

(2009) 03 KL CK 0081

High Court Of Kerala

Case No: Writ Petition (Cri.) No. 231 of 2008 (S)

Smt. Riswana Begam

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision: March 30, 2009

Acts Referred:

- Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - Section 11, 3(1)
- Constitution of India, 1950 - Article 22(5)
- Customs Act, 1962 - Section 108

Citation: (2009) CriLJ 2758 : (2009) 2 ILR (Ker) 354 : (2009) 2 KLT 646

Hon'ble Judges: Kurian Joseph, J; K.T. Sankaran, J

Bench: Division Bench

Advocate: D. Peethambaran and S. Palanikumar, for the Appellant; Govt. Pleader and Noble Mathew, for the Respondent

Final Decision: Allowed

Judgement

K.T. Sankaran, J.

The petitioner is the wife of Abu Backer Bin Abdulla, S/o. Abdullah, Jalan Manjindia, Kuala Lumpur, Malaysia, who has been detained as per Ext. P. 1 order of detention dated 31-5-2008, issued in exercise of the powers conferred on the Government of Kerala by Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA Act"). The writ petition is filed to issue a writ of Habeas Corpus to the respondents to produce the detainee before this Court and to set him at liberty. There is also a prayer for issue of a writ of certiorari to quash Ext. P1 order of detention.

2. In Ext. P2 grounds of detention, the following allegations are made against the detainee. On 10-4-2008 the detainee arrived at the International Terminal of the Airport at Karipur at about 8.00 a.m. by Srilankan airlines flight UL 169 from

Colombo. The officers of the directorate of revenue Intelligence, Calicut, examined the travel documents and baggages of the detainee. The detainee was travelling from Singapore to Colombo on 9-4-2008 and from Colombo to Calicut on 10-4-2008. He was having a Malaysian Passport. It was found from the customs clearance gate pass that the detainee brought goods worth Rs. 15,000/- in the checked in baggages. On examination of the baggages, a total number of 3906 computer RAM chips were found. The market value of the same was assessed at Rs. 46,42,800/-. The goods were not declared by the detainee before the Customs and duty was not paid. The goods were seized on the reasonable belief that the same were attempted to be smuggled to India. The statement of the detainee was recorded u/s 108 of the Customs Act. The detainee was arrested. Later he was released on bail by the Magistrate concerned. While he was on bail, he was arrested pursuant to Ext. P1 order of detention. The detainee is undergoing detention in the Central Prison, Thiruvananthapuram.

3. Sri S. Palanikumar, learned Counsel appearing for the petitioner, submitted that the order of detention is liable to be quashed and that the continued detention of the detainee is illegal. He raised the following points: (1) The order of detention was passed u/s 3(1)(i) of the COFEPOSA Act with a view to prevent the detainee from indulging in smuggling of goods, whereas the grounds of detention says that the detaining authority has arrived at the subjective satisfaction that the detainee is likely to continue to engage in prejudicial activities in future also and, therefore, it is necessary to detain him under Sections 3(1)(i), 3(1)(ii) and 3(1)(iii) of the COFEPOSA Act with a view to preventing the detainee from smuggling prohibited goods in future. The Counsel submits that this would show that the detaining authority has not properly applied its mind and the order of detention is thus vitiated. (2) The representation submitted by the detainee was not properly considered and, therefore, the continued detention is illegal. (3) There is variation in the order of detention and the grounds of detention. While the order of detention says that it was issued to prevent the detainee from smuggling of goods, paragraph 14 of the grounds of detention says that it is necessary to detain the detainee under Sections 3(1)(i), 3(1)(ii) and 3(1)(iii) of the COFEPOSA Act with a view to prevent him from smuggling prohibited goods. (4) The detainee is a Malaysian citizen. He married a woman belonging to Tamil Nadu. The detainee knows only Tamil and Malay. He has stated so in his statement dated 10-4-2008 which finds a place in Ext. P 2 grounds of detention as well. The detainee has stated the same in Ext. P. 4 representation dated 20-6-2008 and has pointed out that for making an effective representation, it is necessary to supply to him the material documents translated into Tamil. The translations were not supplied and, therefore, the continued detention is illegal. (5) The family members of the detainee were not informed of the arrest. (6) All the documents relied upon by the detaining authority were not supplied.

