
(1990) 02 DEL CK 0006

In the Delhi High Court

Case No : Criminal Writ Petition No. 654 of 1989

Zalmai

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 15-02-1990

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 22(5), 226
Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (1990) 40 DLT 517

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

Bench : Single Bench

Advocate : Sushil Mehta, V.K. Makhija and Sangeeta Nanchaha, 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 of the Code of Criminal Procedure, seeking quashing of the detention order dated August 1, 1989. passed by respondent No. 2 u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short Cofeposa Act) with a view to preventing the petitioner from acting in any manner prejudicial to the augmentation of foreign exchange.

(2) Before I deal with the various contentions raised by the learned counsel for the petitioner, it is necessary to refer to the facts of the case as re evident from the grounds of detention served on the petitioner.

(3) A secret information being received that the detenu who usually sits Room No. 15 of Dil Aram Guest House, Ballimaran, Delhi, has been indulging in unauthorised sale and purchase of foreign exchange and gold on large-scale, on July 18, 1989, the petitioner was apprehended on the Main Road in front of Police Booth, Opposite Nai Sarak near Town Hall Building, Chandni Chowk, His personal

search led to the recovery of 22,550 US dollars in case concealed in his right leg beneath the knee cap. Along with Rs. 780.00 in Indian currency and one loose sheet from the front pocket of the petitioner's kurta. His statement u/s 40 of the Foreign Exchange Regulation Act, 1973, was recorded wherein he stated that he was an Afghan national and had come to India about ten months back on a refugee status and that he had destroyed his passport and was not in a position to produce his refugee card and had no means of earning his livelihood and thus, he started purchasing articles like camera, clothes, shoes etc. from the persons coming to India from abroad and selling the same on profits to other persons at the aforesaid room in Dil Aram Guest House and that other Afghan nationals were also indulging in same type of business in other rooms of the said Guest House and the petitioner came to know about purchase and sale of foreign currency, i.e. dollars, pounds etc., and had seen other Afghan nationals making profits by dealing in purchase and sale of foreign currency and the petitioner also started purchasing foreign currencies and selling the same to some person in Jama Masjid and he indulged in this purchase and sale of foreign currencies on a large-scale and after huge foreign currencies used to accumulate with him purchased from various persons coming from Jaipur and Agra, the petitioner used to sell the same to same persons residing at Lajpat Nagar he admitted the said recovery effected from him and stated that he was purchased the said dollars @ Rs. 19.95 per dollar from persons who had come from Jaipur and that he was keeping the account of the said transaction in the said loose sheet recovered from his kurta's pocket and the petitioner also admitted that in this way, he had earlier indulged in illegal purchase and sale of foreign currency to the tune of about Rs. 30,00,000.00 (thirty lakhs) and he had no license or permission from the Reserve Bank of India for dealing in foreign exchange, it is also mentioned that the statement was recorded by Shri S.A.Ali, Chief Enforcement Officer and he had read over the statement to the petitioner who admitted the same as correct. It was also recorded in the grounds of detention that the petitioner was remanded to judicial custody and the petitioner had moved an application for being released on bail in the court on July 19, 1989. Then the contents of the bail application have been reproduced showing the version of the petitioner as to how he had come into possession of the said dollars innocently. The detaining authority after keeping in view the said retraction of the petitioner and the other facts reached the subjective satisfaction that the petitioner has been indulging in unauthorised purchase and sale of foreign exchange and the same had affected the foreign exchange resources of the country adversely and although the petitioner was in judicial custody yet there was every possibility of his being released on bail as his application was fixed for arguments on August 2, 1989 and if the petitioner was to be released on bail, the petitioner again would indulge in such prejudicial activity affecting the foreign exchange resources of the country adversely and thus, the detention order was passed.

(4) The learned counsel for the petitioner at first vehemently argued that the order of detention dated August 1, 1989 was not actually served on the detenu

at any time and thus, the detention of the petitioner is vitiated. Shri Mahendra Prasad, Joint Secretary to the Government of India, has filed the counter-affidavit in opposition to this writ petition. At page 12 while replying to ground (1), it has been averred that the order of detention Along with its translation was sought to be served on the detenu in Tihar Jail on August 2, 1989, but the petitioner refused to receive the same and a Panchnama in that respect was drawn and later on the grounds of detention and the documents and their translations in Dari language were served on the petitioner in Tihar Jail on August 4, 1989. In para 3 of the counter affidavit there was some confusion about these averments but that confusion stands cleared by these clear averments made in reply to ground No. (1). No affidavit in rebuttal has been filed by the petitioner although the counter affidavit was filed in court on February 7, 1990, but I had given an option to Mr. Sunil Mehta, counsel for the petitioner, that if necessary the case can be adjourned to enable the petitioner to file a rejoinder and Mr. Sunil Mehta stated that there is no need to file any rejoinder.

