

THE HIGH COURT OF JUDICATURE AT MADRAS

Order Reserved on : 20-02-2020

Order Pronounced on : 27-02-2020

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MR. JUSTICE R. PONGIAPPAN

Habeas Corpus Petition No. 2816 of 2019
and
Crl.M.P. No. 925 of 2020

Kumuthamalar Ramachandran .. Petitioner/Detenu

Versus

1. The Joint Secretary (COFEPOSA)
Government of India, Ministry of Finance
Department of Revenue
Central Economic Intelligence Bureau
6th Floor, B-Wing, Janpath Bhawan
Janpath, New Delhi - 110 001
2. The Director General
Government of India, Ministry of Finance
Department of Revenue
Central Economic Intelligence Bureau
6th Floor, B-Wing, Janpath Bhawan
Janpath, New Delhi - 110 001
3. The Superintendent of Prisons
Special Prison for Women, Puzhal
Chennai - 600 066

.. Respondents

Prayer of Habeas Corpus

Writ Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Habeas Corpus calling for the records in connection with the order of detention passed by the first respondent herein vide Order No.PD-12002/24/2019- COFEPOSA dated 11.10.2019 against me/detenu (Kumuthamalar Ramachandran, Daughter of Ramachandran Rajoo Krishnasamy, aged about 41 years) confined at Special Prison for Women, Puzhal and set aside the

same, consequently direct the respondents to produce the body of the detenu before this Court and set her at liberty.

For petitioner : Mr. N.R. Elango, Senior Advocate
for Mr. E. Raj Thilak
For respondents : Mr. Rajnish Pathiyil

ORDER

The petitioner in this Habeas Corpus Petition calls in question the validity of the order of detention passed by the first respondent herein vide Order No.PD-12002/24/2019- COFEPOSA dated 11.10.2019 invoking the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

2. According to the respondent, on 25.08.2019, the officers of the Airport Intelligence Unit (AIU), on suspicion, intercepted the petitioner herein who reached Chennai Airport from Malaysia by Air Asia Airlines Flight No. AK 11 at 07.40 hours. On questioning, the petitioner appeared to be nervous and was giving inconsistent version to the questions posed to her. On verification, it was revealed that the petitioner was holding a Malaysian Passport Number A36434097 issued on 05.10.2015 in Malaysia. The personal belongings of the petitioner - two number of hand baggage viz., one black colour shoulder bag and one purple colour stroller suitcase were examined in the presence of witnesses. On further examination of the black colour shoulder bag, three small purses were recovered. On opening the three purses, each purse contained a bundle wrapped up with adhesive tape. On opening the bundle, 12 numbers of yellow colour metallic cut bars totalling weighing 6478 grams were recovered. On suspicion that the metallic bars so recovered could be gold bars, a Government approved gold appraiser was summoned to examine the same. Accordingly Gopi Achari, an approved gold appraiser examined the bars and certified them as 24 k pure gold totalling weighing 6478 grams and valued at Rs.2,52,51,244/- at the rate of Rs.3,898/- per gram. The gold bars were therefore seized by way of a Mahazar dated 25.08.2019 as required under Section 110 of the Customs Act for pursuing necessary action under Customs Act read with Foreign Trade (Development and Regulation) Act, 1992. The respondents also received a report from the approved gold appraiser on the same day namely 25.08.2019. When the petitioner was questioned about the possession of the gold bars, it was replied that a person who was relative of a Malaysia lady named Ros Maszwin Binti Abdul Kadir had handed over the three purses

containing the gold to her outside Kuala Lumpur airport with instructions to handover it to a person outside the Chennai Airport, who would identify her and would give Rs.17,000/- soon after she hands it over to him. According to the respondents, the petitioner, knowing fully well that she is smuggling gold by concealing it or without declaring it to the customs officials, has committed the offence for monetary benefit. Therefore, after obtaining a voluntary statement on the same day i.e., 25.08.2019 from the petitioner, as required under Section 108 of The Customs Act, 1962 and after complying with the formalities, the petitioner was arrested on the same day at 17.30 hours for having committed an offence punishable under Section 132, 135 (1) (a) and 135 (1) (b) of the Customs Act, 1962. Upon arrest, the petitioner was remanded to judicial custody through the Judicial Magistrate, Alandur.

