
(1989) 10 MP CK 0003
In the Madhya Pradesh High Court
Case No : M.P. No. 930/89

Premlata	Vs	APPELLANT
Union of India (UOI)		RESPONDENT

Date of Decision : 25-10-1989

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3, 3(1)
Constitution of India, 1950 — Article 21, 226
Customs Act, 1962 — Section 108, 135
Gold (Control) Act, 1968 — Section 85

Citation : (1991) 53 ELT 286

Hon'ble Judges : V.D. Gyani, J; A.G. Qureshi, J

Bench : Division Bench

Advocate : H.S. Oberai, for the Appellant; B.G. Neema, for the Respondent

Final Decision : Allowed

Judgement

A.G. Qureshi, J.—The petitioner, who is the wife of detenu Dhaniya Kumar Jain alias Dhanraj Jain, has filed this petition under Article 226 of the Constitution of India for issuance of a writ of habeas corpus to set aside the order of detention passed on 17-5-1989 and served on the detenu on 29-6-1989 with a direction that the detenu be set at liberty. The order is made by Shri A.K. Batabyal, Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, who is made respondent No. 1 in the petition. The order has been passed u/s 3(i) and (iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The detenu is lodged in the Central Jail, Indore and the Superintendent of the Central Jail has also been made as respondent No. 4.

2. According to the petitioner, on 3rd April, 1989 the detenu was arrested by the Officers of the Excise Department from his residence for alleged complicity in the offences u/s 85 of the Gold Control Act and Section 135 of the Customs Act, 1962.

3. According to the case of the Central Excise and Customs Department they had received information that the detenu and his son were dealing in foreign marked gold biscuits and that they have received some foreign marked gold biscuits and have agreed to deliver them to one Ramkumar Agrawal on 3-4-1989 near the Rajani Building, M.G. Road, Indore. A surveillance was kept near the Rajani Building. At about 9.15 hours on 3-4-1989, a person was seen in the Maruti car bearing registration No. CIF 1529. He was given a signal to stop, but he did not stop. The car was chased and was intercepted near 2/1 New Palasia, Indore. The occupant of the car gave his name as Ram kumar Agrawal and a small bag was found kept between the two seats in front portion of the car. Ramkumar Agrawal was interrogated in presence of the witnesses about the possession of contraband gold, which he denied. Therefore, the car was taken to the Office of the Central Excise and Customs at Manik Bagh Palace, Indore, where a thorough search of the car was made. The search resulted in recovery of 52 foreign marked gold biscuits weighing 6.065 kgs and of 24 carat purity, valued at Rs. 18,20,000/-. The car was seized and the statements of panchas were recorded. A panchnama was also prepared. The statement of Ramkumar Agrawal was also recorded u/s 108 of the Customs Act, wherein Ramkumar Agrawal revealed that he had received the biscuits from detenu's son, one Mukesh Jain. The residence of the detenu was searched from where silver weighing 30.130 kgs, valued at Rs. 1,80,000/- and Indian currency of Rs. 1,45,000/- along with some incriminating documents were recovered. The detenu was also examined by the Department u/s 108 of the Customs Act. In his statement on 3-4-1989 the detenu admitted that his son Mukesh Jain helps him in his business and he had purchased 10 foreign marked gold biscuits 12 or 13 days ago from one Sagarmal Jain of Bombay and had paid Rs. 3,45,000/- to this person and that he had sold the 10 foreign marked gold biscuits in the retail in the market. On 3-3-1989 also he had received 18 silver bars from Sagarmal Jain of Bombay and he had asked him to send 54 foreign marked gold biscuits at the rate of Rs. 34,500/- per biscuit, the same were received on 3rd April, 1989. He is also alleged to have admitted that he had received Rs. 70,200/- for the sale of two foreign marked gold biscuits from one Rakesh Jain on 31-3-1989. It was also allegedly admitted that on 1-4-1989 his son Mukesh Jain had a talk with Ramkumar Agrawal about the sale and purchase of 52 foreign marked gold biscuits in the presence of the detenu. This talk was telephonic. It has further been alleged that the detenu admitted that he received 54 foreign marked gold biscuits upon which his son Mukesh Jain informed Ramkumar Agrawal to take delivery of the 54 foreign marked gold biscuits near Suvidha Petrol Pump, Indore. Thereafter Mukesh Jain went to the Suvidha Petrol Pump in the car bearing registration No. CPO 340 to deliver the contraband and the payment for 54 foreign marked gold biscuits was to be received by the evening. On 4-4-1989 the detenu further admitted that Sagarmal Jain resides at Bombay and his telephone number was also mentioned by him.

