

(1991) 10 AHC CK 0008

In the Allahabad High Court

Case No : Civil Misc. Habeas Corpus Petition No. 20787 of 1991

Jagdish Chandra Mittal

APPELLANT

Vs

Adhikshak, Kendriya Karagar and Others

RESPONDENT

Date of Decision : 09-10-1991

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 22(5)
Customs Act, 1962 — Section 104, 107, 112, 4

Citation : (1992) 34 ACR 135

Hon'ble Judges : G.D. Dube, J;A.P. Misra, J

Bench : Division Bench

Advocate : Daya Shanker, for the Appellant;

Judgement

By the Court

1. Heard the learned Counsel for the Petitioner and learned Counsel for the State at length.

2. The Petitioner by means of this writ petition has challenged the order of detention dated 26th April, 1991 passed as against Petitioner by Up--Sachiv, Gopan Vibhag, U.P. Government u/s 3(1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Before dealing with the questions raised by the Petitioner, it is necessary to quote necessary facts. On 23rd November, 1990 a Custom authority at Bahraich has seized gold, precious stones, a draft of Rs. 10,000/--a diary, Rs. 2192/--in cash and ticket from Nepal to Nepalganj recovered from the possession of the Petitioner. On 24th November, 1990 a Panchnama was executed. In consequence thereof a search was made at the residences of Petitioner and one Mr. Javedi at Bombay on 22nd November and 26th November, 1990 respectively. However, nothing incriminating was found. A statement of Petitioner thereafter was recorded Under Sections 104 and 107 of the Customs Act. The Petitioner was taken in custody on 25th November,

1990 and his remand was extended till 7th December, 1990. On 6th December, 1990 a bail application was moved by the Petitioner before the Chief Judicial Magistrate which was rejected on the same day. On 7th December, 1990 the remand was extended. The Petitioner thereafter moved the second bail application on 12th December, 1990 which was again rejected by the Special Judicial Magistrate on 19th December, 1990. The Petitioner's bail application was also rejected by the District and Sessions Judge on 2nd January, 1991. A notice of filing a bail application before the High Court was given to the Special counsel for the Custom Department on 4th January, 1990. Bail application of the Petitioner was finally allowed by the High Court on 31st January, 1991 which is Annexure 4 to the writ petition. Thereafter on 1st February, 1991 the Petitioner was released from the jail custody. On 5th February, 1991 a letter was sent to the Custom authority alongwith an affidavit retracting earlier admission made u/s 104 and 107 of the Customs Act which was recorded on 20th and 27th November, 1990. This letter is Annexure 11 to the Petitioner. On 9th April, 1991 a show cause notice u/s 112 of the Customs Act was given to the Petitioner. After receipt of the same on 23rd April, 1991 the Petitioner demanded certain documents in order to reply to the aforesaid show cause notice. It is relevant to mention here that on 26th April, 1991 the aforesaid impugned order of detention alongwith ground of detention was passed by the detaining authority. This detention order was actually served on the Petitioner on 19th May, 1991 when he was at Jaipur and was detained at Central Jail Bareilly on 10th of May, 1991.

3. Thereafter on 13th May, 1991, Annexure 5 to the writ petition, the Petitioner made an application to the Home Secretary to the U.P. Government through Jail authority. The Petitioner's case is that this application was not a representation as against the detention order but was only in the form of a petition made to the authority as no relief of revocation of detention order was prayed in this application. On 4th June, 1991 the Petitioner made an application to the State Government to the Home Secretary, Annexure 6 to the writ petition, for supplying certain essential documents for preparation of full and effective representation. According to the Petitioner on 14th June, 1991, Annexure 7 to the petition, a short representation was made by the Petitioner. Thereafter on the very next date viz. 15th June, 1991, Annexure 8 to the writ petition a detailed representation through a counsel was made both to the Central, as well as, State Government which was sent through registered letter. On 20th June, 1991 the Petitioner was informed (Annexure 9) that his representation dated 15th June, 1991 has been forwarded to the Secretary Finance for appropriate action. Similarly Petitioner was informed on 27th June, 1991 from Secretary to the Government that his aforesaid representation has been forwarded to the Home Department. Thereafter on 30th July, 1991, detention order of the Petitioner was confirmed by the State Government for a period of one year. Aggrieved by the said order and the detention order passed earlier the Petitioner filed the present petition.

4. At the outset the learned Counsel for the Petitioner stated that he is not

seeking any relief as against the Central Government and is not pressing any point so far as the Central Government is concerned. It is on account of this statement that inspite of learned standing counsel for Union of India not present today, the case is taken up.

5. The main two points urged by the learned Counsel for the Petitioner, firstly, that the detaining authority while passing the detention order as against the Petitioner was not aware of the Petitioner being outside jail and hence on account of non-awareness itself the detention order is illegal. Secondly: it was contended that on the date the detention order was passed admittedly the bail application moved by the Petitioner before the High Court and comment of the sponsoring authority viz. the custom authority in the present case to the said application already having come in existence, and it not being placed before the detaining authority or if placed the same not being supplied to the detenu itself takes away effective right of the detenu Under Article 22(5) of the Constitution of India for making effective representation and thus the detention order also be quashed on this ground alone. The second ground is that the relevant papers and the material documents, the Petitioner having prayed for it being supplied through application dated 4th June, 1991, the Respondents not supplying the same itself takes away the right of the Petitioner for making effective reply in support of his representation as against the detention order and thus on account of this also the detention order be quashed.

