

(1990) 01 DEL CK 0039

In the Delhi High Court

Case No : Criminal Writ Appeal No. 179 of 1989

Pallickal Kunhamu Abdul Latheef

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 17-01-1990

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1)
Constitution of India, 1950 — Article 226

Citation : (1990) 40 DLT 527

Hon'ble Judges : S. Duggal, J

Bench : Single Bench

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

Judgement

Santosh Duggal, J.

(1) In this writ petition filed under - Article 226 of the" Constitution of India, the petitioner challenges the order of his detention passed on 2nd January 1989 in exercise of the power u/s 3(1) and the declaration issued subsequently on 13th January 1989 u/s 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "the Act") by Union of India through its duly empowered officers respondents No. 2 and 3 respectively and seeks an order of issuance of writ of habeas

(2) The facts which impelled the detaining authority to take a decision to place the petitioner under preventive detention are that on arrival at Calcutta Airport by Bangladesh Biman flight from Dacca on 27th November 1988, the petitioner was found to have smuggled into India gold in the shape of 65 pieces of bars concealed in the cavities of one refrigerator; besides other goods which he had duly declared and paid custom duty. The gold was seized on he reasonable belief that it had been brought into India without the authority of any valid importation and was thus liable to confiscation. The petitioner was simultaneously taken into custody and examined when he revealed in his statement u/s 108 of the

Customs Act that he was working in Sharjah since 1986 and had come to know there on Mohan Das who had been using him against payment to carry gold into India by various means and through different routes and that this time also, the refrigerator had been handed over to him by said Mohan Das and under his advice he had taken circuitous route to reach India via Dacca instead of flying straight from Sharjah. The petitioner was produced subsequently before the Chief Judicial Magistrate, Barasat and remanded to judicial custody and while he was still there, the impugned detention order was served on him on the view that in spite of the fact that adjudication proceedings were contemplated and criminal prosecution was to ensue, it was found necessary in view of the past activities of the petitioner, as revealed by him in his statement, and also in view of the manner and quantity of smuggling detected under the present act, it was a fit case to place him under preventive detention. The petitioner was accordingly served with the order of detention passed on 2nd January 1989 while lodged in jail, on 5th January 1989. Representations made by him through a friend as well as personally failed and after consideration of the Advisory Board report, the order of detention was confirmed as also the declaration issued u/s 9(1) of the Act which extends the period of detention from one year to two years.

(3) In the writ petition filed through Mr. Harjinder Singh, Advocate, a number of pleas have been taken up assailing the legality and validity of the detention order as also the continued detention of the petitioner and the learned counsel at the time of hearing took up all the pleas for consideration of the Court which were repelled by Mr. S.K. Dubey appearing for Mr. S.K. Mishra, counsel for the respondents.

(4) On a conspectus of the contentions raised before me I find that one of the pleas raised on behalf of the petitioner is such that his detention becomes liable to be revoked, and for that reason I think it appropriate to take up that plea for consideration, and feel that it is not necessary in this case to examine the other grounds.

(5) The plea referred to above _ is contained in paragraph 8 but most specifically in paragraph 10 of the writ and reiterated in ground V thereof. The contention is that the petitioner was in judicial custody since 28th November 1988 and his petition for bail was rejected by the Chief Judicial Magistrate Barasat on the very first day when it was moved before the court and he was ordered to be remanded to judicial custody where he remained lodged continuously and there was no likelihood of his coming out of jail and indulging in the alleged prejudicial activities for the prevention of which the impugned detention is purported to have been passed inasmuch as he was not a free agent and there was no likelihood of his being released from custody. Mr. Harjinder Singh further stated at the Bar that subsequently another petition for the bail was moved which was dismissed by order passed on 26th December 1988 and such it was a case where the concerned court was not inclined to grant bail to the petitioner and as such, he continued to be in judicial custody and thus there could be no compelling

necessity for the detaining authority to clamp the detention order on the petitioner in addition, while he was still in jail with no prospect of coming out.