4. In para 25 of the petition the petitioner-detenu has alleged that the aforementioned statement u/s 108 of the Customs Act was not voluntary and the

detenu was maltreated by the Authorities and he was coerced to sign some papers. The detenu was also examined on 6-4-1989 in the Jail custody and injuries were found on his person. The detenu pursuant to the bail order was released from Jail on 6-4-1989. Thereafter the detenu was detained in pursuance of the detention order served upon him as aforesaid.

5. The detenu has challenged the detention order mainly on the ground that there is no evidence of any complicity of the detenu in the alleged offence. The medical report and the letters sent by the detenu immediately after his release on bail to the Customs Authorities were not placed before the detaining authority which contain the retraction of the so called statements made by the detenu. The order of detention is liable to be quashed on this short ground alone. The statement of the co-detenu cannot be used against the present detenu for any purpose. The order of detention is vague and indefinite. The copies supplied to the detenu are illegible thus depriving him from making an effective representation. There was no antecedent, history or past conduct of the detenu showing his involvement in smuggling goods. Hence there was no material on the basis of which the detaining authority could be satisfied that the detenu would or is likely to indulge in activities prejudicial to the interest of the revenue in future. The detaining authority failed to inform the wife or son or parents of the detenu about his detention as required by law, which is violative of Article 21 of the Constitution of India. The sponsoring officer has not placed before the detaining authority all the particulars and as such the detention order suffers from the vice of non-application of mind by the detaining authority because the vital facts are deliberately suppressed from the detaining authority and not put before him by the sponsoring authority. All the documents were not supplied to the detenu in Hindi which is the only language he knows. The age of the detenu has also not been mentioned in the detention order. The retracted statement of Ramkumar Agrawal also cannot be made a basis of the detention order against the detenu. The statement of Mukesh has not been recorded, which was necessary.

6. In justification of the detention order Shri Kuldeep Singh, Under Secretary to the Govt. of India, Ministry of Finance, Department of Revenue, New Delhi has sworn an affidavit submitting reply to the allegations made by the detenu in the affidavit. After stating the facts of the case and reproducing the statement of the detenu recorded u/s 108 of the Customs Act, it has been averred that the statement of Mukesh Jain could not be recorded as he was not available although a summon was sent to him on 7-4-1989. It is admitted that the detenu sent an application on 6-4-1989 through the Supdt. Central Jail, Indore to the A.C.J.M. Indore and requested for him medical examination, and it is also admitted that the detenu was released on bail, vide and interim order of the Sessions Judge dated 6-4-1989, which was effective till 10-4-1989 pending final order. Later on 10-4-1989 the detenu was released on bail. A summon was served on detenu on 10-4-1989 for his appearance on the same day at the Office of the Collector, Central Excise and his statement was again recorded on 10-4-1989. On that date

also the detenu again confirmed his earlier statement. But later on at his request the recording of statement was adjourned to 13-4-1989. Only one letter dated 21-4-1989 was received on 24-4-1989 by the Department wherein the detenu has stated that the statement given by him on 10-4-1989 was not voluntary.

7. In follow up action, the premises of Sagarmal T. Jain at Bombay was searched on 4-4-1989, but nothing objectionable was found. In his statement u/s 108 of the Customs Act Sagarmal Jain deposed that he did not know any Dhanya Kumar Jain alias Dhanraj Jain and Mukesh Jain and he had not delivered any gold or silver to any person by name Dhanraj Jain or Mukesh Jain. The order of detention was passed by the Joint Secretary, Government of India in exercise of his powers conferred u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act. It has been denied that the statement of the detenu was obtained under duress and third degree method. The statements dated 3-4-1989 and 4-4-1989 of the detenu were written by the detenu in his own handwriting and were signed by him voluntarily. It has also been stated that on 5-4-1989 when produced before the court the detenu did not make any request for his medical examination. As regards the allegations of the detenu pertaining to sending of letters retracting his statement, as stated in para 25 of the petition, the receipt of any letter has been denied by the Department. It has been stated that the letter referred to in para 25 with its postal receipts was not provided with the petition to know the contents. It has also been denied that the detenu was made to write certain documents at the dictation of the Excise Officers.

