
(1990) 09 P&H CK 0116
In the Punjab And Haryana At Chandigarh
Case No : Cril. Writ Petition No. 3816 of 1989

Rajiv Talwar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 13-09-1990

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1), 7
Constitution of India, 1950 — Article 14, 19, 21, 226, 226(1)
Criminal Procedure Code, 1973 (CrPC) — Section 82, 83

Citation : (1991) CriLJ 2042 : (1991) 1 RCR(Criminal) 118

Hon'ble Judges : J.S. Sekhon, J

Bench : Single Bench

Advocate : H.S. Mattewal and Sukhbir Singh, for the Appellant; Jaishree Anand, for the Respondent

Final Decision : Allowed

Judgement

J.S. Sekhon, J.—Through this writ petition for habeas corpus, Rajiv Talwar petitioner seeks quashment of the detention order Annexure P-1 passed on 19-5-1989 by Sh. A.K. Batabyal, Joint Secretary to the Government of India u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, hereinafter called the. Act, with a view to preventing him from acting in any manner prejudicial to the augmentation of foreign exchange.

2. A brief re"sume" of relevant facts figuring in the grounds of detention Annexure P-2 is that on 13-4-89, at about 1.00 a.m., the officers of the Customs and Central Excise, Chandigarh intercepted one Maruti Car bearing Registration No. CHF 1212, at Tribune Chowd, Chandigarh and found Sudarshan Kumar, a co-associate of the petitioner and Smt. Anita Arora, travelling in that car. The personal search of Sudarshan Kumar, yielded the recovery of 8400 US \$, besides Rs. 2000/- in Indian currency. As a follow up action, the said officers searched the premises of aforesaid Sudarshan Kumar, G.S. Mandhanda, Ajay Budhiraja and Rakesh Budhiraja, but nothing incriminating was recovered from their

respective premises. However, the search of the residential premises of Rajiv Talwar petitioner yielded the recovery of some documents and fixed deposit receipts of the value of Rs. 2,61,000/- besides Rupees 1,73,550/- in cash. During interrogation by the Assistant Collector (Preventive), Customs and Central Excise, Chandigarh Sudarshan Kumar admitted that he used to deal in the business of sale and purchase of foreign currency with Rajiv Talwar petitioner and other persons, referred to above. The petitioner was apprehended on 13-4-89. On interrogation, he also admitted his indulgence in the sale and purchase of foreign currency, besides admitting that pages 50 and 60 of the seized dairy from his residence relate to calculations of foreign currencies sold by the petitioner. The petitioner and the aforesaid Sudarshan Kumar were released on bail on 19-4-1989 by the Chief Judicial Magistrate. Under these circumstances, the order of detention Annexure P-1 dated 19-5-1989 was passed against the petitioner. This order, however, remained miserved upon the petitioner so far.

3. The petitioner challenged to above referred to detention order by filing Cr. Writ Petn. No. 2374 of 1989 which was dismissed on 7-11-1989 by S.D. Bajaj, J. as being incompetent for failure of the petitioner to append the grounds of detention therewith, and that the grounds appended to the petition served upon Sudarshan Kumar, his co-associates were not identical. The petitioner then procured the grounds of detention Annexure P-2 and filed the present Criminal Writ Petition, challenging the order of his detention, inter alia, on the ground that nothing incriminating was recovered from his possession and that a single instance of possession of foreign currency by Sudarshan Kumar, a co-associate of the petitioner was not sufficient to invoke the order of detention and the factum that the petitioner had not indulged in any prejudicial activity after his being released on bail on 19-4-1989 was not considered by the detaining authority. The non-consideration of the retraction of confession in the bail application was also stressed. The ground of non-application of mind by the detaining authority was also taken.

