

(1987) 05 DEL CK 0019
In the Delhi High Court
Case No : Criminal Writ No. 28 of 1987

Jean Sala

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 25-05-1987

Acts Referred:

Citation : (1988) CriLJ 1640 : (1987) 2 Crimes 616 : (1987) 13 DRJ 197

Hon'ble Judges : M.K. Chawla, J

Bench : Single Bench

Advocate : Ashok Arora, Rajender Dutt and Ajay Chandel, for the Appellant;

Judgement

1. The petitioner Shri M. R. Jean Sala is a French national. He came to New Delhi from Kathmandu on 21-6-86. During his stay in India, he mostly remained in Srinagar, Kashmir. From there, he is alleged to have dispatched a consignment of 38 packages said to contain paper Machie boxes of different shapes and sizes to Calcutta for export by sea to Rotterdam Holland. The said consignment was purchased from one M/s. M. S. Doona & Sons, Srinagar for a total consideration of Rs. 64,700/-.

2. On 7-8-86, the petitioner went to Calcutta for the purpose of supervising and finalising the export of the said 38 packages. On 21-8-86, the shipping bill was presented to the Calcutta Customs for examination by the Customs House Clearing Agent M/s. Jeena & Company, Calcutta. During examination of the said consignment the Customs Officers selected two packages out of 38 for examination. On closer examination, it was observed that the bottoms of the paper Machie boxes were unusually heavier. On breaking open the said boxes it was found that those contained one packet each, securely covered with waxed yellow paper with an outer cellophane covering. On opening the said wrappers, in the presence of two independent witnesses, it was found to contain some dark brownish semi-solid substance, suspected to be narcotic drug. Representative samples of the said substance were drawn and sealed in the presence of the witnesses and sent for Chemical analysis, which confirmed that these are

"Resinous Extract from the Plant Cannabis Sataiva (Charas) dangerous drug."

3. At the time of the examination, the petitioner was not present and in spite of earnest efforts, he could not be found anywhere in Calcutta. The Officers of the Special Investigation Branch later on came to know that the petitioner had left for Port Blair on 19-8-86. A crash radio message was sent to the Inspector General of Police of Andaman and Nicobar Island, for the apprehension of the petitioner. On 23-8-86, the authorities were able to apprehend the petitioner at Andaman Beach Resort Hotel at Port Blair. From his possession, certain quantity of narcotic drug was recovered, which was identical to the narcotic drug detected in the 38 packages at Calcutta. Immediately after his arrest, the petitioner was produced before the Chief Metropolitan Magistrate, Port Blair who remanded him to Police Custody, till 5-9-1986. On 14-10-86, the petitioner was ordered to be released on bail.

4. In the follow up action, the statements of number of persons were recorded which revealed that within a span of three years the petitioner has exported numerous consignments of paper Machie, old wooden furniture clothing material from different parts of India. On the basis of the foregoing facts and circumstances, Shri Tarun Raj Joint Secretary to the Government of India felt satisfied that the petitioner has engaged himself in fraudulent activities of export of contraband goods in contravention of the provisions of Import and Export (Control) Act, 1947. He was further of the opinion that although adjudication proceedings and prosecution proceedings are likely to be initiated against the petitioner, the case is fit for invoking provisions of the COFEPOSA Act with a view to prevent him from smuggling goods. The order of detention is dated 15-10-86, but was served on the petitioner on 21-10-86. This very order is under challenge in this writ petition seeking an appropriate writ order or direction for its quashing.

5. The first and foremost submission of the learned counsel for the petitioner is that the material documents i.e. the petitioner's bail applications dt. 12-9-86, 26/29-9-86 and 14-10-86, the recovery memo dt. 23-8-86 vide which the narcotic drug identical to that found in export consignment, was allegedly recovered from the possession of the petitioner, and the diary showing the petitioner's day to day activities were not placed before the detaining authority. This act of the respondent has deprived the detaining authority to apply its mind to important circumstances bearing on the detention of the petitioner. Furthermore, the material documents were not supplied to the petitioner along with the order of detention, and this has prevented him from making an effective representation. Lastly, his submission is that from the order of detention, it is not clear if the detaining authority applied its mind to the fact that the release of the petitioner from detention was imminent or that the order of detention was necessary to keep him in jail. The subjective satisfaction of the detaining authority must comprehend the very fact that the person sought to be detained is already in jail or under detention or is likely to be released in the immediate future, and yet a preventive detention order is a compelling necessity. The

impugned order does not qualify this test.

