

(1987) 09 BOM CK 0033

In the Bombay High Court

Case No : C.R. Writ Petition No. 36 of 1987

Mahmood Medhar Khan alias Maherdeen Khan alias Mohamad Moherdin **APPELLANT**

Vs

Government of Maharashtra **RESPONDENT**

Date of Decision : 07-09-1987

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)

Citation : (1988) 2 BomCR 378

Hon'ble Judges : M.S. Ratnaparkhi, J;M.M. Qazi, J

Bench : Division Bench

Advocate : S. Pailwal, for the Appellant; B.P. Jaiswal, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

M.M. Qazi, J.—All these there writ petitions can be disposed of by this common order, since the point involved is common.

2. The petitioners in the above petitions has challenged the order of detention dated 16-2-1987 passed by the Officer on Special Duty and Ex-Officio Secretary to the Government of Maharashtra, Home Department, in exercise of powers under sub-section (1) of section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974) read with Government order, Home Department (Special) No. SPL-3 (A)/PSA-1186/1 dated 20th October 1986. Mr. Paliwal has challenged the impugned order on several grounds. However, in our view, it is not necessary to deal with all those challenges, since the petitions can be allowed in view of the ground (VI) which is reproduced below :

"(VI) The petitioner submits that the impugned order suffers from non-application of mind. The impugned order shows that till 4-12-1986 the petitioner was in jail, but it is silent from 4-12-1986 onwards till 16-2-1987 when the

impugned order was passed. It is, therefore, submitted that the impugned order is passed by the respondent without being aware of the fact that the petitioner was already in jail on 16-2-1987 and as such the impugned order is invalid. Alternatively, the petitioner submits that the D.I.R. officers did not place the relevant material i.e. the proceedings of the pending prosecution from 4-12-1986 till 16-2-1987 before the respondent and therefore, there is a clear case of non-application of mind by the respondent, and as such the impugned order is invalid. Alternatively, the petitioner submits that the impugned order is totally silent as to why the Detaining Authority passed the preventive detention order inspite of the fact that the petitioner was in jail. The impugned order is silent as to for what reason the Detaining Authority thought it proper to pass the preventive detention order inspite of the petitioner being in jail."

3. Mr. Jaiswal, Additional Public Prosecutor for the respondent, has invited our attention to para 24 of the grounds on which the order of detention is based. It is worthwhile to reproduce para 24 which reads thus :

"S/Shri III amdin Khere Khan, you (Mohamed Mehrudin) and Kassam Minu Khan were arrested on 25-8-1986 and on production before the Court on 26-8-1986, you all were remanded to Judicial Custody till 9-9-86. On 9-9-86, you all were further remanded till 23-9-86. On 23-9-86, you all were further remanded till 7-10-86 on which date you all were all further remanded till 20-10-86. On 20-10-86 you all were further remanded till 24-10-86. On 24-10-86 a bail application was filed on behalf of you of you three persons at the time of remand application. On hearing the department and the Advocate of the parties, Shri Illamdin Khere Khan and yourself (Mohamed Mehruddin) were ordered to be released on bail of Rs. 1,00,000/- each, and Kassam Miru Khan was ordered to be released on a bail of Rs. 75,000/-, in default, you all were remanded till 6-11-86. On 6-11-86, you all had not availed of the bail, your remand period was extended till 20-11-86, on which date it was further extended till 4-12-86. On 11-11-86, Shri Gaji Khan alias Chotu Khan alias Chotia s/o Jumme Khan was arrested and on production before the Court on 20-11-86, he was remanded to Judicial Custody till 26-11-86. On 19-11-86, an interim bail application was filed on his behalf. On hearing the application on 21-11-86, he was ordered to be released on bail of Rs. 30,000/-. On 26-11-86, his bail amount was reduced to Rs. 10,000/- in default, he was remanded to judicial custody till 10-2-86."

