

(1998) 08 BOM CK 0011
In the Bombay High Court
Case No : Criminal W.P. No. 1319 of 1996

Arvind Ganeshmal Jain

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 07-08-1998

Acts Referred:

Constitution of India, 1950 — Article 141, 22(5)
Criminal Procedure Code, 1973 (CrPC) — Section 161
Foreign Exchange Regulation Act, 1973 — Section 35, 40

Citation : (1998) 08 BOM CK 0011

Hon'ble Judges : Vishnu Sahai, J;N. Arumugham, J

Bench : Division Bench

Advocate : M.G. Karmali and Ms. A.M.Z. Ansari, for the Appellant; R.M. Agarwal and D.G. Bagwe, Additional Public Prosecutor for Respondents Nos. 3 to 5, for the Respondent

Final Decision : Allowed

Judgement

Vishnu Sahai, J.—This Writ of Habeas Corpus has been preferred by the petitioner, who is the nephew of the detenu Arvind Ganeshmal Jain, impugning the detention order dated 12th July, 1995 passed by the respondent No. 2 (K. L. Verma, the Joint Secretary to the Government of India, Ministry of Finance, department of Revenue, New Delhi) detaining the detenu under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. A true copy of the detention order dated 12th July, 1995 has been filed as Exhibit A to the petition and along with the grounds of detention bearing the same date, a true copy of which has been filed as Exhibit B to the petition, was contemporaneously served on the detenu on 9th June, 1996.

This petition was filed before the Aurangabad Bench of this Court but, vide orders dated 2nd December, 1996, passed by a Division Bench of the said Bench (B. N. Deshmukh and R. G. Deshpande, JJ.) it was transferred to Bombay.

Before we proceed to dispose off the petition, we would like to mention that Mr.

M. G. Karmali learned counsel for the petitioner candidly stated that the period of detention of the detenu having been over, he has been ordered to be released from the Yerwada Central Prison, wherein he was detained but as the impugned order of detention could form a foundation of consequential actions, it could be challenged through the present petition, as laid down by the Apex Court in para 5 of the decision reported in 1996 SCC (Criminal) 269, *Nutan J. Patel (Ms) vs. S. V Prasad*, we have examined para 5 of the said decision and we find that the said proposition has been laid down in it.

2. The grounds of detention in short mention that the detaining authority was satisfied that the detenu had been engaged in unauthorised transactions in violation of the provisions of Foreign Exchange Regulation Act, 1973, which had affected foreign exchange resources of the country adversely and therefore his detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 with a view to prevent him in future from acting in any manner prejudicial to the augmentation of the country's foreign exchange resources was imperative.

In the grounds, it has been mentioned that officers of the Enforcement Directorate, Bombay, on reliable information that on 20th March, 1995, the detenu had placed an order for substantial amount of foreign currencies from Dharmachand Lakhara and the same were likely to be delivered to him that day at 6 p.m. at his shop situate at 3, Pestonji Street, Colaba, Bombay-5 searched the shop of the detenu and the premises of Dharamchand Lakhara, in their absence, and recovered from the former Rs. 10,000/- and some documents and from the latter some foreign currencies.

On 6th April, 1995 the statement of the detenu was recorded u/s 40 of the Foreign Exchange Regulation Act, 1973 (FERA). He stated therein that officers of the Enforcement Directorate had searched his shop premises on 20th March, 1995 and recovered one Maruti notebook, one pocket diary, one telephone diary, some documents and Rs. 1,10,000/-therefrom. He also mentioned therein that he had purchased US \$ 7000 at black market price from Dharamchand as he had to give the same to a Arab named Ali Mohd in lieu of 599.9 gms of gold purchased from him.

On 6th April, 1995 the detenu was arrested u/s 35 of the FERA and was produced before the Chief Metropolitan Magistrate, Bombay, the next day i.e. on 7th April, 1995 who ordered him to be released on bail the same day.

The grounds of detention also mention that the detenu had filed a retraction petition on 7th April, 1995 which was replied by the department on 5th July, 1995 and had sent a letter on 15th April, 1995 which was replied by the department on 20th April, 1995 and another letter on 2nd May, 1995 addressed to the Assistant Registrar, Enforcement Directorate Bombay, which was replied by the department on 5th July, 1995.

3. Although in this petition a number of grounds have been pleaded but, we are

not adverting to them because this petition can be disposed off on the legal contention canvassed by Mr. M. G. Karmali learned counsel for the petitioner pleaded in para 5 ground (ii) of the petition.

