

(1983) 08 DEL CK 0017

In the Delhi High Court

Case No : Criminal Writ Appeal No. 74 of 1983

R.K. Aggarwal

APPELLANT

Vs

The Administrator, Union Territory of Delhi

RESPONDENT

Date of Decision : 17-08-1983

Acts Referred:

Citation : (1983) 24 DLT 268

Hon'ble Judges : Charanjit Talwar, J

Bench : Single Bench

Advocate : A.K. Sen, P.H. Parekh, Indu Malhotra, Arun K. Sinha and R.M. Bagai, for the Appellant;

Judgement

Charanjit Talwar, J.

(1) On 10th August, 1983, after hearing the learned counsel for the parties I quashed the impugned order of detention dated 22nd April, 1983, and directed that the detenu be set at liberty forthwith. I had stated then that I would give my reasons later which I do presently.

(2) The detenu Mohinder Kumar Aggarwal was detained by the aforesaid order of the Administrator of the Union Territory of Delhi under Sections 3(1) read with Section 2(f) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (hereinafter to be referred to as COFEPOSA) "with a view to preventing him from acting in any manner prejudicial to the conservation and augmentation of foreign exchange and also preventing him from smuggling goods viz., diamonds out of India".

(3) The grounds of detention dated 23rd April, 1983, were served upon him on the very day. Briefly the facts disclosed in the grounds are that on the night of 16/17-12-1982 the detenu was booked to travel to Bangkok by flight No. Alitalia Az 1790 on Thai Airways ticket. On his reporting for customs clearance his baggage on examination was found to contain amongst his personal clothes three card board boxes of sweets. weighing approximately 1 kg. each. One of the

card board boxes containing Khoya sweet on being emptied was found to contain at its bottom a blue colour small paper packet which on opening was found to contain 5 small paper packets duly fixed with adhesive tape. These paper packets contained 6 pieces of diamonds. On weighment total weight of those pieces was found to be 15.75 carats. The value of the same was estimated to be at rupees two lacs. As the detenu could not produce any export permit covering the export of the said diamonds those were seized u/s 110 of the Customs Act, 1962 (herein called "the Act") under the reasonable belief that the same were liable to confiscation. In his statement recorded u/s 108 of the Act the detenu stated that he was staying with his father at Delhi who was running a business of Gems and Jewellery at 1088, Maliwara, Delhi-6 in the name and style of M/s Aggarwal Jewellers and that one of his brothers Kailash Chand was staying in Hong kong for the last 4-5 years and was doing business of imports and exports of Gems and Jewellery in the name of M/s D.D.G. Ltd., 10-A Manson Commercial Building 12 Jublie Street, Hong kong. In his statement the detenu admitted that he had concealed the packet containing the diamonds in the box containing Khoya sweets and that he was smuggling those out of India to Bangkok. The detenu stated that during his frequent visits to Bangkok to finalise a deal for opening a restaurant there he had met one P.S. Narula of Bangkok, Telephone No. 4654578 to whom he offered to pay commission for helping him (the detent)in disposing of the diamonds which he would be smuggling to Bangkok. This offer was accepted by Narula, who came to India on 7th December, 1982, for finalising the scheme to smuggle the diamonds. On 8th December, 1982, the diamonds were purchased through Banwari Lal Dalal, and were shown to Narula who told him (the detent)that those would fetch very good profit in Bangkok; that at that time the father of the detenu, Bhola Ram and his brother Ram Autar were also present. Thereafter, Narula went back to Bangkok. Those were the diamonds which were recovered at the time of customs clearance when the detenu was proceeding to Bangkok.

(4) The detenu was placed under arrest u/s 104 of the Act on 17th December, 1982. A complaint for offences punishable under Sections 132, 135(1)(a) and 135A of the Customs Act was filed against him on 18th December, 1982. The Magistrate remanded the detenu to judicial custody till 21st December, 1982, on which day he was ordered to be released on bail by the Additional Sessions Judge. It was further stated in the grounds that in the bail duplication moved by the detenu on 18th December, 1982, the statement made to the customs authorities u/s 108 of the Act was retracted. It was noticed that according to the detenu the statement had been made on coercion and under duress.

(5) The present petition has been filed by the brother of the detenu.

