

(1994) 08 BOM CK 0069

In the Bombay High Court

Case No : Criminal Writ Petition No's. 297 and 335 of 1994

Iqbal Hasanali Rupani and Another

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 05-08-1994

Acts Referred:

Constitution of India, 1950 — Article 226

Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 —
Section 3(1)

Citation : (1995) 2 BomCR 78

Hon'ble Judges : Vijay Bahuguna, J; V.A. Mohta, J

Bench : Division Bench

Advocate : Maqsood Khan, in W.P. Nos. 297 and 335 of 1994, for the Appellant;
R.P. Desai, Assistant Public Prosecutor, in W.P. No. 297 of 1994 and S.G. Page,
Public Prosecutor, in W.P. No. 335 of 1994, for the Respondent

Final Decision : Dismissed

Judgement

Vijay Bahuguna, J.—Since both the above petitions challenge the legality of the detention orders passed on the same day and as the detenu in both the petitions were involved in the same incident, the petitions were heard together and are being disposed of by this common Judgment.

2. By means of the above habeas corpus petitions under Article 226 of the Constitution of India, the petitioners have challenged the detention orders passed u/s 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988. Petitioner in Writ Petition No. 297 of 1994 is the elder brother of the detenu Shri Firoz Hasanali Rupani, while petitioner in Writ Petition No. 335 of 1994 is the mother of the detenu Shri Harmindersingh Santosksingh Dhanjal.

3. The detenu in both the petitions were detained by order dated 4-2-1994 passed by Shri D.C. Singh, Secretary (Preventive Detention), Government of Maharashtra and the Detaining Authority. The grounds of detention were

communicated to the detenus on 4-2-1994 along with the list of documents and the copies of documents which were placed before the detaining authority on the basis of which the detention orders were passed. The detenu have been detained to prevent them from engaging in illicit trafficking in narcotic drugs in future. In the grounds of detention, it is stated that on 29--2-1993, a godown situated at Radha Niwas, Govind Nagar, near Himalaya Society, Ghatkopar, Bombay, was raided by the Police in the presence of panchas and three persons, viz. Razak Hasanali Rupani, Harmindersingh Santoshksingh Dhanjal and Mohammad Maqsood Mohammad Mehmood were found present in the said premises and huge quantity of narcotic drugs packed in 40 polythene bags were seized. The contraband was found to be of "Hashish" and it weighed 961 kgs. During the investigation, the aforesaid three persons disclosed the name of Firoz Hasanali Rupani, detenu in Writ Petition No. 297 of 1994, and one Gaffar being the prime persons engaged in the trafficking of drugs. The statements of the detenu were recorded on 30-4-1993 in which it was stated that the consignments of Hashish were brought from Rajasthan for being exported and the detenu had rendered assistance in the storage of the said contraband and for this purpose hired godown in question from one Mr. Ramesh Joshi. Involvement of the detenus in the offence is apparent from the statement made by Razak Hasanali Rupani and Mohammed Maqsood on 30-4-1993. The detenu were produced before the Special Court on 29-4-1993 and were remanded to jail custody.

4. Detenu Firoz Rupani moved a bail application before the Special Court and was granted bail in the sum of Rs. 1 lakh with one surety in the like amount and was released on 15-6-1993. It is further stated in the grounds of detention that the detenu Firoz was re-arrested on 21--11-1993 and found in possession of 289 kgs. of Hashish from building No. 181, Kika Street, Gulal Wadi, Bombay and the detenu Firoz has confessed his involvement in the drug trafficking since 1989.

5. From the grounds of detention served on the detenu Harmindersingh in Writ Petition 335 of 1994, it is seen that the detenu was earlier on 29-5-1991 apprehended for smuggling of 160 silver bars and was detained under COFEPOSA Act and was being tried before the Chief Metropolitan Magistrate in Customs Complaint No. 136/CW/1992.

