
(2001) 03 KL CK 0069
In the High Court Of Kerala
Case No : O.P. No. 28358 of 2000 (S)

K.V. Asharaff

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 01-03-2001

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 22(5)
Criminal Procedure Code, 1973 (CrPC) — Section 437, 473

Citation : (2001) CriLJ 1967

Hon'ble Judges : K.S Radhakrishnan, J;G.S. Sasidharan, J

Bench : Division Bench

Advocate : R. Anil, for the Appellant; K. Ramakumar, SGGSC, for No. 2 and P.M. Poullose, Govt. Pleader, for Nos. 1 and 3, for the Respondent

Final Decision : Allowed

Judgement

Radhakrishnan, J.—The question that is posed for consideration is whether non-consideration of the bail application and the order granting bail by a Magistrate would vitiate the Detention order issued u/s 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA") especially when whose documents were placed before the Detaining Authority by the sponsoring authority.

2. This writ of habeas corpus is moved by the brother of one. A Sharaffudin who is under detention in the Central Prison. Thiruvananthapuram u/s 3(1)(i) of COFEPOSA to release and set him at liberty. Detention order dated 1-6-2000 is challenged on various grounds. Main ground is non-application of mind by the Detaining Authority on the bail application preferred by the detenu and the bail order in Cr1. M.P. No. 4161 of 2000 dated 22-5-2000 passed by the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam.

3. Short facts which are necessary for the disposal of the case are as follows :

Superintendent, of Air Intelligence Unit, Calicut Airport intercepted the detenu on 13-4-2000 on his arrival at the baggage hall of Calicut Airport by Jet Airways flight. On examination it was revealed that he had attempted to smuggle into India by concealment and by non-declaration of 30 biscuits weighing 3495 grams of foreign origin gold valued at Rs. 15,72,750/-. A mahazar was prepared on 13-4-2000. Voluntary statement was given by the detenu on the same day itself before the Superintendent, AIO, Calicut. Sharafuddin was then arrested on 13-4-2000 and produced before the Chief Judicial Magistrate, Manjeri on 14-4-2000 and was remanded to judicial custody. Remand order was extended upto 12-5-2000 by the Additional Chief Judicial Magistrate (Economic Offences) Ernakulam. Detenu then moved Cr1. M.P. No. 4161 of 2000, before the Additional Chief Judicial Magistrate (Economic Offences) Ernakulam, which was dismissed on 2-5-2000. Another application for bail was submitted before the District and Sessions Court, Ernakulam. Complainant filed objection on 5-5-2000 against the said application. After hearing both parties, the bail application was dismissed by the District and Sessions Judge, Ernakulam. Yet another bail application was moved by the detenu before the Additional Chief Judicial Magistrate (Economic Offences) Ernakulam on 8-5-2000. On 22-5-2000 complainant filed applicaion to the said bail application. Additional Chief Judicial Magistrate (Economic Offences) Ernakulam passed the following order:

This is a second petition for bail. Objection filed by the prosecutor, seeking time to further investigate the case and it is also submitted that proposal is sent to the COFEPOSA Board to detain the accused.

Considering the fact that the accused has been in judicial remand since 13-4-2000. I find that the prosecution has got sufficient time to investigate and apprehend any other person likely to be involved in the offence.

The fact that the case of the accused is proposed for detention under COFEPOSA is no reason to deny bail. If any order is made for detention under COFEPOSA, the accused can be detained and granting of bail will in any way cause obstruction for such detention. However to secure the presence of the accused for investigation and detention if any, the following conditions are imposed for granting bail.

- (1) The accused shall execute a bail bond to Rs. 2 lakhs with two solvent sureties for like amount having solvency certificates.
- (2) He shall deposit Rs. 20,000/- as cash security.
- (3) He will report before the Investigating Officer on every Monday between 10 a.m. and 12 noon till further orders.

The accused shall appear before this Court on receipt of summon.

The detenu complied with the terms and conditions of the bail order and got himself released.

4. Detaining authority in the meanwhile passed order dated 1-6-2000 detaining the detenu in exercise of the powers conferred u/s 3(1)(i) of COFEPOSA and ordered that detenu be detained and kept in custody. On the basis of the said order detenu was arrested and detained in the Central Prison, Thiruvananthapuram on 19-6-2000.

