
(1999) 06 BOM CK 0002

In the Bombay High Court

Case No : Criminal Writ Petition No. 1265 of 1998

Shri Bashir ali Dafedar

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 09-06-1999

Acts Referred:

Constitution of India, 1950 — Article 22, 226
Criminal Procedure Code, 1973 (CrPC) — Section 161

Citation : (1999) 101 BOMLR 762

Hon'ble Judges : Vishnu Sahai, J;T.K. Chandrasekhara Das, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Vishnu Sahai, J.—Through this Petition preferred under Article 226 of the Constitution of India, the Petitioner Bashir Ali Dafedar, father of the detenu - Mehaboob Ali @ Nawab seeks to challenge the detention order dated 24th June, 1998, passed by the second respondent - Mr. R.H. Mendonca, Commissioner of Police, Brihan Mumbai, in exercise of the powers vested in him by Sub-section (1) of Section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-offenders and Dangerous Persons Act, 1981 (No. LV of 1981) (Amendment - 1996) detaining the detenu under the said provision of the Act. The Detention order dated 24th June, 1998, along with the grounds of detention bearing the said date, was served on the detenu on 29th June, 1998.

2. We have heard Mrs. A.M.Z. Ansari for the petitioner and Mr. Rajiv Patil, Additional Public Prosecutor for the Respondents. Since in our view, this petition deserves to succeed on a purely legal ground, we are not advertng to the prejudicial activities of the detenu contained in the grounds of detention.

3. The legal ground on which this petition deserves to succeed is pleaded as ground No. 4(iii). In short, the said ground is that the detenu was arrested on 15th December, 1997 and was produced before the Metropolitan Magistrate's Court at Bandra, Mumbai, on 30th December, 1997 on which date, his remand

was sought and he filed a written application for bail. A true copy of the latter is annexed as Annexure "E" to the petition. The grievance agitated in the ground is that although the Sponsoring Authority placed before the Detaining Authority, a copy of the remand application along with the bail order dated 30th December, 1997, it did not place before it a copy of the bail application preferred by the detenu. The grievance further is that the said bail application was a document of a vital nature which was likely to influence the mind of the Detaining Authority one way or the other and the non-placement of the bail application, has not only vitiated the subjective satisfaction of the Detaining Authority to preventively detain the detenu but, non-furnishing of its copy by the Detaining Authority to the detenu has trampled upon his right of making an effective representation in terms of Article 22(5) of the Constitution of India.

4. To substantiate her submission, Mrs. Ansari placed reliance on para 12(6) of the decision of the Supreme Court in Abdul Sathar Ibrahim Manik Vs. Union of India and others, . The said para reads thus:-

...

(6) In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the Detaining Authority has to necessarily rely upon them as would be a vital ground for ordering detention. In such a case the bail application and order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu.

5. Mrs. Ansari also invited our attention to the bail application moved by the detenu wherein the main grounds highlighted for bail are as under: -

- (a) the accused has been falsely implicated and has nothing to do with the commission of the offence;
- (b) although it is the second remand but, nothing has been recovered from him;
- (c) nothing will be gained by police custody of the accused;
- (d) the accused is not named in the F.I.R. and no specific role has been assigned to him;
- (e) the accused has no criminal history whatsoever;
- (f) there are no chances of the accused absconding;
- (g) the accused has not been identified by witnesses and the complainant; and
- (h) the accused is the only earning member in the family and the family members are dependent upon him.

Mrs. Ansari urged that in view of the aforesaid averments, the said bail application was a vital document and had it been placed, it might be that the Detaining Authority may not have exercised his subjective satisfaction in favour of preventively detaining the detenu.

She placed reliance on two decisions of the Supreme Court, namely those in *State of U.P. Vs. Kamal Kishore Saini*, and *Ayya alias Ayub Vs. State of U.P. and Another*, . In both these decisions, the Supreme Court has laid down that all vital documents should be forwarded by the Sponsoring Authority to the Detaining Authority and where this has not been done it would not be open for the Detaining Authority to take a stand that even had the vital document in question, been placed before it, its subjective satisfaction to preventively detain the detenu would still have been the same.