4. The respondents in the return filed by Sh. A.K. Batabyal, Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, Delhi challenged the maintainability of the present petition as the petitioner is still absconding and had not yet exhausted alternative remedies available to him under the COFEPOSA, i.e., making of representation before the competent authority and appearing before the Advisory Board, constituted under the Act. The decision of this Court in Cr. W.P. No. 3248 of 1989, Ramesh Kumar Gupta alias Maheshi v. U.O. I was relied upon in this regard. The dismissal of the earlier writ petition filed by the petitioner was also stressed regarding the maintainability of the present writ petition. On merits, it was maintained that the recovery of huge amount of Indian currency from the residential premises of the petitioner, as well as the writing in the Note Book, coupled with the admission of the petitioner in his statement recorded by the Assistant Collector, clearly prove that the petitioner had been indulging in the business of sale and purchase of foreign currency repeatedly. The statements of Sudarshan Kumar and G.S.

Manchanda, co-associates of the petitioner, to the effect that the petitioner had been purchasing and selling foreign currency were also stressed. It was also maintained that although the petitioner and his mother Satya Talwar had retracted from their earlier statements, but their allegation regarding the fabrication of their statements was found baseless enquiry. Thus it was maintained that the detaining authority had issued the order of detention after full deliberation and application of mind to the facts and circumstances of the case.

5. I have heard the learned counsel for the parties besides perusing the record.

6. Dismissal of Cr. W.P. No. 2374 of 1989 of the petitioner by S.D. Bajaj J. on 7-11-1989, challenging the same detention order is of no consequence, as that petition was held to be incompetent for failure of the petitioner to append the grounds of detention therewith. The petitioner has now procured the grounds of detention Annexure P-2 and filed the present criminal writ petition. The question then arises, whether the present writ petition is maintainable without surrender of the petitioner to custody in pursuance of the above referred to detention order. Similar controversy came under consideration of the Delhi High Court in T.A. Rajendran Vs. Governor of Kerala and Another, . In the said case, after relying upon a Division Bench decision of the Bombay High Court in Hira Lal Somabha Damania v. Dr. Gopal Singh (1988) 1 Crimes 857 : 1989 Cri L J 131 it was held that the petitioner could challenge the order of his detention even if he was residing outside India through a writ of mandamus, following portion of the judgment of the Bombay High Court was extracted and relied upon by the Delhi High Court in Ram Kishore's case (supra) :

"We may point out that the COFEPOSA Act is a preventive piece of legislation which affects the fundamental right of liberty of a citizen. When fundamental rights, specially the fundamental right to liberty, are involved, it is manifest that there should be no bounds for the exercise by the High Court of its extraordinary jurisdiction under Article 226 of the Constitution in order to protect and safeguard those fundamental rights guaranteed by the Constitution. Of course a writ of habeas corpus cannot be entertained unless and until a person surrenders to the concerned authorities and is already under detention. But the power of the Court to examine and to adjudicate in the question of the legality of an order which affects the liberty of a citizen, cannot be limited by the fact that the prospective detenu has not surrendered to the concerned authorities or that the Detention Order was not served on him."

7. The perusal of the judgment of the Division Bench at Panaji of Bombay High Court in Hira Lal Somabhai Damania's case 1989 Cri L J 131 , further shows that it has relied upon the earlier view of the Division Bench of that Court in Jayantilal Bhagwandas Shah and etc. Vs. State of Maharashtra and others, . In paragraph 8 of the judgment, following observations of Bharucha, J., were extracted and relied upon :--

"Article 21 of the Constitution enshrines the most inherent fundamental of human, rights, the right to life and personal liberty. It declares that no person shall be deprived of his life and personal liberty except according to the procedure established by law. Under the provisions of Article 21, as we read it, every person has the right to safeguard his freedom and to regain it if he has illegally been made to lose it. Article 226 of the Constitution clothes the High Courts with authority to issue to any person or authority throughout the territories in relation to which they exercise jurisdiction, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of the rights conferred, inter alia, by Article 21. Article 226 is couched in language wide enough to protect a person against an illegal invasion of his right to freedom by protecting him while still free and by regaining his freedom for him if he has already been wrongfully detained. We cannot countenance and do not accept the Advocate General's submission that the High Courts are impotent to give relief against the prospect of illegal detention. We are satisfied that the High Courts may under the provisions of Article 226 issue a direction, order and writ in the nature of mandamus and/or certiorari quashing an illegal order of detention and may by direction, order and writ in the nature of prohibition enjoin the person threatening the illegal detention from executing the threat."

