
(1990) 08 BOM CK 0103

In the Bombay High Court

Case No : Criminal Writ Petition No. 526 of 1990

Loretta Fernandes

APPELLANT

Vs

L. Hmingliana, Secy. (Prev. Detention)

RESPONDENT

Date of Decision : 21-08-1990

Acts Referred:

Customs Act, 1962 — Section 108

Citation : (1991) 54 ELT 165

Hon'ble Judges : S.P. Kurdukar, J; E.D.D. Da Silva, J

Bench : Division Bench

Advocate : Shri R.G. Merchant, for the Appellant; Mrs. R.P. Desai, Public Prosecutor and Shri M.K. Patwardhan and Shri J.C. Satpute, for the Respondent

Judgement

Kurdukar, J.—This is a petition for a writ of habeas corpus filed by the petitioner under Article 226 of the Constitution of India. The petitioner claims to be the sister of one Orlando Fernandes, who came to be detained pursuant to the order dated April 17, 1990, issued by the 1st Respondent in exercise of the powers conferred on him u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the Act"). The petitioner in this petition seeks to challenge the legality and correctness of the order of detention dated 17th April 1990.

2. Mr. Merchant, learned Advocate appearing in support of this petition raised formidable grounds to invalidate the impugned order or detention. In view of his submissions & in our opinion, it is not necessary to reproduce the grounds of detention formulated by the Detaining Authority while issuing the impugned order of detention. Suffice it to say that the detenu at the relevant time was an employee of Trans Meditterrianian Airlines as Traffic Assistant. His duties were at the Sahara Airport, Bombay. The detenu along with other members of the Trans Meditterrianian Airlines, viz. Gul Rajsinghani, Ramesh Pai and Nazir E. Mukadam were also involved in the incident in question which took place on 19th February, 1990. On 19th February 1990, the Customs Officers attached to Air Intelligence

Unit intercepted on suspicion, Jeep; bearing Registration No. BLD 2905 of the Trans Meditterrianian Airlines at Exit Gate No. 5. The detenu was driving the jeep. The jeep was stopped and upon questioning by the Customs Officers, the detenu and co-occupant denied to have concealed any contraband gold or having any knowledge of the concealment. The jeep was then taken to the Cargo Warehouse of R.M.A. for the purpose of taking search. Gul Rajsinghani, the other co-accused escaped from the scene under the pretext of attending nature's call. Two panchas were called and in their presence search of the jeep was taken. The officers opened the glow compartment of the jeep with the bunch of keys produced by the detenu, but nothing incriminating was found therein. On opening the tool box underneath the driver's seat with the keys, which the detenu was having, the Customs officers found one blue coloured cloth belt stitched. The Customs Officers removed the cloth belt which was found to be unusually heavy. On further investigation, the said belt resulted into recovery of 580 gold bars having different foreign markings collectively weighed 67,628 gms. and were valued at Rs. 1,29,84,576/- LMV and Rs. 2,46,84,220/- LMV. They were seized by the Customs officers under the bona fide belief that the same are liable for confiscation under the Customs Act. The statement of the detenu and various co-accused were recorded by the Customs Officers. The Sponsoring Authority placed before the Detaining Authority the documents as per Annexure "C" (list of documents) for its consideration. The Detaining Authority on being subjectively satisfied that the detenu has been involved in the prejudicial activities under the Act the with a view to preventing him from indulging in such prejudicial activities in future, it is necessary to issue the order of detention u/s 3(1) of the Act. The Detaining Authority, accordingly, issued order of detention against the detenu. It is this order which is the subject matter of challenge in this writ petition.

3. Although several contentions are taken up in this writ petition, but, however, Mr. Merchant appearing for the petitioner put forth contention raised in paragraph 5(d) of the petition. According to the learned Counsel, this contention invalidates the impugned order of detention and, therefore, it is not necessary to go into any other contention. Contention raised in 5(d) is that on 26th February, 1990, the detenu had submitted an application to the Court of Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Bombay, retracting his confessional statement recorded on the earlier occasion alleging that the confessional statement recorded by the Customs Officers u/s 108 of the Customs Act, 1962 was obtained by force in ill treatment. The said retraction was sent by the detenu through the Superintendent of the Bombay Central Prison, Bombay, to the Court and the same was received by the Court and taken on record on or about 28-12-1990. A copy of the said retraction statement is annexed to this petition as annexure "K". This retraction statement was a vital document and it was enjoined upon the Sponsoring Authority to have placed before the Detaining Authority the said retraction statement, and it was equally enjoined upon the Detaining Authority not only to have considered the statement but also to have

furnished copy of the same to the detenu along with the grounds of detention. Since the vital document i.e. the retraction was not placed before the Detaining Authority, his subjective satisfaction must stand vitiated. The further contention raised in this ground of attack is that since copy of the retraction was not furnished to the detenu, his right to make effective representation to the various authority was violated and consequently detention order must be struck down on the ground of non-compliance of Article 22(5) of the Constitution of India.