6. The stand of the respondent as disclosed in the counter is that all the material documents required for arriving at a subjective satisfaction were duly placed before and considered by the detaining authority. Similarly, the documents which were required for submitting an effective representation were supplied to the petitioner along with the order of detention. It is also their case that the detaining authority was well aware of the fact that the petitioner is likely to be released on bail at any time. The impugned order thus is valid and legal, and does not call for any interference.

7. I have carefully perused the record and considered the rival contentions of the parties. The grounds of attack appear to be quite weighty. It is the admitted case that the petitioner was arrested on 23-8-86 by the Andaman Police. From his personal search certain quantity of narcotic drug was recovered, his arrest and recovery memos were prepared there and then. On 29-8-86 he was brought to Calcutta by the Customs Officers of Calcutta. He was released on bail by the order of the Chief Presidency Magistrate, Calcutta on 14-10-86. Before that, he has moved two bail applications on 12-9-86 and 26/29-9-86 which were dismissed in limine. The order of detention dt. 15-10-86 does not indicate that the copies of the three bail applications, the arrest and the recovery memos were placed before or considered by the detaining authority. In para 19 of the said order, there is a hand-written note that on 14-10-86, the petitioner was ordered to be released on bail. This writing appears to have been added later on probably at the time of the service of the detention order. Normally, in the bail applications, the petitioners disclose their defense and try to make out a case for their false implication. This document in fact is the first available defense version of the of the detenu. Before that, he had no opportunity to plead his innocence. It comes to that the detaining authority was not made aware of the true facts or the defense version disclosed by the petitioner.

8. Furthermore, at the time of the arrest of the petitioner, his personal search was conducted and a narcotic substance was recovered. It was sealed at the spot. As per the allegations of the sponsoring authority, the narcotic substance recovered from the petitioner was identical to the drug detected in the export consignment at Calcutta on 21-8-86. This is the only document which probably connects the petitioner with the alleged attempt to export the narcotic substance from India to Holland. In this way, the contents of the recovery memo assume importance and is a very material document.

9. Besides that, the diary showing the petitioner's day-to-day activities is another piece of evidence which would have shown his connection with the purchase and packing of paper Machie boxes at Kashmir and their transportation to Calcutta and ultimately, export to Holland. This diary would have supplied the important information of petitioner's concern in the export of narcotic drug. All these documents are most material documents which would either have proved his connection with the purchase and export of narcotic substance in paper

Machie boxes or his innocence in this activity.

10. It is not made clear as to why these documents were not placed before the detaining authority. This default certainly has deprived them of their right to arrive at a correct subjective satisfaction for the detention of the petitioner. The Supreme Court in a judgment reported as *Ashadevi Mehta (Detenu) Vs. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat and Another*, has deprecated the attempt of the sponsoring authority to withhold the material documents from the detaining authority with a view to deprive them of arriving at a correct conclusion and thereby putting the petitioner in a disadvantageous position. It lays down;

"that it is well settled that the subjective satisfaction requisite 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 material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order."

This observation applies fully to the facts of the present case, inasmuch as the respondents have not been able to justify their stand of not placing this material and vital documentary evidence, which has a direct bearing before the detaining authority. This default by itself is fatal, to the order of detention.

11. On the next aspect, the petitioner has much more to say. In ground No. 5 of the petition, he has listed as many as 7 documents which were referred to and relied upon by the detaining authority in the grounds of detention, and copies of which were not supplied to the petitioner along with the service of the impugned order and the grounds of detention thus preventing him from making a purposeful representation against his detention. The details of these documents are :

- (a) Recovery memo dt. 23-8-86
- (b) Arrest memo dt. 23-8-86
- (c) Remand application dt. 23-8-66
- (d) Order dated 27-8-86 passed by the Chief Judicial Magistrate, Port Blair
- (e) Order dated 14-10-86 allowing the petitioner's release on bail.
- (f) Complete report of enquiry having been made at Sri Nagar regarding the firm M/s. Doona & Co.
- (g) Paper surrendered by Mr. Debojit Deb on which the petitioner had allegedly written in his handwriting for Doona & Sons.

The respondents in their counter have taken up the stand that even though the copies of these documents were not supplied to the petitioner, but their reference is found in other documents. Some of the documents were not relied upon by the

