Smt. Hawabi Sayed Arif Sayed Hanif vs L. Hmingliana And Others on 14 October, 1992

Equivalent citations: AIR1993SC810, 1993(1)ALT(CRI)521, 1993(41)BLJR248, 1993CRILJ172, 1992(3)CRIMES635(SC), 1993(42)ECC12, JT1992(6)SC162, 1992(2)SCALE796, (1993)1SCC163, AIR 1993 SUPREME COURT 810, 1993 (1) SCC 163, 1992 AIR SCW 3284, 1992 (6) JT 162, 1993 SCC(CRI) 304, 1993 (1) BLJR 248, (1993) SC CR R 216, (1993) 42 ECC 12, (1993) 1 EFR 1, (1993) 1 MAHLR 451, (1993) 1 SCJ 17, (1992) 3 CURCRIR 451, (1992) 3 ALLCRILR 495, (1992) 3 CRIMES 635

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Bench: S.R. Pandian, R.M. Sahai

ORDER

S. Ratnavel Pandian, J.

1. Leave granted in SLP.

2. The above appeal and the Writ Petition are filed by Smt. Hawabi Sayed Arif Sayed Hanif, who is the wife of the detenu, Sayed Arif Sayed Hanif, assailing the validity of the order of detention dated 23.10.90 passed against the detenu, by the first respondent (Secretary, Preventive Detention, to the Government of Maharashtra) in exercise of the powers conferred on him under Sub-section (1) Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the 'Act') with a view to preventing him from smuggling of goods.

3. The factual matrix of the case in a short compass can be stated as follows:

> In pursuance of the information collected by the officers of the Directorate of Revenue Intelligence, a surveillance was maintained by the officers on Coast Guard vessel O.G. 'VIGRAH' in the sea off Karwar for a suspect Arab Dhow carrying foreign silver to smuggle into India. During surveillance around 23.00 hours on 25.9.90, the officers sighted an Arab Dhow about 3 to 5 nautical miles away from Karwar harbour. On suspicion the officers signalled with loud speakers and search lights to stop the said Dhow, but instead of stopping, the Dhow started speeding away in the opposite direction. Seeing this, the officers fired in the air and warned the crew on the Arab

Dhow to bring it alongside the ship. Thereafter the Dhow stopped and came alongside the coast guard ship and the officers from the coast' guard ship boarded the Dhow. On examination, the officers found 150 packages containing contraband silver ingots on board. There were nine persons on board. The silver ingots were seized and those nine persons were escorted by the coast guard ship to Mole Station, Ballard Pier, Bombay. The silver packages were unloaded in the presence of 2 panchas and the 9 persons were arrested. The total quantity of the contrabands was weighing 4738,901 kgs. and valued at Rs. 3,31,72,507/-. Besides the contrabands on a rummage the officers recovered 17 empty unused cloth jackets generally used for packing contraband gold with 4 documents and 11 seaman cards from the Dhow. The officers seized the silver in the reasonable belief that it was smuggled into India and hence liable for confiscation under the Customs Act, 1962. The other articles were also seized.