6. Learned Counsel for the detenus has challenged the validity of the detention orders on three grounds. The first submission is that the order of detention was vitiated so far as detenu Firoz is concerned, as the bail application moved by the said detenu and the order granting bail to him was not placed for consideration of the detaining authority and as both the documents were relevant, the detention order is vitiated for non-consideration of vital documents having significant effect on the detention. Similarly, the learned Counsel also submitted that so far as detenu Harmindersingh is concerned, his order of detention is also vitiated as the papers relating to his earlier detention under the COFEPOSA Act on 29-5-1991 were not placed for consideration of the detaining authority. The

second submission is that the Police report dated 26-11-1993 which is referred to in the grounds of detention were not furnished to the detenu and the last submission is that the detaining authority has not disclosed the compelling reasons for the passing of the detention order when it was within his knowledge that the detenu were already in custody in connection with the incident of 21-11-1992.

7. The learned Counsel for the petitioners placed reliance on a decision of the Supreme Court in the case of *M. Ahamedkutty Vs. Union of India (UOI) and Another*, wherein the Apex Court held that "the non-furnishing of the bail application and the bail order which are vital material for consideration, vitiates the satisfaction of the detaining authority and if such documents have been considered by the sponsoring and the detaining authorities, the same should have been furnished along with the other documents to the detenu". Whether the failure of the sponsoring authority to place the bail application and the bail order before the detaining authority would impair the satisfaction of the detaining authority will depend upon the facts and circumstances of each case and the nature of the bail order passed by the Court. If the bail has been granted by a reasoned order, and the reasons are relevant for the purpose of detention of the detenu and pertains to the merits of the case, then the failure to place the bail order would definitely vitiate the satisfaction of the authority as the reasons for the grant of bail could have influenced his decision in passing the detention order. If, however the order granting bail is cryptic and does not go into the merits of the case and if the reasons are not relevant for the purpose of passing of the detention order then mere failure of the sponsoring authority to produce the bail order and the bail application before the detaining authority would in our view not vitiate the subjective satisfaction reached in the passing of the said detention order. The effect of the non-placing of the bail application and the bail order and its consequences will have to be examined in the facts and circumstances of each case and whether the reasons contained in the application and the bail order would affect the necessity or the urgency in passing the detention order. In the instant case the bail was granted on the reasoning that the statements of the co-accused involving the detenu in the trafficking of drugs was not admissible in evidence. This reason may be a justifiable for grant of bail to an accused, but will have no relevance in arriving at the subjective satisfaction of the detaining authority in the passing of the detention order. The statement of the co-accused and also of the detenu can be taken into account by the detaining authority for the purpose of passing a detention order to prevent the detenu from indulging in trafficking in Narcotic drugs.

8. There is an additional reason why the non-production of the bail application or the bail order will not vitiate the detention order in the present case. After having been enlarged on bail on 14-6-1993, the detenu Firoz was re-arrested on 21-11-1993 and 289 kgs. of Hashish was found. This detenu was thus already in custody when the detention order was passed. That being so, the significance of the bail order would lose its efficacy as the detenu was no longer on bail and

was in custody.

9. The Supreme Court in the case of Abdul Sathar Ibrahim Manik Vs. Union of India and others, , while considering the M. Ahamedkutty Vs. Union of India (UOI) and Another, took the view that the facts of the said case, the failure to place the bail order before the detaining authority had vitiated the detention order. After examining the aforesaid decision, the Court held:

"We are unable to agree with the learned Counsel. We are satisfied that the above observations made by the Division Bench of this Court do not lay down such legal principle in general and a careful examination of the entire discussion would go to show that these observations were made while rejecting the contention that the bail application and the order granting bail though referred to in the grounds were not relied upon and therefore need not be supplied. The case is distinguishable for the reason that the Division Bench has particularly taken care to mention that "considering the facts..... the bail application and the bail order were vital materials". In that view these observations were made. Further that was a case where the detenu was released on bail and was not in custody. This was a vital circumstance which the authority had to consider and rely before passing the detention order and therefore they had to be supplied.

.....

From the above discussion it emerges that even if the bail application and the order refusing bail are not placed before the detaining authority or even if placed, if the detaining authority does not refer to or rely upon or has failed to take them into consideration, that by itself does not lead to an inference that there was suppression of relevant material or in the alternative that there was non application of mind or that subjective satisfaction was impaired. When these documents are neither referred to nor relied upon, there is no need to supply the same to the detenu."

The most significant aspect of this position are contained in para 12(6) of the above judgment, which is reproduced below :

"(6) In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu."

