

(2004) 12 DEL CK 0012
In the Delhi High Court
Case No : WP (Criminal) 409 of 2004

Chand Mohd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 15-12-2004

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 108

Citation : (2005) 116 DLT 373 : (2005) 79 DRJ 110 : (2005) 99 ECC 120 : (2005) 119 ECR 137

Hon'ble Judges : S. Ravindra Bhat, J;D.K. Jain, J

Bench : Division Bench

Advocate : Sangita Bhayana, for the Appellant; Neeraj Jain, for R-1 and Mukta Gupta, for R-2 to R-4, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Jain, J.—Rule D.B.

2. By this writ petition under Article 226 of the Constitution of India, for a writ of habeas corpus, the petitioner questions the legality and validity of his detention pursuant to an order passed on 30 January 2004 by the Lt. Governor of National Capital Territory of Delhi (hereinafter referred to as the Detaining Authority) in exercise of powers conferred by Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA Act for short).

3. The order of detention is passed on the subjective satisfaction of the Detaining Authority that it was necessary to detain the petitioner with a view to preventing him from smuggling goods in future.

4. According to the grounds of detention, which are in the narrative form, the incident occurred on 27 August 2003, when the petitioner arrived from Bangkok

and after collecting his checked in baggage opted to pass through the green channel. He was intercepted near the exit gate of arrival hall and diverted for X-ray of his baggage. Search of his baggage resulted in the recovery of some miscellaneous goods. On his personal search it came to light that he was wearing two underwears stitched together. underneath he was wearing another grey coloured underwear which looked bulky from front side. On taking off the grey coloured bulky underwear, one layer of the front double layer stitching was found to be re-stitched. The same was unstitched, which resulted in the recovery of seven packets wrapped in brown adhesive tapes. Removal of brown tapes on each of the packets resulted in the recovery of precious stones in small pouches. The customs jewellery experts were summoned; they examined the items contained in 24 pouches and declared the same to be cut and polished precious stones namely Ruby and Sapphire. Total weight of the said items was 1412.7 grams. The aggregate value of these goods was estimated at Rs.6,14,189.50.

5. In his voluntary statement, recorded on the same day, the petitioner, while admitting the recovery of precious stones in the manner aforesaid, stated that he has a cousin in Bangkok who had assured him a job, but despite several visits he could not get any job and that on the last visit he met a lady who asked him to carry these items by concealing in the specially tailored underwear, for which he was to get Rs.1200/- besides expenses for his stay in hotel.

6. The petitioner was arrested on 27 August 2003 and was remanded to judicial custody from time to time. His bail applications were dismissed by the ACMM as well as Additional Sessions Judge, where after he preferred a criminal miscellaneous petition in the Delhi High Court for grant of bail. Ultimately the High Court granted him bail on 16 January 2004 Scrutiny of the passport of the petitioner revealed that he had made nine visits abroad during the period from May 2003 to August 2003.

7. Taking into consideration the material placed before him, including the bail applications moved by the petitioner, the Detaining Authority came to the conclusion that the petitioner has the inclination and propensity for indulging in smuggling activities in an organized and clandestine manner and unless prevented, he is likely to indulge in similar activities in future. Hence the detention order.

8. Reply affidavits have been filed on behalf of the Detaining Authority as well as the Union of India in opposition to the writ petition.

9. We have heard Ms. Sangita Bhayana, learned counsel for the petitioner and Ms. Mukta Gupta, learned counsel for the Detaining Authority.

10. Although in the writ petition the propriety and validity of the order of detention has been challenged on several grounds, but before us, Ms. Bhayana has urged only one ground namely, that the detention order suffers from the vice of non-application of mind, in as much as the Detaining Authority has failed to apply his mind to the retraction of the petitioner, which was made in the bail

application dated 7 November 2003, moved before the Delhi High Court. It is submitted that though in the grounds of detention there is a reference to the bail application but the allegation of the petitioner therein to the effect that ""he has been falsely implicated in the above mentioned case since he was forced/coerced to make some involuntary statement u/s 108 of the Customs Act"" has not been specifically dealt with. Learned counsel has urged that the said retraction was bound to influence the mind of the Detaining Authority one way or the other and Therefore, it was a material circumstance which could not be ignored. It is asserted that the non-application of mind is evident from the fact that in para 2 of the grounds of detention, petitioner's statement dated 27 August 2003 has been described as voluntary despite the said retraction. Strong reliance is placed on the decision of the Supreme Court in K.T.M.S. Mohd. and another Vs. Union of India, to contend that the authority intending to act upon the inculpatory statement as a voluntary one should apply its mind on the subsequent retract on and reject the same in writing and failure to do so vitiates the detention order. It is pleaded that non-consideration of the retraction while arriving at the subjective satisfaction in making the order of detention goes to the root of the order of detention which makes the order of detention invalid. In support , reliance is placed on the decisions of the Apex Court in K. Satyanarayan Subudhi Vs. Union of India, and others, and Rakesh Kumar Miglani Vs. Union of India and Ors., Crl. Appeal o.1410 of 2004, decided on 3 December 2004.