(5) The learned counsel for the respondents shown me the original Panchnama which was prepared when the detenu had refused to accept the order of detention on August 2, 1989, in Tihar Jail. The Panchnama is attested by officials of the Jail. Even register of the Jail was brought during the course of the arguments and it was shown that there exist an entry in the register dated August 2, 1989, showing that the Enforcement Officer had visited the Jail on that day.

(6) The learned counsel for the petitioner has argued that the said entry in the jail record does not indicate that any person knowing Dari language had accompanied the Enforcement Officer to explain the contents of the detention order to the detenu. The case of the detenu is that he was never offered service of order of detention and he never refused to accept the service. I have no hesitation in repelling the contention of the petitioner that he had not refused to accept the order of detention which was sought to be served on him in Jail on August 2, 1989,. After all there could be no earthly reason for the Enforcement Officer to have visited the Jail on August 2, 1989, if the order of detention was not to be served on the petitioner on that day.

(7) Counsel for the respondents has, on the other hand, pointed out that the order of detention was got translated in Dari language from a person knowing that language and it was transcribed in Hindi script and was read over to the detenu but the detenu refused to accept the order of detention. It is also mentioned in the affidavit of Shri Mahendra Prasad that the Enforcement Officer at the time had apprehended the petitioner, had conversed with him in Hindustani and the learned counsel for the respondents has urged that the petitioner has taken up now false pleas that he was illiterate and did not know any other language except Urdu when as a matter of fact the slip of paper containing calculations in Dari language regarding his foreign exchange dealings was recovered from the person of the petitioner himself. Hence, I hold that the

petitioner is not right when he asserts that he had not refused to accept the service of the order of detention which was explained to him before it was sought to be served on him by the officials of the respondent.

(8) The next contention raised on behalf of the petitioner by the learned counsel for the petitioner is that the grounds of detention and the documents have not been served on the petitioner in the language known to the petitioner. It is pleaded by the petitioner that he did not know any other language including Dari language except he could converse in Push to language In the counter-affidavit it has been mentioned that the petitioner comes from a place where Dari language is spoken by the locals and that Shri Mohd Arif Jah while explaining the grounds of detention and the documents of which translations were given in Dari language had conversed with the detenu in Dari language. No affidavit in rebuttal has been filed by the petitioner to controvert this fact. Mere fact that the petitioner had later on in his first representation taken up the plea that he did not knew Dari language in my opinion, is of no consequence in face of the facts coming out on the" record showing that the petitioner had a document with him on his person when he was apprehended, containing calculations in Dari language and Mohd Arif Jab had conversed with him in Dari language. Thus, the service of the documents on the petitioner in Dari language, in my opinion, meets with the requirement of law.

(9) The learned counsel for the petitioner has made reference lo certain judgments which lay down the law that the grounds of detention have to be served in the language known to the detenu. There is no dispute about this proposition of law. But in the present case, in my opinion Affects do show that the petitioner knew Dari language besides Hindustani and documents and the grounds of detention have been slightly served on him translated in Dari language which were read over to him by Mohd.Arif Jah with whom he had conversed in Dari language. I, hence, find no merit in this contention also.

(10) Counsel for the petitioner has then urged that the petitioner had sent a representation dated August 26, 1989, through his Advocate seeking revocation of the detention order besides supply of documents and information mentioned at page 7 of the representation but the information sought at Serial (v) was not conveyed. The petitioner has sought information with regard to the contents of the information and specific information received by the Delhi Zonal Office of the Enforcement Directorate. While rejecting this representation vide memo dated September 15, 1989, the details have been given as to what documents have been supplied to him and what documents he is to be supplied with on his request. Counsel for the respondents has argued that the information sought at Serial No, (v) was not all relevant as to such information had been communicated in the grounds of detention. It is not shown by the petitioner how the said information sought at Serial No. (v) could have enabled him to make any effective representation against the order of detention.

(11) Then, it has been urged that the petitioner had made representation dated

September 20, 1989, in which he asked for documents and information pertaining to the visits of the Enforcement Officer and other persons to Tihar Jail on August 2, 1989. Copies of the said documents were admittedly not supplied. He has argued that if such information had been given the detenu could have made a representation to show to the Advisory Board that in fact, the order of detention was not sought to be served on him in Tihar Jail. Nothing turns on this representation of the petitioner because I have already give a finding on merits that the petitioner was sought to be served with the order of detention in Tihar Jail and he had refused to accept the same. After all the grounds of detention were admittedly served on the petitioner on August 4, 1989 which also clearly indicated that the order of detention has been passed against him. Nothing more was required to be delivered to the petitioner which could have enabled him to make any effective representation to the Advisory Board. So, I do not find any merit in this contention as well.