Further on in paragraph 8 of the judgment in *Hira Lal Somabhai Damania*'s 1989 Cri L J 131 (supra), the Division Bench of the Bombay High Court, after relying upon the consistent view of that Court in different cases figuring therein, had remarked as under :

"The view so expressly recorded by the Division Bench in *Jayantilal Bhagwandas Shah and etc. Vs. State of Maharashtra and others*, was followed by other Division Benches of this Court, inter alia, in *Lachmandas Naraindas Jiwanani v. Union of India*, *Sukhramdas Prabhudas Thakur v. The State of Maharashtra*, *Mohideen Taya, Sony v. K.K. Dwivedi Sayed Iqbal v. State of Maharashtra* 1988 (1) Bom CR 66 (supra), *Yogesh Kantilal Patel v. Home Secretary* 1988 Cri LR (Mah) 230. Similarly in *Manoharilal Naran v. Union of India*. Judgment delivered on July 8th 1980 (reported in ILR (1987) Bom 1, the Division Bench of this Court negated the contention that a Writ Petition was not maintainable and was premature when the Detention Order has not yet been served on the petitioner and he has not been arrested under the same. The Division Bench observed that under a Detention Order, a person is sought to be deprived of his liberty and as laid down in Article 21 of the Constitution, such order can be made only under a law enacted for the purpose and after complying with the provisions of such law. It further observed that it may happen that an order is passed without there being a statute to support it or it may be passed without complying with the provisions of the statute, if any. The order may also be passed against a wrong person and for a wrong purpose and therefore, to insist in such cases that the person against whom the order is passed must first submit to the same and lose his valuable liberty before approaching the Court, is to insist upon an

unreasonable, unwarranted and illegal condition. The Division Bench further said that there is no support for such proposition in our legal system and that on the other hand the fundamental rights guaranteed by the Constitution, particularly by Articles 14, 19 and 21 confer on any person to be likely to be affected by such order an implicit right to approach the Court and knock at its door at any time, and the Court will not and cannot refuse relief to such person by insisting that he first surrender his liberty. With respect, we are in full agreement with the above observations made in Manoharlal Narang's case (above)."

8. In the case in hand also, the petitioner has not only craved for the issuance of a writ of habeas corpus, but has also prayed for any other appropriate writ, order or direction for quashing the impugned detention order.

9. A Full Bench of the Gujarat High Court in Vedprakash Devkinandan Chiripal and etc. Vs. State of Gujarat and Another, had answered the question, regarding the maintainability of the writ petition for challenging the order of detention even though the detenu had absconded, in the affirmative, by relying upon the decision of the Supreme Court in A.K. Gopalan Vs. The State of Madras, , Additional District Magistrate, Jabalpur Vs. Shivakant Shukla, . The Full Bench of the Gujarat High Court took the view that an order of detention in a writ of mandamus can be challenged on the ground that it is a nullity because, (a) it was passed by an incompetent person or (b) it is a mala fide order, or (c) it is contrary to the legal procedure prescribed for passing such order or (d) it is otherwise a nullity for any other reason, for example, passed against a wrong person etc.

