Martins Hans Peter vs Union Of India And Others on 3 August, 1987

Equivalent citations: 33(1987)DLT133, 1987(32)ELT297(DEL)

JUDGMENT

M.K. Chawla , J.

1. Mr Martin Hans Peter, the petitioner, holder of a German Passport arrived at Calcutta Airport from Bangkok on 6-8-1986. He had a confirmed ticket for journey between Bangkok-Calcutta-Bombay and Zurich. The Customs Officers at Calcutta airport kept a secret watch on his movements. The petitioner became conscious of being suspected by the Customs Officers. He became further apprehensive when two of his associates were subjected to thorough search by the Customs officers. Out of the fright during the course of interrogation, the petitioner suddenly desired to back to Bangkok and, if not possible, to Katchmandu without baggage being examined by the Customs at Calcutta airport.

2. The Customs officers in order to be on the safe side recorded the statements of Mrs. Tanima Datta, the I.A.A.I lady receptionist and Miss Denaz Bhesania, ground hostage of Thai Airlines, who disclosed that the petitioner, in order to avoid customs check at Calcutta airport requested for help from Miss Denaz Bhesania to send him to Bombay as a transit passenger. The witness did not agree to his request and advised him to observe the normal facilities for clearance of his baggage through immigration and customs the petitioner again made futile attempts to go back to Bangkok. In the beginning, the petitioner attempted to misled by stating that he only had gold jewellery in his possession. His baggage and person were then searched resulting in the recovery of 26 pieces, circular gold tablets which collectively weighed 3,742.4 grams and were valued at Rs. 8,08,421/-. These gold pieces were found inside the unregistered accompanied baggage. Since the petitioner failed to produce any valid document/permit in support of the legal importation of the gold tablets, the same were seized by the Customs officers on the reasonable beliefs that the same were smuggled and were liable to confiscation under the provisions of Customs Act, 1962 read with Foreign Exchange Regulation Act, 1963.

3. In his statement made on the same day, the petitioner admitted the recovery and seizure of the aforesaid gold from his possession. he however, contended that the said gold was not for landing in India but was taken to be Zurich via Bombay and as such his ticket was booked for Bangkok-Calcutta-Bombay-Zurich. He further disclosed that two of his associates who were examined by the Customs Officers at Calcutta airport had been asked by two Nepalese nationals at Bangkok for carrying gold into India. He, in turn, entered into a conspiracy with the above said two associates who were examined by the Customs Officers at Calcutta airport had been asked by two Nepalese nationals at Bangkok for carrying gold into India. He, in turn, entered into a conspiracy

with the above said two associates to decamp with the gold secretly to Zurich. As regards the gold was recovered, the special cavities inside the Suit- Case and the leather Jacker from where the gold was recovered, the petitioner discloses made by him for carrying gold for smuggling. He however, submitted that this was his first offense and expressed regrets in committing such offence without the knowledge of any customs and expressed regrets in committing such offense without knowing any customs rules and regulations. The statements of other connected witness were also recorded before the proposal for taking action under the COFEPOSA Act was initiated.

4. The petitioner was arrested u/s 104 of the Customs Act on 7-8-1986 and produced before the learned Chief Judicial Magistrate, Barasat. His bail application on the next day was rejected by the Chief Judicial Magistrate, Barasat. His subsequent application before the District & Sessions Judge, Alipur, met the same fate. The Calcutta High Court, however, released the petitioner on bail with two sureties of one lakh each, one of which must be local.

5. From the foregoing facts and circumstances, Shri Tarun Roy, Chief Secretary to the Government of India was convinced that the petitioner has been smuggling gold into India and unless prevented, he will continue to do so in future. He concluded that although the departmental adjudication proceedings are in progress in the matter, it has become necessary to detain the petitioner under COFEPOSA Act, with a view to prevent him from smuggling goods in future. This order is dated 3rd November, 1986. This very order is the subject-matter of challenge in the present petition.

