

(1990) 08 DEL CK 0008

In the Delhi High Court

Case No : Criminal Writ Petition No. 220 of 1990

C. Ummer

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 29-08-1990

Acts Referred:

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

Citation : (1990) CriLJ 2610 : (1990) 42 DLT 39 : (1990) 2 ILR Delhi 314

Hon'ble Judges : M.K. Chawla, J

Bench : Single Bench

Advocate : S.R. Setia, D.N. Sawhney, G. Prakash and T.T.K. Kannan, for the Appellant;

Judgement

M.K. Chawla, J.

(1) On 4th November. 1989. Shri C. Ramachandran. Secretary to the Government of Kerala (Home Department) directed the detention of the petitioner in Central Prison, Trivendrum, with a view to preventing him from abetting the smuggling of goods, while exercising powers conferred by Section 3(I)(ii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, (hereinafter referred to as the Cofeposa Act). The detention of the petitioner for a period of one year from 10-1-90 has since been confirmed by the aforesaid Authority on 17-3-90 consequent upon the receipt of the opinion of the Advisory Board.

(2) The petitioner has challenged the order of detention and the order of confirmation by way of filing the present writ petition on numerous grounds, one of them being that the following vital and material documents which would have swayed the mind of the detaining authority one way or the other were suppressed and not placed before it. The documents are :-

1. Bail application dated 18-8-89, wherein he stated" that he is innocent and has

not done any offence; 2. Bail order dated 19-8-89 releasing the petitioner on certain stringent conditions; 3. Application dated 21-8-89, wherein the petitioner alleged that his statement before the Customs Authorities was not a voluntary one and was recorded under threat and by use of force; 4. The issuance of a show cause notice to the petitioner by the Additional Collector of Customs and Central Excise, and the reply thereto.

(3) To support his contention, learned counsel referred to para No. 4 of the grounds of detention wherein there is only the mention of the petitioner having been arrested on 14-8-89 and produced before the Additional Judicial Magistrate Trivendrum the same day who remanded him to judicial custody and the petitioner was later on enlarged on bail. In the list of documents supplied to the petitioner *pari pasu* the grounds of detention. there is no mention of the bail application or the order passed thereon.

(4) It is not disputed that before the order of detention was passed, the petitioner had already moved the Additional Chief Judicial Magistrate, Ernakulam on 16-8-89 for his release on bail and in fact was released on bail on 19-8-89 on the following terms and conditions :-

"HEARD both sides. Opposed. Separate order. Allegation that he. is an abetter. A-2 is granted the bail on his executing a bond for Rs. 5000 with two sureties each surely for the like amount. The sureties producing solvency valuation or salary certificate and depositing cash security of Rs. 12500 each on condition that if released on bail, the accused A-2 will appear before Superintendent, Intelligence, Air Customs, Trivendrum once in every week for 3 times, to 26-8-89."

(5) The importance of bail application and the order passed thereon cannot be over-emphasised. It is immaterial whether the detenu already knew about their contents or not. To appreciate this point, one has to bear in mind that the detenu is in jail and has no access to his documents. At least these two documents had already come into existence and it was the bounden duty of the Department concerned to place the same before the detaining authority and for not doing so, the requisite satisfaction of the detaining authority can be questioned.

(6) The case of the respondents, as disclosed in the affidavit of the Additional Secretary to the Government of Kerala (Home Department); Trivendrum is as under :-

"ALL the documents relied upon in the grounds for detention were placed before the detaining authority. The bail applications of the petitioner and two of the other co-accused persons, bail orders of the Court and the show cause notice issued against the accused persons (common show cause notice) were placed before the detaining authority and the above documents were also considered by the detaining authority before issuing detention order against the petitioners."

This stand of the respondent is *prima facie* against the order of detention

wherein there is no mention of the consideration of the bail application of the petitioner and the effect of the orders passed thereon. These two documents Along with a show cause notice also do not form of the documents mentioned in the list of documents supplied.

(7) The submission of the learned counsel for the respondent is that if the detaining authority has only made a casual or passing reference to any document in the course of narration of facts ^but has not relied upon the same, while making the order of detention, it could not be said that the detenu was prevented from making an effective representation. In this behalf, he places reliance on the Judgment reported as Mst. L.M.S. Ummu Saleema Vs. Shri B.B. Gujaral and Anr, holding:-

"EVERY failure to furnish copy of a document to which reference is made in the grounds of detention under S. 3(1) of the Act is not an infringement of Art. 22(5), fatal to the order of detention. It is only failure to furnish copies of such documents as were relied upon by the detaining authority, making it difficult for the detenu to make an effective representation that amounts to a violation of fundamental right, guaranteed by Art. 22(5)."

(8) The bare perusal of this Judgment leaves no doubt in my mind that these very documents, were relied upon and were duly considered by the detaining authority while passing the impugned order of detention. This is very clear from the counter of the Secretary, Home Department, the relevant portion of which has been referred to above.

(9) If that be the case of the respondents, then it was imperative for the detaining authority to give documents relied on and referred to in the order of detention pari pasu the grounds of detention. All these documents should have been furnished to the detenu at the earliest so that he could make an effective representation immediately, instead of waiting for the documents to be supplied to him. The question of demanding such like documents was wholly irrelevant and the infirmity in that regard is vocative of constitutional safeguard enshrined in Article 22(5) of the Constitution of India.

(10) This aspect can also be looked into from another angle. The respondents are losers on both count". Considering the facts in the instant case, the bail application and the bail order were vital and material documents for consideration. If those were not considered, as the case of the petitioner is, the satisfaction of the detaining authority itself would have been impaired and if those had been considered as alleged by the respondents", these would be the documents relied upon by the detaining authority though not specifically mentioned in the annexures to the order of detention and those ought to have formed part of the documents supplied to the detenu with the grounds of detention and without them, the grounds themselves could not be said to have been complete.

(11) Under these circumstances there is no option for this court but to hold that

it amounted to denial of the detenu's right to make an effective representation and that it resulted in violation of Article 22(5) of the Constitution of India rendering the detention of the detenu illegal and entitling him to be set at liberty.

(12) The second limb of the argument of the learned counsel for the petitioner is that the opinion of the Advisory Board is also vitiated for the reason that the above said four documents, namely, the bail application, the petition retracting the statement, the bail order del ailing the stringent conditions of bail, and the show cause notice issued to the petitioner were not placed before the Advisory Board. The said documents were received by the Collector of Customs on 21-11-89 while the case of the petitioner was referred to the Cofeposa Advisory Board on 9-2-90. The non-placement of the said documents according to the learned counsel, vitiates the opinion of the Advisory Board and consequently the detention.

(13) The respondents in their counter have taken the stand that though the bail application, the bail order., the retraction petition and the show cause notice were not placed before the Advisory Board by the detaining authority, but the officers of the Customs Department were present before the Advisory Board" with the relevant papers for verification, if required by the Advisory Board. It is not a straightforward reply to the question posed for decision before the Court. From this. it cannot be inferred that the Members of the Advisory Board asked for or perused those documents. In the absence of any specific plea that the document were shown to the Members of the Advisory Board, which is lacking, this court will presume otherwise. It is not even explained during the course of arguments as to why such material documents were also withheld from the Advisory Board. This inaction by itself would vitiate the opinion of the Advisory Board and consequently the detention.

(14) In the result, the petition is accepted and the Rule Nisi is made absolute. The petitioner be set at liberty forthwith if not required to be detained in any other case.