(6) Mr. A. K.. Sen, learned counsel for the petitioner, did not dispute that the material disclosed in the above grounds was plima facie sufficient to show the detenu's involvement in the offence. He, however, submitted that the detention order is vitiated as material and vital facts which would have influenced the mind

of the detaining authority, one way or the other, were not considered by it before issuing the impugned order. According to the learned counsel two facts ought to have been borne in mind by the detaining authority (1) whether in spite of the passage of time from the date of arrest to the issuance of the detention order it was necessary to order the prevention detention and (2) whether in view of the pendency of the criminal case it was necessary to pass the impugned order.

(7) In support of the contentions the learned counsel placed reliance on *Aahadevi v. K. Shivraj* and another Air 1979 SC 447; *Lakshman Khatik Vs. The State of West Bengal*, ; and *Golam Hussain alias Gama Vs. The Commissioner of Police Calcutta and Others*, .

(8) In *Asha Devi's* case following the law in *Sk. Nizamuddin Vs. State of West Bengal*, , it was held:

"It is well settled 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 material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order".

(9) After noticing the law laid down in *Sk. Nizamuddin's* case it was held that "the detaining authority must exercise due care and caution and act fairly and justly in exercising the power of detention and if taking into account matters extraneous to the scope and purpose of the statute vitiate the subjective satisfaction and renders the detention order invalid then failure to take into consideration the most material or vital facts likely to influence the mind of the authority one way or the other would equally vitiate the subjective satisfaction and invalidate the detention order".

(10) The contentions urged have been taken in the petition as grounds (1) and (12). It is appropriate to quote the reply of the respondents to ground No. (1). It reads :-

"It detention is wrong and denied. There is absolutely no delay in passing the detention orders. The proposal for detention of the detenu under Cofeposa Act was sent by the concerned Addl. Collector of Customs (Palam Airport) on 23rd February, 1983, to the Collector of Customs, New Delhi who after examining the same sent the same to the detaining authority on 10-3-83. After thorough examination of the proposal of detaining the detenu under Cofeposa Act, the detention orders were passed on 22-4-83. The facts of launching the prosecution against the detenu was duly placed before the detaining authority and the same also finds mention in the grounds of detention. However, it may also be submitted that prosecution under the Customs Act has no bar for taking action under Cofeposa Act as held by the Hon"ble Supreme Court".

(11) The case of the respondents, Therefore, is that there is no delay in passing

the impugned detention order.

(12) In reply to the second contention raised on behalf of the petitioner, Mr. Bagai, learned counsel for the respondents submitted that the mention of the fact regarding the pendency of the trial and also of the fact that the statement u/s 108 of the Act has been retracted by the detenu the detention order shows that the detaining authority was satisfied that the pendency of the case would not deter the petitioner from indulging in smuggling activities and, Therefore, the satisfaction arrived at is not vitiated.

(13) The first question which arises for consideration is whether vital facts have been ignored by the detaining authority. The detaining authority being aware of the pendency of the trial may come to a finding that the ordinary law of the land is not enough to prevent the petitioner from indulging into prejudicial activities or that the "witnesses having been either over-awed or won over the prosecution is not likely to succeed. The finding may be to the contrary but the fact which is vital must be considered. This principle is clearly deducible from the law laid down by the Supreme Court in the authorities noticed above. On this ground alone the detention order is liable to be quashed. As far as the question of delay is concerned it is the respondents' case that the question of detention of the petitioner was being examined at various levels. The Additional Collector of Customs made his proposal on 23rd February, 1983, i.e., after 2 months of the arrest of the detenu; the Collector of Customs forwarded this proposal after approving it on 10th March, 1983, and the impugned order was passed on 22nd April, 1983. The second question Therefore is whether the detaining authority had considered that it was necessary to order the detention of the detenu after the passage of four months. The grounds of detention, Annexure B, show that this question has not been considered by the detaining authority. The authority cited by Mr. Bagai, namely, Ashok Narain Vs. Union of India (UOI) and Others, is distinguishable on its own facts. It was held therein "We find from the file that the very question whether the passage of time had made it unnecessary to order the detention of the detenu was also considered by the detaining authority".

(14) Mr. Bagai has produced the original file. I find that this vital fact was also not examined.

(15) The detention order is thus liable to be quashed. I accordingly quashed it on 10th August, 1983, and directed that the petitioner be released forthwith. (D.B.)