

(1992) 09 DEL CK 0063

In the Delhi High Court

Case No : Criminal Writ Appeal No. 129 of 1992

Vinod Lachwani

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 15-09-1992

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 22(4)
Criminal Procedure Code, 1973 (CrPC) — Section 482
Customs Act, 1962 — Section 108

Citation : (1993) 49 DLT 147 : (1993) 41 ECC 343 : (1993) 1 RCR(Criminal) 503

Hon'ble Judges : Mohd. Shamim, J

Bench : Single Bench

Advocate : Sunil Mehta, for the Appellant;

Judgement

Mohd. Sharnim, J.

(1) This is a petition under Articles 226 and 227 of the Constitution of India read with Section 482 Criminal Procedure Code for the issuance of writ of Habeas Corpus or any other appropriate writ, order or direction for immediate release of the petitioner from illegal and wrongful detention made u/s 3 of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the COFEPOSA").

(2) The brief facts which gave rise to the present petition are as under. that the officers of Customs Department, Calcutta intercepted Royal Bhutan Bus No. Bwh 533 3/12/1991 while the said bus was coming from Phuntshilling. The petitioner was found sitting in the said bus along with Murli Chainani alias Murli Lachwani. The petitioner was apprehended on the pointing out of Murli Chainani. On the search of the bus five packages were alleged to have been recovered from the said bus belonging to the petitioner. On search of the said packages it was alleged to have resulted in the recovery of halogen bulbs, fax machines, ladies

"woolen pullover, zipper bags and 24 foreign coins. All the above items valued at Rs. 11,51,600.00. The petitioner could not produce any valid document in support of the legal acquisition of the said goods. The petitioner was arrested and produced before the Magistrate on 2/12/1991. On the said date he is alleged to have made a confessional statement u/s 108 of the Customs Act. However, the same was retracted subsequently on the said date. Co-accused Murii Chainani was also arrested and produced before the Court on 3/12/1991. He also retracted statement alleged to have been made by him u/s 108 of the Customs Act. The petitioner was subsequently released on bail on 9/12/1991. A detention order bearing No. 673/26/92-Cus-VIII dated 21/01/1992 was passed u/s 3 of the COFEPOS A against the petitioner by Shri Mahendra Prashad, Joint Secretary, Government of India, for the detention of the petitioner whereunder the petitioner was ordered to be detained with a view to preventing him from smuggling goods in future. The said detention order was served on the petitioner on 19/02/1992. The petitioner made representation against the said detention order on 4/03/1992. The above detention order was confirmed by Government of India vide Notification No. 673/26/92-Cus. Validated 5/06/1992 and the petitioner was ordered to be detained for a period of one year from the date of detention.

(3) The said detention order is absolutely illegal and invalid and is thus liable to be set aside. The petitioner thus through the present writ petition challenges the legality and the validity of the said order of detention .

(4) The respondent in their counter-affidavit sworn by Shri R.P.Kapur, Under Secretary, Department of Revenue, Ministry of Finance, have not controverted the above facts. According to them, the petitioner was very much found in possession of five packages containing the contrabands such as, halogen bulbs, fax machines and 24 foreign coins valued at Rs.11,51,600.00. The petitioner made a confessional statement u/s 108 of the Customs Act voluntarily, without any coercion, pressure or undue influence .The detention order is, thus, very much legal and valid and sustainable in the eye of law.

(5) However, nobody appeared for and on behalf of the respondent and they allowed their case to go by default. Thus, I could hear none for and on behalf of the respondent.

(6) Learned Counsel for the petitioner, Mr. Sunil Mehta, has contended with great zeal and fervor that the impugned order dated January 21, 1992 and the confirmation order dated 5/06/1992 are absolutely illegal and invalid and cannot be sustained by any stretch of imagination in the eye of law and they are thus liable to be quashed. The contention put forward by the learned Counsel for the petitioner is two fold. According to him ,the detaining authority miserably failed to consider the retracted statement made by the petitioner on 2/12/1991 with the result that it affected the subjective satisfaction of the detaining authority. Had the said retracted statement been put before the detaining authority it would have just been possible that no detention order was passed against the

petitioner.

(7) The next limb of the argument advanced by the learned Counsel for the petitioner is that the confirmation order in the instant case was passed much after the expiry of the period of three months as envisaged by Art .22 of the Constitution of India. Admittedly, the learned Counsel contends ,the detention order in the instant case was passed on 21/01/1992 and the same was executed on 19/02/1992. Whereas the confirmation order was passed on 5/06/1992. It implies thereby that the confirmation order was passed much after the expiry of the statutory period of three months.