4. Separate statements were recorded from all those 9 persons under Section 108 of the Customs Act. None of them had any documents to prove the illicit import of the seized silver. Of the 9 persons, one by Name, Sajid Ali Abdul Rehman Qureshi stated in his statement that in the first week of July 1990 he met his Pakistani friend Usman at Haji Alki and requested him a job. Two days thereafter he met him while in the company of the detenu. The detenu offered him a job of piloting a vessel from Dubai to Indian coast carrying contrabands, which he accepted on promise of a handsome amount. The said Sajid met the detenu at the latter's residence and handed over his passport to the detenu two or three days thereafter. The detenu handed over his passport and airlines tickets. He also gave some Dollars and Indian currency. As instructed by the detenu Sajid went to Dubai and met the detenu in Hotel Orient; that the detenu taking Sajid went to Hamaria Port and boarded a vessel. At that time Sajid found silver bricks packed in gunny bags being loaded on the vessel. The detenu gave a walkie-talkie and gave his coded words. On 19.7.90 the detenu saw Sajid and others off the shore with his instructions to meet him. He also gave Sajid a telephone number 225767 for contacting Usman on his return for delivering the silver consignment. It was only during the import of contrabands Sajid was caught along with 8 others. On the basis of the above statement, the detenu was apprehended by the revenue intelligence. When the detenu was interrogated, he admitted his involvement and also gave information about his past activities of smuggling of goods. As the details of all the statements are well set out in the grounds of detention, it is unnecessary for us to proliferate the same in this judgment. The detaining authority on the materials placed before him drew, his requisite subjective satisfaction and passed this impugned order of detention. The detenu specifically retracted his statement which was also considered by the detaining authority while passing the impugned order. The detenu was unsuccessful in getting the bail order. However, the detaining authority observing that persons who were charged with smuggling are generally granted bail, decided to pass the order of detention in spite of the fact that the detenu, to his knowledge, was in judicial custody. The detention order was served on the detenu on 26.10.1990 while he was in judicial custody. On 19.11.1990 a declaration under Section 9(1) of the Act was made and the same was served on the detenu on 8.12.90.

5. The wife of the detenu, appellant herein challenged the validity and legality of the order of detention raising several contentions, but the High Court dismissed the Writ Petition by the

impugned order. Hence the present appeal.

6. Though several contentions arc raised in the grounds of appeal, Mr. R.K. Jain, the learned senior counsel appearing on behalf of the appellant pressed only the followings by way of challenging the detention order:

(1) Though the declaration under Section 9(1) of the Act has been made on the ground that the detenu is likely to smuggle goods into and through the Indian coastal waters, contiguous to the State of Karnataka which is highly vulnerable to smuggling as defined in Explanation 1 to Section 9(1) of the Act, the said declaration has never been communicated and served on the detenu within 5 weeks, which is the maximum period for making declaration from the date of the detention.

(2) The said declaration though was made on 19.11.1990 it was served on the detenu only on 8.12.1990 by a delay of 21 days from the date of declaration made under Section 9(1) and, therefore, the detenu was deprived of making and effective representation at the earliest point of time challenging the validity of the detention order.

(3) The detention order was made on 23.10.1990 and served on the detenu while in jail on 26.10.1990 from which date the detention pursuant to the impugned order has commenced. Therefore, the delay caused in serving the declaration by 8 days delay after the period of 5 weeks has made the declaration invalid.

(4) The declaration under Section 9(1) of the Act is also an order within the meaning of Article 22 and, therefore, all the constitutional safeguards which are available to the detenu in relation to the main detention order should be extended to the detenu in relation to the declaration under Section 9(1) also.

(5) Whilst the first respondent has passed the detention order with a view to preventing the detenu from smuggling goods within the State of Maharashtra, the declaration has, been made on a different ground that the detenu is likely to smuggle goods into and through the Indian coastal waters, contiguous to the State of Karnataka. Therefore, there was no territorial nexus providing jurisdiction to the detaining authority to pass the impugned order and that the second respondent has passed the declaration without application of mind.

(6) There was no application of mind of the detaining authority to the fact whether there was likelihood of the detenu coming out on bail.

(7) The non-placing of the full text of the remand order of the other accused-namely, Sajid Ali before the detaining authority vitiates the order of detention.

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7. It is not in controversy that the detaining authority (first respondent) after reaching his subjective satisfaction on the materials placed before him passed the order of detention on 23.10.1990 which order was served on the detenu on 26.10.1990, that is within 3 days from the date of passing of the order while he was in judicial custody. That is to say that Section 3(3) of the Act which requires the order of detention 10 be communicated to the detenu ordinarily not later than 5 days and in exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of detention, has been strictly complied with. In fact, the validity of the initial order of detention is not under serious challenge. As in Section 3(3) no statutory period is fixed for the communication of the declaration made under Section 9(1) to the detenu except that the period of 5 weeks as a maximum limit for making a declaration.