10. The Apex Court also in S.M.D. Kiran Pasha v. The Government of Andhra Pradesh, (1989) 4 JT 366 had drawn a fine distinction between pre-violation and post-violation of the right to life and personal liberty while discussing whether a petition under Article 226(1) of the Constitution is maintainable even if the order of detention has not been served upon the detenu after referring to the observations of the Division Bench of the Bombay High Court in Jayantilal Bhagwandas Shah and etc. Vs. State of Maharashtra and others, as well as of the Full Bench of the Gujarat High Court in Vedprakash Devkinandan Chiripal and etc. Vs. State of Gujarat and Another,), had observed in paragraph 15 of the judgment as under :--

"When a right is yet to be violated, but is threatened with violation can the citizen move the Court for protection of the right? The protection of the right is to be distinguished from its restoration or remedy after violation. When right to personal liberty is guaranteed and the rest of the society, including the State, is compelled or obligated not to violate that right, and if someone has threatened to violate it or its violation is imminent, and the person whose right is so threatened or its violation so imminent resorts to Article 226 of the Constitution could not the Court protect observance of his right by restraining those who threatened to violate it until the Court examines the legality of the action? Resort to Article 226 after the right to personal liberty is already violated is different

from the pre-violation protection. Post-violation resort to Article 226 is for remedy against violation and for restoration of the right while pre-violation protection is by compelling observance of the obligation or compulsion under law not to infringe the right by all those who are so obligated or compelled. To surrender and to apply for a writ of habeas corpus is a post-violation remedy for restoration of the right which is not the same as restraining potential violators in case of threatened violation of the right. The question may arise what precisely may amount to threat or imminence of violation. Law surely cannot take action for internal thoughts but can act only after overt acts. If overt acts towards violation have already been done and the same has come to the knowledge of the person threatened with that violation and he approaches the Court under Article 226 giving sufficient particulars of proximate actions as would imminently lead to violation of right, should not the Court call upon those alleged to have taken those steps to appear and show cause why they should not be restrained from violating that right? Instead of doing so would it be the proper course to be adopted to tell the petitioner that the Court cannot take any action towards preventive justice until his right is actually violated whereafter alone he could petition for a writ of habeas corpus? In the instant case when the writ petition was pending in Court and the appellant's right to personal liberty happened to be violated by taking him into custody in preventive detention, though he was released after four days, but could be taken into custody again, would it be proper for the Court to reject the earlier writ petition and tell him that his petition has become infructuous and he had no alternative but to surrender and then petition for a writ of habeas corpus? The difference of the two situations, as we have seen, have different legal significance. If a threatened invasion of a right is removed by restraining the potential violator from taking any steps towards violation, the rights remain protected and the compulsion against its violation is enforced. If the right has already been violated, what is left is the remedy against such violation and for restoration of the right."

In view of the above observations of the Supreme Court, there is no doubt that the writ petition is maintainable against an order of detention even though it was not served upon the detenu as threat to the personal liberty of the detenu is imminent.

11. It appears that the above referred decision of the Delhi High Court and Full Bench decision of the Gujarat High Court were not brought to the notice of G.R. Majithia J., who while disposing of Cr. W.P. No. 3248 of 1989 (Ramesh Kumar Gupta alias Maheshi v. Union of India) had observed that the petition was not maintainable as the detenu had not exhausted remedial measures available under the Act.

12. The question then arises whether the Court should disapprove the conduct of the petitioner in procuring the grounds of detention Annexure P. 2 by some underhand method or that this conduct of the petitioner is in itself sufficient to throw away this writ petition. No doubt, ordinarily the Court should not

encourage a citizen to secure copies of documents in an illegal manner, yet all the same where the personal liberty of a person is at stake, this consideration pales into insignificance.

