
(1991) 03 BOM CK 0091

In the Bombay High Court

Case No : Criminal Writ Petition No. 1288 of 1990

Amina Akbar Ansari

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 25-03-1991

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3
Constitution of India, 1950 — Article 22

Citation : (1991) 3 BomCR 641 : (1992) CriLJ 1599

Hon'ble Judges : S.S. Dani, J;H.H. Kantharia, J

Bench : Division Bench

Advocate : Miss Prabha S. Mane, for the Appellant; S.G. Page, Public Prosecutor, for the Respondent

Judgement

H.H. Kantharia, J.—The petitioner here is the mother of one Mohamed Akbar Ansari (hereinafter referred to as "the detenu"). The petitioner-mother challenges the order dated October 4, 1990 passed by the Secretary (Preventive Detention) to the Government of Maharashtra, Home Department and detaining authority (hereinafter referred to as "the first respondent") by which the detenu was detained under sub-section (1) of S. 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 with a view to preventing him from smuggling goods.

2. The relevant facts on which the detention order was based are that on April 22, 1990 the customs officers of Air Intelligence Unit intercepted the detenu inside the arrival hall of Sahar Airport when he had earlier arrived from Dubai by Air India flight No. AI 710 and had been cleared through walk-through channel and was moving towards the exit gate. The detenu had one grey black colour "Ocean" zipper suit case, one maroon colour "crown" brief case and one carton as his baggage.

3. The customs officers called two panchas in whose presence they checked the

carton carried by the detenu. One gas table was found inside the carton and two burners were found to contain arch shaped pieces of moulinex mixer. The customs officers unscrewed the motor of the mixer and found inside two arch shaped pieces of gold. The weight of all the six pieces was found to be 1120 gms. The customs officers seized the six pieces of gold valued at Rs. 2,46,400/- and Rs. 3,83,040/- under a panchanama under the provisions of the Customs Act.

4. Various contentions are raised in the petition in order to challenge the detention order and likewise quite a few contentions are raised at the hearing by Miss Prabha Mane, learned advocate appearing on behalf of the petitioner, at the time of hearing of this writ petition. However, it is not necessary to deal with all those contentions for the purpose of disposing of this writ petition as, in our opinion, the petition should succeed on one single point that the sponsoring authority did not place vital and important documents before the detaining authority, in that they did not place order of the learned Magistrate passed on the remand application on 24-4-1990 by which the detenu was released on bail after imposing certain conditions on him viz. the detenu was to attend customs department as and when required and that his passport was retained. Miss Mane emphatically submitted that the non-placement of this vital and important document fully before the detaining authority impaired the subjective satisfaction of the detaining authority in passing the impugned detention order.

5. This aspect of the matter was dealt with by the first respondent in his affidavit in reply by stating that it was correct to say that the remand application dated 24th April, 1990 was placed before him and a copy of the same was given to the detenu but the full text of the order passed by the learned Magistrate on the said remand application was not placed before him nor a copy thereof was given to the detenu. However, according to him, in the margin of the said remand application the gist of the order passed by the Court was mentioned and the same was supplied to the detenu. It is the contention of the first respondent, in his affidavit, that the vital part of the Court's order was made known to him and that the full text of the order passed by the learned Magistrate was not a vital and material document. He also contended that the retention of passport by customs may not prevent the detenu from indulging in similar prejudicial activities in future and, therefore, non-placement of the learned Magistrate's order which indicated that the passport of the detenu was retained by customs and that the detenu was required to attend the customs department as and when required could not vitiate the order of detention. Mr. Page, learned Public Prosecutor, argued with equal vehemence that the non-placement of the entire bail order passed by the learned Magistrate was not a vital and material document so as to vitiate the detention order.

6. We are not able to persuade ourselves to agree with the submissions made by Mr. Page as, in our opinion, the bail order passed by the learned Magistrate on the remand application which reads "accused ordered to be released on bail in the sum of Rs. 1,25,000/- with one surety in the like amount or Rs. 1,00,000/-