8. Save as otherwise provided in Section 9 of Act the appropriate Government which has passed the order of detention under Section 3 of the Act should make a reference in respect of the detention order to the Advisory Board within 5 weeks from the date of detention of the detenu as contemplated under Section 8(b) of the Act. Section 8(c) requires the Advisory Board to which the reference has been made, after complying with the requirements of that provision should prepare its report specifying its opinion as to whether or not there is sufficient cause for the detention of the detenu concerned and submit the same within 11 weeks from the date of detention of the detenu concerned. But in a case where a declaration is made under Section 9(1) for the continued detention of the detenu, the period of 5 weeks specified in Clause (b) of Section 8 is extended to 4 months and 2 weeks and the period of 11 weeks specified under Clause (c) of Section 8 is extended to 5 months and 3 weeks.

9. The detenu has got a constitutional right to challenge the order of detention by making a representation against the detention order as envisaged under Article 22(5). It may be recalled that the detenu against whom the order of detention has been passed and thereafter a declaration under Section 9(1) has been made, has got a statutory right under Section 8(c) of the Act to be heard in person if he so desires and the Advisory Board has to submit its report only after hearing him. Therefore, it follows that the detenu should be served with the initial order of detention within the specified period and the order of declaration within a reasonable time so that he could make his personal representation to the Advisory Board leaving apart his right of making representation to the detaining authority under Article 22(5), challenging the order of detention.

10. The submission made by Mr. R.K. Jain that the order of declaration should have been communicated to the detenu within a period of 5 weeks is inconceivable and that does not stand for reason; because Section 9(1) itself gives a maximum period of 5 weeks for making the declaration. Therefore, a copy of the declaration order could be served only after the declaration has been made. Suppose in a case where a declaration has been made on the last date of the 5 weeks' period, it could be served on the detenu only on the expiry of 5 weeks. Section 9(1) speaks of only the maximum period of making the declaration but not the maximum period for communicating the same to the detenu. In fact, as we have already stated that there is no statutory period, specified under Section 9(1) for serving the declaration to the detenu. Hence, his submission that it was served only after the expiry of 5 weeks has to be rejected as devoid of any merit.

11. According to the learned Counsel, the delayed communication of the declaration on 8.12.90 by a delay of 21 days from the date of making the declaration on 19.11.90 and also by a delay of 8 days beyond the period of 5 weeks has caused much prejudice to the detenu in showing cause against the legality of the order before the Advisory Board. This submission, in our view, does not merit any consideration because the Advisory Board has its meeting only on 19.12.1990, that is 11 days after the communication of the declaration and the detenu himself was personally heard.

12. Whilst the first respondent has passed the detention order with a view to preventing the detenu from smuggling goods within the State of Maharashtra the declaration has been made on a different ground that the detenu is likely to smuggle goods into and through the Indian coastal waters, contiguous to the State of Karnataka. Therefore, there was no territorial nexus providing jurisdiction to the detaining authority to pass the impugned order and that the second respondent has passed the declaration with application of mind.

13. It is seen from the affidavit filed by the respondent before the High Court as well as from paragraph 22 of the impugned judgment of the High Court that the declaration which was made by the Central Government was received by the sponsoring authority on 22.11.1990. On 23.11.1990 the declaration was sent to the Central Prison at Aurangabad for service on the detenu as he was lodged therein. The declaration was received by the Superintendent of Central Prison on 27.11.1990. In the meanwhile the detenu had been brought to the Bombay Central Prison. Therefore, on the very next day i.e. , on 28.11.1990 the declaration was sent by Registered post to the Central Prison at Bombay where it was received only on 7.12.90. As the detenu was served on him on that day. Thus the alleged delay of undergoing treatment in JJ Hospital at that time the declaration was again sent to the Hospital Prison on 8.12.90 and the same was service of the declaration on the detenu is very satisfactorily explained. As pointed out supra the detenu had sufficient time of 11 days to make his representation in connection with his declaration also. Hence the detenu cannot make any legitimate grievance in this connection. The High Court before which a similar contention has been raised has rightly rejected and we are in total agreement with the conclusion of the High Court.