3. It is the contention of the respondents that earlier, the petitioner was arrested for having smuggled 1200 grams of gold valued at Rs.39,70,800/-. Taking note of the earlier incident in which the petitioner indulged herself in smuggling of gold as well as the present incident, a show cause notice dated 25.06.2019 was issued to her proposing confiscation of seized gold and imposing penalty. The respondents also carried investigation as to the communication exchanged between the petitioner with Ms. Ros Maszwin Bindi Abdul Kadir through Whatsapp, the arrival and departure particulars of Ms. Ros Maszwin Bindi Abdul Kadir on earlier occasion to India etc., It was also ascertained that the petitioner frequently travelled from Malaysia to India. When the aforesaid material particulars were placed, the first respondent arrived at a subjective satisfaction that the petitioner indulged in fraudulent activities by way of smuggling of goods or abetting the smuggling of goods and engaged in transporting or concealing or keeping smuggled goods at the cost of the government revenue and national security with an intention to enrich herself. Therefore, the first respondent, invoking Section 3 (1) of the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974 clamped the order of detention dated 11.10.2019 against the petitioner. Challenging the order dated 11.10.2019, the present Habeas Corpus Petition is filed.

4. Mr. N.R. Elango, learned Senior counsel appearing for the petitioner invited our attention to para No.v of the detention order dated 11.10.2019 and contended that in order to show that the detaining authority has arrived at a subjective satisfaction to clamp the order of detention, reliance was placed by the detaining authority to the orders of remand. According to the learned Senior counsel for the petitioner, the petitioner was remanded on 25.08.2019 and her remand was

extended on 03.09.2019, 07.09.2019, 19.09.2019, 20.09.2019, 27.09.2019 and 01.10.2019. The petitioner, in order to submit an effective representation for revocation of the order of detention, has submitted a representation dated 08.11.2019 to the respondents requesting to furnish her the copies of the remand orders, but the same has not been furnished to her. The non-furnishing of the orders of remand to the petitioner, according to the learned Senior counsel for the petitioner, has vitiated the order of detention passed against her. In order to lend support to such contention, the learned Senior counsel for the petitioner relied on the decision of the Division Bench of this Court in the case of Chinna Ponnu vs. The Secretary, Prohibition & Excise Department, Government of Tamil Nadu, Fort St. George, Chennai - 9 and another reported in 2000 (II) CTC 423 wherein, it was held as follows:-

"4. However, when the detenu sought the copy of the remand order in order to make an effective representation, there was a duty cast on the authorities to furnish that order, as it is well known that the remand order is not only a judicial order, but one which would contain the complaint if any made by the detenu at the time of the detenu's production before the Magistrate regarding ill-treatment, if any, suffered by the detenu at the hands of the sponsoring authority. The fact that any such complaint had been made can only be established by the production of the remand order. That fact cannot be expected to be gathered from the special report which may or may not correctly set out, all that had transpired at the time the remand was ordered.

5. If the detenu considered it necessary to secure the copy of the remand order for the purpose of demonstrating that the special report had omitted to state certain things contained in the remand order, especially regarding the complaint about the ill-treatment of the detenu, such order will have to be regarded as a document which is necessary for the purpose of enabling the detenu to make an effective representation. Non-supply of such copy would prejudice the detenu.

6. It has been repeatedly held by the Apex Court that the rights conferred on the detenu regarding the grounds of detention, and the right to make an effective representation, are rights which are to be zealously safeguard, as the subjective satisfaction arrived at by the detaining authority is not open for examination by the Court, unless it is found to be wholly unsupported by any material. The detaining authority, therefore, cannot on the

basis of his own assessment as to which document to be furnished, and which should not be furnished, deny to the detainee the document which is necessary for the purpose of enabling the detainee to make an effective representation.

7. The continued detention of the detainee in this case, therefore, cannot be considered as a legal, after the deteneu's right to make an effective representation had been prejudiced by reason of non-supply of remand order which had been sought by the detainee and which had been wrongly refused to be supplied by the detaining authority."

5. By placing reliance on the aforementioned decision of this Court, the learned Senior Counsel for the petitioner would contend that the fact that the detainee has been denied the copies of the remand is explicit inasmuch as it has not been denied by the respondents herein.

6. The learned Senior counsel for the petitioners also invited our attention to para No.12 of the counter affidavit filed by the respondents 1 and 2 to contend that the respondents have made reference to the request made by the petitioner to furnish the copies of the orders of remand. At the same time, there is no reference made in the counter to the effect that the orders of remand were furnished to the petitioner. Thus, admittedly, the orders of remand passed by the learned Judicial Magistrate were not furnished to the petitioner herein and it had prevented her from making an effective representation to the detaining authority seeking revocation of the order of detention. Therefore, according to the learned Senior counsel for the petitioner, the non-supply of remand orders has prejudicially affected the detainee in submitting an effective representation and on that ground, he prayed for allowing the Habeas Corpus Petition.

