
(1990) 01 DEL CK 0002

In the Delhi High Court

Case No : Criminal Writ Petition No. 657 of 1989

Maresh Kumar Chauhan @ Banti

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 29-01-1990

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (1990) 41 DLT 628 : (1990) 2 ILR Delhi 342

Hon'ble Judges : P.K. Bahri, J

Bench : Single Bench

Advocate : Harjinder Singh, Rohit Kochhar, S.K. Mishra and S.K. Dubey, for the Appellant;

Judgement

Bahri, J.

(1) This petition has been brought under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, seeking issuance of a writ of habeas corpus or any other appropriate writ or direction for immediate release of the petitioner and for quashing the order of detention dated July 13, 1989, passed by respondent No. 2 u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (hereinafter referred to as "Cofeposa Act").

(2) The first contention raised by learned counsel for the petitioner in support of the writ petition is that the petitioner had made a representation dated August 18, 1989, in which inter alia, he had prayed for supply of copy of the retraction made by a co-detenu dated June 21, 1989, which he had sent through the Superintendent Central Jail to Additional Chief Metropolitan Magistrate, New Delhi, and a memo of rejection of the representation dated September 19, 1989, was received in which it was indicated that copy of the said retraction is attached

but in fact, the copy of the retraction of Vijay Kumar was not so attached and the petitioner had sent another representation dated October 11, 1989, pointing out this mistake of the respondent.

(3) It is now not disputed before me that no copy of the retraction of Vijay Kumar which he had sent through Superintendent Central Jail dated June 21, 1989, to Additional Chief Metropolitan Magistrate, New Delhi, has been supplied to the petitioner. The question which has been raised before me is whether non-supply of such copy of the retraction of Vijay Kumar vitiates the detention order or not inasmuch as whether the petitioner had been deprived of making an effective and purposeful representation against his detention or not ?

(4) The learned counsel for the petitioner has vehemently argued that a legal duty has been cast on the respondent to have supplied the copy of the retraction of Vijay Kumar as the same could have enabled the petitioner to have made an effective and purposeful representation against the order of detention.

(5) The learned counsel for the respondents has, on the other hand, vehemently argued that the retraction of Vijay Kumar contained in letter dated June 21, 1989, sent to Additional Chief Metropolitan Magistrate through Superintendent, Tihar Jail, contained some facts which he had enumerated in earlier documents appearing at Serial Nos. 39, 40 & 45 of the list of documents, relied upon for passing the detention order, of which copies stood duly supplied to the petitioner and thus, the petitioner has not been deprived of his right to make an effective and purposeful representation based on such retraction of Vijay Kumar, co-detenus. The learned counsel for the respondents has also contended that there is no reference made to retraction of Vijay Kumar dated June 21, 1989, in the grounds of detention or in the documents relied upon of which copies stood supplied to the petitioner and thus, no duty was cast on the authorities to have supplied copy of the said retraction of Vijay Kumar to the petitioner and he has placed reliance on the judgment of this Court taking similar view in *Mohd. Saleem v. Union of India & Others* 1989(2) DL 109(1).

(6) I find much force in the contention of the learned counsel for the respondents. The Court has to go by realities of life and things. No hyper-technical view has to be taken just to see that the order of detention is quashed. After all the only thing to be seen is whether the petitioner had an opportunity of making an effective and purposeful representation and any material which is required by the petitioner for making a purposeful and effective representation is made available to the petitioner or not. In the present case, the facts which had been mentioned in the retraction of Vijay Kumar dated June 21, 1989, stood already enumerated in documents of which copies already stood supplied to the petitioner and such documents appeared at Serial Nos. 39, 40 and 45 of the list of documents. It is not shown that any additional fact stood mentioned in the retraction of Vijay Kumar dated June 21, 1989, which could have been taken benefit of by the petitioner for making an effective and purposeful representation. I, hence, negate this contention of the learned counsel for the

petitioner.