6. Ground No. 4(iii) has been replied to in the return of the second respondent Mr. R.H. Mendonca, Commissioner of Police, Brihan Mumbai, the Detaining Authority, in para 12 of his return. In the said para, the Detaining Authority has alleged that the detenu was arrested on 15th December, 1997 and was released on bail on 30th December, 1997 and the remand application dated 30th December, 1997, was placed before him and considered by him. He has also mentioned in para 12 that he was aware that the detenu had been released on bail. He has also stated in the said para that since the detenu was granted bail on the remand application, it could not be said that the application for bail was a vital document and its non-placement would vitiate the order of detention.

Finally, he has averred in the said para that no bail application dated 30th December, 1997, was placed before him by the Sponsoring Authority and no such application for bail was made by the detenu and therefore, ground No. 4(iii) is misconceived.

7. Mrs. Ansari learned Counsel for the petitioner placed before us a certified copy of the bail application dated 30th December, 1997. In view of the certified copy, we are constrained to observe that we find it difficult to accept the averment contained in the return of the Detaining Authority in terms that no application for bail was moved by the detenu.

In our view, where there is oath against oath, the affidavit which receives support from a certified copy of a document, should be believed.

8. In such situation, we proceed on the footing that the detenu had made an application for bail on 30th December, 1997. As mentioned earlier, on the said date, an application for remand was also moved by the Officers of the Sponsoring Authority. It is true that the bail order was passed on the remand application and not on the bail application but, that was because, the necessary consequence of not giving of remand in law was bail. And once the bail order was passed on the remand application, there was no question of passing it on the bail application. Hence, on the bail application, the Court passed the following order "bail order passed on remand application".

In such a factual matrix, the bail order passed on "remand application" would also be deemed to have been passed on the bail application. A similar situation arose before this Court, case Criminal Writ Petition No. 1319 of 1996 decided on 7th August, 1998 by a Division Bench of this Court of which one of (Vishnu

Sahai, J.) was a member. Arvind Ganeshmal Jain v. The Union of India and Ors. This Court while repelling the submission by the counsel for the respondents that since the bail order was passed on the remand application and not on the bail application, the ratio laid down in Abdul Sathar Ibrahim Manik Vs. Union of India and others, would not apply held as under:-

The position which emerges is that on 7th April, 1995 both the remand application and the bail application were before the Court and since it was incumbent for the Court to dispose off the remand application and furnish reasons for not giving remand and the necessary consequence of not giving of remand was bail, the bail order was passed by the Court, after setting reasons for the refusal of remand, on the remand application itself. And once it was passed on the remand application there was no question of passing a separate order on the bail application. That is the reason on the bail application, the Court mentioned OPS. In these circumstances, in our Judgment, the bail order would be deemed to have been passed on the bail application also.

9. It is not disputed by the learned Counsel for the respondents that when the impugned detention order was passed, the detenu was on bail. In such a factual position, in our view, the ratio laid down in para 12(6) of Abdul Sathar Ibrahim Manik Vs. Union of India and others, , that where the detenu is on bail, at the time of the passing of the detention order, the bail application should be forwarded to the Detaining Authority and its copy supplied to the detenu to enable him to make an effective representation would be applicable.

10. We have earlier extracted in some detail the averments contained in the bail application moved by the detenu. The said averments would show that it was not a stereo-typed or formal application for bail but, it was one where a number of specific grounds for bail were taken. In such a situation, in our view, the said bail application was a vital document and it was incumbent on the part of the Sponsoring Authority to have forwarded its copy to the Detaining Authority.

In our view, since the bail application was not placed by the Sponsoring Authority before the Detaining Authority, there was a possibility of his subjective satisfaction having been impaired. It may be that had it been placed, the Detaining Authority may still have passed the detention order but, the converse was also equally likely.

After all, it was a matter of his subjective satisfaction and we cannot conjecture which way would it have gone had it been placed.

In this connection, it would be pertinent to refer to the decisions of the Supreme Court reported in AIR 1989 SC 34 and State of U.P. Vs. Kamal Kishore and Another, .