7. Opposing the submission of the learned Senior counsel for the petitioner, the learned Standing Counsel for the respondents, by placing reliance on the counter affidavit of the respondents, would contend that the order of detention has been passed by the detaining authority after arriving at a subjective satisfaction based on the materials made available to conclude that the activities of the petitioner has resulted in loss of revenue to the Government apart from being a threat to the national security. As regards non-supply of the orders of remand, the learned Standing counsel would contend that the detainee was produced before the learned Judicial Magistrate on each day of extension of remand and the petitioner pretty well knows about the date until which the order of remand was extended. The petition filed by the sponsoring authority for

extension of remand is a mandate of law and only after considering the plea of the sponsoring authority, the order of remand was extended. In this context, the learned standing counsel for the respondents relied on the decision of the Honourable Supreme Court in the case of Hawabi Sayed Arif Sayed Hanif (Smt) vs. L. Hmingliana and others reported in (1993) 1 Supreme Court Cases 163 to contend that non-furnishing of the remand order of the accused will not vitiate the order of detention. In Para No.33 of this decision, it was held by the Honourable Supreme Court as follows:-

"33. This contention relates to the non-placing of the full text of the remand order of Sayed Arif Sayed Hanif before the detaining authority. A similar contention was raised before the High Court, but it was rejected. The remand Application No. 981 of 1990 dated September 28, 1990 was made in respect of the crew members. A copy of this remand application is annexed to the grounds of detention. At the foot of the remand application there is an endorsement to the effect that all the accused produced before the court were remanded in judicial custody till October 11, 1990. Though the full text of the remand order was not placed before the detaining authority, the substance of the same was placed. We are not in complete agreement with the High Court that non-placing of the remand order before the detaining authority has in no way affected either the subjective satisfaction of the authority or the detenu's right to make a detailed representation."

8. By relying on the aforesaid decision of the Honourable Supreme Court, the learned Standing counsel for the respondents would contend that non-furnishing of the orders of remand will not vitiate the order of detention passed against the detenu and he prayed for dismissal of the Habeas Corpus Petition.

9. We have given our anxious consideration to the rival submissions made. Though very many contentions have been raised by the counsel for both sides, the core contention urged on behalf of the petitioner is that the respondents, inspite of request made, did not furnish the copies of the orders of remand which had deprived the fundamental right of the petitioner to submit an effective representation to revoke the order of detention passed against her. In this context, our attention was drawn to the representation dated 08.11.2019. In Para Nos. 2 to 4 of the representation, the petitioner has stated thus:-

"2. It is mentioned in ground v that I was remanded on 03.09.2019, 07.09.2019, 19.09.2019, 20.09.2019, 27.09.2019 and 01.10.2019. These orders

and the order granting me bail have not been furnished in the RUD, preventing me from making an effective representation.

3. I retracted my statement made to the customs authorities in my bail petitions filed on 26.08.2019 and 03.10.2019 in that I have stated in the petition that I am innocent of the offence. The same has not been considered in the order of detention.

4. The order of detention in ground v mentions I have been remanded to judicial custody until 15.10.2019 reflecting that the order of detention was passed before the order of granting bail. However, there is no similar case or other material for arriving at a subjective satisfaction that I had a "real possibility" of coming out on bail.

10. It is not the case of the respondents that they did not receive the representation dated 08.11.2019 from the petitioner. On the other hand, in para No.12 of the counter affidavit of the respondents 1 and 2, reference was made to such representation having been made by the petitioner seeking copies of the order of remand. Thus, the respondents have admitted that the petitioner has submitted such a representation dated 08.11.2019. However, there is no reference made in the counter affidavit of the respondents that the representation dated 08.11.2019 of the petitioner has been rejected or the copies of the remand orders were furnished, as sought for in the representation dated 08.11.2019. Thus, we are of the view that the non-furnishing of the copies of the orders of remand to the petitioner has prevented her from submitting an effective representation to the detaining authority seeking revocation of the order of detention passed against her. The periodical extension of the order of remand must have disclosed the stage of the investigation, the materials relied against the petitioner for such extension, the other attendant circumstances which warrant the continuance of detention of the deteneu etc., Unless the order of remand is furnished to the petitioner, the petitioner will be made to grope in the dark as to what prompted the learned Judicial Magistrate to periodically extend her report and what are all the incriminating materials collected against her during the course of investigation when she was under incarceration. In fact, the decision relied on by the learned Senior counsel for the petitioner in Chinna Ponnu's case cited supra squarely apply to the facts of the case.

