

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31-7-2009

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

AND

THE HONOURABLE MR.JUSTICE C.S.KARNAN

HCP No.1876 of 2008

Zulika Gani

.. Petitioner

vs

1.The Secretary to the Government
Government of Tamil Nadu
Public (SC) Department
Chennai 600 009.

2.The Secretary to the Government
Government of India
Ministry of Finance
Department of Revenue
COFEPOSA Unit, Janpath
New Delhi 110 001.

3.The Additional Superintendent
Central Prison-II, Puzhal,
Chennai 600 066.

4.The Intelligence Officer
R & I (AIR) Customs House
Chennai (RR No.29/08)

.. Respondents

Habeas corpus petition filed under Article 226 of the Constitution of India praying for a writ of habeas corpus calling for the records of the first respondent herein made in G.O.No.SR.1/567-3/2008, setting aside the order of detention passed therein dated 9.9.2008, and directing the respondents herein to produce the body and person of the detenu by name Gani Abdul Hameed, S/o. Gani before this Court and set him at liberty.

For Petitioner : Mr.Mohamed Ehiya

For Respondents : Mr.N.R.Elango
Additional Public
Prosecutor for RR1 & 3

Mr.M.Dhandapani
CGSC for RR2 and 4

ORDER

Challenge is made to an order of detention made by the first respondent in G.O.No.SR.1/567-3/2008 dated 9.9.2008, against one Gani Abdul Hameed, the son of the petitioner herein under the provisions of COFEPOSA Act.

2.The facts and circumstances which led the authorities to make the order under challenge can be stated as follows:

(a) On 17.7.2008 at about 22.30 hours, the detenu, holder of Indian Passport No.F 6166973 issued on 3.2.2006 at Chennai, bound for Kuala Lumpur via Singapore by Singapore Airlines flight along with one black colour "Polo House USA Collection" stroller suitcase carried as checked-in-baggage, and one black colour "Star Dragon" laptop bag carried as hand baggage, was intercepted after the completion of the immigration formalities. When he was proceeding to the security check, the authorities entertained suspicion that he might be carrying contraband/restricted goods either in his baggage or in person. When he was questioned, he replied in negative. The authorities were not satisfied, and he was brought to the Air Intelligence Unit at Anna International Terminal for a detailed examination. The Officer in the presence of witnesses opened the laptop bag and it found to contain the personal belongings only. Thereafter the black colour "Polo House USA Collection" stroller suitcase which was checked-in baggage, was opened, and it was found to be stuffed with numerous light green colour polythene packets with marking "PX TONER for use in CANON" only. The packets were then numbered as 1 to 25 for the purpose of easier identification and taken up for examination. When opened and examined, each of the packet was found to contain white colour crystalline powder packed in polythene cover. On being questioned by the Officer, he finally admitted that white colour crystalline powder is a substance called Ketamine.

(b) The substance containing polythene covers in the polythene packet marked "1" weighed 935 gms, "2" weighed 935 gms, "3" weighed 930 gms, "4" weighed 925 gms, "5" weighed 960 gms, "6" weighed 981 gms, "7" weighed 951 gms, "8" weighed 955 gms, "9" weighed 930 gms, "10" weighed 941 gms, "11" weighed 970 gms, "12" weighed 1,017 gms, "13" weighed 950 gms, "14" weighed 931 gms, "15" weighed 937 gms, "16" weighed 934 gms, "17" weighed 943 gms, "18" weighed 941 gms, "19" weighed 945 gms, "20" weighed 935 gms, "21" weighed 935 gms, "22" weighed 935 gms, "23" weighed 941 gms, "24" weighed 982 gms, and "25" weighed 961 gms. Thus they were all totalling to 23700 grams of the above said white coloured crystalline powder identified by him as Ketamine. Thereafter, they were recovered under a cover of seizure mahazar in the presence of witnesses. Thus, he has committed the offence punishable under Sections 132 and 135 of the Customs Act, 1962 read with Foreign Trade under the Foreign Trade (Development & Regulation) Act, 1992, and a case was registered under the provisions of the Customs Act. Further, the act of the detenu was found to be smuggling as defined under the Customs Act.

