

(1990) 02 DEL CK 0008

In the Delhi High Court

Case No : Criminal Writ Appeal No. 720 of 1989

Ramavtar Motilal Jangid

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 05-02-1990

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 22(J)
Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (1990) 40 DLT 558

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

Bench : Single Bench

Advocate : Ashutosh, Naveen Matta, V.K. Makhija, R.P. Lao and Kamani Lao, for the Appellant;

Judgement

P.K. Bahri, J.

(1) This petition has been brought under Article 226 of the Constitution of India read with Section 482, Code of Criminal Procedure seeking quotient of the detention order dated April 13, 1989 passed u/s 3(1) of the Cofeposa Act with a view to preventing the petitioner from smuggling goods, engaging in transporting, concealing and keeping smuggled goods and the declaration dated June I, 1989 issued u/s 9(1) of the Act.

(2) The facts in brief are that on August 11, 1988, the petitioner had arrived at I.G.I. Airport, New Delhi from Dubai and had declared certain goods including one TV-cum-VCP set and had stated that he was not carrying any contraband goods like gold. On suspicion the said TV-cum-VCP Set was opened and from one of its transformers 20 gold biscuits of 10 Gms. each were recovered and were seized. The petitioner was arrested under the Customs Act and he made the statement before the authorities that he had visited Dubai four times from May 1986 onwards and on his last visit he met one Abdulla at Sherjah and he told

him that he was not being taken back in job by the Company in Dubai and he would not be able to earn anything due to his ill-health in India and Abdulla asked him to render some work for him and he would arrange for his free air return ticket from Dubai to Delhi and pay him Rs. 5,000.00 and he handed over the aforesaid TV-cum-VCP Set to the petitioner and he told him that he had concealed 20 gold biscuits in one of the transformers and told him that he should get the said TV-cum-VCP Set detained at the Delhi Airport and after about 10 days Abdulla would come and then he would obtain the detention receipt and would accompany the petitioner and get the said TV-cum-VCP released from the Delhi Airport and would give him Rs. 5,000.00 as a remuneration for this work.

(3) The petitioner, however, was able to get bail from the Judicial Court vide order dated August 25, 1988.

(4) Various grounds have been urged in challenging the impugned orders but it is not necessary to deal with all those grounds inasmuch as this petition is liable to succeed on a very short ground.

(5) It is an admitted case that the Customs Authorities were suspecting that petitioner had been indulging in smuggling of gold earlier as he had visited, Dubai 4-5 times and might be having some previously smuggled gold at his residence. Thus, on August 13, 1988, the residential premises of the petitioner in presence of his father were searched but no incriminating articles or documents were recovered and no incriminating statements were made by the petitioner's father and a Panchnama in that respect was prepared.

(6) The learned counsel for the petitioner has contended that the Panchnama prepared in respect of the search carried out at the petitioner's residential premises showing nil recovery was a very vital document which could have influenced the mind of the detaining authority and the same having been not placed before the detaining authority, has the effect of vitiating the impugned orders.

(7) The learned counsel for respondent No. 2 admits that this Panchnama was not even placed before the declaring authority. In the counter-affidavit filed on behalf of respondents 1 and 2, the only plea taken is that the all relevant material furnished by the sponsoring authority were placed before the competent authorities and petitioner has been detained on the basis of the incident dated August 11, 1988 resulting in the seizure of contraband gold at the I.G.I. Airport, New Delhi which is enough material against the petitioner.

(8) The learned counsel for the respondents have vehemently argued that the said seizure memo was not a vital document and non-placement of the same before the detaining authority is of no consequence as the detaining authority has been subjectively satisfied from the material placed before the detaining authority in shape of the recovery of the gold effected from the petitioner and thus the impugned orders are not open to challenge on this ground.

(9) It is a well settled law that the subjective satisfaction requisite on the part of the detaining authority, the formation of which is a condition precedent to the passing of the detention order, will get vitiated if some material or vital facts which would have a bearing on the issue and could influence the mind of the detaining authority one way or the other, are ignored or are not considered by the detaining authority before passing the detention order. (See *Ashadevi v. K. Shivraj* Air 1979 S.C. 447), it is not necessary to refer many more judgments on this point given by the highest Court as well as by this Court as this legal position is not at all in dispute.

(10) The short question which then arises for consideration is whether the aforesaid Panchnama showing nil recovery from the residential premises of the petitioner is a material and a vital document or not which could sway the mind of the authority one way or the other while considering whether the the detention order should be made or not made.

(11) A similar question came up for consideration before the Division Bench of the Bombay High Court in *Abdulla Kozukhal Assainar Vs. State of Maharashtra*, . In the said case also a Panchnama prepared in respect of the search carried out at the residence of the detenu showing the nil recovery was not placed before the detaining authority. It was held that the Panchnama was a vital document which would have materially influenced the detaining authority in arriving at his subjective satisfaction whether or not to issue the order of detention. The argument that the nil recovery is of no consequence as stated by the Home Secretary is unacceptable. It was laid down that failure to place the said material and vital document before the detaining authority Therefore vitiated the order of detention. The reliance has been placed for this view on another Division Bench judgment of the Bombay High Court, particulars of which are given in Paras 5 and 6 of the judgment. In another case of the Division Bench of the Bombay High Court in *Mohamed Shahanawaz Vs. D.N. Capoor*, , same ratio has been laid down.

(12) It is evident that the suspicions of the authorities that petitioner was indulging in such smuggling activities even on earlier occasions, were not substantiated when the residential premises of the petitioner were searched and no recovery of any incriminating thing could be effected. If the Panchnama showing nil recovery at the residential premises of the petitioner had been placed before the detaining authority, it is possible that detaining authority might have considered that it is not a fit case for passing the detention order when petitioner had succumbed to the temptation of earning about Rs. 5,000.00 as a carrier in this solitary incident. It may be that detaining authority could have come to to the conclusion differently, that despite the fact that no recovery had been effected from the residence of the petitioner, still keeping in view the other facts placed before the detaining authority it is a fit case for passing the detention order. All I am emphasising is that the said Panchnama showing nil recovery was a vital document which. ought to have been placed before the detaining authority

as it could have swayed the mind of the detaining authority in considering whether he should pass the detention order or not. As this vital document has admittedly not been placed before the detaining authority, the same had the effect of showing that there has been non-application of mind. to a very vital document which vitiates the subjective .satisfaction reached by the "detaining authority in passing the detention order.

(13) I hence, allow the writ petition, make the rule absolute and quash the impugned orders and direct that petitioner be set at liberty forthwith, if not required to be detained in any other case.