

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.2.2008

CORAM

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
AND
THE HONOURABLE MR.JUSTICE R.REGUPATHI

H.C.P.No.1303 of 2007

Rengashamy Sasiharan

.. Petitioner

Vs.

1. The State of Tamil Nadu
rep. by the Secretary
to the Government
Public (SC) Department
Fort St.George, Chennai.
2. The Union of India
rep. by its Secretary
to the Government
Ministry of Finance
Department of Revenue
New Delhi.
3. The Superintendent of
Central Prison, Central
Prison, Puzhal, Chennai.

.. Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India to issue Habeas Corpus H.C.P.No.1303/07 calling for the records relating to the impugned Detention order in G.O.No.S.R.I/608-5/2007 dated 10.08.2007 passed by the state of Tamil nadu rep. by the secretary to the Government, public (SC) Department, Secretariat, Fort. George, Chennai & Quash the same and directing the respondents to produce the body of the person of the detenu Rengashamy sasiharan S/o. Rengasamy pillai (OFEPOSA detenu now detained in central prison, chennai before this Honourable court and set him at liberty forthwith.

For Petitioner : Mr.A.Ganesh

For Respondents : Mr.N.R.Elango
Addl. Public Prosecutor

O R D E R

(Order of the Court was made by P.D.DINAKARAN,J.)

The petitioner herein was incarcerated by virtue of an order of detention in G.O.No.SR.I/608-5/2007, Public (S.C.) Department, dated 10.8.2007 passed under Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short "the Act") by the first respondent, and as a consequence of such mittimus, the petitioner (hereinafter referred to as "the detenu") was interned in the Central Prison, Chennai. The relevant portion of the said order dated 10.8.2007 reads as under:

"Order:

WHEREAS, the Government of Tamil Nadu are satisfied with respect to the person known as Thiru Rengashamy Sasiharan, s/o Thiru Rengashamy Pillai (aged 27 years), resident of No.238, Peradhani Road, Kandy, Sri Lanka (now a remand prisoner in the Central Prison, Chennai) that with a view to preventing him from abetting the smuggling of goods in future, it is necessary to make the following order:-

NOW, THEREFORE, in exercise of the powers conferred by section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974), the Government of Tamil Nadu hereby direct that the said Thiru Rengashamy Sasiharan, s/o Thiru Rengashamy Pillai, be detained and kept in custody in the Central Prison, Chennai."

(emphasis supplied)

2. At this juncture, it is apt to refer Section 3(1) of the Act:
"Section:3. Power to make orders detaining certain persons.-

(1) The Central Government or the State Government or any officer of the Central Government, not below the rank of Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or

with a view to preventing him from—

- (i) smuggling goods, or
- (ii) abetting the smuggling of goods, or
- (iii) engaging in transporting or concealing or keeping smuggled goods, or
- (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or
- (v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,

it is necessary so to do, make an order directing that such person be detained.

[Provided that no order of detention shall be made on any of the grounds specified in this sub-section on which an order of detention may be made under Section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 or under Section 3 of the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance, 1988 (J&K Ordinance 1 of 1988).]"

(emphasis supplied)

3. The facts, in brief, leading to the preventive detention of the detenu, as gathered from the grounds of detention, are: On 3.7.2007, the detenu, holder of Sri Lankan Passport No.N1682329, dated 30.5.2006 arrived from Colombo by Sri Lankan Flight No.UL 121. He was intercepted while passing through the Green Channel by the Intelligence Officer of Air Intelligence Unit, Customs Airport, Chennai on a reasonable suspicion that he might be carrying objectionable items like gold by way of concealment. The detenu was carrying one dark grey colour "Pierre Delow" suitcase. On interception, the detenu was asked whether he was carrying any valuable items like gold, to which the detenu replied in negative. Not being satisfied, the detenu was taken to Air Intelligence Unit room for detailed examination. On personal examination, in the presence of witnesses, one crude gold chain weighing 350 gms, worn on the neck and three crude gold bars weighing 350 gms. concealed in a copper hollow tube and worn on the right hand wrist like a wrist band (total wieght of gold - 700 gms) were recovered. On questioning as to the non-declaration of the gold and passing through the green channel, the detenu admitted his offence. The gold was seized. The detaining authority having satisfied that the detenu indulged in smuggling of goods detained him under Section 3(1) (i) of the Act.

4. However, the detaining authority passed the impugned detention order to prevent the detenu from abetting the smuggling of goods in future, which attracts the offence under Section 3(1)(ii) of the Act.

5. "Abetment of a thing" is defined in Section 107 of the Indian Penal Code as under:

"Section 107. Abetment of a thing.- A person abets the doing of a thing, who-

First: -Instigates any person to do that thing; or

Secondly: -Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly: -Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1:- A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2: - Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

6. "Abettor" is defined in Section 108 of the Indian Penal Code as under:

"Section 108. Abettor.- A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable of law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1: - The abetment of the illegal omission of an act may amount to an offence although the abettor may

not himself be bound to be that act.

Explanation 2: - To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that effect requisite to constitute the offence should be caused.

Explanation 3: -- It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of abettor, or any guilty intention or knowledge.

Explanation 4-The abetment of an offence being an offence, the abetment of such an abetment is also as offence.

Explanation 5 - It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.

7. A conjoint reading of the above provisions makes it clear that in order to constitute abetment there should be more than one person and the abettor must be shown to have "intentionally" aided the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of Section 107 of the Indian Penal Code. It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of the crime. Intentional aiding and therefore active complicity is the gist of the offence of abetment under the third paragraph of Section 107 of Indian Penal Code, vide *Shri Ram v. State of U.P.*, [1975] 3 SCC 495.

