, Surat dated 22nd January, 2015, who states in capacity of the Executing Authority, he has affirmed the affidavit on the basis of record and files and facts within his knowledge.

21. With reference to paragraph 5(iv) of the Petition, he states that he executed the order of detention upon the detenu after the same was received by his office on 8.10.2014 and that the grounds of detention and the Annexure "A" and "B" in respect of present detenu, which were enclosed in duplicate, were required to be explained to the detenu in the language known to the detenu and her acknowledgment obtained thereon. He further states that in accordance with instructions he has executed the order upon the detenu on 10.10.2014 and on the docket of detention order, an endorsement is made by the detenu in Gujarati and in addition the statement of the detenu was recorded by the Police Inspector B.C. Thakur all of which shows that along with documents total number in page 1 to 116 are in Gujarati language and same was received by the detenu.

22. The said affidavit states as follows :

"Along with documents total number in page 1 to 116 are in Gujarati language and same was received by the detenu and the detenu know's the Gujarati language and the order of detention is also explained to her in the Gujarati language by me and

same was signed by the detenu”.

From the above it is clear that the deponent has merely stated that the documents at page 1 to 116 were in Gujarati language and further this clearly indicates that the order of detention, grounds of detention and list of documents were not duly translated and provided to the detenu as otherwise there was no occasion for the deponent to state that the order of detention is explained to her in Gujarati language.

23. The fact remains that the document annexed at Page 142 and 143 purporting to be acknowledgment of Ms.Salma Karolia does not bear the signature of Ms.Salma Karolia since the copy of detention order annexed is not in her name but bears name of Mr. Shaikh Abdul Ahmed Said. These may have been annexed to the affidavit of Mr.Pradip B. Shejul above petition erroneously. We have found in the case of companion petition No.4293 of 2014 wherein the detenu was Mr.Sedu Altaf Mohd. Yunus, that the annexure to the affidavit of Pradip Shejul in that matter appears to have been addressed to and signed by Ms.Salma Karolia the detenu. We may mention here that Ms.Karolia has signed this in English language alluding to the fact that she may be knowing English language. However, that itself is not sufficient to establish beyond doubt that she was fully conversant with the English language enabling her to follow the contents and understand the order of detention, grounds of

detention and the list of documents in order to enable her to make an effective representation against the order of detention. The Respondent have not embellished compliance with the requirement of law specially since even the additional affidavit of Ms.Pradeep Shejul falls short of categorically stating that the aforesaid order of detention and grounds were translated and provided to the detenu.

24. On the other hand as seen from the above, the deponent merely states that these documents were explained to the detenu in Gujarati. Moreover, the affidavit records that translated copies of the document relied upon in Gujarati language were served but not the order of detention and grounds of detention.

25. In the case of *Rama Dhondu Borade Vs. V.K Saraf (1989)* 3 SCC 172 the Hon'ble Supreme Court observed in paragraph 19 as follows :

"19. The propositions deducible from the various reported decisions of this Court can be stated thus:

The detenu has an independent constitutional right to make his representation under Article 22(5) of the Constitution of India. Correspondingly, there is a constitutional mandate commanding the concerned authority to whom the detenu forwards his representation questioning the correctness of the detention order clamped upon him and requesting for

his release, to consider the said representation within reasonable dispatch and to dispose the same as expeditiously as possible. This constitutional requirement must be satisfied with respect but if this constitutional imperative is observed in breach, it would amount to negation of the constitutional obligation rendering the continued detention constitutionally impermissible and illegal, since such a breach would defeat the very concept of liberty--the highly cherished right--which is enshrined in Article 21 of the Constitution".

It is to be noted that Article 22(5) enjoins upon the State to satisfy the aforesaid constitutional requirement. If this constitutional imperative is observed in the breach, it would amount to negation of the constitutional right thereby rendering continued detention impermissible. The Supreme Court highlighted the fact that the representation should be expeditiously decided with due promptitude and without avoidable delay.

26. In the circumstances, given the facts of the case at hand we are of the view that the order of detention cannot be sustained as it violates mandate of Article 22(5) of the Constitution of India, especially since the detenu was deprived of opportunity of promptly making a representation against the detention. Hence, we pass the following order :

(i) Rule is made absolute in terms of prayer clause (a) which reads

thus :

“(a) That this Hon'ble Court be pleased to issue a Writ of Habeas Corpus or any other appropriate writ, order or direction quashing and setting aside the said order of detention bearing No.PSA-1214/CR37(2)/SPL3(A) dated 30.09.2014 and be pleased to direct that the detenu Salma Karolia be set at liberty”.

(ii) All concerned to act upon an authenticated copy of the operative part of this order.

(A.K. MENON, J.)

(A.S. OKA, J.)