(6) The learned counsel developed this argument by referring to a catena of authorities, mostly judgments of the Supreme Court, contending that the law is now well settled judicially to the effect that in case a person is in judicial custody and there is no possibility of his indulging in smuggling or any other prejudicial activities, for the prevention of which detention order is passed, then the order was liable to be struck down for the short reason that it lacked application of mind to the fact situation and also smacked of want of subjective satisfaction, as regards the necessity of detention. He agreed that there is in fact a judgment by a Constitutional Bench of the Supreme Court in a case decided as early as 1963 in the case *Rameshwar Shaw Vs. District Magistrate, Burdwan and Another*, , where their Lordships held that Section 3(1) of the Preventive Detention Act, 1950 necessarily postulates that a person sought to be detained would be free to act in a prejudicial manner if he is not detained. In other words, the freedom of action to the person sought to be detained at the relevant time must be shown before an order of detention can be validly served on him under the said section and that if a person is already in jail custody it cannot be rationally postulated that if he is not detained he would act in a prejudicial manner.

(7) Mr. Harjinder Singh submitted, that besides a number of cases thereafter, where the same principle was reiterated; this proposition has been unequivocally affirmed again by the three Judges' bench in a very recent case reported as *Judgments Today 1989 S.C. 478, N. Meera Rani v. Government of Tamil Nadu & another*, laying down that besides showing the awareness of the fact that the detenu was already in custody, the detaining authority has been further to show that it was subjectively satisfied that the detention became necessary as there was compelling necessity to preventively detain the said person. The entire case law on the subject has been taken note of in this judgment quoting with approval the principles laid down in the case of *Shashi Aggarwal Vs. State of U.P. and Others*, , where the detention order, made merely on the ground that the detenu was trying to come out on bail as there was enough possibility of his being bailed out, was struck down on the ground that a detention order passed against a person, who was already in custody, was not sustainable and the mere fact that the detenu was likely to come out of jail on bail was not enough justification for passing on order of detention against the person who was already in jail, by serving him there with the detention order.

(8) Mr. Harjinder Singh then placed reliance on yet another judgment of the Supreme Court in the case of *Abdul Razak Abdul Wahab Sheikh v. Shri S .N. Sinha .Commissioner of Police Ahmedabad and another*. *Judgments Today 1989(1) S.C. 478*, where also, (though on the facts of that case), it was held that the detention order, passed in respect to a person already in jail, was not sustainable unless cogent relevant material and fresh facts had been disclosed which necessitated making of the order of detention, and that such an order

would not be justified where the detenu was in jail custody in connection with a criminal case and order of detention was served on him in jail, and the application for bail filed by the detenu has been rejected by the designated court on 13th May 1988 whereas the order of detention had been passed on 23rd May 1988. The learned counsel argued that the ratio of this judgment is attracted to the present case because here also apart from the past activities, there was no other material to show that inspire of the petitioner being in jail, he was likely to resume his alleged prejudicial activities, or more specifically indulge in the smuggling and that in face of the decision of the Supreme Court in the case of Smt. Shashi Aggarwal (supra) and N. Meera Rani (supra) and basic authority of the Constitutional Bench in the case, of Rameshwar Shaw (supra), the present order was liable to be revoked.

(9) Mr. S.K. Dubey appearing for Mr. S.K. Misra, counsel for the respondents countered these arguments by contending that it could never be the universal proposition of law that whenever a person was in judicial custody, his preventive detention cannot be ordered and that each case would depend upon its own facts, which proposition has been recognised by all the cases referred to above where it has been observed that as an abstract proposition of law, the detention of a person while still in jail, was not barred. He further submitted that there was another very recent judgment of the Supreme Court reported as Bal Chand Bansal Vs. Union of India (UOI) and Ors, , where it was held that where a perusal of the grounds for detention indicated that the detaining authority was conscious of the fact that the petitioner was in judicial custody and was apprehensive that he would be released on bail, the order of detention could not be said to have been passed for the purpose of circumventing the expected bail order but to achieve the object of prevention of a detenu from indulging in activities prejudicial to the conservation of foreign exchange resources .He further argued that this judgment has reference to another decision of the Supreme Court in the case of Suraj Pal Sahu Vs. State of Maharashtra and Others, holding that where the activities of the person are interlinked and continuous in character, then detention order would be justified. He submitted that the statement of the detenu in the present case also revealed that he had been very frequently in the past smuggling gold into India and that in face of that background, the detaining authority was justified in considering the preventive detention of the petitioner being imperative.