6. The first and foremost contention of the learned counsel for the petitioner i that the order of detention stands vitiated in as much as the sole ground of detention is formulated on non-existent and factually erroneous assertions and reasons which are based on misconceived facts and disregarding of the statements relied upon. Further more, there is non-consideration of relevant and favorable material qua the detenu in the formation of the grounds by the detaining authority rendering the detention bad. Even though the respondents have denied the allegations but from the persual of the material on record, it can safely be said that it is a pure and simple case of non-application of mind and the subjective satisfaction has been arrived at on non-existent and misconceived evidence.

7. The following illustrations will make the point crystal clear :

Sl. Factually non-existent, erroneous, Actual facts as per the statements misconceived and incriminating relied upon facts relied upon in the grounds of detention (Annexure -B)

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1. In para 1 at page 2 of the The detenu on a arrival at grounds it is stated that "Out Calcutta first contacted of freight during the course of Mrs. Taniam Datta the IAAI interrogation, he (detenu) Lady Receptionist, who in suddenly desired to go back to

turn book the detenu to Bangkok, and if not possible, to Miss Denaz Bhesawa, Ground Kathmandu without the baggage Hostess, Thai Airlines, being examined by Customs at whose statements have been Calcutta Airport." (emphasis relied upon and copie provided) enclosed with the Rejoinder.

	A perusal of the statements reveal that nowhere there is any mention of "fright" on the part of the detenu and he, in fact in the very instance told Mrs. Tanima Datta that he wanted to go to Zurich and wanted to be a transit passenger for Bombay as per his confirmed ticket for journey between Bangkok, Calcutta, Bombay and Zurich. On being advised that he cannot be treated as a transit passenger for Bombay, he requested to go to Kathmandu, failing which to "anywhere out of Inida". The expression "out of fright" in the ground of detention is non-existent in the said statement and the expression "that he suddenly desired to go to Bangkok" is misconceived.
2. In para 1 at page 2 of the grounds grounds , it is stated that Mrs. Tanima Datta and Miss Denaz Bhesania in their statements u/s 108 of the Customs Act, 1962 "disclosed that the said passenger (detenu) .... in order to avoid Customs check at Calcutta airport, request for help from Miss Denaz Bhesania to send his (detenu) to Bombay as an in-transit passenger." (Emphasis provided)	A persual of the two statements reveal no mention of the words ".....in order to avoid Customs check at Calcutta airport....."On the contrary, Miss Denaz Bhensania in her statement says that Mr. Bhowmick, Supdt. of Customs told her that the detenu "should not go without custos checking". Further, the later part of the adjoining para is clearly in contradiction of the assertion in part 1 above, i.e. "... he

		suddenly desired to go back to Bangkok."
3.	In para 1 at page 3 of the grounds it is stated that "Thereafter he he was asked to go to Customs ... but at this stage he again explored the possibility of going to Kanthmandu obviously to avoid examination of his baggage....Then he made another futile attempt to go back to Bangkok.	The assertions are misconceived and erroneous as there is nothing to support the same in the statements of the detenu or Miss Denaz bhesania and/or Mrs. Tanima Dutta.
4.	In para 1 at page 3 of the grounds it is stated that "In the beginning he (detenus) `attempted to mislead by stating that he only had gold jewellery in his possession. However , after protracted interrogation and close examination he ultimately confessed that he had gold bullion in his possesion."	The assertion are erroneous, misconceived and non-existent. The detenu in his statement at page 11 says, as under:- "while I was coming back to that Customs Officer another civil dressed man interrogated me and as I did not know the rules and regulations of this country I thought carrying gold in transit to Bombay and Zurich is not an offence, As such, voluntarily I declared that I was having /carrying some gold in my biscuit-coloured suit case."(Emphasis provided).
	In para 2 at page 6,it is stated that " as regards the special cavities - inside the suitcase and in the leather jacket...(detenu) admitted that these had been made by him for carrying gold for smuggling."	The assertion is misconceived inasmuch as it suppressed the material words which the is in the following words at page 22 of the detenu's statement;(emphasis provided)
		Regarding the specially made cavities .. I would like to state the same were ade by me for carrying the gold safely after r5eceiving the same from my aforesaid two friends for taking to Zurich."(Emphasis provided
6	.In para 9 at page 12 and 13, it is stated that "at page 1 of the	The assertion is misconceived and non-existent .The

