

(2003) 11 BOM CK 0032

In the Bombay High Court

Case No : Criminal Writ Petition No. 442 of 2003

Errol Robert Lucien

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 11-11-2003

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 2(e), 3
Constitution of India, 1950 — Article 22
Customs Act, 1962 — Section 108, 2(39)

Citation : (2004) 106 BOMLR 42

Hon'ble Judges : S.S. Parkar, J;H.L. Gokhale, J

Bench : Division Bench

Judgement

H.L. Gokhale, J.—This writ petition by the husband of the detenu seeks to challenge the order of detention dated 11th February, 2003 passed by the respondent No. 2, Detaining Authority u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "C.O.F.E.P.O.S.A."). The petition is opposed by filing affidavit in reply of the 2nd respondent, Detaining Authority and the Deputy Secretary of the 1st respondent, State of Maharashtra and thereafter affidavit of Asst. Director of the Directorate of Revenue Intelligence, Mumbai. The respondents have also tendered a paper book containing the various papers concerning the action, which were tendered to the Detaining Authority leading to the detention order. Mrs. Ansari has appeared for the petitioner whereas Mrs. Pai, A.P.P., has appeared for the respondents.

2. The short facts leading to the detention order are as follows : The detenu arrived at the International Airport at Mumbai from Dubai on 26th November, 2002 when 34 gold bars were recovered from her. She was arrested at about 2.30 a.m. Thereafter her residence was raided but nothing further incriminating was found. Then her statement was recorded on the same day u/s 108 of the Customs Act wherein she stated that she is supposed to have acted at the

instance of one vasu. On the next day she retracted her statement made earlier by giving a statement of retraction before the Magistrate before whom she was produced. As per the compilation of documents before the Detaining Authority she withdrew this first statement of retraction on 2nd December, 2002. However, what we find from the compilation of the documents tendered is that on the same day she was produced before the Magistrate concerned when her remand application was made as well as when her bail application came to be considered. It is the case of the detenu that she withdrew the statement which was taken from her on the same day by giving a second retraction on 2nd December, 2002. There is reference to this second retraction having been made before the Addl. Chief Metropolitan Magistrate in the order passed by him on the remand application, the order being dated 3rd December, 2002 and which is seen at page 100 of the compilation of papers produced for our perusal by the respondents.

3. In this petition filed before this Court a ground has been taken in paragraph 4(v) that this retraction which was a handwritten one being dated 2nd December, 2002 and which document was taken on record by the Court and which was a document of vital nature likely to influence the mind of the Detaining Authority was not produced before the Authority. It is, therefore, submitted that the order of detention is vitiated. It is material to note that at page 32 of this petition the list of documents which were produced before the Detaining Authority is produced and therein we do not find any reference to this second retraction.

4. Mrs. Ansari, the learned Counsel appearing for the petitioner submits that this was a vital document and since it was not produced before the Detaining Authority, the order of detention suffers from non application of mind to the relevant document. Under Article 22(5) of the Constitution of India a detenu has to be given the grounds of detention and an opportunity to make representation. The opportunity to make a representation to be meaningful implies that all the necessary documents have to be placed before the authority concerned and it is axiomatic that the Sponsoring Authority must place before the Detaining Authority all the documents which were available to it so that the Detaining Authority could arrive at its own decision.

5. It is material to note that in the statement made by the detenu on 26th November, 2002 she stated that she used to go to Dubai and that she had visited it on three occasions earlier and this was the fourth occasion when she was going there and coming back. From the entries on the passport of the detenu it is seen that all these visits were for a very short duration. In that statement she has stated that she used to bring gold while coming back to India and this was at the instance of one Mr. Vasu. In the statement of retraction she has withdrawn this statement. Thereafter she has withdrawn this retraction in the statement made on 2nd December, 2002. Thus the withdrawal of the first retraction was very much before the Detaining Authority and, therefore, on the basis of material before it in para 12 of the grounds of detention the Detaining Authority has observed that considering her past conduct and the antecedent activities the

detenu had high potential and propensity to indulge in smuggling activities in future. In para 1 the has recorded that he was reasonably satisfied that the detenu was engaging in smuggling activities in an organised manner and that her activities amount to smuggling as defined in Section 2(39) of the Customs Act and as adopted u/s 2(e) of the CO.F.E.P.O.S.A. Act, 1974. Before coming to this conclusion in para 10 the Detaining Authority has recorded that he had carefully gone through the retractions and allegations made and having regard to the material placed before him, he did not find any merit in the retractions and the allegations, we asked Mrs. Pai, learned A.P.P., appearing for the State as to what is meant by allegations and she states that by allegations what is meant is the allegations made by the detenu. Thus the Detaining Authority did not find any merit in her retractions. Now, as stated above, there was only one retraction before the Detaining Authority which the detenu had subsequently withdrawn. The second retraction made by her before the Magistrate in her own handwriting on 2nd December, 2002 was not there before the Detaining Authority and so he did not have the benefit thereof.