C.D. in default remanded to jail custody till 8-5-1990. Passport of the accused permitted to be detained by customs department. Accused to attend customs department as and when required should have been in its entirety placed before the detaining authority. Instead, what is placed before the detaining authority is a typed remand application in the margin of which the customs officer himself wrote down the gist of the bail order passed by the learned Magistrate which was not in its full form. In other words, what is placed before the detaining authority was the truncated order of the learned Magistrate. The order of the Magistrate spoke in clear terms that the passport of the detenu was permitted to be detained by the customs department and the detenu was to attend the customs department as and when necessary which facts if brought to the notice of the detaining authority he would have perhaps thought of not detaining the detenu. In our opinion, the entire bail order was thus quite a vital and important document which should not have been withheld from the detaining authority in its entirety. Thus, it can be well said that the subjective satisfaction of the detaining authority was impaired by non-placement of the entire document before the detaining authority. It was pointed out by a Division Bench of this Court (Jahagirdar and Tipnis, JJ.) in the similar circumstances in Criminal Writ Petn. No. 881 of 1988 decided on October 28, 1988 in case of Smt. Roshma Manohar Sangtani v. Union of India that the sponsoring authority placed before the detaining authority only the application for remand without placing the order passed on the said application before the detaining authority in which case the learned counsel for the petitioner was fully justified in contending that a document was produced piecemeal because if an application for remand was made, the order on that application must necessarily form an integral part of the said document. The Division Bench then considered such a document to be vital and important and came to the conclusion that the detaining authority was completely deprived of this material and vital document and, therefore, the order of detention was vitiated by non-consideration of such important document. In another case, a Division Bench of this Court (Kurdukar and Ashok Agarwal, JJ.) while deciding Criminal Writ Petn. No. 531 of 1989 on 4th August, 1989 in case of Smt. Moorunisha Siraj Lalani v. A. K. Batabyal in the similar circumstances had observed that from the bail order it was quite clear that the accused was directed to report to the customs department daily and that the passport of the detenu (accused) was permitted to be detained by the department and the conditions imposed by the learned trial Magistrate were vital and, therefore, this document viz. the order passed by the Magistrate was a vital documents which ought to have been placed by the sponsoring authority before the detaining authority for consideration and in the opinion of the learned Judges, the non-placement of this material and vital document by the sponsoring authority before the detaining authority had vitiated the subjective satisfaction of the detaining authority and consequently it must follow that the detention order was illegal and void.

Yet in another case of Smt. Kanchan Chandra Hemrajani v. Union of India in Criminal Writ Petition No. 792 of 1990, decided on 22nd November, 1990 by a

Division Bench of this Court (S. W. Puranik & S. S. Dani, JJ.) dealing with similar facts it was submitted on behalf of the petitioner that during remand proceedings the Metropolitan Magistrate had passed an order dated 12th March, 1990 releasing the detenu on bail also imposing a condition that the passport of the detenu be retained by the customs department. From the documents which were placed before the detaining authority, it was pointed out that it appeared that the copy of the remand application was produced before the detaining authority, but the full text of the order of bail along with the condition of retaining the passport of the detenu by the customs department was not placed and instead there was a marginal note by the customs officer noting that the detenu has been ordered to be released on bail of Rs. 1,00,000/- with one surety and further that the vital condition that the passport of the detenu was to be retained by the customs department was not brought to the notice of the detaining authority. In the submission of the learned Counsel of the petitioner therein, the subjective satisfaction of the detaining authority was gravely impaired, resulting in a void order of detention. Like in the present case, in the said case also it was urged on behalf of the detaining authority that the copy of remand application was placed along with the noting which was sufficient to communicate to the detaining authority that the accused (detenu) has been released on bail and it was further contended that xerox copies of the passport pages were also placed before the detaining authority and, therefore, the detaining authority was also aware of the fact that the passport of the detenu had been in the possession of the customs department. Dealing with these rival contentions raised on behalf of the parties, the Division Bench held : "It is well settled by now that if any document is to be placed before the detaining authority, then it must be placed in its full text and not in a truncated form. The application for remand as well as the order passed thereon are integral parts of the same document and the entire document inclusive of the full text of the order is, therefore, required to be placed before the detaining authority. Even otherwise, the condition that the passport of the detenu is allowed to be retained by the customs department is a vital document because it makes it impossible for the detenu to leave the country in the absence of the passport. If this vital condition is brought to the notice of the detaining authority, his subjective satisfaction may be swayed one way or the other. The non-placement of this vital document has therefore, in our opinion, impaired the subjective satisfaction of the detaining authority, rendering the order of detention invalid. Reference may be made to the cases in Criminal Writ Petn. No. 1231 of 1987, Sunil Mahadik v. D. N. Capoor, decided on 26th February, 1988 and in Criminal Writ Petn. No. 965 of 1988, Narumal Hotchand Ahuja v. Union of India, decided on 3rd November, 1988".

7. On behalf of the detaining authority, Mr. Page, learned Public Prosecutor, submitted that the substantial, material and vital part of the order of the learned Magistrate was before the detaining authority and the non-communicated part of the order was not substantial, vital and material. In support of his contention, Mr. Page firstly relied upon a decision of the Supreme Court in case of Haridas

