

(1992) 09 DEL CK 0026

In the Delhi High Court

Case No : Criminal Writ No. 654 of 1991

Bharat alias Bharat Singh

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 25-09-1992

Acts Referred:

Citation : (1993) CriLJ 1156 : (1992) 3 Crimes 687 : (1993) 49 DLT 521 : (1992) 24 DRJ 277

Hon'ble Judges : Mohd. Shamim, J

Bench : Single Bench

Advocate : Mr. Trilok Kumar and Mr. Manoj D. Taneja, for the Appellant; Mr. B.S. Nagraj and Mr. V.K. Shali, for the Respondent

Judgement

Mohd. Shamim, J.—The petitioner through the present petition wants to challenge an order of detention made against him by the Union of India vide Notification No. 673/394/91-Cus. VIII dated September 25, 1991 passed by Shri Mahendra Prasad, Joint Secretary to the Government of India, Ministry of finance, Department of Revenue, u/s 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the COFEPOSA").

2. Brief facts which gave rise to the present petition are as under : that on the basis of an intelligence a Tata Mobile Van bearing registration No. MP 09 D 8093 was intercepted at Shahjahanpur Police Post by the officers of the Revenue Intelligence on August 30, 1991 at 22.45 hours along with its two occupants known as Rajinder Kumar i.e. the driver of the van, and the petitioner. The aforesaid van was thoroughly rummaged which resulted in the discovery of five secret cavities specially built, two each beneath the seats in the rear portion of the van and one cavity in the floor of the van. On further search of the cavities 23 bags containing 581 slabs of silver weighing 702.780 kgs. valued at Rs. 47,08,626/-. Since neither the said Rajinder Kumar nor the petitioner could produce any licit document to show the legal import of the 581 slabs of silver the

same was seized under the Customs Act, 1962 along with the above said mobile van. Shri Rajinder Kumar as well as the petitioner both made their Statements under S. 108 of the Customs Act where though they admitted the recovery of the said silver from the said van. The petitioner in his statement stated that he was simply an employee of Kanchan Aggarwal, a co-accused, on a monthly salary of Rs. 1,200/- and it is Shri Kanchan Aggarwal who who is engaged in the smuggling of gold and he was simply transporting the said silver to Kapur Guest House Delhi. Shri Rajender Kumar and the petitioner were arrested on the aforesaid date and they were produced before a Metropolitan Magistrate on August 31, 1991 who remanded both of them to the judicial custody. Subsequently an order for detention under S. 3(1) of the COFEPOSA with regard to the petitioner was passed with a view to prevention the petitioner from engaging in transporting smuggled goods on September 25, 1991 vide F. No. 673/394/91-Cus. VIII, which is the subject-matter of the challenge through the present petition.

3. The respondents neither filed a counter-affidavit to rebut the averments raised for and on behalf of the petitioner in his petition nor this Court could hear anyone for and on behalf of the respondent. Thus, the respondent for the best reasons known to them allowed the present matter to go by default .However, one Mr. B. S. Nagra, Advocate Mr. V. K. Shali, Advocate was present throughout the arguments advanced for and on behalf of the petitioner.

4. It has been urged for and on behalf of the petitioner that since the respondent for the best reasons known to them have failed to file a counter-affidavit before this Court and to put any contest, hence all the averments raised by the petitioner through the present petition go un-challenged and remain un-rebutted. The respondent would be thus deemed to have admitted all the contentions put forward by the petitioner in his petition. The learned counsel thus contends that in view of the above the impugned detention order is liable to be quashed and set aside. The learned counsel besides the above has also led me through Rule 10 of the rules framed by the High Court for the issue of Writ of Habeas Corpus under Article 226 of the Constitution of India. It reads as under :-

"on the returnable day of such rule or on any day to which the hearing thereof may be adjourned if no cause is shown or if cause is shown and disallowed the Court shall pass an order that the person or persons improperly detained shall be set at liberty. If the cause is allowed the rule should be discharged."

It is manifest from my aforesaid discussion that the respondent did not file any counter in the instant case. Thus, all the averments made by the petitioner in his petition would be deemed to have been admitted. This is all the more so in view of the clear cut provision in the form of Rule 10 framed by the High Court for the writ of Habeas Corpus under Article 226 of the Constitution of India. Admittedly, in the instant case on cause has been shown for not allowing the writ presented by the petitioner for setting him at liberty and quashing the impugned detention order dated September 25, 1991. Thus, the petitioner is entitled to succeed on

this ground alone and the detention order dated September 25, 1991 is liable to be quashed.