detaining authority. In this way no prejudice has been caused to the detenu. By this Explanation the respondents have tried to sideline the main issue and to my mind, have fallen in a trap. Each of the documents asked for is a complete document in itself. It could not form part of another document and even if it be so, will not furnish the complete information. It hardly matters if a particular fact concerning these documents is mentioned in another document which may or may not have an important bearing on the issue in question. It is not disputed that during the course of the enquiry, the Department contacted M/s. Doona & Co. of Kashmir as well as the concerned Customs Clearing Agents at Calcutta. The petitioner is not made aware of the said enquiry report even though the sponsoring authority is in possession of the same. During the course of the recording of the statement of the Clearing Agent, it has come on record that their Custom Clearance license has since been revoked by the concerned Department on charges of smuggling. We do not know what stand has been taken by M/s. Doona & Co. in respect of the recovery of narcotic substance in packing of the paper Machie boxes done at their end. We are also kept in dark as to whether the petitioner was present at the time of its packing or not. The possibility of the partners of M/s. Doona & Co. in concealing the drug in false bottoms on their own cannot be ruled out. Without the knowledge of the petitioner, they may also be in league with the clearing agents, for export of the dangerous drug. During the enquiry the sponsoring authority must have come to know of the real culprits. There was no occasion for them not to supply this material information to the petitioner, if at all he was involved in this smuggling activity, and certainly this lapse has deprived the petitioner of his right to make an effective representation.

12. For the non-supply of material documents a serious view has been taken in number of detention matters. One such case is reported as Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI) and Others, . On this aspect, it lays down as under :-

"Once the documents are referred to in the grounds of detention, it becomes the bounden duty of the detaining authority to supply the same to the detenu as part of the grounds or *pari passu* the grounds of detention Thus, it is absolutely clear to us that whether the documents concerned are referred to, relied upon or taken into consideration by the detaining authority, they have to be supplied to the detenu as part of the grounds so as to enable the detenu to make an effective representation immediately on receiving the grounds of detention. This not having been done in the present case, the continued detention of the petitioner must be held to be void."

13. In the subsequent judgment of the Supreme Court reported as Mohd. Zakir Vs. Delhi Administration and Others, , it was observed as under :-

"It is the constitutional mandate which requires the detaining authority to give the documents relied on or referred to in the order of detention *pari passu* the grounds of detention in order that the detenu may make an effective

representation immediately instead of waiting for the documents to be supplied with. It is manifest that question of demanding the documents is wholly irrelevant. The infirmity in this regard is vocative of constitutional safeguard enshrined in Art. 22(5) of Constitution."

14. Following the above said dictum laid down by the Supreme Court judgments which applies to the facts of the present case, I have no hesitation to hold that on this short ground alone the petition must succeed.

15. The last contention also deserves thorough probe. The Division Bench of this Court in case reported as Robert Lendi Vs. K.K. Dwivedi and Others, , had the occasion to deal with the contention that once the petitioner is reported to be in jail, there was no need for passing any detention order against him as the said order would amount to double detention. The Division Bench of this court followed the observations of the case reported as Vijender Kumar Jain Vs. Union of India and Others, , decided on December 10, 1985 and after noticing various judgments on the subject, held as under :-

"A detention order can be passed against a person who is in detention or in jail but the detention order or the grounds of detention served on the detenu must show that the detaining authority is aware of the fact that the person against whom the detention order is being passed is already in jail, and if still the detaining authority finds it necessary to pass the order of detention there has to be material before the detaining authority to reach the satisfaction. In arriving at the satisfaction an important factor would be antecedent history and the past conduct of the detenu. It would, naturally, depend on the facts and circumstances of each case whether a detention order should or should not be made in the case of a person who is already in jail."

16. With this background one has to examine the facts. The petitioner was arrested at Port Blair on 23-8-86. He was brought to Calcutta on 29-8-86. While in judicial custody the petitioner moved three bail applications. The first two were dismissed while the last one dt. 14-10-86 was allowed. The order of his detention is dt. 15-10-86. As observed earlier, in the grounds of detention, there is no mention of the fact that the accused has moved any bail application, or the same has been rejected. The copies of the grounds of detention supplied to the petitioner are in cyclostyled form, on which the order of release on bail on 14-10-86 has been added in hand. Normally, it takes quite sometime for the sponsoring authority to make up its mind for initiating proceedings under the COFEPOSA Act. Firstly the proposal is drawn up, then the file is taken from one officer to another for approval. It reaches in the office of the detaining authority after sufficiently long time. It cannot be that immediately on coming to know of the release of the accused on bail, the order of detention was drawn up, approved and issued. It comes to that these facts were not before the detaining authority when the order of detention was approved and passed. For that reason, the detaining authority must not have applied its mind, that the man is in custody, or that there is no imminent possibility of the release. At least there is

no indication in the impugned order. If there were cogent reasons for thinking that the detenu might be released then these should have been made apparent. If that is the position, then, however, disreputable the antecedents of a person, might have been, without consideration of all the aforesaid relevant factors, the detenu could not have been put in preventive custody. This is also a material circumstance which has come out prominently entitling his release.

17. In the result, the petition succeeds. The detenu be set at liberty immediately, if not required to be detained in any other case.

18. Petition allowed.