4. Sri Noble Mathew, learned Senior Government Pleader, submitted that the contentions raised by the petitioner are unsustainable and that the order of

detention is legal and valid. The continued detention of the detainee is also justified.

5. It is not in dispute that the detainee is a Malaysian citizen. His case is that he knows only Malay and Tamil. The detainee stated so in his statement made on 10-4-2008 u/s 108 of the Customs Act. That the statement contains such an averment is clear from paragraph 5 of the grounds of detention. In Ext. P4 representation dated 20-6-2008, the detainee has stated thus:

The detainee submits that his mother tongue is Tamil and he had not gone to school and he can read Tamil and Malay. The detainee does not know English and Malayalam. The detaining authority after passing the detention order, the detainee voluntarily surrendered before the officers and the detaining authority supplied the grounds of detention and booklet to the detainee in jail in which all the documents are supplied in English and Malayalam only. But the detaining authority had decided to supply some of the documents like statement of the detainee with Tamil translation. Having decided to supply some of the documents in language known to the detainee but nothing prevented them to supply all other relied upon and referred documents in language known to the detainee. Therefore the detainee is not able to read and understand the same and could not send a detailed representation to the authority against the detention order and he is handicapped in making an effective and meaningful representation and he requested the authority to supply the Tamil translated copies of all the relied upon and referred documents including detention order and grounds of detention for making effective representation, but the authority failed to supply the same and hence the non-supply of those documents in language known to the detainee vitiates the detention order.

6. In the Writ Petition, a specific ground on this aspect has been taken. In the counter affidavit filed by the first respondent, it is stated that "the grounds of detention and other documents have been explained to the detainee in Tamil".

7. The question is whether, explaining the grounds of detention and other documents to the detainee in the language known to him is a sufficient compliance of the requirements of Article 22(5) of the Constitution of India and whether it would constitute a communication to the detainee the grounds on which the order has been made within the meaning of Article 22(5) of the Constitution. In [Shri. Lallubhai Jogibhai Patel Vs. Union of India \(UOI\) and Others](#), the Supreme Court considered this question and held as follows:

20. It is an admitted position that the detainee does not know English. The grounds of detention, which were served on the detainee, have been drawn up in English. It is true that Shri C.K. Antali, Police Inspector, who served the grounds of detention on the detainee, has filed an affidavit stating that he had fully explained the grounds of detention in Gujarati to the detainee. But, that is not a sufficient compliance with the mandate of Article 22(5) of the Constitution, which requires that the grounds of detention must be "communicated" to the detainee. "Communicate" is a strong word.

It means that sufficient knowledge of the basic facts constituting the "grounds" should be imparted effectively and fully to the detenu in writing in a language which he understands. The whole purpose of communicating the "ground" to the detenu is to enable him to make a purposeful and effective representation. If the "grounds" are only verbally explained to the detenu and nothing in writing is left with him, in a language which he understands, then that purpose is not served, and the constitutional mandate in Article 22(5) is infringed. If any authority is needed on this point, which is so obvious from Article 22(5), reference may be made to the decisions of this Court in [Harikisan Vs. The State of Maharashtra and Others](#), and [Hadibandhu Das Vs. District Magistrate and Another](#), .

8. In [A.C. Razia Vs. Government of Kerala and Others](#), , it was held thus:

We are concerned here with Clause (5) of Article 22. The dual rights under Clause (5) are: (i) the right to be informed as soon as may be of the grounds on which the order has been made, that is to say, the grounds on which the subjective satisfaction has been formed by the detaining authority, and (ii) the right to be afforded the earliest opportunity of making a representation against the order of detention. By judicial craftsmanship certain ancillary and concomitant rights have been read into this article so as to effectuate the guarantees/safeguards envisaged by the Constitution under Clause (5) of Article 22. For instance, it has been laid down by this Court that the grounds of detention together with the supporting documents should be made available to the detenu in a language known to the detenu.