(7) Another contention raised in support of the petition is that as soon as the detenu had made a second representation the same ought to have been considered and copy of the retraction of Vijay Kumar should have been supplied. It is contended that the authorities had decided to supply copy of the retraction of Vijay Kumar earlier and there was no reason why the authorities did not comply with the said decision when mistake was pointed out by the petitioner to the authorities that a wrong copy has been supplied which was not copy of the retraction of Vijay Kumar as was sought to be supplied. It is also contended that in the second representation it has been highlighted that Vijay Kumar was tortured and beaten when his confessional statement was recorded and he was medically examined and the medical certificate should be perused to consider whether the confessional statement was voluntary or not. So, it was argued that second representation should have been considered in that light.

(8) The learned counsel for the respondents has, on the other hand, contended that second representation was on similar lines as the first representation and as there was no legal duty cast upon the respondents to have supplied the copy of the said retraction of Vijay Kumar to the petitioner, thus the mere fact that second representation had been made on the same point is of no consequence. He has placed reliance on *Jamal Haji Jakaria v. Union of India & Others* 1988(2) DI 409(2), wherein it has been held that if the second representation brings no new facts and circumstances, the delay in considering the second representation is not material. It is, doubt, true that if a second re-presentation is based on new facts and grounds the same has to be dealt with due promptitude, but in the present case the second representation, in my opinion, did not contain any new ground. So, I do not find any merit in this contention as well.

(9) It was also argued by the learned counsel for the petitioner that the petitioner had in his representation to the Advisory Board made a prayer for permission to examine the co-detenus as his defense witnesses but the Advisory Board had not acceded to this request. It is really surprising that such a false and wrong averment has been made in the petition. I have gone through the original record of the Advisory Board and find that the Advisory Board allowed this prayer of the petitioner and had permitted the petitioner to examine the co-detenus as his witnesses and very brief statements of the co-detenus were also recorded. So, there is no merit in this contention.

(10) Lastly, a plea has been raised that there was no compelling necessity for the detaining authority to have passed the detention order inasmuch as the petitioner was already in Jail when the detention order dated July 13, 1989, was served on him on July 24, 1989 and there was no likelihood of the petitioner being released from Jail inasmuch as the bail application moved by the petitioner had already been rejected. It was pleaded that there was cogent material before the detaining authority to come to the conclusion that the petitioner would continue to indulge in any prejudicial activities in future when released on jail.

(11) The grounds of detention dated July 13, 1989, show that the petitioner was found driving a blue Maruti Car on the night of June 7, 1989 and 206 gold biscuits of foreign origin were recovered from the car. The statements of the petitioner as well as his co-detenus Vijay Kumar, Sanjeev Aggarwal and all other persons who were found in the car were recorded. The petitioner in his statement confessed that he had been visiting Dubai frequently and had been smuggling some goods and gold, ornaments for being sold in local market and on his one visit he met Avtar Singh and he entered into agreement with him that he would smuggle gold biscuits to Delhi for selling the same at a commission of Rs. 10 per tola and Avtar Singh had supplied smuggled gold biscuits at his shop in Beadon Pura and the petitioner sold those gold biscuits in Karol Bagh and got his commission and the present gold biscuits were brought in a new Maruti Car by the petitioner at the behest of Avtar Singh and he was to be paid Rs. 20,000.00 for the same and he was to hand over the said smuggled biscuits to Vijay Kumar for disposal and services of Sanjeev Kumar were to be also utilised in case of emergency and telephone number of Sanjeev Aggarwal was also made available to the petitioner on a slip which was also recovered from the person of the petitioner.

(12) A perusal of the facts above, detailed out in the grounds of detention, clearly show the continuance prejudicial activities of the petitioner. It is also evident from the grounds of detention that the detaining authority was very much aware that the petitioner was in Jail custody and had moved an application seeking bail and the detaining authority was satisfied that there was imminent possibility of petitioner being released on bail and he reached the subjective satisfaction that unless the petitioner is detained, the petitioner would be engaging in transporting and concealing smuggled goods and dealing in smuggled goods in future as well.