14. Our view is fortified by a recent decision of this Court made in Smt. Azra Fatima v. Union of India wherein the order of detention was passed under Section 3(3) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 and thereafter a declaration under Section 10(1) of the said 1988 Act which section is similar to 9(1) of the COFEPOSA Act. A contention was raised in that case that there was delayed communication of the declaration which had vitiated the order. This Court rejected that contention observing thus:

> The principle of five days and fifteen days as provided in Sub-section (3) of Section 3 relating communication of grounds of detention cannot be applied in respect of declaration issued under Section 10(1) of the Act....

15. In view of the above finding there is no need to deal with the question as to whether constitutional safeguards under Article 22(5) should be extended in the case of declaration also as in the case of detention order.

16. Hence for the above mentioned reasons we find no merit in Ground Nos.1-4 and accordingly they are all found against the appellant.

17. The High Court while dealing with an identical contention raised before it on the usage of the expression "Coastal Waters" instead of "Customs Waters" has given sufficient and detailed reasons in paragraphs 15-21 of its judgment. In paragraph 3 of the declaration the reason for making the declaration is given as follows:

> Now, therefore, I, the undersigned, hereby declare that I am satisfied that the aforesaid Shri Sayed Arif Sayed Hanif is likely to smuggle goods into and through the Indian coastal waters contiguous to the State of Karnataka which is highly vulnerable to smuggling as defined in Explanation 1 to Section 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

18. As pointed out by the High Court Section 2(d) defines "Indian Customs Waters" as having the same meaning as in Clause 28 of Section 2 of the Customs Act, 1962 (as substituted for certain words by Act 25 of 1978) which defines Indian Customs Waters as waters extending into sea up to the limit of contiguous zone of India under Section 5 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (in short 'Territorial Waters Act of 1976') and includes any bay, gulf, harbour, creek or tidal river. Section 3 of the Territorial Waters Act states that the sovereignty of India extends and has always extended to the territorial waters of India and to the soaked and the subsoil underlying etc. Under Section 3(2) the limit of territorial waters is the line, every point of which is at a distance of twelve nautical miles from one nearest point of the appropriate baseline. Section 5 defines the 'contiguous zone of India' stating that it is an area beyond and adjacent to the territorial waters and the limit of the contiguous zone is as defined in Section 3(2) of this Territorial Waters Act of 1976. Indian Customs Waters, therefore, cover as area of 24 nautical miles from the coastal baseline in the States specified in explanation 1 to Section 9(1) of the COFEPOSA Act. As rightly pointed out by the High Court, looking to this definition of 'Indian Customs Waters' it covers not only Indian coastal waters but also much more because the customs waters extends 24 nautical miles from the coastal baseline which follows that Indian coastal waters are within the Indian customs waters and, therefore, the explanation "Indian Coastal Waters" used in the declaration refers to an area within the Indian Customs Waters which is highly vulnerable to smuggling.

19. The averments made in the grounds of detention would also make it clear that the offence of smuggling of silver ingots was within the Indian Customs Waters. The relevant portion of averments read thus:

> During surveillance around 23.00 hrs., on 25.9.90, the officers sighted an Arab Dhow about 3 to 5 nautical miles away from Karwar harbour. It was found moving slowly towards Karwar and on suspicion the officers on the coast guard ship signalled with loud speaker and search lights for the Arab Dhow to stop. The Arab Dhow, instead of stopping, started speeding away in the opposite direction from the coast. Seeing this, the officers on coast guard ship fired in the air and warned the crew on the Arab

> Dhow to bring it alongside the ship. Thereafter the Arab Dhow stopped and came alongside the coast guard ship and the officers from the coast guard ship boarded the Arab Dhow. It was found named 'AL AKBARI'. On examination of the Arab Dhow the Officers found 150 packages containing contraband silver ingots on board.