(12) Counsel for the petitioner has made reference to Criminal Writ Petition No. 324/86, MM. Yusuf v. Union of India, decided by a Division Bench of this Court on March 17, 1987 and some other judgments in support of his contention that if a request is made by the detenu for supply of some documents which could enable him to make an effective and purposeful representation and those documents are not supplied, the detention of the detenu would stand vitiated. It is true that in case there has been made some reference even casually in the grounds of detention with regard to certain documents which although are not being relied upon by the detaining authority for passing the detention order but if the detenu makes a request for supply of copies of such documents, then the detaining authority ought to supply copies of such documents to enable the detenu to make an effective and purposeful representation. The law has been now clarified by the Supreme Court in Abdul Sattar Abdul Kadar Shaikh Vs. Union of India (UOI) and Others, , where it has been held that it is the duty of the court to see whether the detenu is in any way handicapped in making effective representation if copies of such documents are not supplied to the detenu on his request being made. In the said case, a request had been made for supply of copies of FIRs, bail application, and bail which was declined. The Court held that the detenu knew about the contents of such documents and thus, non-supply of copies of such documents does not prejudicially affect the right of a detenu to make any effective representation.

(13) For parity of reasons when as a question of fact it has been found by me that detenu had refused to accept the order of detention when it was sought to be served on him, it is evident that non-supply of copies of documents and information requested by him in the representation had not in any manner prejudicially affected the right of the detenu to make an effective representation.

(14) Lastly, it has been contended that as the detenu was already in Jail in judicial custody there was no compelling necessity for the detaining authority to have passed the detention order and reliance is placed by the learned counsel for

the petitioner in this respect on *Shashi Aggarwal Vs. State of U.P. and Others*, . On facts in that case it was found that the prejudicial activities which were the basis for passing the order of detention, were not the actual cause of the communal riots which had taken place in Meerut on April 14, 1987 and during the intervening night of May 18 & 19, 1987. So, it was held that the subjective satisfaction recorded in the grounds of detention that the communal riots had broken out due to the prejudicial activities of the detenu was wrong on material mentioned in the grounds of detention itself. So, the Supreme Court giving this particular finding on merits examined the question whether the detaining authority could have also gone into the point whether the petitioner was likely to be released on bail and in that context the Supreme Court observed that the detail cannot be interdicted from moving the court for bail by clamping an order of detention and mere a bald statement in the grounds of detention that the person would repeat his criminal activities would not be enough, it was held that there must be credible information or cogent reason apparent on the record that the detenu if enlarged on bail would act prejudicially to the interests of public order. On facts this particular judgment of the Supreme Court is distinguishable. The facts of the present case, as enumerated above, clearly indicate the continuous prejudicial activity of the present detenu dealing in foreign exchange illegally even earlier, to the time when he was actually apprehended. So, the past prejudicial activity of the petitioner in dealing illegally with the foreign exchange on a very high scale was itself a sufficient material to enable the detaining authority to formulate the subjective satisfaction that if petitioner is released on bail he is likely to indulge in same very prejudicial activity again in future. As held in *Vijay Kumar Vs. Union of India (UOI) and Others*, , the detaining authority has to only keep in view the fact that the detenu is already in detention and has to apply its mind to the material in order to determine whether there still exist compelling reasons justifying the passing of the order of detention. It was held that it is not necessary that in the order of detention such awareness of the detaining authority has to be indicated. It is enough if it appears from the grounds of detention that the detaining authority is aware of the fact that the detenu is already in detention. In the cited case also, the detenu was indulging in dealing with smuggled gold biscuits on a large-scale and subjective satisfaction was reached by the detaining authority that if order of detention is not passed the detenu is likely to indulge in same type of prejudicial activity in future. The factum of detenu being in judicial custody was to the knowledge of the detaining authority before detaining authority reached the necessary subjective satisfaction for passing the detention order. It is true that on mere fact that the detenu is likely to be released on bail the detention order cannot be clamped in order to put an obstacle in the right of the detenu to obtain an order of bail in a criminal case, but it will depend on the facts of each case in order to determine whether an order of detention, can be made or not against a particular detenu who is already in judicial custody. So, where there is enough material present in the grounds of detention to show that a particular detenu has been indulging in prejudicial activities continuously in a consistent manner, the detaining authority

can from the subjective satisfaction. In such a case the order of detention should be made to preventing such a detenu to indulge in such prejudicial activity in future if his release on bail is imminent. So, I hold that in the present case, the order of detention is based on sufficient material in this respect.

(15) No other point has been urged.

(16) I, hence, find no merit in this petition which I, hereby, dismiss and discharge the rule.