5. Learned counsel for the petitioner has then contended that the impugned order in the instant case is illegal and invalid on account of the suppression of vital and material facts from the detaining authority. The learned counsel in this connection has argued that Shri Kanchan Aggarwal, a co-accused of the petitioner, wrote a letter to Shri D. A. Nistane, Superintendent, Officer of Deputy Director, Revenue Intelligence, Delhi Zonal Unit, dated September 14, 1991. The said letter was written in reply to the summons issued to him u/s 108 of the Customs Act. Shri Kanchan Aggarwal in the said letter has very categorically stated that 581 slabs of silver recovered from the Tata Mobile Van on August 30, 1991 are his property and they belong to him. He further goes on to state that the said slabs are of Indian origin. Curiously enough the said letter was never put before the detaining authority at the time of the passing of the impugned detention order. The relevant question which comes to the tip of the tongue is as to whether the said letter is a material and relevant document for the consideration of the detaining authority which is likely to affect his subjective satisfaction. This Court feels a relevant document can be defined for the consideration of the detaining authority any document which can sway the mind of the detaining authority at the time of the passing of the detention order in either way. Judged by that standard this Court feels that the said letter was very important and material piece of document. It is entirely a different thing that even after the consideration of the said letter the detaining authority would have passed the impugned order, but we feel that the said letter must have been brought to the notice of the detaining authority inasmuch as it could have affected the subjective satisfaction of the detaining authority. Had the detaining authority agreed with Shri Kanchan Aggarwal that the silver slabs in question were of Indian origin and the property of Shri Kanchan Aggarwal in that eventuality no detention order would have been passed. In the circumstances stated above we conclude that the non-consideration of the above said document vitiates the subjective satisfaction of the detaining authority. We are supported in our above view by the observations of the Supreme Court as reported in *Ashadevi Mehta (Detenu) Vs. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat and Another*, "It is well settled that the subjective satisfaction requisite on the part of the detaining authority the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order.

6. In the instant case by a detention order the detenu was detained with a view to preventing him in transporting smuggled goods. In passing the detention order the detaining authority based its decision on the detenu's confessional statement made earlier before the Customs Officers. The said confessional statements were squarely retracted by the detenu at the first available

opportunity while he was in judicial custody.

7. In the above circumstances the detention order was held to be illegal for non-consideration of the retracted statements.

8. It has next been urged for and on behalf of the petitioner that the petitioner made a representation to the Chairman, Advisory Board, on November 29, 1991. Curiously enough neither any reply till to this date has been received by the petitioner from the Advisory Board or from Government of India, thus, it can be safely concluded from above that the said representation is still pending decision and has not been disposed of. Thus, the non-consideration of the said representation by the Government of India is sufficient enough to quash the detention order in the present case.

9. It has already been observed that the respondents have not filed any counter-affidavit to rebut or controvert the averments made by the petitioner in the present petition. Thus, this allegation by the petitioner that his representation has not been considered and disposed of by the Central Government goes unchallenged and remains un-rebutted. If this is so, then we feel that the detention order in the instant case is liable to be quashed on this ground also. The above view was given vent to by their Lordships of the Supreme Court in *Smt. Gracy Vs. State of Kerala and another*, It was observed at page 1094 " Thus, any representation of the detenu against the order of his detention has to be considered and decided by the detaining authority, the requirement of its separate consideration by the Advisory Board being an additional requirement implied by reading together clauses (4) and (5) of Article 22, even though express mention in Article 22(5) is only of the detaining authority. Moreover, the order of detention is by the detaining authority and so also the order of its revocation if the representation is accepted, the Advisory Board's role being merely advisory in nature without the power to make any order itself. It is not as if there are two separate and distinct provisions for representation to two different authorities viz. the detaining authority and the Advisory Board, both having independent power to act on its own. Dual obligation of consideration of the detenu's representation by the Advisory Board and independently by the detaining authority flows from Article 22(5)."

10. "In the present case there had been a breach by the Central Government of its duty under Article 22(5) to consider and decide the representation independently of the Advisory Board's opinion. The order of detention as well as the order of its confirmation passed by the Central Government are, Therefore, quashed."

11. In view of the above the petitioner is entitled to succeed. The petition is allowed and the impugned detention order dated September 25, 1991 is hereby quashed. Let the petitioner be set at liberty at once in case he is not required for detention in any other case.

12. Petition allowed.