A perusal of para 13 of the former decision would show that the detenu pleaded that he had been taken into custody at 8 p.m. and his alleged presence at the scene of occurrence at 9.10 p.m. was concocted. A telegram was despatched by

one Mirazuddin at 12.30 midnight on 18.2.1988 wherein it was mentioned that the detenu had been arrested at 8 p.m. On behalf of the respondents, it was argued before the Supreme Court that the telegram was not sent at 12.30 midnight on 18.2.1988 but, at 12.30 noon on 19.2.1988. The Supreme Court took the view that the respondents may be right regarding the time when the telegram was sent but, observed that since the telegram was a vital piece of evidence, its non-placement was fatal. It also observed: "what weight the contents and assertions in the telegram should carry is an altogether a different matter. It is not disputed that the telegram was not placed before and considered by the Detaining Authority"....

Laying down the ratio, the Supreme Court observed thus in the concluding part of para 13:-

...

There would be vitiation of the detention on grounds of non-application of mind if a piece of evidence, which was relevant though not binding, had not been considered at all. If a piece of evidence which might reasonably have effected the decision whether or not to pass an order of detention is excluded from consideration, there would be a failure of application of mind which, in turn vitiates the detention. The Detaining Authority might very well have come to the same conclusion after considering this material but in the facts of the case the omission to consider the material assumes materiality.

11. In State of U.P. Vs. Kamal Kishore and Another, , as evident from para 7, certain vital documents, like the statement of witnesses u/s 161 of the Cr.P. C, bail application of the co-accused and the detenu and the police reports thereon, had not been placed before the Detaining Authority and the assertion made in the return by the Detaining Authority was that even had the said material been placed before him, he would not have changed his subjective satisfaction.

Repelling the said assertion, of the Detaining Authority, the Supreme Court observed thus in para 7:-

...

The High Court therefore was justified in holding that the assertion made in the return that even if the material had been placed before the Detaining Authority, he would not have changed the subjective satisfaction as this has never been accepted as a correct proposition of law. It is incumbent to place all the vital materials before the Detaining Authority to enable him to come to a subjective satisfaction as to the passing of the order of detention as mandatorily required under the Act....

12. Since the bail application of the detenu was a vital document and its copy was not supplied by the Detaining Authority to the detenu, he was also deprived of his right of making an effective representation under Article 22(5) of the Constitution of India.

13. Mr. Rajiv Patil learned Counsel for the respondents, strenuously urged that the ratio laid down in para 12(6) of Abdul Sathar Ibrahim Manik Vs. Union of India and others, , is not a blanket proposition of law and should not be applied in all situations. We are constrained to observed that we do not find any merit in this submission. As we make out para Abdul Sathar Ibrahim Manik Vs. Union of India and others, , lays down that where the detenu is on bail at the time of passing of detention order, it is a mandatory requirement on the part of the Sponsoring Authority to forward the bail application to the Detaining Authority and the latter is also under a mandatory requirement to furnish its copy to the detenu to enable him to make an effective representation.

Mr. Rajiv Patil also cited before us a Division Bench decision of this Court in Shri Mohammed Sharif Farid v. Shri Satish Sahney and Ors. 1996 (2) All M.R. 295 We have perused the said decision and therein, we find that the learned Judges of the Division Bench have not considered the question whether para Abdul Sathar Ibrahim Manik Vs. Union of India and others, , has a blanket application or a restricted one.

Apart from it in the said case, in the bail application, all that was pleaded was that the detenu had been falsely implicated. In the bail application, in our case, a number of grounds which we have detailed above have been taken.

Whether in a given case, a bail application is a vital document or not, would depend on the averments contained in it and the averments contained in the bail application moved in the present case leave no shadow of doubt in our minds, that it was a vital document.

For the said reasons, the said authority would be of no avail to the respondents.

14. For the said reasons, this petition deserves to be allowed.

15. In the result, this petition is allowed. The impugned detention order detaining the detenu Mehaboob Ali @ Nawab s/o Bashir Ali Dafedar is quashed and the detenu is directed to be released forthwith unless wanted in some other case.

Rule is made absolute. Office is directed to forthwith communicate this order to the Detaining Authority.