4. In short, ground No. (ii) is that on 7th April, 1995 the detenu had filed a written bail application before the court seeking his release on bail and the same was not forwarded by the sponsoring authority to the detaining authority and the result of such a default was two-fold :-

(a) the subjective satisfaction of the detaining authority (respondent No. 2) in issuing the detention order was vitiated on account of non-application of mind; and

(b) the bail application being a vital document, its non-placement before the detaining authority trampled upon the fundamental right of the detenu, contained in Article 22(5) of the Constitution of India, to make a representation at the earliest opportunity;

5. Ground No. 5(ii) pleaded in the petition has been replied to in para 3 of the return filed by the detaining authority. In substance, the reply of the detaining authority incorporated in the said para is that the allegations made in the bail application dated 7th April, 1995 were of a general nature; they were found in two documents which were placed before the detaining authority namely the bail order dated 7th April, 1995 passed by the court and further retraction of the detenu dated 15th April, 1995; the bail application was not served on the department which is clear from the reply dated 20th April, 1993; the allegations in the bail application which are of a casual nature have been duly referred by the Magistrate in his bail order; and the retraction of the detenu dated 7th May, 1995, was perused by the detaining authority before passing the detention order.

The thesis of the detaining authority in his return is that his subjective satisfaction was not impaired on account of non- placement of the bail application dated 7th April, 1995 and the detenu on account of its not being supplied to him, was not hampered in exercising his fundamental right provided by Article 22(5) of the Constitution of India of making an effective representation.

6. Having perused the averments contained in ground No. 5(h) and those contained in para 3 of the return of the detaining authority (respondent No. 2) and hearing the learned counsel for the parties, we are satisfied that the impugned detention order is vitiated in law and deserves to be set aside.

7. Mr. M. G. Karmali learned counsel for the petitioner strenuously urged that the Supreme Court in the oft-quoted case of Abdul Sathar Ibrahim Manik Vs. Union of India and others, has observed as follows :-

(6) In a case where detenu is released on bail and is at liberty at the time of passing the order of detention then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and the order granting bail should necessarily be placed

before the authority and the copies should also be supplied to the detenu.

Mr. Karmali contended that a perusal of para 12(6) would show that where the detenu is at liberty at the time of the passing of the detention order, it is obligatory for the authorities to place before the detaining authority a copy of the bail application and the bail order and furnish copies of the same to the detenu for the same are vital documents. In Mr. Karmali's contention, failure to do so would vitiate the detention order.

8. It is common ground between the counsel for the parties that when on 12th July, 1995 the impugned order of detention was passed by the detaining authority :-

- (a) the detenu was on bail;
- (b) the sponsoring authority was aware that the detenu had made an application for bail before the Chief Metropolitan Magistrate, Mumbai, on 7th April, 1995;
- (c) the copy of the bail application moved by him on 7th April, 1995 had not been placed before the detaining authority and copy of the same and not been furnished to the detenu.

Mr. Karmali pointed out that a perusal of para 12(6) of Abdul Sathar Ibrahim Manik Vs. Union of India and others, would show that the result of non-placing of the bail application before the detaining authority and non-furnishing of its copy to the detenu would be to vitiate the detention order.

9. Mr. R. M. Agarwal learned counsel for the respondents Nos. 1 and 2 and Mr. D. G. Bagwe learned counsel for the respondents Nos. 3 to 5 strenuously urged that the non-placement of the bail application of the detenu before the detaining authority and non-furnishing of its copy to the detenu would not vitiate the detention order.

Mr. Agarwal urged that the ratio laid down in Abdul Sathar Ibrahim Manik Vs. Union of India and others, would have no application to this case because, the bail order was not passed on the bail application but, was passed on an application moved from the side of the respondent, seeking remand of the detenu. In this connection, he specifically invited our attention to the bail order which was passed on the remand applications No. 71/95 and 56/95 dated 7th April, 1995.

Mr. Karmali strenuously repudiated the correctness of Mr. Agarwal's contention. He furnished before us a certified copy of the bail application dated 7th April, 1995. A perusal of the said application shows that on the same, the Court had written OPS and thereafter, appended its signatures. It is not disputed that OPS means orders passed separately.

The position which emerges is that on 7th April, 1995 both the remand application and the bail application were before the Court and since it was incumbent for the Court to dispose off the remand application and furnish

reasons for not giving remand and the necessary consequence of not giving of remand was bail, the bail order was passed by the Court, after setting reasons for the refusal of remand, on the remand application itself. And once it was passed on the remand application, there was no question of passing a separate order on the bail application. That is the reason on the bail application, the court mentioned OPS. In these circumstances, in our Judgment, the bail order would be deemed to have been passed on the bail application also.

It is pertinent to point out that in para 3 of his return, the detaining authority has not taken the stand canvassed by Mr. Agarwal, but, on the converse as mentioned therein that "the casual allegations contained in the said bail application dated 7th April, 1995 have been duly referred to by the Magistrate in his bail order dated 7th April, 1995." Consequently, we reject the said submission of Mr. Agarwal.

10. Mr. Agarwal also urged that the significance of the placement of the bail application lay in the fact that the retraction of the detenu was contained therein and since the same was spelt out more elaborately in the detailed retractions made by the detenu on 15th April, 1995 and 7th May, 1995 which were replied to by the department on 20th April, 1995 and 5th July, 1995 respectively, the non-placement of the bail application before the detaining authority was of no consequence. We regret that we cannot accede to his contention. As mentioned earlier, the law laid down in Abdul Sathar Ibrahim Manik Vs. Union of India and others, , is that where the detenu is on bail, the bail application has to be placed before the detaining authority and its copy has to be furnished to the detenu.

