Rivadeneyta Ricardo Agustin vs Govt. Of Delhi on 8 April, 1993

Equivalent citations: 1994 SCC, SUPL. (1) 597, AIRONLINE 1993 SC 78

Author: B.P. Jeevan Reddy

Bench: B.P. Jeevan Reddy, N Venkatachala

PETITIONER:
RIVADENEYTA RICARDO AGUSTIN

Vs.

RESPONDENT:
GOVT. OF DELHI

DATE OF JUDGMENT08/04/1993

BENCH:
JEEVAN REDDY, B.P. (J)
BENCH:
JEEVAN REDDY, B.P. (J)
VENKATACHALA N. (J)

CITATION:
1994 SCC Supl. (1) 597

ACT:

HEADNOTE:

JUDGMENT:

ORDER

1.In this petition for issuance of a writ of Habeas Corpus, the validity of the order of detention made by the Administrator of the Government of National Capital Territory of Delhi Act under Section 3 of the COFEPOSA, is challenged. The order of detention is dated August 18, 1992.

2.The petitioner is a foreign national. He arrived in India from Bangkok on April 4, 1992. While he was passing through the Customs Hall he was apprehended and on being searched, substantial quantity of gold was found concealed in the VCR. He made a statement admitting that he was smuggling gold. He was arrested and investigation commenced.

3.On May 13, 1992 the Magistrate took cognizance of an offence under, Section 135 of the Customs Act. It appears that the actual hearing of the case commenced on July 3, 1992 and charges were framed on August 11, 1992. It is at that stage, the impugned order of detention was made on August 18, 1992. The order states that with a view to prevent the petitioner from engaging himself in smuggling activities, it is necessary to detain him. The grounds of detention served upon him mention the number of visits he made to India during the year 1991 (as many as eight) and during the year 1992 (two) and his local contacts in India. The petitioner is stated to be an unemployed engineer engaged in the nefarious activity of smuggling.

4.Though several grounds are urged in support of the writ petition by Shri Ram Jethmalani, learned counsel for the petitioner, it is not necessary to refer to all of them except one which, in our opinion, merits acceptance. It is submitted that on the date the order of detention was made the petitioner was in judicial custody. The bail petitions filed by him were dismissed finally on June 9, 1992. He did not move any bail application thereafter. No bail application was pending on August 18, 1992. There was no other circumstance indicating that the petitioner would be released from custody. In these circumstances, there was no material before the authority to believe that there was a real possibility of petitioner being enlarged on bail or being released and that it is necessary to detain him to prevent him from engaging in prejudicial activity. It is pointed out that according to the counter, proposal for the detention of petitioner was sent to the Administrator on May 22, 1992 but the authority passed the order only on August 18, 1992 without apprising himself of the fact-situation prevailing in the middle of August 1992. Reliance is placed upon two decisions of this Court in Kamarunnissa v. Union of India' and Hawabi Sayed Arif Sayed Hanif v. L Hmingliana2. In the first case the principle relied upon by the learned counsel, is stated in the following words: (SCC pp. 138-39) "The decisions of this Court to which our attention was drawn by the learned counsel for the petitioners Jay down in no uncertain terms that detention orders can validly be passed against detenus who are in jail, provided the officer passing the order is alive to the fact of the detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty. We will now consider the case-law in brief.

1 (1991) 1 SCC 128 1991 SCC (Cri) 88
2 (1993) 1 SCC 163 1993 SCC (Cri) 304

In Vijay Narain Singh' this Court stated that the law of preventive detention being a drastic and hard law must be strictly construed and should not ordinarily be used for clipping the wings of an accused if criminal prosecution would suffice. So also in Ramesh Yadav v. District Magistrate, Etah4 this Court stated that ordinarily a detention order should not be passed merely on the ground that the detenu who was carrying on smuggling activities was likely to be enlarged on bail. In such cases the proper course would be to oppose the bail application and if granted, challenge the order in the higher forum but not circumvent it by passing an order of detention merely to supersede the bail order. In Suraj Pal Sahu v. State Of Maharashtra5 the same principle was reiterated. In Binod Singh v. District Magistrate, Dhanbad6 it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. There must be cogent material before the officer passing the detention order for inferring that the detenu was likely to be released on bail. This inference must be drawn from material on

record and must not be the ipse dixit of the officer passing the detention order. Eternal vigilance on the part of the authority charged with the duty of maintaining law and order and public order is the price which the democracy in this country extracts to protect the fundamental freedoms of the citizens. This Court, therefore, emphasised that before passing a detention order in respect of the person who is in jail the concerned authority must satisfy himself and that satisfaction must be reached on the basis of cogent material that there is a real possibility of the detenu being released on bail and further if released on bail the material on record reveals that he will indulge in prejudicial activity if not detained."

