

(1988) 12 DEL CK 0007

In the Delhi High Court

Case No : Criminal Writ Petition No. 419 of 1988

Harbhajan Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 21-12-1988

Acts Referred:

Citation : (1989) CriLJ 702 : (1989) 2 Crimes 86 : (1989) 37 DLT 246

Hon'ble Judges : P.K. Bahri, J

Bench : Single Bench

Advocate : R.M. Bagai, Rajender Dutt and Jayant Bhushan, for the Appellant;

Judgement

P.K. Bahri, J.

(1) The petitioner through his wife has filed the present writ petition praying for a writ, orders or directions for quashing the detention order made on July 11, 1988, passed by respondent No. 2 u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA Act") with a view to prevent the petitioner from indulging in smuggling activities and a subsequent declaration made on August 2, 1988, u/s 9 of the Cofeposa Act, by respondent No. 1.

(2) Facts, in brief, are that the petitioner was stated to have come from Dubai in Air India Flight No. AI-890 on June 14, 1988, via Delhi for Bombay destination while the aircraft landed at Delhi the Customs Officers made queries from the petitioner who was sitting on seat No. 24-A as to whether he was smuggling any contraband. On his denying the same his seat was rummaged and one packet wrapped with Air India polythene bag was recovered from the cushion of the said seat which was found to contain four gold biscuits and two gold chains. The statement of the petitioner u/s 108 of the Customs Act, 1962, was recorded and he confessed of his having smuggled the said contraband at the behest of some person who had promised to pay him Rs. 2,000 and he was to pass on the said packet to a passenger who was to travel in that aircraft from Delhi to Bombay.

(3) Various grounds have been taken in the writ petition for challenging the detention order as well as the declaration but it is not necessary to deal with all these grounds because the petition is liable to succeed on a very short ground.

(4) It has been pleaded in ground (r) that an order had been made by the court of Shri Bharat Bhushan, Additional Chief Metropolitan Magistrate, New Delhi, on July 18, 1988, rejecting the bail application of the petitioner but the said order was neither placed before the authority nor considered by that authority before making the declaration u/s 9 of the Cofeposa Act and that shows the non-application of mind by the said authority which has the effect of vitiating the impugned orders.

(5) In the affidavit filed by Shri K. L. Verma, Director of Enforcement, Ministry of Finance, in counter to the writ petition it has been averred that the order of the Additional Chief Metropolitan Magistrate rejecting the bail application could not be placed before the declaring authority inasmuch as the sponsoring authority has not forwarded the said order to the declaring authority before the declaring authority made the declaration. So, it is admitted fact that the said order rejecting the bail application was not considered by the declaring authority before making the declaration.

(6) Counsel for the petitioner has vehemently argued that the said particular document was a material piece of evidence which ought to have been placed before the declaring authority because the same could have influenced the mind of the declaring authority in order to decide whether the declaration should be made or not. The learned counsel for the respondent on the other hand, has contended that it was quite clear from the facts that the petitioner was already in jail and the detention order had been already made u/s 3(1) of the Cofeposa Act, so the mere fact that his bail application had been rejected was of no consequence and even if the said fact had not been brought to the notice of the declaring authority the same is of no consequence because it would not have influenced the subjective satisfaction of the declaring authority for making the declaration. It is to be remembered that before making declaration u/s 9 of the Cofeposa Act the declaring authority has to be satisfied from the material placed before it as to whether it is a fit case for making a declaration. The making of declaration u/s 9 of the Cofeposa Act has the effect of enlarging the period for putting up the case before the Advisory Board as well as the detention period from one year to two years. So, any vital material which may influence the subjective satisfaction of the declaring authority comes into existence before the declaring authority makes an order u/s 9 of the Cofeposa Act the said material must be placed before the declaring authority. There can be a case where some vital material in the shape of documentary or oral evidence showing the petitioner as innocent may come into existence after the order of detention is made and if such material is not placed before the declaring authority the subjective satisfaction arrived at by the said authority in ignorance of the said vital material would stand vitiated. The matter is not rest integra. It has been

held in various judgments reported as *Sita Ram Somani Vs. State of Rajasthan and Others*, *Anant Sakharam Raut Vs. State of Maharashtra and Another*, *Union of India (UOI) and Others Vs. Manoharlal Narang, and Vinod Kumar Vohra v. Union of India & Others*, 1988 (2) Cri 543 that the bail applications and the orders made thereupon are vital documents which may influence the mind of the detaining authority/declaring authority in deciding whether the order of detention or declaration should be made or not. Hence, if the vital documents are not placed before the competent authority, the order made by such authority would stand vitiated. At least" in the case of *Vinod Kumar (supra)* the matter pertained to the declaring authority having not considered the bail application and the b"ail order made thereupon. In criminal writ No. 115/88, *Ramaswamy Rajan v. Union of India & Others*, decided on August 19, 1988, (5) a Single Bench of this Court considered the point and held that the rejection of the bail application of the detenu by the court does constitute a vital and a relevant material which should have been brought to the notice of the declaring authority and it should not have been suppressed from him. The declaration made u/s 9(1) was held to be vitiated on the sole ground that such vital and important material had not been placed and considered by the declaring authority. Criminal Writ No. 513/87, *Kuldeep Singh v. Union of Indian & Others* decided on January 19, 1988(6) and criminal writ No. 431/87, *Anthony D'Souza v. Union of India & Others*, decided on November 30, 1988, (7) also dealt with the same point.

(7) The learned counsel for the petitioner also made reference to criminal writ No. 7/88, *Patta Ibrahim v. Union of India & Others*, decided on July 21, 1988 (8) by a Division Bench of this court in which it was held that the order made on the bail application is a material and vital document which must be placed before the detaining authority and if such a document is suppressed, the satisfaction arrived at by the detaining authority shall stand vitiated. Even if the bail application had been rejected by the judicial court that does not mean that such an. order is of no consequence and would not have the effect of influencing the mind of the declaring authority either way while deciding whether the declaration should or should not be made. There is & catena of judgments, referred above, which lay down the proposition that the order made on the bail application is a vital document. I have no reason to take a different view. So, I hold that tbs order of declaration cannot be sustained inasmuch as the declaring authority has at taken into consideration the order of the Additional Chief Metropolitan Magistrate declining the bail to the petitioner.

(8) I, hence, allow the writ petition, make the rule absolute and quash the declaration order made u/s 9(1) of the COFE.POSA Act and also hold the continuous detention of the petitioner is illegal He shall is illegal be released forthwith unless required to be detained in any other case.