We regret to observe that it is not open for us to infer that in spite of the averments in the bail application, the detaining authority would still have passed the impugned detention order. This is because, it was a matter in the province of the subjective satisfaction of the detaining authority and we cannot anticipate what his subjective satisfaction would have been had the bail application been placed before him. In this connection, it would be necessary to advert to two decisions of the Supreme Court namely :-

(i) State of U.P. Vs. Kamal Kishore and Another, ,

(ii) AIR 1989 SC 34, Ayya alias Ayub, Petitioner vs. State of U.P. and another, Respondents.

In the former decision, a perusal of para 7 shows that certain vital documents like statement of witnesses u/s 161, Criminal Procedure Code the bail applications of co-accused and the detenu and the police reports thereon had not been placed before the detaining authority and the assertion made in the return by the detaining authority was that even had the said material been placed before him, he would have not changed his subjective satisfaction. Repelling the said assertion of the detaining authority, the Apex Court observed thus in the said para :-

...The High Court therefore was justified in holding that the assertion made in the return that even if the material had been placed before the detaining authority, he would not have changed the subjective satisfaction as this has never been accepted as a correct proposition of law. It is incumbent to place all the vital materials before the detaining authority to enable him to come to a subjective satisfaction as to the passing of the order of the detention as mandatory required under the Act....

In the later authority, a telegram sent by the detenu prior to the passing of the detention order had not been placed before the detaining authority and what was canvassed from the side of the respondents was that it was not necessary to place the same because, the same was not sent at the purported time. In spite of the observations in para 13, to the effect that :- "It is extremely probable that it was sent not at 12.30 midnight as claimed by the petitioner, but only at 12.30 noon on 19-2-1988 as suggested by Sri. Yogeshwar Prasad, "the Supreme Court held in the said para that since it was not disputed that the telegram was not placed before and considered by the detaining authority the detention order suffered from the vice of non-application of mind. It candidly observed in the said para that it is another matter, what weight would have been attached by the detaining authority to the said telegram.

11. We would be failing in our fairness if we do not refer to the following decision cited by Mr. R. M. Agarwal :-

- (i) Smt. K. Aruna Kumari Vs. Government of Andhra Pradesh and Others, ;
- (ii) Kamarunnissa and Others Vs. Union of India and another, ;
- (iii) AIR 7990 SC 176, Madan Lal Anand, Petitioner vs. Union of India and others, Respondents;
- (iv) Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others, Respondents;
- (v) Criminal Writ Petition No. 1017 of 1991, decided on 7-10-1991 by a Division Bench of the Bombay High Court, Yakub Ibrahim Bhorania vs. State of Maharashtra and others;
- (vi) Criminal Writ Petition No. 1061 of 1998 decided on 26-10-1993 by Division Bench of the Bombay High Court in the case of Futarnal Parasmal Jain vs. Union of India and others;
- (vii) Smt. Meena Jayendra Thakur Vs. The Union of India and others, , a Division Bench decision of the Bombay High Court rendered in the case of Smt. Meena Jayendra Thakur, Petitioner vs. The Union of India and others, Respondents.

We have perused the decisions cited by Mr. R. M. Agarwal and we are constrained to observe that in none of them, the question whether the bail application made by the detenu was a vital document and the effect of its non-placement before the detaining authority has been considered. The said decisions in our Judgment

have no bearing.

12. Mr. Agarwal cried hoarse that in Criminal Writ Petition No. 1061 of 1991, this Court has taken the view that the bail order may not on the facts of the case be a vital document and therefore urged that it followed as a logical imperative that the bail application in the given facts of a case, as is the case here, may not be a vital document. Weighed purely on the anvil of logic, the submission sounds attractive but we regret that we cannot accept it for in doing that we would be laying down law contrary to Abdul Sathar Ibrahim Manik Vs. Union of India and others, , which by the mandate of Article 141 of the Constitution of India is binding on us and wherein it has been laid down, in para 12(6) that where the detenu is on bail at the time of the passing of the detention order the bail application and bail order are vital documents and their copy has to be supplied to the detenu.

13. For the said reasons, in our view the failure on the part of the sponsoring authority to place the bail application of the detenu before the detaining authority has not only vitiated the detention order since the same was passed without application of mind on the part of the detaining authority but the non-supply of its copy to the detenu has trampled upon his right of making a effective representation as mandated by Article 22(5) of The Constitution of India. Hence, the detention order would have to be quashed.

14. In the result, this petition is allowed, and the impugned detention order is quashed. Rule is made absolute.

In case an application is made by the learned counsel for the parties, for a certified copy of this Judgment, the same shall be issued within four weeks from today.