(c) Following the arrest, he was produced before the Additional Chief Metropolitan Magistrate, E.O.II, Egmore, Chennai, and remanded to judicial custody till 1.8.2008. He was lodged in Central Prison, Chennai. The period was extended till 13.8.2008, 27.8.2008 and then till 10.9.2008. The seizure was valued at Rs.8,29,500/- at the Anna International Airport.

(d) A telegram was sent to his wife Shaira Banu informing that he was remanded to judicial custody and lodged in Central Prison, Chennai, and thereafter, a search was made in his residential premises at No.7/1, 9th Street, Kamarajar Nagar, Vysarpadi, Chennai 39, by the officials of the Customs Department on 18.7.2008. No contraband or incriminating documents were either found or seized. Then he gave a written statement on 31.7.2008, and the same was also recorded. Thereafter, he moved for bail, and the bail application was dismissed by the Additional CMM, E.O.II.

(e) Thereafter, the recommendations were made that the activities of the detenu were detrimental and found to be smuggling activities, and under the circumstances, he should be detained under the provisions of the Act. The detaining authority after perusal of the entire materials, also satisfied that in order to prevent him from indulging in any such activities in future, it is necessary to detain him under the provisions of the COFEPOSA Act, 1974, and also to prevent him from indulging in smuggling of goods in future, and accordingly the order was passed and served upon him.

3. Under the stated circumstances, the mother has brought forth this petition before this Court seeking to set aside that order.

4. Advancing arguments on behalf of the petitioner, the learned Counsel would submit that the order under challenge dated 9.9.2008, suffers from both factually and legally. According to the Counsel, the order under challenge came to be made by the department on the specific allegation that he was in possession of 23700 grams of contraband and that too without any document which is expected in law, and under the circumstances, the act of the detenu should be termed as smuggling, and in order to prevent him from indulging in future activities he should be detained. The department stated on a report given on testing, that the contraband which was in his possession at the time was actually Ketamine; but, the test report dated 11.8.2008, reads that UV absorbance (max) of the samples could not be determined as the UV -VIS. Spectrophotometer is not in working condition. It would be quite clear that though the samples were actually placed before the analyst for testing, it could not be found out, and under the circumstances, what was alleged to have been carried by the detenu and recovered by the authorities cannot be stated as Ketamine. By that test report, the authority could not fix that it was ketamine hydrochloride. Under the circumstances, the test report cannot form basis to come to the conclusion that what was carried by him was ketamine. Hence the authority before passing the order should have called for a clarification, but not done so. It can even be stated that it was done without application of mind either of the authority has not fixed that it was ketamine hydrochloride, and hence the order would suffer.

5.The learned Counsel would further submit that it is found in paragraph (xi) of the impugned order that the approximate grey market value of the seized ketamine hydrochloride is Rs.8,29,500/-; that nowhere in the course of the order or in any one of the materials placed before the authority, there was anything to indicate how the value namely Rs.8,29,500/-, was actually arrived at and whether the value was arrived at by any document or pursuant to an enquiry from the market; that those documents should be taken as relied on documents; that in the case on hand, neither those documents were served upon the detenu, nor there was anything to indicate how the value namely Rs.8,29,500/-, was actually arrived at; that in the absence of the same, such a document fixing the value at Rs.8,29,500/- is found to be defective; and that the same would cause prejudice to the interest of the detenu.

6.It is further submitted by the learned Counsel that when the relied on documents were served upon the detenu, item No.23 is shown as copy of notification No.67/2004 in English with Tamil translation as found in pages 192 and 193 of the booklet; that though it is found to be notification No.67/04, what was actually served upon the detenu was the copy of the notification No.67/07 and not 67/04; that if the notification 67/04 was actually relied, then that would be the relied on document; but, a copy of such document was not given; on the contrary, a copy of notification 67/07 in English with Tamil translation, was served upon him; that under the circumstances, it can be well stated that the relied on document was not actually served upon the party, and hence it would also make the order defective.

7.Added further the learned Counsel that it was claimed by the department that a voluntary statement was given by the detenu; that it was the usual practice that the statement is being made by the detenu and used to be reduced into writing by the officials of the department; that in the instant case, as could be seen from page 71 of the booklet, it is found in the handwriting of the detenu, and thus the procedure has not been strictly followed and that would also make it defective.