8. As regards the injury found on the person of the detenu it has been stated that during the interrogation on 4-4-1989 the detenu had desired to go to toilet where he had made a futile attempt to run away and there he got injury in his left eye. A panchnama was drawn to this effect on the spot. Therefore, the detenu did not pray for medical examination to the A.G.J.M. Indore while he was produced on 5-4-1989. It has been denied that the order of detention suffers from various infirmities and is vague and indefinite. The allegation that the copies supplied were illegible is also denied. The act of not informing the members of the family of the detenu of his arrest has also been denied. The Department has also denied the fact that the material particulars were not placed before the detaining authority. The detenu did not mention any material particulars which were not placed by the sponsoring authority. The allegation of non-application of mind by the detaining authority is also denied. It has also been averred that as the identity of the detenu is not in dispute the non-mention of age is of no significance. According to the Department the material placed before the detaining authority was sufficient to arrive at a subjective satisfaction that the detenu should be detained under the Act to prevent him from involving himself in the offence of a like nature in future which he had already committed. Therefore, the order does not suffer from any infirmity. As such there is no case for setting aside the detention order passed by the detaining authority.

9. The learned counsel for the petitioner Shri Oberai has firstly argued that the

detenu has challenged the detention order inter alia on the ground that there is non-application of the mind by the detaining authority. Therefore, the only person and the proper person to deny that allegation would be the detaining authority himself. But the detaining authority has not filed any affidavit or reply to controvert this allegation. The affidavit has been sworn by Shri Kuldeep Singh, who even does not say that he is acquainted with the facts of the case and that he at one stage or another was involved in the process of passing the detention order.

10. Shri Neema, learned standing counsel for the Government of India, on the other hand, states that the affidavit of Shri Batabyal was not necessary because Shri Kuldeep Singh is the Under Secretary of the relevant section dealing with the detention order and he has filed the affidavit on the basis of the record and the information available to him.

11. The same question arose in M.P. No. 829 of 1989 (Ramkumar v. Union of India and Ors.) filed by the co-detenu Ramkumar Agrawal before this court. In paragraph 20 of the order this court had an occasion to consider the same question as is raised before us and it was held as under :-

"20. Since it is a question of subjective satisfaction of and application of mind by detaining authority, it is necessary that he should, as a general rule, come forward with an affidavit. It is only in exceptional circumstances that the filing of affidavit by the detaining authority may be dispensed with, but for such a course some justification or explanation must be placed before the court. Unfortunately, there is none in this case. It may also be noted that the affidavit filed by the Officer-in-charge is of no help to the respondents. He has not at any stage handled or processed the case. The affidavit is solely based on record. How can he say and what can he say about the colourable exercise of power by the detaining authority. It is for him and him alone to explain and rebut the allegation. It is not the respondents case that the detaining authority is not available in the real sense that no affidavit could be sworn and filed by him. A host of authorities were cited by Shri Gupta on this point and they are mentioned below, but to mind, it is not necessary to deal with them, as the propositions laid down therein have not been disputed or distinguished. The authorities cited are; Shaik Hanif v. State of W.B. (AIR 1974 SC 619), Jagdish Prasad Vs. The State of Bihar and Another, , Ranjit Dam Vs. State of West Bengal, , Devi Lal Mahto Vs. State of Bihar and Another, and Mohinuddin alias Moin Master Vs. District Magistrate, Beed and Others, ".

As a result of the aforesaid discussion this court had held that the detention order cannot be sustained and was liable to be quashed on that ground alone.

12. In our opinion, in view of the aforesaid judgments of the Supreme Court mention in para 20 of M.P. No. 829/89 (supra) we have to hold that the Union of India has not given any justification for not filing the affidavit of the detaining authority to rebut the allegations pertaining to the lack of material or non-

application of mind on the question of subjective satisfaction. The affidavit filed by Shri Kuldip Singh does not say as to in what circumstances the affidavit is being filed by him instead of the detaining authority. He has also not stated that he has handled the case or processed it at any stage. His affidavit is solely on the basis of the record. Therefore, he is not the proper person to swear an affidavit about the subjective satisfaction of the detaining authority. Therefore, following our earlier view taken in M.P. No. 829 of 1989, we hold that the petition deserves to be allowed on this short question alone.