5. Detention order dated 1-6-2000 along with Malayalam version of the grounds of detention and the documents numbering 15 stated to have been relied upon by the detaining authority were forwarded to the detenu. It was received at the Central Prison on 20-6-2000.

6. Detenu then sent a representation dated 7-7-2000 through the Superintendent of Central Prison to the detaining authority for revocation of the order of detention. Detenu filed objection with regard to the non-consideration of his bail application and the order passed by the Additional Chief Judicial Magistrate (Economic Offences) granting bail. We may extract relevant portion of the objection hereunder.

9. I submit that the sponsoring authority sent the written proposal and some of the documents to the detaining authority who considered the same, the grounds of detention and approved my detention. I also submit that the document numbers 11 to 15 mentioned in the list of documents supplied to me along with the grounds of detention were received after the grounds of detention were formulated and approved by the detaining authority. But the office of the detaining authority simply added those five documents in the list of documents to make it appear that those documents were also considered by the detaining authority. But the office of the detaining authority simply added those five documents in the list of documents to make it appear that those documents were also considered by the detaining authority. The mere perusal of the list of documents would clearly reveal that those 5 documents with its page numbers were subsequently type-written and included in the list of documents. In this context it is pertinent to read para 06 of the grounds of detention. Para 06 of the grounds of detention reads as follows:

You were arrested on 13-4-2000 and produced before the Hon"ble Chief Judicial Magistrate, Mancheri on 14-4-2000 and remanded to Judicial custody. Your remand was extended upto 12-5-2000 by the Additional Chief Judicial Magistrate (F.O.) Ernakulam.

There is no mention in the grounds of detention regarding any subsequent event that occurred after 12-5-2000. From the above facts it is quite clear that the detaining authority has not perused any of the documents which came into existence after 12-5-2000. On 15-5-2000 a remand extension application was filed by the department before the Court of the Additional C.J.M. (E.O.), Ernakulam. On 18-5-2000 an application for bail was filed before the Court of the Additional C.J.M. (E.O.), Ernakulam. A written objection was filed by the department to the said bail application. The said application for bail was

dismissed by the Additional C.J.M. (E.O.), Ernakulam by order dated 2-5-2000. Thereafter an application for bail was filed by me on 3-5-2000 before the District and Sessions Court at Ernakulam. On 5-5-2000 an objection was filed by the department to the said bail application. After hearing both parties the said bail application was dismissed by the District and Sessions Judge, Ernakulam. Thereafter a second bail application was filed before the Court of the Additional C.J.M. (E.O.), Ernakulam on 18-5-2000. On 22-5-2000 the department filed objection to the said application. The said application was allowed by the Court by order dated.22-5-2000. It is submitted that the detaining authority was not alive to those documents, particularly the documents which came into existence after 12-5-2000.

In the objection he has also stated that many of the vital documents were neither placed before the detaining authority nor considered by it.

7. Counsel for the petitioner Sri R. Anil submitted that in fact detention order was passed by the detaining authority without looking into the application for bail submitted by the detenu and the order passed by the Court to that effect on 22-6-2000. Counsel contended a cursory look at the Detention Order would reveal that Doc. Nos. 11 to 15 were subsequently type-written and incorporated along with the list of documents and that the detaining authority had not examined those documents while passing the Detention Order. Counsel further submitted that the detenu submitted letter-of retraction to the Commissioner of Customs and Central Excise along with Ext. P3 representation. But the retraction statement was not considered by the detaining authority along with the representation. Representation submitted by the detenu against continued detention was wrongly rejected by the detaining authority by order dated 20-7-2000. Counsel submitted that the said order rejecting the request of the detenu for revocation of the detention order is illegal.

8. Government Pleader appearing for the State Sri. P.M. Poulouse submitted that all the relevant documents were made available by the sponsoring authority to the detaining authority and were considered by the authority. Counsel contended a detailed order examining each and every document is unnecessary. Counsel submitted that the authority had passed a valid order in accordance with the powers conferred u/s 3(1)(i) of COFEPOSA. Placing reliance on the counter-affidavit learned Government Pleader submitted that the detaining authority after considering the facts and circumstances of the case kept the detenu under detention.

9. Senior Central Government Standing Counsel relying upon the counter-affidavit of the second respondent submitted that all the necessary materials and documents were made available to the detaining authority who in turn forwarded the same to the detenu. It is his contention that no retraction statement was received from the detenu.