13. On the merit of the case, it transpires that admittedly no foreign exchange was recovered from the possession of the petitioner or from his house search. Only Indian currency to the tune of Rs. 1,73,550 and Fixed Deposit Receipt of the value of Rs. 2,61,100/-were recovered besides a diary containing on pages 50 and 60 some noting of the petitioner regarding the transaction of sale and purchase in foreign exchange. Page 50 of the printed diary relates to 1-6-1979 while page 60 relates to 25-6-1979. From the confessional statement made by the detenu before the Enforcement Staff, the detaining authority inferred that these transactions of sale and purchase of American dollars were noted down by the detenu. There is no other evidence to connect these writings in the diary with the petitioner or to infer that these writings pertain to the transactions of dealing in foreign currency except the one amount of 710 which has been multiplied by 14, which gives rise to oblique indication that the American Dollars were converted into rupees. The statement of the detenu is completely silent as to on which date or year these transactions of sale and purchase of foreign exchange mentioned in this diary took place. At one stage, during interrogation, the petitioner admitted before the concerned officials that he has been indulging in the sale and purchase of foreign currency since 1 1/2 years and at the later stage of his statement he admitted that he has been indulging in this activity for the last five years. These statements were recorded on 13-4-1989. The petitioner in this case as well as his co-associates Sudarshan Kumar, G.S. Manchanda, Ajai Budhiraja had retracted their confessional statements recorded by the Enforcement Staff to the effect that they along with the present petitioner used to indulge in the sale and purchase of foreign currency. From the perusal of the grounds of detention (Annexure P. 2) it appears that the detaining authority had applied his mind to the factum that Rajiv Talwar petitioner and his above-referred co-associates had retracted their confessional statements subsequently, on different dates, but in para 26 of the grounds of detention, it is specifically averred that Rajiv Talwar had retracted his confession by telegram dated 22-4-1989. Admittedly, the petitioner was released on bail by the Chief Judicial Magistrate, Chandigarh vide his order dated 19-4-1989 and the petitioner having retracted from his statement in the bail application as contended in sub-para (iii) of para 7 of this petition was not considered by the detaining authority even though the detaining authority was aware of the order of granting bail. Although in corresponding para of the return, it is stated by the detaining authority that he did apply his mind to the application for bail, yet all the same it would be of no consequence since this fact is not borne out from the grounds of detention served upon the petitioner. This, it can be well-said that the copy of the application for bail was not placed before the detaining authority. If that is so, then the order of detention is vitiated on the ground of non-application of mind.

14. The matter does not rest here as the petitioner in Ground No. (x) of para 7 of

the petition had specifically averred that on 19-4-1989 the officer of the Enforcement Directorate, New Delhi had searched the following premises :--

"S.No. Place/Person Searched Brief particulars i. Jeevan Singh Gift House/Dua Brothers, Stall Documents No. 78 Gaffar Market, New Delhi ii. Residential premises at A-70, L.I.G. Flats, Documents Prashad Nagar, New Delhi, (under occupation of Sh. Balbir Singh) iii. Residential premises at 26-B, Prasad Nagar, Nil DDA Flats, New Delhi (of Sh. Jasbir Singh S/O Balbir Singh) iv. Search of the person of Sh. Bheer Singh S/O Rs.20,000/- Sh. Shiv Ram R/O H. No. 9271, Kishan Ganj, Gulshan Road, Delhi-6 v. Search of the person of Sh. Kishan Kumar S/O Rs.45,000/- Sh. Om Parkash R/O 673, Sector 1. R.K. Puram, New Delhi.

It is further averred that some documents were recovered from Jeevan Singh Gift House/Dua Brothers, Stall No. 78, Gaffar Market, New Delhi. The search authorisation warrants of items (i) to (iii) Panchnama of the search conducted and documents seized from the premises of Jeevan Gift House were not placed before the detaining authority at the time of passing of the detention order. Further, the statement of Balbir Singh recorded by the Enforcement Directorate officers was also suppressed from the detaining authority. In corresponding para of the return, reply has been given as under :--

"The averments made in this para are not true. Facts are that the detaining authority issued the detention order after examining all the records of the case and none of the documents or information was suppressed from the detaining authority."

A bare perusal of the reply leaves no doubt that it is not specific but an evasive one although the respondent was required to specifically state as to which of these documents were placed before the detaining authority or whether the detaining authority did apply his mind to these documents.