11. Having carefully perused the grounds of detention, in particular paragraph 11 thereof, we are of the view that there is not much substance in the contention of learned counsel for the petitioner.

12. There is no denying the fact that personal liberty of a person is one of the most cherished freedoms but where individual liberty comes into conflict with interest and security of the State, then the liberty of the individual must give way to the larger interest of the nation. It is an accepted fact that the smuggling activities not only have deleterious effect on the national economy, they also adversely affect the security of the State. With a view to at least contain, if not eradicate, this menace, COFEPOSA Act was enacted for the purpose of prevention of smuggling activities as also for conservation and augmentation of foreign exchange. The power to detain under this Act is to be exercised on the Detaining Authority being satisfied with respect to any person that with a view to preventing him from indulging in prejudicial activities as specified in Section 3 of the COFEPOSA Act, it is necessary to make an order for his detention.

13. There is no gain saying that the power of preventive detention being only preventive unlike punitive detention which is meant to punish for the wrong done, must be cautiously exercised not to undermine the fundamental freedoms guaranteed under the Constitution and the procedural safeguards have to be complied with punctiliously, yet these safeguards have to be looked at from a pragmatic and common sense point of view. In Prakash Chandra Mehta Vs. Commissioner and Secretary, Govt. of Kerala and Ors., 1995 SCC 144, taking

note of what Thomas Jefferson said in his writings that ""to lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; t us absurdly sacrificing the end to the means"" their Lordships of the Supreme Court observed that we must remember that observance of written law about the procedural safeguards for the protection of the individual is normally the high duty of public official but in all circumstances not the highest. The law of self-preservation and protection of the country and national security may claim in certain circumstances higher priority.

14. It is well settled that the subjective satisfaction 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 a vital fact or material, which would have a bearing on the issue and would influence the mind of the Detaining Authority one way or the other, is ignored or not considered by the Detaining Authority before issuing the detention order. It cannot be disputed that retraction of the detenu would be a mater al circumstance which might possibly have an impact on the decision of the Detaining Authority whether or not to make the order of detention.

15. Thus, the question for consideration is whether in the instant case the purported retraction contained in the bail petition dated 7 November 2003 has been ignored by the Detaining Authority while making the detention order and in the process vitiating the subjective satisfaction?

16. Having carefully perused para 11 of the grounds of detention, we are of the view that the Detaining Authority was fully alive to the afore-mentioned allegation of the petitioner in the bail application. For the sake of ready reference the said paragraph is reproduced below:

""11.The Lt. Governor of the National Capital Territory of Delhi has taken into consideration the entire material including your bail applications but from the material on record, the Lt. Governor is satisfied that the averments contained therein are baseless, afterthought and devoid of any merit. Hence, the Lt. Governor rejects the same."

17. It is evident from the said paragraph that the Detaining Authority has clearly rejected the averments in the bail application as baseless, afterthought and devoid of any merit. In so far as the bail application as such was concerned, the Detaining Authority had nothing to do with it particularly when it was aware that the petitioner had been admitted to bail by the High Court. The Detaining Authority was required to take into consideration only that part of the application which could influence his mind in taking the decision whether to make or not to make the detention order. Obviously, the nature of the petitioner's statement u/s 108 of the Act, referred to above, was the only material fact/circumstance which had to be taken into consideration, which, as noted above, has been specifically rejected. We feel that the argument of learned counsel for the petitioner suffers from inherent contradiction. If the petitioner himself contends that the bail

application containing retraction was placed before the Detaining Authority, he cannot at the same time plead that the Detaining Authority was not aware as to what was contained therein and, Therefore, he failed to apply its mind on the averments. We are, Therefore, of the opinion that in the circumstances of the case there has been no omission on the part of the Detaining Authority to ignore a vital fact. Ratio of the decisions relied upon by learned counsel for the petitioner is of no avail to the petitioner, which are otherwise distinguishable on facts. In K. Satyanarayana Subudhi's case (supra) and Rakesh Kumar Miglani's, case (supra) admittedly the retractions of the confessional statements were not placed before the Detaining Authority, which is not the case here. Similarly, in K.T.S. Mohd.'s case (supra), it was observed that the voluntary nature of any statement made either before the Customs authorities or the officers of Enforcement under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose. Nevertheless, the authority or any Court intending to act upon an inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing lest the order will be vitiated. As noted above, in the instant case petitioner's plea of coercion etc. has been rejected by the Detaining Authority in the afore-extracted paragraph 11 and Therefore, the principle of law enunciated in the said decision is not applicable.

18. For the foregoing reasons, the writ petition fails and is dismissed accordingly. The rule is discharged.