6. Mrs. Ansari, the learned Counsel appearing for the petitioner referred to some of the judgments governing this field. Firstly she referred to and relied upon the judgment of the Apex Court in the case of Ashadevi Mehta (Detenu) Vs. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat and Another, . In the last paragraph i.e. para 7 of this judgment the Apex Court noted in the facts of that case that the Detaining Authority obviously based its decision on the detenu's confessional statement. The Court further noted that it cannot be disputed that the fact of retraction would have its own impact one way or the other on the Detaining Authority before making up its mind whether or not to issue the impugned order of detention. The Court, therefore, held that there was non-application of mind to the most material and vital facts vitiating the requisite satisfaction of the Detaining Authority thereby rendering the impugned order of detention invalid and illegal.

7. Mrs. Ansari then relied on another judgment of the Apex Court in the case of Ayya alias Ayub Vs. State of U.P. and Another, . where at the end of para. 13 the Apex Court has observed as follows :

13. ...What weight the contents and assertions in the telegram should carry is an altogether a different matter. It is not disputed that the telegram was not placed before and considered by the Detaining Authority. There would be vitiation of the detention on grounds of non-application of mind if a piece of evidence, which was relevant though not binding, had not been considered at all. If a piece of evidence which might reasonably have affected the decision whether or not to pass an order of detention is excluded from consideration, there would be a failure of application of mind which, in turn, vitiates the detention. The Detaining Authority might very well have come to the same conclusion after considering this material, but in the facts of the case the omission to consider the material assumes materiality.

8. She lastly referred to a recent judgment of the Apex Court in the case of V.C. Mohan Vs. Union of India and Others, where in para 12 the Apex Court laid down that the concerned documents sought by the detenu were not only important but would definitely have an impact in the matter of detention. The Court held, under the circumstances, there was thus bounden obligation to place the same before the Detaining Authority for fair play and justice.

9. Mrs. Pai, the learned A.P.P., appearing for the State on the other hand submitted that the second retraction was not relevant and could not be said to be a vital documents in the facts of the present case. She drew our attention to the affidavit of the Detaining Authority i.e. respondent No. 2 where in para. 11 he has observed that there were no fresh facts in the retraction and hence handwritten retraction dated 2nd December 2002, even if placed before him before issuing the order of detention, it would not have affected his subjective satisfaction for issuing the order of detention. As far as this aspect is concerned. Similar assertion was made by the Detaining Authority in the case of State of U.P. Vs. Kamal Kishore Saini, and in paragraph 7 of the report the Supreme Court has noted that the High Court rejected such assertion. Thereafter the Apex Court has observed that 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 detention as mandatorily required under the Act. Mrs. Pai states that it appears that the second retraction was made when the detenu was in Court and it is perhaps due to inadvertence that it was not made available to the Detaining Authority. This submission is without prejudice to the earlier submission that the sponsoring authority was not aware of the second retraction.

10. It is necessary to emphasise that it is for the Detaining Authority to come to the conclusion and for that all the necessary documents and material available to the sponsoring authority have to be placed before the Detaining Authority. This is because it is the individual liberty of the detenu concerned which is at stake. It is for the Detaining Authority to come to its own conclusion. It is no use for the Detaining Authority to say in the High Court that it would have come to the same conclusion. As noted in the above referred quotation from the case of Ayya alias Ayub v. State of U.P., the Detaining Authority might very well have come to the same conclusion after considering this material but the omission to reconsider the material becomes material. In view of what is stated above, in our view, non-consideration of the second retraction dated 2nd December 2002 vitiates the order passed by the Detaining Authority which is impugned in the present petition. The period of detention is of one year out of which nine months are already over.

11. In the circumstance, rule is made absolute in terms of prayer Clause (a) and

the detenu is directed to be released forthwith from her detention and to be set at liberty unless required otherwise under any authority of law. There will be no order as to costs.