15. In *Ashadevi Mehta (Detenu) Vs. K. Shivraj*, Addl. Chief Secretary to the Govt. of Gujarat and Another, , the Apex Court observed that the respondents intentionally withheld material documents which have far-reaching consequences on the matter in issue and that there was non-application of mind to the most material and vital facts vitiating the requisite satisfaction of the detaining authority and thereby rendering the detention order invalid and illegal. In that case also the detenu had retracted his confessional statement made before the Customs Officer while he was in judicial custody and this aspect of the matter was not placed before the detaining authority. Under these circumstances by making the above-referred observations, the Apex Court had set aside order, of detention.

16. Moreover, in view of the petitioner having retracted his confession at the first available opportunity, it transpires that there is no reliable evidence to infer whether the transactions of sale and purchase of foreign exchange figuring at pages 50 and 60 of the diary recovered from the house search of the petitioner pertain to the year 1979 or later. Thus, at the most, these entries can be said to

have been made by the petitioner in the year 1979 as these figure in the printed diary of that year. If that is so, then there is no nexus between the last prejudicial activity of the detenu and the passing of the detention order, especially when it is not even stated by Sudarshan Kumar, accomplice of the petitioner, that 8400 US. dollars recovered from his personal search on 13-4-1989 were purchased by him from Rajiv Talwar petitioner or were to be sold to this petitioner.

17. Similarly, in Cr. W.P. No. 1841 of 1989, Gurdip Singh Manchanda v. Union of India, decided on 20-7-1989 Reported in (1989) Cri LJ 317 . S. D. Bajaj, J. has quashed the detention of aforesaid Gurdip Singh Manchanda, accomplice of the petitioner, inter alia, on the ground that single incident could not be pressed into service by the detaining authority for subjective satisfaction, especially when nothing incriminating was recovered from the possession of aforesaid Gurdip Singh Manchanda.

18. The detention of Sudarshan Kumar, accomplice of petitioner, from whom 8400 U.S. dollars were recovered on 13-4-1989 was quashed by this Court in Sudarshan Kumar v. Union of India (1989) All Cri LR 288, on the ground that solitary activity was not sufficient for passing the order of detention, especially when the confessional statement has been retracted by that detenu.

19. Moreover, it appears that the detaining authority was not serious about the future propensity of the petitioner to indulge in similar activities as the detention order Annexure P. 1 passed on 19-5-1989 has not still been served upon the detenu. There is no indication available on the file that the authorities had resorted to any coercive measures for ensuring the detention of the petitioner as envisaged u/s 7 of the COFEPOSA Act. This section clearly provides that if the detenu has resorted to absconding then the authorities should obtain warrants of his arrest from the concerned Judicial Magistrate and should resort to the provisions of Sections 82 and 83 of the Code of Criminal Procedure, for ensuring the surrender of the detenu to the detention order.

20. The matter does not rest here. The concerned authorities had not moved the Court of the Chief Judicial Magistrate, Chandigarh for cancellation of bail order Annexure P. 5, especially when a direction has been given to the petitioner therein to join the investigation as and when required by the Customs Authorities or by the Enforcement Directorate, Jullundur.

21. The ratio of the decision of the Delhi High Court in Subhash Chander v. Union of India (1990) 1 Rec Cri R 196, to the effect that where the detenu had given wrong address and was not available at the given address, the delay in serving the detention order was not sufficient to quash the detention order, relied upon by the learned counsel for the respondents, is not attracted to the facts of the case in hand as herein it is not even alleged that the petitioner had given wrong address. On the other hand, the authorities very well knew the full address of his residence as H. No. 3251, Sector 15D, Chandigarh because they had searched

that house and recovered the above referred documents and Indian currency etc. The only explanation given in the return in this regard in para 2 of the reply on merits is that the detenu has resorted to absconding.

22. The apex Court in *Sk. Serajul Vs. State of West Bengal*, had observed that undue delay in actual arrest of the petitioner reflects upon the genuineness of the satisfaction of the detaining authority and vitiates the order of detention.

23. For the foregoing reasons, the order of detention Annexure P-1 is quashed by accepting this writ petition.