(13) At the outset I may mention that the petitioner has not come to this Court with clean hands inasmuch as the petitioner suppressed a material fact from the notice of this Court by not disclosing in his writ petition that his bail application was rejected on July 25, 1989, much after he passing of the detention order and even after the detention order had been served on the petitioner. The petitioner intentionally, it appears, did not mention in the writ petition the date of rejection of the bail application. Unfortunately, Shri A. K. Batabyal, Joint Secretary in the Ministry of Finance, Government of India, New Delhi who filed the counter-affidavit (who is the officer who passed the detention order) also in his counter-affidavit misled in making an averment that he was aware of the factum of rejection of bail application of the petitioner at the time he passed the detention order. It is now clear that the bail application of the petitioner was still pending when the order of detention was passed and served on the petitioner. So, it is due to some mis-apprehension that Shri Batabyal in his affidavit mentioned that he was aware of rejection of the bail application at the time he passed the detention order which fact is obviously against the record. So, at the time the detention order was passed, the bail application of the petitioner was pending

and thus, the detaining authority from the material mentioned in the grounds of detention could come to the conclusion that there was possibility of petitioner being released on bail and indulge in such prejudicial activities. and there was compelling necessity to pass the detention order.

(14) The learned counsel for the petitioner has contended that as the detenu was already in Jail, there was no material present in the grounds of detention which could have justified the passing of the detention order. He has placed reliance on *Rameshwar Shaw Vs. District Magistrate, Burdwan* and *Another, N. Meera Rani Vs. Government of Tamil Nadu* and *Another, Smt. Shashi Aggarwal v. State of U.P. & Others 1938 (1) Scc 436(5)* and *Abdul Razak Abdul Wahab Sheikh Vs. S.N. Sinha, Commissioner of Police, Ahmedabad* and *Another, I have gone through these judgments and I find that. the ratio which can be culled out from these judgments is that in case a person is already in judicial custody in a criminal case and his bail application has been rejected, these facts must be placed before the detaining authority and there must be some compelling ground available from the facts necessitating the passing of the detention order. It is laid down that if the bail application of the detenu already stands rejected, there could be very remote possibility of his being released on bail and thus, in such a case it would be futile to pass a detention order in order to prevent him from indulging in any prejudicial activity in future.*

(15) It depends on the facts of each case in order to determine whether a person, who is already in Jail, should be detained or not. For that purpose the material has to be disclosed in the grounds of detention. If the prejudicial activity of the detenu is of a continuous nature and there is possibility of his being released on bail and the detaining authority is aware of these facts from the material disclosed in the grounds of detention, there is no legal bar in detaining authority reaching the subjective satisfaction that in such a case detention order should be passed. Reference may be made in this connection to the law laid down in *Bal Chand Bansal v. Union of India and Others Air 1980 Sc 1175(7)* and *Suraj Pal Sahu Vs. State of Maharashtra and Others*, The learned counsel for the petitioner also made reference to a recent judgment in *Criminal Writ Petition No. 179189, Pallickal Kunhamu Abdul Latheef v. Union of India and Others*, decided on January 17, 1990, (9) by Santosh Duggal, J., in which the whole case law has been analysed. Nothing different has been lain down in this judgment from what has been culled out as main principles from the previous judgments. It is evident that if the bail application of a detenu stands rejected, there is no immediate apprehension of his being released on bail. Then, the question of passing any detention order against such a detenu would not arise.

(16) Now coming to the facts of the present case, it is clear from the grounds of detention that this petitioner has been indulging in prejudicial activities continuously before he was caught in the present case and his bail application was still pending and there was every possibility of his being released on bail and from such facts the detaining authority, in my opinion, rightly formed the

subjective satisfaction that unless the petitioner is prevented by passing of the detention order, he is likely to be released on bail and indulge in prejudicial activities: in future. So, I do not find any merit in this ground as well raised by the learned counsel for the petitioner in challenging the detention order.

(17) No other point has been urged.

(18) I find no merit in this petition which I, hereby, dismiss and discharge the rule.