(emphasis supplied)

5. To the same effect is the other decision.

6. On the other hand, the learned Additional Solicitor- General appearing for the State submitted that the authority did not sit over the proposal after receiving it but was actively pursuing the matter, collecting material and was following the criminal case against the petitioner deligently. On being fully satisfied about the necessity of detaining the petitioner, did he pass the impugned order. He submitted that the authority was aware that no bail petition was filed after June 9, 1992, yet, he was of the opinion that the possibility of his filing such a petition and his release on that basis could not be discounted. In view of his past record, the detention of the petitioner was found absolutely essential. Learned Additional Solicitor- General relied upon the decisions in Abdul Sathar Ibrahim Manik v. Union of India7 and Birendra Kumar Rai alias Virendra Kumar Rai v. Union of India8. The question for consideration is whether there was material before the authority establishing that the detenu is likely to be released or that there was imminent possibility of his being released and whether he was satisfied about the said aspects?

3 Vijay Narain Singh v. State of Bihar, (1984) 3 SCC 14 :

1984 SCC (Cri) 361

4 (1985) 4 SCC 232: 1985 SCC (Cri) 514 5 (1986) 4 SCC 378: 1986 SCC (Cri) 452 6 (1986) 4 SCC 416: 1986 SCC (Cri) 490 7 (1992) 1 SCC 1: 1992 SCC (Cri) 1 8 (1993) 1 SCC 272: 1993 SCC (Cri) 324: JT (1992) 5 SC

7. In the grounds of detention, the following statement occurs in para 9 :

> "The Administrator of the National Capital Territory of Delhi is aware that you are in judicial custody and had not moved any bail application in the Court(s) after June 9, 1992 but nothing prevents you from moving bail applications and possibility of your release on bail cannot be ruled out in the near future. Keeping in view your modus operandi to smuggle gold into India and frequent visits to India, the Administrator of the National Capital Territory of Delhi is satisfied that unless prevented you will continue to engage yourself in prejudicial activities once you are released."

8.The above statement merely speaks of a "possibility" of the detenu's release in case he moves a bail petition. It neither says that such release was likely or that it was imminent. Evidently, the statement falls short of the requirement enunciated by this Court in Kamarunnissal. Even in the return filed in this petition, the authority has not stated (in response to Ground 'B' of the writ petition) that there was material before him upon which he was satisfied that the petitioner was likely to be released or that such release was imminent. In Ground 'B' of the writ petition, the petitioner had alleged:

> "[T]hat the respondent knew perfectly well that a complaint has already been filed in Court against the petitioner. He also knew that his two applications for bail were rejected by the Court. Between June and August, the petitioner had made no attempt whatsoever to secure any bail either from the trial court or from any superior court. Without any application of mind to this aspect of the matter, the respondent acted perversely in coming to the conclusion that the petitioner was ever likely to indulge in any offence of smuggling, to prevent which the respondent found it necessary to pass the order Annexure 'A' hereto."

9. In response thereto, the following statement is made in para 9-B of the return:

> "As regards contents of ground B, 1 say that the petitioner moved applications for bail which were rejected by the concerned courts and the release of the petitioner on bail on subsequent application could not be ruled out. The fact that the petitioner was in judicial custody was within the knowledge of the detaining authority and having full knowledge of the facts, the detaining authority considered it necessary to detain the petitioner. The subjective satisfaction was arrived at having full knowledge of the facts." (emphasis supplied)

10.The learned Additional Solicitor-General placed before us the relevant file but he could not bring to our notice any material indicating that the release of the petitioner was likely or that there was a real possibility of his being released and/or that the authority was satisfied about the said aspect.

11.In the circumstances, we must hold that the principle enunciated by this Court in Kamarunnissa v. Union of India1 squarely applies and the order is liable to be quashed. It is accordingly quashed. The detenu if in custody shall be released forthwith if he is not required in any other case or if he is not being detained under an order of competent court.

12. The writ petition is disposed of accordingly.