(8) Let us now see as to how far the learned Counsel has succeeded in substantiating the above arguments. The learned Counsel for the petitioner has led me through his petition wherein it has been averred that the impugned detention order is bad and illegal and invalid inasmuch as there was a suppression of the material facts from the detaining authority. The petitioner retracted his alleged voluntary statement vide his application dated 2/12/1991 moved before the Chief Metropolitan Magistrate, Calcutta. The said fact of retraction was never brought to the notice of the detaining authority which resulted in affecting the subjective satisfaction of the" said authority .Learned Counsel for the petitioner in support of his argument has led me through the documents relied upon by the detaining authority while passing the impugned order (Annexure "C"). A close scrutiny of the said documents reveals that the retracted statement dated 2/12/1991made by the petitioner is not one of the said documents which were relied upon by the detaining authority at the time of the passing of the impugned order .There was no mention of the said retracted statement in the said documents which are as many as 43. According to the learned Counsel the involuntary statement made by the petitioner u/s 108 of the Customs Act which was subsequently retracted by the petitioner was taken into consideration while ignoring the fact that the said statement was no more in operation inasmuch as it has been retracted. There is no gainsaying the fact that a retracted statement is a very important, relevant and material document and the same should have been brought to the notice of the detaining authority. It is fully manifest from above that it was not so. Thus ,this Court is of the view that it affected the subjective satisfaction of the detaining authority and vitiated the impugned order. I am of the view that non-consideration of such an important fact rendered absolutely illegal and invalid the impugned detention order. The above view was given vent to by their Lordships of the Supreme Court reported in Ayya alias Ayub Vs. State of U.P. and Another, . It was 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. 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 affected 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." To the same effect are the observations as reported in *Asha devi v. K. Shivraj* and Another AIR 1979 Sc 447 " It is well settled that 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 mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order." It was further observed in the said authority (vide para 7)...." Questions whether the confessional statements recorded on December 13 and 14,1977 were voluntary statements or were statement which were obtained from the detenu under duress or whether the subsequent retraction of those statements bythe detenu on 22/12/1977 was in the nature of an after- thought, were primarily for the detaining authority to consider before deciding to issue the impugned detention order but since admittedly the aforesaid vital facts which would have influenced the mind of the detaining authority one way or the other were neither placed before nor considered by the detaining authority it must be held that there was non-application of mind to the. most material and vital facts vitiating the requisite satisfaction of the detaining authority thereby rendering the impugned detention order invalid and illegal."

(9) This brings me to the next point raised by the learned Counsel for the petitioner. The learned Counsel has urged that the impugned detention order is liable to be quashed in the instant case inasmuch as the confirmation order which was required to be passed within three months from the date of the execution of the order i.e. 19/02/1992 was not done. The learned counsel in this Connection has led me through certain important and relevant dates. The impugned detention order in the present case was passed on 21/01/1992. It was executed on 19/02/1992 whereas the confirmation order was passed on 5/06/1992 i.e. after the expiry of the requisite period of three months, vide Art. 22 of the Constitution of India .Thus, the above confirmation order was not passed within the minimum period of three months as prescribed under Art. 22 of the Constitution of India, thus, the above non-confirmation of the order renders the said order absolutely illegal and invalid. It is thus liable to be quashed. I am .supported in my above view by the observations of their Lordships of the Supreme Court as reported in *Nirmal Kumar Khandelwal Vs. Union of India (UOI) and Others,*" If no order of confirmation, of the detention is made under Clause (f) of Section 8 within three months of the date of detention by the appropriate Government, further detention of the detenu after the expiry of that period is without the authority of law.

(10) The expression "may confirm" in Clause (f) of Section 8 is significant. It imports a discretion. Even where the Advisory Board makes a report that in its opinion, there is sufficient cause for the detention concerned, the Government may not confirm the detention order. Read in the light of Art .22 of the

Constitution and the context of the words "continue the detention" in Clause (f) of Section 8 they definitely lead to the conclusion that the sine qua non for continuing the detention made beyond the period of three months, is the confirmation of the detention order by the appropriate Government .Conversely the non-confirmation of the initial order by the appropriate Government before the expiry of the period of three months "detention ,shall automatically result in revocation and termination is further clear from the language of Section 10. The words "which has been confirmed under Clause (f) of Section 8" occurring in Section 10 underscore the same policy which underlies the constitutional mandate in Art. 22."

(11) It is manifest from above that the further detention of a detenu beyond a period of three months as provided under Art. 22 of the Constitution is permissible only in those discerning few cases where the confirmation order is passed before the expiry of period of three months. A perusal of the affidavit dated 7/05/1992 [vide para 5(b)] reveals that the Advisory Board meeting was not held till then. It implies thereby that the Advisory Board did not make any suggestion for the further detention of the petitioner till then. The confirmation order was passed subsequently thereafter on 5/06/1992 Vide Notification No. 673/26/92-Cus. Viii dated 5/06/1992 i.e. much after the expiry of the period of three months. The above lapse on the part of the respondent 1 thus feel has also rendered illegal and invalid the further detention of the petitioner beyond the period of three months.

(12) In the circumstances stated above the petitioner is entitled to succeed .The petition is allowed. The detention order dated 21/01/1992 and the confirmation order dated 5/06/1992 are hereby quashed. Let the petitioner be set at liberty in case he is not required to be detained in any other case.