20. No doubt in the declaration the expression 'Indian Coastal Waters' is used instead of 'Indian Customs Waters'. In sub-para (vii) of paragraph 7 of the counter the respondents have attempted to explain this expression by stating that the word 'Coastal' in place of 'Customs' is a typographical error which does not vitiate the order on any ground inclusive of one that there was no application of mind.

21. After carefully analysing the submission with reference to the explanation given by the respondents, we are in full agreement with the High Court that this typographical mistake has in no way prejudiced the detenu in making his representation. It is not the case of the detenu that he was in any way deprived of making his effective representation before the Advisory Board nor he has made any complaint before the Advisory Board.

22. In the present case, the apprehended activities of smuggling by the detenu have a territorial nexus with the State of Maharashtra. Indisputably the detenu is a resident of Bombay. The grounds of detention refer to a conspiracy hatched by the detenu in Bombay to smuggle silver ingots from Dubai to India. The detenu had engaged some of the crew members of the vessel which brought the contraband silver ingots into India, in Bombay. Their air-tickets were also purchased by the detenu in Bombay. A perusal of the grounds of detention clearly show that almost all arrangements were made for the disposal of smuggled silver ingots in Bombay. According to the respondents the silver ingots were seized in Bombay although the contraband were taken to Karwar (Karnataka State) for safe custody. Added to that, it is seen from the grounds of detention that of the two previous attempts to smuggle silver the first attempt was to smuggle the silver at a spot within 5 or 6 nautical miles off Murud which is within the jurisdiction of Maharashtra. In the above circumstances, the detaining authority legitimately drawing his subjective satisfaction that in future also the smuggling activities of the detenu may take place within the State of Maharashtra has passed the detention order in exercise of his powers under Section 3(1) of the Act. Thus, there is a clear nexus between the detenu and his activities of smuggling goods within the State of Maharashtra.

23. So far as the Declaration under Section 9(1) is concerned, that section empowers the Central Government or any officer of the Central Government not below the rank of the Additional Secretary to that Government specially empowered by that Government to make a declaration exercising its powers throughout the territory of India. Under Section 9(1) the Central Government or an officer of the Central Government specially empowered may make the declaration if satisfied that any one of the conditions enumerated in (a) to (c) of Section 9(1) of the Act is attracted. The continued detention in pursuance of the declaration has to be read along with the original order of detention.

24. Reverting to this case, the first respondent on being satisfied that the detenu is likely to smuggle goods into and through Indian Customs Waters (wrongly mentioned in the declaration as 'coastal waters') contiguous to the State to Karnataka which is highly vulnerable to smuggling which satisfies

the requirements under Section 9(1)(a) has passed this order. Therefore, the grievance that the second respondent has passed the declaration without application of mind is rejected.

25. According to Mr. R.K. Jain, there was absolutely no compelling reasons justifying the detention when the detenu was in judicial custody and that the detaining authority has to shown sufficient reason that the detenu was likely to be released from custody in the near future.

26. The reason given by the detaining authority in the grounds of detention reads as follows:

> You are likely to continue to indulge in smuggling activities in future unless you are detained.
>
> You are still in judicial custody as bail has to been granted to you in spite of your applications. However the persons who are charged with smuggling are generally granted bail.
>
> I am therefore satisfied that there is a compelling necessity to issue your Detention Order under the COFEPOSA Act to prevent you from indulging in such prejudicial activities in future, though you are at present in judicial custody.

27. As to what are the compelling reasons in the context of making the order of detention this Court in D.S. Chelawat v. Union of India after making reference to a number of decisions of this Court on this point has made the following observation:

> The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenus is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.