4. Mr. Hmingliana, the Detaining Authority has filed the return and in reply to the above contention, return reads as under :-

"With reference to para 5(d) and (e), I say that the retraction application and the bail applications referred to in paragraph under reply were not served on the Sponsoring Authority. The petitioner has not annexed to the Petition, the xerox copies of the said applications. The petitioner may prove that, in fact, the Sponsoring Authorities were served with the copies of the said documents. In any event, I do not admit that the said documents are vital and material documents. I deny that non-placement and consequent non-consideration of the said allegedly vital material amounts to non-application of mind on my part. I deny that it was enjoined upon me to have furnished to the detenu a copy of the said retraction application. I deny that non-application and non-supply of the said allegedly vital document is fatal to the detention. I deny that the fundamental rights guaranteed to the detenu under Article 22(5) of the Constitution of India are vitiated the infringed rendering the detention and/or continued detention of the detenu mala fide, null and void."

It is well settled that the retraction is a vital document and it should be placed before the Detaining Authority for its consideration while issuing the detention order under the Act. A rider will have to be added as to whether such retraction has been served upon the Sponsoring Authority and, therefore, the Sponsoring Authority had knowledge of such retraction and/or the said retraction was referred to in any of the contemporaneous documents filed in the Court. As far as facts of the present case are concerned, Mr. Merchant drew our attention to the retraction statement annexed at page 55, which is dated 24th February, 1990. According to the petitioner, the detenu was in custody and, therefore, it was sent through the Superintendent of the Bombay Central Prison, Bombay, to the Court of Addl. Chief Metropolitan Magistrate, 8th Court, Esplanade, Bombay. It is averred in the petition that it was taken on record by the Magistrate on 28th February, 1990. There is no denial on the part of the Detaining Authority of this fact. We, therefore, proceed on the assumption that the retraction dated 24th February, 1990 was received by the Court and taken on record vide order dated 28th February, 1990.

Mr. Merchant then drew our attention to the interim bail application made on behalf of the detenu to the Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Bombay. The application is Annexure "1" (page 57) to the petition. In this application, apart from praying for bail, the detenu in para 6 has stated as

under :

"The accused has, on the 26-2-1990, filed in this court an application through jail, retracting his statement extorted by the officers of customs against his will."

Mr. Merchant urged that although retraction is dated 24th February, 1990, it was forwarded to the jail authority on 26th February, 1990, and, therefore, in the bail application at Ex. "L", the retraction is referred to as dated 26th February, 1990. On this bail application, the Court passed the following order :

"Notice to Customs returnable tomorrow."

This bail application was heard by the Magistrate on 6th March, 1990 and order was passed on 7th March, 1990. What is important to note is that the bail application filed by the detenu at Annexure "L" was the subject-matter of consideration before the learned Additional Chief Metropolitan Magistrate, Bombay in his order dated 7th March, 1990 and accordingly, after hearing Respondents and the detenu's counsel, the Court vide its order dated 7th March, 1990 refused bail to the detenu and remanded him to the jail custody till 16th March, 1990. In para 2 of the said order, there is specific reference to the submission of the learned Advocate for the accused and the learned Public Prosecutor Shri A. R. Gupta having been heard on 2-3-1990 and on 6-3-1990 on the question of bail for detenu and other co-accused. In para 5, contention raised on behalf of the detenu was also summarised to the effect that the confessional statement was not voluntary one, but it was obtained by the customs officers by using third degree methods. There is also reference to certain medical certificates as regards injury on the detenu. The Court then observed as under :

"Even if it is assumed that the retracted confessional statements were not of voluntary nature still for the purpose of initial investigation the same can be considered for the purpose of granting judicial custody for further investigation."

From the above material it is clear to us that the Counsel appearing for the Customs Department was very much aware of the retraction statement taken on record by the Court on 28-2-1990 and the said statement of retraction was the subject-matter of controversy before the learned Magistrate. If this be so, it must follow that the Customs Department who was represented by Advocate Shri A. R. Gupte was aware of the retraction statement of the detenu taken on record on 28-2-1990. In these circumstances it was necessary for the Sponsoring Authority to have obtained a copy of such retraction statement from the Court and it was equally enjoined upon it to have placed it before the Detaining Authority for its consideration, one way or the other. Having not done so, in our opinion, the subjective satisfaction of the detaining authority must stand vitiated.

5. Mrs. Desai, however, submitted that it was obligatory on the part of the detenu to serve copy of the retraction on the Customs Department as also on the Advocate appearing for the Customs Department in the trial Court. If such course was not adopted by the detenu, then certainly no fault whatsoever could be

found with the sponsoring authority for having not placed the retraction statement before the Detaining Authority. In the present case, we need not decide this issue in view of the fact that the retraction dated 24-2-1990 was very much within the knowledge of the Advocate for the Customs Department since application made by the detenu for bail was contested by the Customs Department and ultimately the said application was rejected and the detenu was remanded to judicial custody till 16th March, 1990. In the face of this material it cannot be said that the sponsoring authority was not aware of such vital document. The claim of the detaining authority that copy was not served on the sponsoring authority and consequently the same was not placed before it for consideration can hardly be accepted. Having regard to the facts and circumstances of the case, in our opinion, it was obligatory on the part of the sponsoring authority to have placed the retraction statement before the Detaining Authority for its consideration, one way or the other and having not placed the same, before the Detaining Authority, the subjective satisfaction must stand vitiated.

6. In view of our conclusions, it must follow that the impugned detention order is bad and illegal and cannot be sustained. The impugned order of detention dated 17th April, 1990 at Exhibit "A" is quashed and set aside.

Rule made absolute. Detenu be set at liberty forthwith if not required in any other case. No order as to costs.