

(1987) 12 DEL CK 0011

In the Delhi High Court

Case No : Criminal Writ Appeal No. 411 of 1987

Shyam Sunder Agarwal

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 02-12-1987

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3

Citation : (1988) ILR Delhi 76 : (1988) 1 RCR(Criminal) 443

Hon'ble Judges : M. Sharief-ud-din, J

Bench : Single Bench

Advocate : Harjinder Singh, Rohit Kochhar, S.K. Mishra, Rajiv Nanda and S.K. Duggal, for the Appellant;

Judgement

Malik, J.

(1) The petitioner was detained pursuant to a detention order dated 4th of June 1987 passed by Shri S. K. Kohli, Joint Secretary to the Government of India, u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (as amended). The order of detention was passed with a view to preventing him from smuggling goods. This followed an incident dated 25th of March 1987 when one Sushil Kumar Agarwal, Parmeshwar Lal Karel and the petitioner arrived at Calcutta Airport from Hongkong via Bangkok. From all of them the customs authorities recovered some foreign made wrist watches and foreign marked gold. Further, some documents were recovered showing some account of 13,000 U.S. dollars. From the petitioner the customs authorities recovered three gold biscuits and three wrist watches. The petitioner was arrested on the same day and was produced before the court of the Magistrate on 26th of March 1987 when he was remanded to judicial custody till 10th of April 1987. An application for bail was moved before the High Court of Calcutta which came to be rejected on 1st of April 1987. Another application for bail was rejected by the Magistrate on 24th of April 1987. But, subsequently, in April and

May 1987, the petitioner and his accomplice were granted bail by the High Court of Calcutta on certain conditions. I will advert to this aspect of the case at the appropriate place of this order, but at this stage it may be stated that the other two persons furnished bail and came out of jail while the petitioner could not fulfill the conditions of bail and remained in the judicial Custody. It was in the meantime that on 4th of June 1987 the order of detention was passed which was actually served on the petitioner in jail on 8th of June 1987.

(2) The contention raised by Mr. Herjinder Singh is that the detaining authority has failed to show his awareness that at the time when the detention order was passed the petitioner was in custody and has further failed to express that despite this awareness there are compelling reasons to pass the detention order. Mr. Herjinder Singh urged that in fact what is mentioned in the grounds of detention indicates that the detaining authority was under the impression that the petitioner has been admitted to bail. He has in this regard invited my attention to para 13 of the grounds of detention in which apart from other things it is stated as under :

"YOU were granted bail by the Hon'ble Calcutta High Court on 18-5-87 on certain conditions. Shri Parmeshwar Lal Karel was granted bail by the Hon'ble Calcutta High Court on 22-4-87 and Shri Sushil Kumar Agarwal was granted bail by the learned Chief Judicial Magistrate, Barasat on 26-5-87, subject to fulfillment of certain conditions."

(3) Mr. Herjinder Singh, therefore, urged that since two persons had already furnished bail and come out of jail the detaining authority was under the impression that the petitioner was not in custody and the very fact that the detaining authority has not shown any awareness about the petitioner being in custody vitiates the order of detention as it amounts to double detention. The fact that a person "is in custody does not by itself take away the jurisdiction of the detaining authority to pass a detention order. All that is required is that he must show his awareness about the detenu being in custody and still arriving at a subjective satisfaction that it is necessary to detain the detenu. In the present case, I am not in agreement with the contention of Mr. Herjinder Singh that the detaining authority has not shown any awareness of the petitioner being in custody when the subjective satisfaction was arrived at. In fact, the order of detention is addressed to the petitioner at his residence but in the grounds of detention which are of the even date" he is also shown as care care of Superintendent, Dum Dum central Jail, Dum Dum. This shows that the detaining authority was fully aware of the fact that the petitioner" was in jail and that is how the grounds of detention together with the detention order has been served on the petitioner in jail. This is how the respondents have explained the whole thing in the counter affidavit.

(4) The next contention of Mr. Herjinder Singh is that the petitioner neither in the past nor after this incident was involved in any act of smuggling and he does not have antecedents on the basis of which he could be characterised as a chronic

smuggler and that on the basis of" the solitary incident the detention order could not have been passed as a measure of punishment as the authorities could have taken recourse to the normal and ordinary law. In this connection he has invited my attention to the case of Suresh Chand Srivastava vs. Union of India and others, Criminal Writ No. 100 of 84 decided on 15-11-1984(1). This is quoted to canvass the point that this court has held that it is not proper to base the detention order on a solitary incident. I have been taken through the relevant paras of the judgment. This judgment is on the facts and circumstances and background of that case. In all such matters the facts and circumstances of each case are more important and the application of settled principles can only be attracted if justification is provided by the facts and circumstances of each case. In the present case, I find from the counter affidavit that there is evidence available to indicate that the detenu along with others organized a racket, pooled their resources and with a view to make easy money decided to start the operation smuggling. If the case of the petitioner is nudged from that angle, in my view, all this is possibly a fit case where detention with a view to prevent the petitioner from smuggling is absolutely warranted. I find, therefore, no force in this contention of Mr. Herjinder Singh as such.

(5) Having dealt with both the contentions of Mr. Herjinder Singh, I still find that this petition will have to be allowed in the light of" yet another contention that the detention order is a result of total non-application of mind to the material which was before the detaining authority. It is true that in such matters the court is not concerned with the sufficiency or insufficiency of the material, nor can the court substitute its satisfaction for the subjective satisfaction of the detaining authority. That, however, does not mean that the subjective satisfaction arrived at by the detaining authority should be arbitrary or should be bereft of any justification or reason. It must, in fact, be a satisfaction which normally a reasonable man is expected to arrive at on the basis of the relevant material. If that reasonableness is lacking then the court has sufficient powers to review the same. In the present case, I am told that the order of the Calcutta High Court granting bail was not placed before the detaining authority but it is admitted that a letter from the advocate informing the authorities about the grant of bail and the conditions appended thereto was before the detaining authority. That shows that the crux of the order of the High Court of Calcutta regarding the grant of bail was before the detaining authority but, unfortunately, the detaining authority does not seem to have considered this document.

(6) Now, the High Court of Calcutta while granting bail in the sum of Rs. 1,00,000 to the petitioner directed the petitioner to meet the investigating officer twice a week on Mondays and Thursdays between 1 p.m. and 2 p.m. for a period of one month from the date of the release and thereafter whenever called upon to do so. It also directed that the international passport seized from the petitioner shall not be returned to him until further orders of the court. It further directed the petitioner to furnish the address where he will be living during the pendency of the case before he is released from custody. This conditional order of bail of

the High Court of Calcutta had practically made it impossible for the petitioner to leave even his place of residence and there was no scope for him to go abroad and smuggle goods. It seems that all other material excepting this was taken into account by the detaining authority when it passed the order of detention. Had this document been taken by the detaining authority into consideration it is possible he may not have found it necessary to pass the order of detention. This goes to show that the detaining authority while passing the detention order has not taken into consideration the most relevant material resulting in total non-application of mind. The courts have repeatedly warned that detention is not to be made as a substitute for punishment. The purpose of preventive detention is to prevent a person from acting in a prejudicial manner and if that object is achieved without ordering detention there is no scope for passing the order of detention. On that ground I find that this detention stands vitiated. The petition Therefore is allowed and the order of detention of the petitioner is quashed. He shall be released from the custody forthwith unless required in some other case.