8.Lastly, the learned Counsel would contend that no bad antecedents of the detenu are shown anywhere; that there was only one occasion even according to the department; that if to be so, there was no justification in detaining him under the Act, and on that ground also the order suffers.

9.The Court heard the learned Additional Public Prosecutor for the State and the learned Central Government Standing Counsel and paid its anxious consideration on the submissions made.

10.Admittedly, the order under challenge came to be passed by the first respondent on 9.9.2008. On scrutiny of the materials placed, the first respondent has recorded its satisfaction that the activities of the detenu were to be termed as smuggling, and in order to prevent him from indulging in further activities in future, an order of detention under the provisions of COFEPOSA Act was to be made, and accordingly made the order. The order came to be passed under the above stated facts and circumstances that on 17.7.2008 at

about 22.30 hours, when the detenu was bound for Kuala Lumpur by Singapore Airlines flight, after the completion of the immigration formalities, he was intercepted by the authorities of the Air Intelligence Unit, and entertaining suspicion, both his checked-in baggage and the other laptop bag in hand were actually searched in the presence of witnesses, and the checked-in baggage was found to contain 25 small packets which weighed 23700 grams of Ketamine, and it was seized under a cover of mahazar, and the statement of the detenu was recorded. A case under Sections 132 and 135 of the Customs Act was registered. The contraband was liable to be confiscated under the provisions. Then he was produced before the Additional Chief Metropolitan Magistrate, E.O.II, Chennai, and the contraband was also produced before the Court, and it was valued at Rs.8,29,500/-. The arrest was also intimated to the relatives that he was produced before the Court and sent for judicial remand. The incident was narrated and placed before the first respondent which satisfied that it was a fit case where an order of detention was to be made under the provisions of the COFEPOSA Act. Accordingly, the order has been passed.

11.As regards the first contention that the goods alleged to have been seized from the detenu though subjected to testing, the test report did not indicate that it was Ketamine Hydrochloride, the learned Counsel relied on the analyst's report as to the testing of samples as found in page 165 of the booklet. This contention has got to be discountenanced for the simple reason that the analyst's report whereby the testing of samples was done reads as follows:

"Each of the five samples is in the form of white crystalline powder. In respect of tested characteristics, each sample responds the tests for Ketamine Hydrochloride, an organic compound."

Thus it would be quite clear that what was actually seized was Ketamine Hydrochloride as per the report, and hence, this contention has got to be rejected.

12.Insofar as the second contention as to the valuation of the contraband, it is mentioned as Rs.8,29,500/-. The report in page 189 of the booklet reads as follows:

"As such, to arrive at the price of the drug in the illegal market, discreet enquiries carried out and revealed that the prevalent market value for this drug in the grey market is Rs.35,000/- per Kg, which value has been adopted in this seizure as well as in all the recent seizures by the Air Intelligence Unit."

Thus it would be quite clear that the market value was arrived at Rs.8,29,500/- by conducting discreet enquiries. It is pertinent to point out that the order came to be passed on 9.9.2008. But this note which speaks about the the value that was arrived by discreet enquiries in the market was dated 27.3.2008, a copy of which was also placed in the hands of the authority. Thus it would be quite indicative of the fact that the value was not arrived by relying on any document or by recording any statement from any individual or any

marketeer. The valuation was actually fixed random. So long as the value of the goods is not fixed basing on any documentary evidence or any source, under the circumstances, it cannot be a ground to set aside the order.

13.The third contention is that item No.23 speaks about the notification 67/04; but, a copy of that notification was not served upon the party; that what was served upon him was the notification of the year 2007, and hence the order has got to be termed defective. Page 192 of the booklet contains Notification No.67 (RE -2007)/2004-2009, New Delhi, dated 27.12.2007. The department has also served Tamil translation of this English version. Needless to say that this notification was a relied on document. The reply given by the learned Additional Public Prosecutor is that it was a notification which would cover the period 2004-2009, and under such circumstances, the notification that was served upon him would suffice. The learned Additional Public Prosecutor also took the Court to page 192 of the booklet where from it could be seen that the notification was for the period from 2004 to 2009, and whenever necessity arises, revised entries are being made. He also took the Court to the contents of the same. From this it can be stated that the notification was originally issued in the year 2004 which would cover for a period till 2009, and then and there revised entries are made. Accordingly, it could be found that the original notification was only of the year 2004, and it is also made mention therein. Under the circumstances, the contention that copy of notification 67/04 was not served upon him cannot be accepted. Hence it is rejected.