8. In the case on hand, the materials relied upon would show that there is one another accused. In such a case, the detaining authority having come to the subjective satisfaction in paragraph (6) of the grounds of detention that the impugned detention order is being passed to prevent the detenu from indulging in smuggling of goods in future, ought to have clamped the impugned order of detention as provided under Section 3(1)(i) of the Act, viz., to prevent him from smuggling goods, but, in the detention order it has been stated to prevent him from abetting the smuggling of goods in future, which attracts Section 3(1)(ii) of the Act and not 3(1)(i) of the Act.

9. There is apparent discrepancy as to the provision under which the impugned detention order has been passed and the purpose for passing the same, viz., for preventing him from indulging in smuggling goods as provided under Section 3(1)(i) of the Act; or for preventing him from abetting the smuggling of goods as provided under Section 3(1)(ii) of the Act.

10. In case of preventive detention, it is settled law that it is absolutely necessary to communicate the grounds of detention to the detenu in clear and unambiguous terms giving as much particulars as will facilitate making of an effective representation in order to satisfy the detaining authority that the order is unfounded or void, vide *Ajit Kumar Kaviraj v. District Magistrate* [1975] 3 SCC 264.

11. Under similar circumstances, the Larger Bench of the Apex Court in *Vijay Kumar Dharna v. Union of India*, (1990) 1 SCC 606, while dealing with an order of detention passed under the COFEPOSA Act, taking note of the satisfaction of the detaining authority recorded as under:

"I am satisfied it is necessary to detain you under COFEPOSA Act, 1974 with a view to preventing you from concealing, transporting smuggled goods as well as dealing in smuggled goods"

held as under:

"This satisfaction clearly reflects the grounds contained in clauses (iii) and (iv) of Section 3(1) of the Act. The above satisfaction does not speak of smuggling of goods or abetting the smuggling of goods which are the grounds found in the Gurmukhi version of the detention order. There is, therefore, considerable force in the contention urged by the learned counsel for the appellant that on account of this variance the detenu was not able to effectively represent his case before the concerned authorities. In fact according to him the appellant was confused whether he should represent against his detention for smuggling of goods and/or abetting the smuggling of goods or for engaging in transporting and concealing smuggled goods and/or dealing in smuggled goods. Besides the English version of the detention order was only for abetting the smuggling of goods. The satisfaction recorded in the Gurmukhi version of the grounds for detention is not consistent with the purpose for detention found in the detention order. It left the detenu confused whether he should represent against the grounds in the detention

order or the satisfaction recorded in the grounds of detention. We are, therefore, of the opinion that because of this variance the detenu was unable to make an effective representation against his detention and was thereby denied his right under Article 22(5) of the Constitution."

(emphasis supplied)

12. In the instant case, as already pointed out, even though the detaining authority based on materials available before it have arrived at a subjective satisfaction that the detenu indulged in smuggling activities attracting Section 3(1)(i) of the Act, had chosen to hold that the impugned detention order was passed with a view to prevent him from abetting the smuggling of goods in future, which attracts Section 3(1)(ii) of the Act, thereby causing a confusion in the mind of the detenu as to, to which material ground or reason of detention is he expected to submit his objection.

13. Moreover, in the Tamil version of the detention order it is indicated that the detenu has indulged in smuggling of goods, and in the English version it has been stated as if to prevent him from abetting the smuggling of goods.

14. At this juncture, it was submitted by Mr.N.R.Elango, learned Additional Public Prosecutor that mere wrong quoting of the provision of detention would not vitiate the detention.

15. Of course, it is well settled in law that quoting of wrong provision does not take away jurisdiction of the authority under the Act, vide State of Karnataka v. Krishnaji Srinivas Kulkarni, [1994] 2 SCC 558.

16. But, in the case on hand, it is not mere wrong quoting of the provision, viz., instead of detaining under Section 3(1)(ii) of the Act, they have stated Section 3(1)(i) of the Act. The detaining authority in the grounds of detention arrived at a subjective satisfaction that the the offence attracts Section 3(1)(i) of the Act, viz., to prevent the detenu from indulging in smuggling. On the other hand, in the detention order they have stated that the detention order is passed with a view to to prevent him from abetting the smuggling of goods in future, which attracts Section 3(1)(ii) of the Act, thus raising a confusion in the mind of the detenu as to, to which offence he has to submit his explanation.

17. For the reasons aforesaid, we are convinced that the impugned detention proceedings deprived a valid opportunity to the petitioner to submit his effective representation and therefore the same is vitiated. This habeas corpus petition is allowed and the order of detention is set aside. No costs. The detenu is directed

to be set at liberty unless his presence is required in connection with any other case.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

sasi

To:

1. THE STATE OF TAMIL NADU REP BY
THE SECRY TO THE GOVT
PUBLIC (SC) DEPT
CHENNAI -09

2. THE UNION OF INDIA
REP BY ITS SECRY TO THE GOVT
MINISTRY OF FINANCE
DEPT OF REVENUE
NEW DELHI

3. THE SUPTD OF CENTRAL PRISON
CENTRAL PRISON PUZHAI
CHENNAI

4. THE JOINT SECRETARY TO GOVT.
PUBLIC (LAW & ORDER),
FORT ST. GEORGE, CHENNAI - 9.

5. THE PUBLIC PROSECUTOR
HIGH COURT,
MADRAS.

WEB COPY

H.C.P.No.1303 of 2007

CK(CO)
JJM(20/03/08)