10. When the matter came up for hearing we called for the original files from the

detaining authority and perused the same. We notice from the file that documents 11 to 15 annexed along with the annexures stated to have been relied on by the detaining authority were received by the said authority on 29-5-2000. Those documents are enumerated below :

11. Order in Cr1. M.P. No. 4161/2000 of dd1. CJM granting bail to Shri Sharafuddin accused in O.S. No. 8/2000.

12. Copy of objection filed by Prosecutor in Cr1. M.P. 4161/2000.

13. Copy of bail application filed by the accused.

14. Copy of Cr1 Misc. Petition filed by the accused before the District and Sessions Court in Cr1. Misc. 1219/2000.

15. Objection filed by the Prosecutor in Cr1. M.P. 1219/2000 before the Sessions Court.

We notice the above documents 11 to 15 were subsequently typed and incorporated along with the list of documents stated to have been relied upon by the detaining authority since they were received only on 29-5-2000. We notice by the time a draft detention order in all probability must have been prepared. In this connection we would refer to paragraph 6 of the grounds of detention which we extract below :

You were arrested on 13-4-2000 and produced before the Hon"ble Chief Judicial Magistrate, Mancheri on 14-4-2000 and remanded to judicial custody. Your remand was extended upto 12-5-2000 by the Additional Chief Judicial Magistrate (E.O.), Ernakulam.

There is absolutely no whisper about the copy of bail application preferred by the detenu or the order passed by the Additional Chief Judicial Magistrate, (Economic Offence) Ernakulam on the bail application on 22-5-2000. This, according to us, is vital flaw which vitiates the detention order.

11. Bail has been granted by the Magistrate in exercise of the powers conferred Under 437 of the Code of Criminal Procedure. While exercising the powers the Chief Judicial Magistrate has not considered the fact that the accused was in judicial remand since 13-4-2000 and that the prosecution had got sufficient time to investigate and apprehend any other person likely to be involved in the offence and that, if any order of detention is passed accused can be detained and granting of bail would not in any way cause obstruction for such detention. This was the reasoning of the Chief Judicial Magistrate (Economic Offence) when he granted bail. We are of the view when detenu is arrested and when he is already on bail granted by the Chief Judicial Magistrate in exercise of the powers conferred u/s 437 of the Code of Criminal Procedure that order is of vital importance to be taken into consideration by the detaining authority when detention order is passed especially when the order was placed before the Detaining Authority to the Sponsoring Authority.

12. The apex Court in *M. Ahamedkutty Vs. Union of India (UOI) and Another*, had occasion to consider the scope of a detention order while the detenu is already on bail and the impact of the bail application and the order passed on the said application. In that case the apex Court held as follows :

Considering the facts the bail application and the bail order were vital materials for consideration if those were not considered the satisfaction of the detaining authority itself would have been impaired, and if those had been considered, they would be documents relied on by the detaining authority though not specifically mentioned is the annexure to the order of detention and those ought to have formed part of the documents supplied to the detenu with the grounds of detention and without them the grounds themselves could not be said to have been complete. It must therefore be held that if amounted to denial of the detenu's right to make an effective representation and that if resulted in violation of Article 22(5) rendering the continued detention of the detenu illegal and entitling the detenu to be set at liberty in this case.

The apex Court in *Abdul Sathar Ibrahim Manik Vs. Union of India and others*, while dealing with a case of detenu who was already on bail under the COFEPOSA, after analysing the various decisions laid down the following propositions :

(1) A detention order can validly be passed even in the case of a person who is already in custody. In such a case, it must appear from the grounds that the authority was aware that the detenu was already in custody.

(2) When such awareness is there then it should further appear from the grounds that there was enough material necessitating the detention of the person in custody. This aspect depends upon various considerations and facts and circumstances of each case. If there is possibility of his being released and on being so released he is likely to indulge in prejudicial activity then that would be one such compelling necessity to pass the detention order. The order cannot be quashed on the ground that the proper course for the authority was to oppose the bail and that if bail is granted notwithstanding such opposition the same can be questioned before a higher Court.

(3) If the detenu has moved for bail then the application and the order thereon refusing bail even if not placed before the detaining authority it does not amount to suppression of relevant material. The question of non-application of mind and satisfaction being impaired does not arise as long as the detaining authority was aware of the fact that the detenu was in actual custody.