(10) Mr. Dubey then contended that the only requirement was awareness on the part of the detaining authority of the fact situation, namely, that the person concerned was already in jail and that he was likely to be released and then likely to resume his prejudicial activities. He read out from the relevant portion of the grounds of detention where it is recorded that the detaining authority was aware that the petitioner was arrested on 28th November 1988 u/s 104 of the Customs Act and was produced on that day before the Chief Judicial Magistrate, Barasat who was pleased to remand him to jail custody till 12th January 1988 which period stood extended till 9th January 1989 adding that although he was

still in jail custody, the possibility of his being released on bail could not be ruled out. According to Mr. Dubey it is sufficient to indicate that the detaining authority arrived at a requisite subjective satisfaction and in the light of the background of Bal/ Chand Bansal's case (supra), the detention order was unassailable.

(11) Mr. Harjinder Singh in a short rejoinder, in so far as this contention is concerned, pointed out that on the face of the later detention in the case of N. Meera Rani (supra) and that too by a bench comprising of large number of judges, then in the case of Bal Chand Bansal (supra) and in the case of the Constitutional Bench judgment in Rameshwar Shaw (supra) and also another judgment in the case of Smt. Shashi Aggarwal (supra), the detention order made while a person in jail custody, as in the present case, is liable to be struck down for the short reason that the jurisdiction in this respect is preventive, not punitive, and so long a person is in "judicial custody, with no freedom of action, there cannot be any rational basis for arriving at the subjective satisfaction, that preventive detention was necessary.

(12) On a careful consideration, of the respective contentions canvassed by the learned counsel for the parties, I find force in the pleas raised by the counsel for the petitioner in this regard. The judgment in the case of Smt. Shashi Aggarwal (supra), which came only a few months before the judgment in the case of Bal Chand Bansal (supra), and has not been taken note of in the latter judgment, is very specific on this point, namely, that the mere fact that the person was likely to be released on bail, would not justify an order of detention, so long as he was in judicial custody. Moreover, the facts in Bal Chand Bansal's case (supra) were distinguishable inasmuch as it is recorded in the judgment that the learned Additional Solicitor General had placed the case file before the Court and a definite note was recorded that the petitioner therein was likely to be released on bail on that day and it was in this background that the impugned order of detention was passed on some particular day.. There is no such plea in the present case and, in fact, the counter is entirely silent and does not even advert to the factum of bail application having been moved or rejected. The facts in the case of Shashi Aggarwal (supra) are more *pan materia* where the detention order passed on the general apprehension of likelihood of release on bail who held to be not sustainable without any positive information or concrete material, as in the present case. The position has been settled by a Bench of larger number of Judges in N. Meera Rani's case (supra) basing themselves primarily on the Constitutional Bench judgment in the case of Rameshwar Shaw (supra) that the detention order served on a person in jail was liable to be set aside.

(13) The petitioner in the writ has made a categorical assertion that the bail application moved in the first instance was rejected the same day. Not only there is no reference to this fact in the grounds of detention, and on this " score also, the order suffers from an infirmity because awareness of the essential facts which might have influenced the subjective satisfaction of the detaining authority was necessary. Here neither the facts of institution and dismissal of the first

application nor pendency of the second petition, which was dismissed, according to statement at the Bar during arguments, on 26th December 1988, have been mentioned in the grounds of detention. It Therefore cannot be said that the detaining authority was fully aware of the facts having a bearing on this question. Apparently, it was not kept abreast of all the developments up to the passing of the detention order, while it was incumbent upon the sponsoring authority to do so, as held by the Supreme Court in the case of Union of India (UOI) and Others Vs. Manoharlal Narang, .

(14) For all these reasons. I hold it to be a case where the detention of the petitioner while he" was still in jail, with no prospect of release, and there being consequently no rational basis for the detaining authority to arrive at the conclusion that preventive detention was necessary, inspire of the petitioner being in jail; was not justified and is liable to be set aside.

(15) As observed earlier, since the petition is being disposed of on this one ground, it is not felt necessary to record finding on the other pleas taken in the writ petition.

(16) In view of the above, the writ petition is allowed and the rule is confirmed with the result that the detention order dated 2nd January 1989 and the declaration issued Therefore on 13th January 1989 are quashed. The petitioner be released forthwith if not required to be detained in any other case or proceeding.

(17) It is, however clarified that in case, in the event of petitioner''s release from jail, the concerned authorities wish to reconsider the question of detaining him under Cofeposa Act on the existing material, the present judgment will not be an impediment.