11. On the other hand, in the decision relied on by the learned Standing counsel for the respondents, the Honourable Supreme Court had an occasion to consider as to what would be the effect of the non-furnishing of the copy of the orders of remand for consideration of the detaining authority. In that case before the Honourable Supreme Court, admittedly, the full text of the remand order was not placed before the detaining authority, but the substance of the same was placed. Therefore, in those circumstances, it was held by the Honourable Supreme Court that the detaining authority, who passed the order of detention, will be in possession of several other materials, including the substance of the order of remand and consequently, the order of detention is not vitiated by reason of not placing the entire text of the orders of remand. This decision cannot be made applicable to this case. In the present case, as we have already held, the orders of remand passed against the petitioner were not furnished to her depriving her fundamental right to submit an effective representation to the detaining authority for revocation of the detention order. Therefore, we hold that the petitioner is entitled to succeed on this ground and consequently, the impugned order of detention is liable to be quashed.

12. In the result, the Habeas Corpus Petition is allowed. The order of detention passed by the first respondent herein in Order No.PD-12002/24/2019-COFEPOSA dated 11.10.2019 is set aside. The detenu Kumuthamalar Ramachandran, Daughter of Ramachandran Rajoo Krishnasamy, aged about 41 years, who is now confined at Special Prison for Women, Puzhal is directed to be set at liberty, unless her detention is required in connection with any other case. Consequently, CrI.M.P. No. 925 of 2020 is closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

rsh

To

1. The Joint Secretary (COFEPOSA)
Government of India, Ministry of Finance
Department of Revenue
Central Economic Intelligence Bureau
6th Floor, B-Wing, Janpath Bhawan
Janpath, New Delhi - 110 001

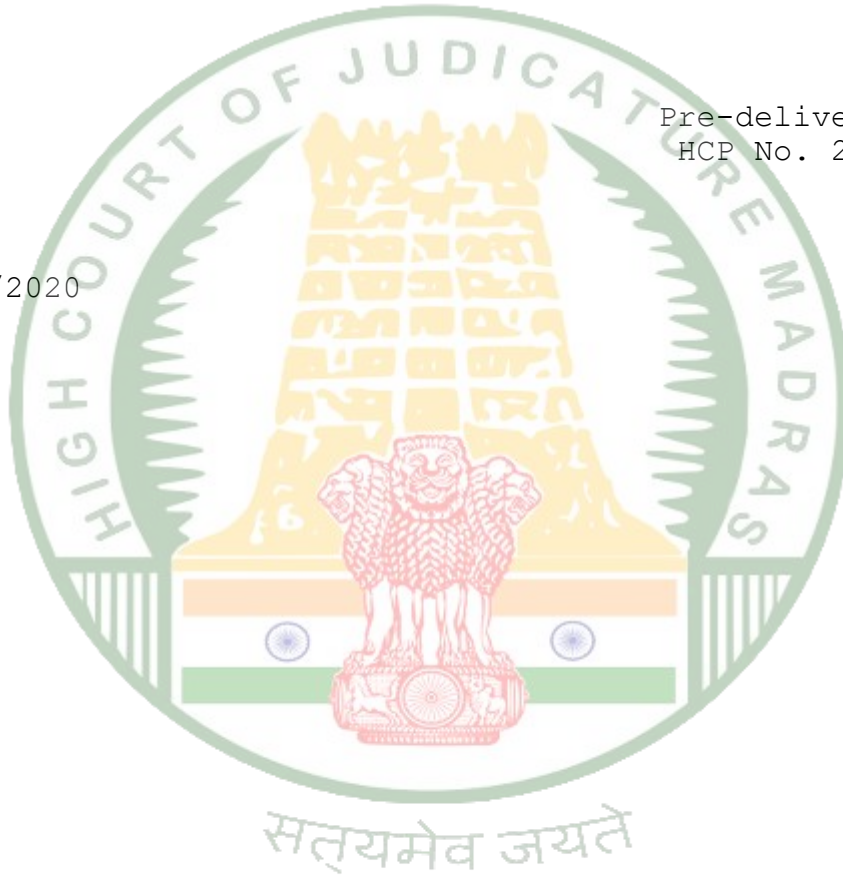
2. The Director General
Government of India, Ministry of Finance
Department of Revenue
Central Economic Intelligence Bureau
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3. The Superintendent of Prisons
Special Prison for Women, Puzhal
Chennai - 600 066

+1cc to Mr.Rajnish Pathyil, Advocate, S.R.No.17021

Pre-delivery Order in
HCP No. 2816 of 2019

MR(CO)
KKV/11/06/2020



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