(4) Accordingly the non-supply of the copies of bail application or the order refusing bail to the detenu cannot affect the detenu's right of being afforded a reasonable opportunity guaranteed under Article 22(5) when it is clear that the authority has not relied or referred to the same.

(5) When the detaining authority has merely referred to them in the narration of

events and has not relied upon them, failure to supply bail application and order refusing bail will not cause any prejudice to the detenu in making an effective representation. Only when the detaining authority has not only referred to but also relied upon them in arriving at the necessary satisfaction then failure to supply these documents, may, in certain cases depending upon the facts and circumstances amount to violation of Article 22(5) of the Constitution of India. Whether in a given case the detaining authority has casually or passingly referred to these documents or also relied upon them depends upon the facts and the grounds which aspect can be examined by the Court.

(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 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.

The propositions thus stated by the apex Court would indicate that in a case where detenu is released on bail and set at liberty at the time of passing the order of detention, detaining authority has to necessarily rely upon them as that would be a vital ground for the formation of its opinion, detention. In such case the apex Court said that bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu. The apex Court in *Ahamed Nassar Vs. The State of Tamil Nadu and Others*, held that detaining authority, in spite of the rejection of the bail application by the Court can come to its own satisfaction based on the contents of the bail application. The afore-mentioned decisions were later considered by a bench of this Court in *Pathooty Vs. State of Kerala and Another*, . This Court noticed the distinction between bail being granted before the order of detention and bail being granted subsequent to the order of detention. This Court held that when detenu was already on bail before detention order was passed, bail order and bail application were vital documents which are to be considered by the detaining authority. Purpose of the detention under COFEPOSA is not punitive but preventive but where the liberty of a citizen is infringed it is the bounden duty of the Court to take all safeguards. When once liberty is to be curtailed on the subjective satisfaction of the detaining authority with area of interference of the detaining authority with area of interference by the Court then the Court must see that the detaining authority does not stretch legitimately in the exercise of its jurisdiction. Non-consideration of vital documents would vitiate the order of detention. When detenu is on bail granted by a competent Court, application moved by the detenu and the bail granted by the Court are all vital documents. Detaining Authority is arresting and detaining a person who is granted bail by a competent Court. Therefore it is imperative that those documents should be considered while passing order of detention.

13. In the instant case, we notice all those documents were with the detaining authority before actually passing the detention order on 1-6-2000. There is no

reference to any of the documents Nos. 11 to 15 in the order of detention. Non-consideration of and non-application of mind to those documents would in our view, vitiate the order of detention. In the instant case before the detaining authority there existed not only order rejecting the bail but also contents of the bail application. Averments made in the bail application as well as the order passed by the Court u/s 473 of the Code of Criminal Procedure are all relevant documents on which subjective satisfaction could legitimately be drawn either way. In spite of rejection of bail application by Court it is open to the detaining authority to come to its own satisfaction based on the contents of the bail application keeping the nature and circumstances that there is likelihood of detenu being released on bail. So also keeping in view that the contents of the bail application and the manner in which bail application was considered by the Magistrate and the ground on which he was satisfied of granting bail will also have a bearing to form subjective satisfaction of the detaining authority in passing the detention order. All those documents were vital documents. In the case we notice those documents though made available by the sponsoring authority were not considered by the detaining authority while issuing the order of detention. Non-application of mind to the available documents would therefore vitiate the order of detention.

14. We have reminded the authorities concerned in our judgment in *Pathooty Vs. State of Kerala and Another*, of the necessity of meticulous compliance with the procedural safeguard however technical is mandatory. In this case even though the copies of the bail application and the order passed thereon were before the Detaining Authority they have not dealt with the documents in the grounds of detention. The Detaining Authority may not be bound by the order of bail releasing the accused but a factor to be taken note of while forming the subjective satisfaction for detaining a person in prison without trial. The authorities should bestow more attention to these matters in future.

15. We have already found that the detention order is vitiated by patent illegality. Therefore we have no other alternative but to set aside the order of detention. We therefore hold that the detention order dated 1-6-2000 suffers from patent illegality and this cannot be sustained. Detention order is therefore quashed and K.V. Sharafuddin is ordered to be set at liberty forthwith unless wanted in connection with some other case. The original petition is allowed as above.