9. In [Harikisan Vs. The State of Maharashtra and Others](#), , a Constitution Bench of the Supreme Court considered the scope and ambit of Article 22(5) of the Constitution and held:

We must, therefore, proceed on the assumption that the appellant did not know enough English to understand the grounds, contained in many paragraphs, as indicated above, in order to be able effectively to make his representation against the order of detention. The learned Attorney-General has tried to answer this contention in several ways. He has first contended that when the Constitution speaks of communicating the grounds of detention to the detenu, it means communication in the official language, which continues to be English; secondly, the communication need not be in writing and the translation and explanation in Hindi offered by the Inspector of Police, while serving the order of detention and the grounds, would be enough compliance with the requirements of the law and the Constitution; and thirdly, that it was not necessary in the circumstances of the case to supply the grounds in Hindi. In our opinion, this was not sufficient compliance in this case with the requirements of the Constitution, as laid down in Clause (5) of Article 22. To a person, who is not conversant with the English language, service of the order and the grounds of detention in English, with their oral translation or explanation by the police officer serving them does not fulfil the requirements of the law. As has been explained by this Court in the case of the [The State of Bombay Vs.](#)

[Atma Ram Sridhar Vaidya](#), Clause (5) of Article 22 requires that the grounds of his detention should be made available to the detenu as soon as may be, and that the earliest opportunity of making a representation against the order should also be afforded to him. In order that the detenu should have that opportunity, it is not sufficient that he has been physically delivered the means of knowledge with which to make his representation. In order that the detenu should be in a position effectively to make his representation against the order, he should have knowledge of the grounds of detention, which are in the nature of the charge against him setting out the kinds of prejudicial acts which the authorities attribute to him. Communication in the context, must, therefore, mean imparting to the detenu sufficient knowledge of all the grounds on which the order of detention is based.

10. In [N. Kumaresan Vs. State](#), the Madras High Court considered the question whether the detenu having submitted his representations in English, he could insist on supply of translations of the documents in the language known to him. It was held thus:

For that, the detenu had claimed that he was an illiterate person. At least, he did not know and understand English. Though the representation is made in English language, it is obvious that the representation is made on his behalf by somebody else. Therefore, the plea raised by the learned Additional Public Prosecutor that in this case the representation itself was made in English, cannot be considered. In our opinion, the detenu who was pleaded the ignorance of English language was bound to be supplied the translation of the English portions in pages 13, 34 and 46.

11. Article 22(5) of the Constitution of India provides that when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. Section 11 of the COFEPOSA Act provides for revocation of detention orders at any time. For requesting to pass an order of revocation, the detenu is entitled to make a representation. The right of the detenu to make an effective and meaningful representation cannot be doubted. To make an effective and meaningful representation, the allegations made against the detenu in the grounds of detention and the materials on which such grounds are founded must be made known to the detenu. If the grounds of detention and the documents supplied to him are in a language not known to him, it cannot be said that there was a communication within the meaning of Article 22(5) of the Constitution of India. Communication means an effective communication and making known to the detenu the facts and circumstances and the grounds on which the order of detention is founded. Without such an effective communication, it cannot be said that the detenu was afforded the earliest opportunity of making a representation against the order of detention, as provided in Article 22(5) of the Constitution. In the

light of the decisions of the Supreme Court and of the Madras High Court referred to above, we are of the view that the respondents have not complied with the mandate of Article 22(5) of the Constitution of India. The order of detention is, therefore, liable to be set aside.

12. The order of detention having held to be illegal as above, we do not think it necessary to consider the other grounds raised by the learned Counsel for the petitioner.

13. Ext. P1 order of detention is quashed and the detenue is set at liberty. The respondents shall release the detenue forthwith unless his detention is otherwise required as per law.

The writ petition (Criminal) is allowed as above.