Amarchand Shah of Bombay Vs. K.L. Verma and Others, in which it was contended on behalf of the appellant that the application for bail and the order dated September 15, 1987 by the Metropolitan Magistrate granting conditional bail of Rs. 1 lakh with one surety of like amount though placed before the detaining authority, the application for variation of the condition and the order made thereon by the Magistrate on September 21, 1987 was not placed before the detaining authority resulted in the order being illegal. A decision in Ashadevi Mehta (Detenu) Vs. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat and Another, was cited at the Bar. In that case it was observed by the Supreme Court that documents which were vital and necessary for formation of subjective satisfaction which is the pre-requisite for making an order of detention have not been placed before the detaining authority for making the detention order, the order of detention will get vitiated and that the detention was to prevent the detenu from indulging in hawala business i.e. making various payments to various persons in this country on receiving instructions from Rafiq from Dubai. The application for variation of condition of bail and the order passed by the Metropolitan Magistrate varying the condition of bail were, in the opinion of Their Lordships of the Supreme Court, not vital and material documents inasmuch as the granting of bail by the Magistrate enabled the detenu to come out and carry on his business activities as before. Their Lordships further pointed out that condition imposed by the Magistrate directing the detenu to appear before the office of the Enforcement Department every day between 11 a.m. to 2 p.m. had been varied to the extent that "the accused to attend enforcement department as and when required". Under the circumstances, Their Lordships of the Supreme Court opined that the condition imposed by the Magistrate had no relation to the activities carried on by the detenu and as such the High Court after considering all the circumstances held that the order varying the condition of bail was not a relevant document and failure to produce the document before the detaining authority before arriving at his subjective satisfaction had not been vitiated the order with which view Their Lordships agreed. In our opinion, these judgments cited at the Bar are not relevant to the facts of our case inasmuch as in the case before the Supreme Court, the entire bail order was placed before the detaining authority but the application for variation and variation itself was not placed which was innocuous.

8. Another authority on which the learned Public Prosecutor relied is the judgment of a Division Bench of this Court (S. P. Kurdukar and R. G. Sindhakar, JJ.) in case of Apinos Victor v. A. K. Batabyal, in Criminal Writ Petn. No. 372 of 1990 decided on June 22, 1990. In that case on behalf of the detenu it was urged that the sponsoring authority ought to have placed before the detaining authority a copy of the order passed by the learned Magistrate on 7-2-1989 on the remand application and that the sponsoring authority placed the remand application before the detaining authority but failed and neglected to produce the copy of the order before the detaining authority when the subjective satisfaction was arrived at. According to the learned counsel appearing on behalf of the

detenu therein, for want of placement of the copy of the order passed by the Magistrate on 7-2-1989 the subjective satisfaction was vitiated and on that ground alone the detention order must fail. In reply it was submitted on behalf of the detaining authority that the copy of the order dated 7-2-1989 was not placed before the detaining authority but that, however, would mean nothing because the detaining authority was made aware of the fact that the detenu was remanded to judicial custody till 21st February, 1989 on the remand application made by the customs department on 7-2-1989. It was further urged on behalf of the detaining authority that the order dated 7-2-1989 made by the Magistrate on the remand application was not a vital document and, therefore, non-placement of the same had not vitiated the subjective satisfaction of the detaining authority and thus the non-placement of the copy of the order dated 7-2-1989 before the detaining authority would not amount to withholding the important document/material and will not vitiate the order of detention. On these rival pleadings on behalf of the parties, the Division Bench came to the conclusion that no absolute rule could be laid down that every order made on such remand application is a vital, material/document and contents of the document was a decisive factor. In the opinion of the Division Bench, having regard to the contents of the order dated 7-2-1989 and bearing in mind the facts and circumstances of the said case, the said order (dated 7th Feb., 1989) could not be said to be a vital document for the reasons recorded by the Division Bench. In other words, the observations made by the Division Bench were in the facts and circumstances obtaining in the said case which could not be relevant to the facts and circumstances of the present case.

9. Lastly, Mr. Page brought to our notice a ruling of the Supreme Court in case of Syed Farooq Mohammad Vs. Union of India and another, . In the said case, one of the grounds of challenge of the detention order was that the relevant document i.e. bail application of the petitioner and order made thereon which might have been considered by the detaining authority were not supplied to the petitioner and as such his right of making effective representation guaranteed under Art. 22(5) of the Constitution of India has been seriously prejudiced. The ground taken on behalf of the detenu was found to be without any substance by the Supreme Court because firstly there was nothing to show from the grounds of detention that the rejection of the bail application by the Sessions Judge, Greater Bombay on January 5, 1990 was considered by the detaining authority before passing the impugned order of detention and as such that being not referred to in the grounds of detention, the documents had not been supplied to the petitioner and it, therefore, cannot be urged that non-supply of this document prejudiced the petitioner in making effective representation against the order of detention. The Supreme Court further pointed out that Art. 22(5) of the Constitution, undoubtedly, mandates that all the relevant documents referred to in the grounds of detention and which are considered by the detaining authority in coming to his subjective satisfaction for clamping an order of detention are to be supplied to the detenu and that the said document was not

considered by the detaining authority in coming to his subjective satisfaction and in making the impugned order of detention. In that view of the matter, Their Lordships of the Supreme court observed that the non-furnishing to the detenu of the said document i.e. the bail application and the order passed thereon; does not affect in any manner whatsoever the detenu's right to make an effective representation in compliance with the provisions of Art. 22(5) of the Constitution of India. Thus, in the case before the Supreme Court the document which was not considered by the detaining authority was not supplied to the detenu which fact would not be relevant to the facts and circumstances of the present case.

10. In this view of the matter, the writ petition succeeds and the same is allowed. The impugned order of detention is quashed and set aside. The detenu shall be set at liberty forthwith unless required in some other case. Rule is accordingly made absolute.

11. Rule made absolute.