4. Relying on the above statement, Mr. Jaiswal contended that the Detaining Authority has already referred to the fact that the petitioners were arrested on 25-8-1986 and that they were produced thereafter, before the Magistrate from time to time and remand was obtained. According to him, it is clear from the above statement that the Detaining Authority was aware of the fact that the petitioners were in jail on 16-2-1987 and even then it was thought necessary to pass the impugned order. In our view, there is no substance in the above submission. Para 24 of the grounds reproduced supra only shows that the Detaining Authority considered the fact that the petitioners were arrested on

25-8-1986 and that thereafter they were remanded to the judicial custody from time to time. The Detaining Authority has also considered the facts that the petitioners were ordered to be released on bail subject to certain conditions, but since the petitioners did not avail of the bail, their remand period was extended from time to time till 4-12-1986. There is nothing in the grounds to indicate that the Detaining Authority considered the events after 4-12-1986. There is also nothing in the grounds to indicate that the Detaining Authority know that even on 16-2-1987 the petitioners were in jail and yet it was necessary to pass the impugned order, detaining them under provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Mr. Jaiswal contended that the Detaining Authority was made aware of the fact that the petitioners were in jail on 16-2-1987 and yet the Detaining Authority thought it necessary to pass the impugned order. Even assuming that necessary documents were placed before the Detaining Authority showing that the petitioners were in jail on 16-2-1987, but since there is nothing in order to indicate that they have been taken into consideration by the Detaining Authority, the only conclusion which could be drawn is that such documents have not been considered by the Detaining Authority. Even then the impugned order would be bad for non-application of mind. The impugned order does not show as to why the Detaining Authority thought it necessary to pass the impugned order even though the petitioners were already in jail on 16-2-1987.

5. This Court in Writ Petition No. 82 of 1986 decided on 21-1-1987 has observed in para 2 as under :

"We may here usefully refer to the decision reported in *Anant Sakharam Raut Vs. State of Maharashtra and Another*, . In the said decision the Supreme Court quashed the order of detention on the short ground that there was no mention in the order of detention about the fact that the petitioner was an under-trial prisoner, that he was arrested in connection with the 3 cases ; that the application for bail were pending and that he was released on 3 successive dates in 3 cases. In our view, the ratio of this decision is that the Detaining Authority must be made aware about the relevant exents which immediately preceded the order of detention. We have already shown above that the proceedings in the two writ petitions which preceded immediately the present impugned order were very much relevant and, therefore, the same should have been placed before the District Magistrate, Wardha, while passing the impugned order. Since the petition has to be allowed on this short ground alone, it is not necessary for us to refer to various other challenges which were raised before us."

In this context, it is worth while to refer to the decision reported in *Rameshwar Shaw Vs. District Magistrate, Burdwan and Another*, . The Supreme Court has observed in para 13 as under :

".....It is obvious that before an authority can legitimately come to the conclusion that the detention of the person is necessary to prevent him from acting in a prejudicial manner, the authority has to be satisfied that if the person

is not detained, he would act in a prejudicial manner and that inevitably postulates freedom of action to the said person at the relevant time. If a person is already in jail custody, how can it rationally be postulated that if he is not detained, he would act in a prejudicial manner ? At the point of time when an order of detention is going to be served on a person, it must be patent that the said person would act prejudicially if he is not detained and that is a consideration which would be absent when the authority is dealing with a person already in detention. The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus the basis of the order u/s 3(1)(a), and this basis is clearly absent in the case of the petitioner. Therefore, we see no escape from the conclusion that detention of the petitioner in the circumstances of this case, is not justified by section 3(1)(a) and is outside its purview. The District Magistrate Burdwan who ordered the detention of the detenu acted outside his power conferred on him u/s 3(1)(a) when he held that it was necessary to detain the petitioner in order to prevent him from acting in a prejudicial manner....."

6. In the circumstances, we have no doubt that the Detaining Authority did not consider the events immediately preceding the impugned orders and on this ground alone, all the petitions will have to be allowed. The petitions are accordingly allowed and the impugned orders are quashed and set aside. The petitioners be released forthwith unless they are required in any other case.