	said Notebook..some figures show conversion of English weight of gold into India weight of Tolas. On being asked in this regard, Mr. Martin Hans Peter admitted .... that he had ... made the conversion of English weight of gold into India weight i.e. tola, for which it is evident that (detenu).... made the calculation to assertion the worth of gold attempted to be smuggled into india at the local price." (Emphasis provided)	detenue in his statement at page 19 only says: " I wrote these accounts for understanding English weight of gold in comparison of Tola to to grammes and tola to ounces." (Emphasis provided) are, in fact, now and at the relevant time, Indian weights as well. The inference is, therefore misconceived. Further in the later part of the averments that "ascertain the worth of the gold "ascertain the worth of the gold attempted to be smuggled into India at the local price" is factually incorrect, non-existence and misconceived. (Emphasis provided)
7.	In para 14 at page 15 of the grounds it is stated that "..... is evident that you have been smuggling gold into India...."	The assertion is absolutely misconceived as there is no material whatsoever in the ground to reflect any repetitive activity on the part of the detenu in the past so as to warrant the averment that "you have been smuggling gold into Inida."
8.	In para 14 at page 15 of the grounds , it is stated that "Although departmental adjudication proceeding and prosecution proceedings are in progress in the matter, I am satisfied....."	The assertion is prejudicial and is absolutely misconceived, factually incorrect, and non-existent as is evident from paras 13 and 15 on pages 3 and 4 of the counter-affidavit, which says - "It is pertinent to submit that no complaint for prosecuting has been filed till the passing of the detention order"(para 13). "There was not question of supplying the copy of the complaint, Court's orders etc., and show cause

notice....since the same
have not been filed/issued
at the time of passing of
the detention order."

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8. As many as 8 factually non-existent and erroneous facts have been pointed out which formed part of and made the basis of the order of detention. The grounds do not flow from the material relied upon by the detaining authority. The mistakes or mis-statements made in the grounds of detention as well as in the affidavits clearly indicate total non- application of mind on the part of the detaining authority. To say the peast, an inference is inevitable that the order of detention is passed mechanically and in a very casual and cavalier manner without application of mind and, there for, is invalid. The contention of the learned counsel for the respondent is that Court cannot over look the fat of the petitioner having been found in possession of contraband gold when he landed at Calcutta airport. This fact, by itself, was enough for the detaining authority to conclude that the petitioner is engaged in the smuggled of gold into India and unless presented, will continue to do so in future. This contention on the face of it is devoid of any substance. It is well settled that in an order under the COFEPOSA Act, the decision of the authority is subjective one and if one of the grounds is non-existent or irrelevant of is not available under the law, the entire detention order will fall since it is not possible to predicate as to whether the detaining authority would have made an order for detention even in the absence of non-existent or irrelevant grounds. In the case reporter4d as Dwarika Prasad Sahu V. The State of Bihar and others, 1975 SCC (Crl.) 177, the Supreme Court has gone to the extent of holding that :

> "If there is one principle more firmly established than any other in this field of jurisprudence, it is that even if one of the grounds or reasons which led to the subjective satisfaction of the detaining authority is non-existence or misconceived or irrelevant, the order of detention would be invalid and it would not avail the detaining authority to contend that the other grounds or reasons are good and do not suffer from any such infirmly, because it can never be predicted to what extent the bad grounds or reasons operated on the mind of the detaining authority or whether the detention order would have been made at all if the bad grounds or reason were excluded and the good grounds or reasons alone were before the detraining authority."

The above said judgment is a complete answer to the objection of the respondents and set at rest the controversy.