28. See also Sanjay Kumar Aggarwal v. Union of India .

29. In the case on hand the detaining authority was well aware of the fact that the detenu was in jail custody and he was also satisfied that the detenu was likely to continue indulgence in smuggling activities if he was not detained. If one goes through the entire grounds of detention, wherein the nature of antecedent activities of the detenu is mentioned will serve as a compelling reason for the detaining authority to arrive at a conclusion that the detenu is likely to indulge in prejudicial

activities if he is released from custody. Now it has to be seen whether the other reason within the parameter of Chelawat's case, namely, as to whether the detenu was likely to be released from custody in the near future appears on the fact of the order. This order of detention was passed on 23rd October, 1990 on the basis of the grounds of detention dated 23rd October, 1990 wherein it is stated that detenu after having become unsuccessful in his attempt to get bail on an earlier occasion i.e. on 5.10.90 had made another application for interim bail on 15.10.1990 before the Additional CMM which came for hearing on 16.10.90 on which day the matter stood adjourned to 23.10.90 for arguments and orders. As we have already pointed but the order of detention was passed on 23.10.90. The detaining authority while giving his reason which we have extracted above has made an unpalatable statement stating "The persons who are charged with smuggling are generally granted bail." This sweeping statement amounting to an aspersion on the functioning of the judiciary is absolutely unjustifiable and unwarranted and as such it has to be strongly condemned. But the question whether there was any compelling reason to draw an inference that the detenu was likely to be released from the custody in the near future has to be examined.

30. In Sanjay Kumar Aggarwal's case to which one of us (S. Ratnavel Pandian, J) was a party, it has held that it is not the law that no order of detention can validly be passed against a person in custody under any circumstances. In Kamarunissa v. Union of India & Another 1990(4) Judgments Today 7 while the detaining authority has stated the offence with which the detenu therein had been charged was bailable, the Joint Secretary who filed the counter explained it saying that he passed the detention order on his past experience in such cases normally and almost as a matter of rule the court grants bail after the investigation is completed. While dealing with that explanation, Ahmadi, J speaking for the Bench observed.

...having regard to the background in which this expression is used in paragraph 15 of the grounds of detention and bearing in mind the explanation and the fact that in such cases courts normally grant bail, it cannot be said that the use of the said expression discloses non-application of mind.

31. Coming to the facts of the case though we are of the view that the detaining authority has unwarrantedly made such sweeping remarks as mentioned above, yet in view of the facts and circumstances of this case inclusive of the fact that the detenu was relentlessly attempting to get bail by filing successive bail applications, it cannot be said that there was no material for the detaining authority to draw an inference that the detenu was likely to be released on bail. The affidavit filed by the then Secretary (Preventive Detention) to the Government of Maharashtra (first respondent) it is stated as follows:

> I reiterate that though the detenu was in judicial custody, the gravity of the prejudicial activity in which the detenu was involved, the interim bail application filed by the detenu, the possibility of the said application being granted and the further possibility of the detenu being released on bail and indulging in similar prejudicial activities in future were the pressing and compelling reasons which prompted me to issue the impugned order of detention.

32. Therefore, we hold that all the conditions that are necessary to satisfy the compelling reasons for passing the order of detention are established. Hence this submission is also rejected.

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. 981/90 dated 28.9.90 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 11.10.1990. Though the full text of the remand order was not placed before the detaining authority, the substance of the same was placed. We are in complete agreement with the High Court that the non-placing of the remand order before the detaining authority has in no way effected either the subjective satisfaction of the authority or the detenu's right to make a detailed representation.

34. Incidently, Mr. R.K. Jain advanced an argument that this is a case of abetting the smuggling of goods but not smuggling goods and, therefore, the detention order should have been made under Section 3(1)(ii) of the Act but not under Section 3(1)(i). Admittedly, this ground has not been urged either before the High Court or in the grounds of appeal or in the writ petition. When it was pointed out to the learned Counsel, he did not press this contention. However, after going through the entire documents, we see no force in this submission. The impugned order is passed under Section 3(1) of the Act in general.

35. For the discussions made above we find no merit in any one of the contentions advanced questioning the legality of the impugned order of detention. In the result, the appeal is dismissed.

36. For the reasons given above in the Criminal Appeal, this Writ Petition also stands dismissed.