In view of the above proposition of law, the first submission made by the learned Counsel for the detenu fails and is to be rejected as the detenu was not at liberty at the time of passing of the detention order and was in custody, the significance of the order granting bail had lost its relevance and the non consideration of such an order by the detaining authority would not vitiate the subjective satisfaction on the ground of non-application of mind.

10. The next submission is that the orders of detention were illegal as the Police

report dated 26-11-1993 which is referred to in the ground of detention has not been furnished to the detenu and as such his constitutional right to make a representation, under Article 22(5) of the Constitution of India had been violated. From the grounds of detention, it is apparent that the material facts and particulars in regard to the arrest of the detenu on 21-11-1993 and the seizure of 259 kgs. of Hashish have not been stated. It is apparent that the detaining authority has made a passing reference to the incident of 21-11-1993. The said incident has been taken into consideration only to the limited extent that even when the detenu was on bail, he continued with his activities of trafficking in narcotic drugs and as such in the opinion of the detaining authority, it was necessary to detain the detenu from indulging in such prejudicial activities in future. As the detaining authority has merely made a passing reference to the incident of 21-11-1993 and also of earlier detention order on 29-5-1991 and has not made it a basis for passing of the detention orders it was not necessary for him to have furnished the complete records and documents of the said incidents to the detenu. The grounds itself show that mere Police report had been placed before the detaining authority. In this context we would like to refer to a decision of the Supreme Court in the case of Mst. L.M.S. Ummu Saleema Vs. Shri B.B. Gujaral and Anr, , wherein the Apex Court held that

"It is therefore, clear that every failure to furnish copy of a document to which reference is made in the grounds of detention is not an infringement of Article 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 the Fundamental Rights guaranteed by Article 22(5). In our view it is unnecessary to furnish copies of documents to which casual or passing reference may be made in the course of narration of facts and which are not relied upon by the detaining authority in making the order of detention. In the case before us we are satisfied that such were the two documents, copies of which were not furnished to the detenu. We are satisfied that the documents cannot be said to be documents which were relied upon by the detaining authority in making the order of detention. Therefore, the detenu could not properly complain that he was prevented from making an effective representation. There was no violation of the right guaranteed by Article 22 of the Constitution."

11. The last submission of the learned Counsel for the petitioners is that the detention orders are vitiated as the detaining authority has not disclosed the necessity of passing a detention order against the detenus when they were already in custody and therefore, the detention orders are invalid and are the result of non-application of mind by the detaining authority. The said submission has also no force. In the grounds of detention itself, it is specifically mentioned that the detenu was repeatedly involved in prejudicial activities and the detenu were in custody at the time of the passing of the detention orders. The compelling necessity for passing the detention orders is disclosed in the grounds of detention and the order mentions that the detaining authority was satisfied

that the detenue were a part of a gang engaged in trafficking of drugs and as such it was necessary to pass a detention order to prevent them from trafficking in drugs in future. In the affidavit of the detaining authority filed in this Court it is stated that he was aware of the fact that when the order of detention was issued the detenue were in custody and that after availing of the bail facility in C.R. No. 19 of 1993 detenu was re-arrested by the Police on 21-11-1993 in connection with the seizure of 289 kgs. of Hashish and it was on account of the gravity of the prejudicial activities of the detenue and the possibility of their availing of the bail and becoming a free agent again and the further possibility of their indulging in similar prejudicial activities upon their release on bail were the pressing and compelling circumstances which prompted the detaining authority to pass the detention orders, though the detenue were already in custody. The grounds of detention as also the affidavit of the detaining authority fully disclose that the detaining authority was aware of the custody of the detenue while passing the order of detention and it was on account of the likelihood of the detenue being released on bail and indulging in trafficking of drugs that the necessity of the passing of the detention order arose. The Supreme Court in the case of *Devi Lal Mahto Vs. State of Bihar and Another*, , held that the awareness of the detaining authority in passing the detention order against the detenu who is in jail must appear either in the order or in the affidavit justifying the impugned detention order when challenged.

12. In our view the detention orders do not suffer from any infirmity in law and the same are hereby upheld. No case is made out for quashing of the detention orders. The writ petitions fail and are hereby dismissed. Rule discharged.