6. The facts stated as aforesaid is not in dispute nor has been disputed by the learned Counsel appearing for the State. On the aforesaid facts it is pleaded that the Petitioner was released from jail on 1st February, 1991 and impugned order was passed on 26th April, 1991. i.e. to say admittedly the Petitioner was out side the jail having being granted bail by the High Court for almost about three months. The question is whether the detaining authority while passing the detention order was aware of this fact or not. We find from Annexure 2 to the writ petition the ground of detention. It is mentioned that detenu is trying to get out of jail on bail which shows that detaining authority while constituting ground showed on the date of passing the detention order awareness that detenu is in jail and is making attempt to come out from jail by being released on bail. This mention of the ground in the detention order itself speaks complete unawareness of the detaining authority that the Petitioner was already out of jail for the last several months as aforesaid. This complete unawareness of the detaining authority on vital issue has been repeatedly said by this Court and the Supreme Court in catena of authorities to lead to vitiate the detention order. The fact whether the detenu is in jail or out side jail is a very vital consideration to be taken up for consideration by the detaining authority. Before coming to the conclusion regarding detention of a detenu he has further to record the fact whether if detenu is out side jail, there is likelihood on the facts of each case of such detenu of committing or doing recurring incidence in future or not. In case the detenu is out side jail for several months, he has to apply his mind whether for that period, he was out side jail, what was his conduct. It is on account of

this, this Court repeatedly has emphasising application of mind of detaining authority on this aspect of the matter.

7. Coming to the facts of the present case as aforesaid admittedly the detenu was out side jail on 1st February, 1991 and detention order was passed on 26th April, 1991. Apart from non-consideration of facts regarding conduct of detenu after he was released from jail which could not have been considered in view of the ground of the detention order as aforesaid that detaining authority was not aware that the detenu was already set at liberty on bail by the High Court earlier. On account of this we have no hesitation to hold that on this ground alone the impugned detention order as against the Petitioner in the present case can not be sustained in the eyes of law. On behalf of Respondent strong reliance was placed in case of Pawan Kumar v. State of U.P., decided by this Court in Civil Miscellaneous Habeas Corpus writ petition No. 20981 of 1959 decided on 2nd May, 1990.

8. This was a case in which the detention order was challenged on the ground that the satisfaction arrived at by the detaining authority was not real as the order of detention does not show that the detaining authority had considered the facts of the bail application moved by the Petitioners which had been allowed. This Court rejected the said contention raised on behalf of the detenu, and it was held that the non-consideration of the contents of the bail application and the order granting bail can be of any consequence as Petitioners have appended the order by which the Petitioners were released. It was considered in that judgment that the bail was granted only on the ground that custom authorities were not competent to effect arrest, search and seizure. It was further held in that judgment that if the detaining authority has merely not considered this aspect of the matter that the arrest etc. of the Petitioners by the customs authorities may not have been in accordance with the provisions of Section 4 of the Customs Act that cannot in any manner effect the real activity of the Petitioners. Accordingly the said petition of the detenu was dismissed by this Court.

9. No doubt this authority by itself assist the Respondent on the facts of the present case which according to the learned Counsel for the Respondents squarely covers the present case also. However, we find that the said judgment of this Court as aforesaid was set aside by the Hon''ble Supreme Court of India in Criminal Appeal No 317 of 1990 arising out of SLP (Crl.) No. 574 of 1990. We find in this case Hon''ble Supreme Court after considering question decided in the said decision set aside the same and allowed the appeal and held that the said detention order vitiates and suffers from the vice of non-application of mind of the detaining authority entitling the detenu to set at liberty forthwith unless detenu is required from some other matter.

10. Apart from the said judgment being set aside by the Supreme Court as aforesaid in number of cases Hon''ble Supreme Court has held that the detention order passed in such circumstances to be illegal and vitiates. We are not giving exhaustive detail of all authorities but we refer only some of such authorities on

this point which are as under:

P. U. Abdul Rahiman v. Union of India 1991 ECC SC 414 . M. Ahamedkutti Vs. Union of India (UOI) and Another, , Suresh Kumar, v. State of U.P. 1991 LLJ 22, Pradeep Kumar Varma alias Munna v. Superintendent Jail, Varanasi 1991 LLJ 59 and Shakeel Ahmad v. Superintendent of Central Jail, Naini 1990 U.P. CR 337.

11. In view of the aforesaid decisions and the facts and circumstances of this case we find that the detaining authority has shown complete unaware--ness regarding detenu being out side jail for several months. On account of this alone the impugned detention order dated 26th April, 1991 which is Annexure 1 to the writ petition is not sustainable and is accordingly quashed. In view of this, we felt to which learned Counsel for the Petitioner also argued that the other point need not be gone into. We accordingly direct the Respondents to set at liberty the Petitioner for thwith unless he is required in connection with some other case.