13. Next it has been strenuously urged by Shri Oberai that along with the petition, the petitioner has filed a bunch of documents collectively marked as Annexure-C. The first document in Annexure-C is a receipt of a registered letter issued by the post office. However, it cannot be said that to whom it was addressed because the name of the addressee is not legible. The second document of Annexure-C is an acknowledgment of the registered letter sent by Dhaniya Kumar Jain to Shri Jaiswal, Excise Inspector, Manik Bagh Place, Indore. This acknowledgment bears the seal of 21-4-1989. There is a certificate of posting of a letter to Shri Jaiswal, Inspector, Central Excise as the third document of Annexure-C. The fourth document of Annexure-C is postal certificate of a letter sent to Central Excise, Manik Bagh, Indore by Dhaniya Kumar Jain. The fifth document of Annexure-C, is a copy of the letter addressed to Shri Jaiswal by Dhaniya Kumar Jain dated 8-4-1989 which says that whatever has been recorded on 3-4-1989 is not his voluntary statement and that statement may not be used for any purpose. There is a letter dated 11-4-1989 to Collector, Central Excise retracting the so-called confessions alleged to have been recorded by the authorities of Dhaniya Kumar Jain. The other document of Annexure-C is the letter dated 21-4-1989 written in English addressed to Shri Jaiswal, Inspector, Central Excise. According to the Revenue the letter dated 21-4-1989 was received by the authorities and was also placed before the detaining authority, but this letter is of no avail because it was an after thought and an attempt to wriggle out of the situation in which the detenu was placed as a result of his voluntary statements made earlier. But as regards the letters dated 11-4-1989 and 8-4-1989 and the receipts filed as Annexure-C the reply of the department is simply this that they havenot received any other letter and that for want of filing of proper receipts by the petitioner no definite reply can be given.

14. We do not want to go into the question of the value of the aforesaid retractions because the statements recorded u/s 108 of the Customs Act and the subsequent letters retracting the same may be a subject matter of scrutiny in the criminal case pertaining to the substantive offence. However, the reply filed before us for not placing these letters retracting the confession by the department cannot be held to be satisfactory for the simple reason that an averment has clearly been made in the petition by the detenu that these flitters retracting the confession were sent to the Inspector of the Central Excise Department and postal receipts have also been placed on record. All these documents are marked as Annexure-C. But the reply is only of denial. Shri

Jaiswal should have come forward to rebut the presumption raised in favour of the petitioner in view of the postal receipts and the copies of the letters marked as Annexure-C. But Shri Jaiswal has not filed any affidavit to rebut the allegations. In the instant case it is not in dispute that in the statement of Ramkumar the present detenu was not mentioned at any point of time as a person with whom he had dealings. Similarly, Sagarmal of Bombay has also not stated anything against the present detenu. Therefore, the only basis on which the detention order has been passed appears to be the statement of the detenu himself which he claims to have retracted at the earliest opportunity through the letters marked as Annexure-C. Therefore, non-receipt of these letters as alleged by the Revenue should have been emphatically denied, supported by an affidavit of the person to whom they were addressed. It has not been done and after the denial there is some vague averment about the absence of the details, without which according to the Revenue the reply could not be filed. According to us the allegation made by the detenu in this behalf has not been rebutted as stated above. Therefore, these documents retracting the confession were material documents which should have been placed before the detaining authority in view of the fact that in the light of the circumstances of the case the impugned order appears to have been based mainly on the confessional statement of the detenu. Non-placing of such material facts before the detaining authority is a serious lapse on the part of the Department. Therefore, on this ground also the detention order passed against the detenu deserves to be quashed.

15. Other allegations have also been made by the detenu and arguments have been advanced by the learned counsel of the parties. But, we do not propose to go into this question in view of the fact that only on the aforesaid two grounds we hold that the detention of the detenu is not in accordance with law. The detention order deserves to be quashed and is accordingly quashed. The detenu shall be released from detention forthwith, if not required to be kept in custody in connection with any other offence. There shall be no order as to costs in this petition.