14.As far as the fourth contention that it is the usual practice of the department to get statement of the detenu to be made orally, and it is used to be reduced into writing by the officials concerned; but, in the instant case it is found in the handwriting of the detenu himself, and under the circumstances, the procedure is not followed, is concerned, this Court is unable to agree with the learned Counsel for the simple reason that nowhere the law or the procedure would require that the statement must be made by the party orally, and it should be reduced into writing by the officials of the department. So long as the statement is not tainted with any invalidating factor, this Court is unable to agree with the contention put forth by the learned Counsel for the petitioner. It is also admitted that it is in the handwriting of the detenu. Under the circumstances, it cannot be stated that there was a deviation of any procedure available. Thus this contention has got to be rejected.

15.As regards last contention put forth by the learned Counsel that it was only a stray incident by which it cannot lead to a justifiable satisfaction that the person was engaged in smuggling activities, and in future he would also indulge in such activities, and hence a necessity arose to pass an order, the Court has to necessarily agree with the learned Counsel. In this regard whether a stray incident would suffice to make such an order came up for consideration before the Supreme Court in a case reported in 2009 (2) CRIMES 49 (SC) (POOJA BATRA V. UNION OF INDIA AND OTHERS) wherein their Lordships have held thus:

"As already discussed, even based on one incident the Detaining Authority is free to take appropriate action including detaining him under COFEPOSA Act. The Detaining Authority has referred to the violation in respect of importable goods covered under Bill of Entry No.589144 dated 25.04.2007. In an appropriate case, an inference could legitimately be drawn even from a single incident of smuggling that the person may indulge in smuggling activities, however, for that purpose antecedents and nature of the activities already carried out by a person are required to be taken into consideration for reaching justifiable satisfaction that the person was engaged in smuggling and that with a view to prevent, it was necessary to detain him. If there is no adequate material for arriving at such a conclusion based on solitary incident the Court is required and is bound to protect him in view of the personal liberty which is guaranteed under the Constitution of India."

16. In the instant case, it was a solitary incident. Apart from this, no bad antecedents are brought to the notice of the Court that he was actually involved in any criminal activities in the past, and further he was engaged in smuggling. In the case on hand this Court is unable to notice that the detenu had the propensity and potentiality to involve in such activities in future. Under the circumstances, once it is a stray incident which is brought to the notice of the Court, in the absence of any material or bad antecedents in the past, or in the absence of anything to indicate propensity and potentiality of the detenu to involve in future, this Court feels that on that ground, the order under challenge has got to be set aside following the above judgment of the Apex Court. Though the Court is unable to agree with the learned Counsel in respect of the above four grounds, on the last ground the order has got to be set aside.

17. Accordingly, this habeas corpus petition is allowed setting aside the order of the first respondent. The detenu is directed to be set at liberty forthwith unless his presence is required in connection with any other case.

nsv

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Sd/-
Asst.Registrar

/True Copy/

Sub.Asst.Registrar

To:

1.The Secretary to the Government
Government of Tamil Nadu
Public (SC) Department
Chennai 600 009.

2.The Secretary to the Government
Government of India
Ministry of Finance
Department of Revenue
COFEPOSA Unit, Janpath
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3.The Additional Superintendent
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Chennai 600 066.

4.The Intelligence Officer
R & I (AIR) Customs House
Chennai (RR No.29/08)

5.The Public Prosecutor
High Court, Madras.

6.The Joint Secretary to Government
public (Law & order) Dept.
Fort ST. George Chennai-9.

7.The SAR, COFEPOSA
High Court Madras.

One CC to Mr. M.Dhandapani, Advocate Sr.34029.
one cc to Mr.Mohamed Ehiya, Advocate SR.33648.

सत्यमेव जयते

HCP No.1876 of 2008

NG (CO)
EU 12.8.2009.

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