9. This is not the end of the matter. The detaining authority has considered the relevant and favorable material quo the detenu which exist on the life. Though the detaining authority was not obliged to rely upon the said material but it was desirable on his part to have taken not of and discard it, by giving adequate reasons, The following passages from the statement of the detenu

prima facie go to show that he has not brought n the gold for smuggling into India but his primary intention was to take it to Zurich.

(a) Page 7 of the statements of the detenu :

Immediately I rushed inside the said bathroom ... I found the said Zipperbig bag. I opened the same and found two big packets wrapped with yellow inside the bag. Hurriedly, I removed those cellophane papers and got smaller packets wrapped with black carbon papers. I also removed those black carbons and threw them away...."

It is the common knowledge that wrapping in black carbons papers is registered to avoid detention in the X-Ray checking equipments installed at the airports. The fat that the detenu removed these packing clearly shows that he had no intention to enter Calcutta and had intended to carry gold to Zurich.

(b) Page 18 of the statements of the detenu :

"This is a telephone call ticket dated 6-8-1986. The first telephone No. 57-2031 is the telephone No, Air India, Calcutta airport and the second one No. 57-3685 also belongs to the same. On 6th I made telephone call to these telephone Nos. to give a tip to your Government regarding the smuggling of gold by two Nepalese as started in my earlier pages, who arrived on 6-8-1986 at Calcutta airport by TG-313, but unfortunately, nobody picked up the receiver and thus my honest effort went in vain."

(c) Page 9 of the statement of the detenu :

As per our earlier arrangements with my friends, I was supposed to flee away with the aforesaid gold to Bombay and then to Zurich literally by stealing the said gold from those two Nepalese and for that purpose I made contact with a lady employee of Thai at Calcutta airport for making necessary arrangements to send me to Bombay and for that I also requested her to take me to transit longue. All these request were made to her before observing immigration. But unfortunately the said lady informed me that it was not possible and according to my confirmed ticket to Calcutta and Bombay, I had to observe all the immigration and customs formalities. I was not having any visa because I had a mind to go to Bombay transit passenger."

10. The above said passage from the statement of the detenu clearly indicate that exonerating and favorable circumstances in favor of the detenu were ignored rendering the subjective satisfaction and thereby the order of detention bad ab initio.

11. The next submission of the learned counsel for the petitioners is that it is a case of double detention. The submission is that the petitioner was and continued to be in judicial custody to all after the passing of the order of detention and its execution. This is a mala fide exercise of power inasmuch as the petitioner was sufficiently prevented for the purpose for which the detention order

was made. The impugned order does not reflect the compelling necessity to detain the petitioner.

12. The case of the respondent is that the detaining authority had duly kept in mind the fact that the detenu was granted bail by the High Court of Calcutta on 30-9-1986, but having failed to furnish the requisite sureties, he was remanded to judicial custody.

13. It is no doubt true that where a preventive order is passed against a person already confirmed to jail, the detaining authority must show awareness that the person sought to be detained is already in jail and yet a preventive detention order is a compelling necessity. Has this precaution been taken in this case or not is the proposition which requires a definite answer.

14. The preventive action pustules that if preventive step is not taken, the person sought to be prevented may indulged into an activity prejudicial to the economy of the country. In other words, unless the activity is interdictated, by preventive detention order, the activity which is being indulged into is likely to be repeated. Now if it is shown that the person sought to be prevented by preventive order is already effectively prevented, the power under sub-section (2) of section 3, if exerted, would simply that one who is already prevented is sought to be further prevented which is not the mandate of the Section. An order for prevented detention is made on the subjective satisfaction of the detaining authority. The detaining authority before exercising the power of preventive detention would take into consideration the past conduct or antecedent history of the person and matter of fact, it is largely from the prior events showing the tendencies or inclinations of a man that an inference could be drawn, whether he is likely even in the future to indulged in an activity of smuggling.

15. In this case, the petitioners is a foreign national, It is his first and the last attempt to smuggle gold into India. His attempt failed and he was arrested on 8-8-1986. His three bail applications were rejected by the Chief Judicial Magistrate, Barsat as well as the Sessions Judge, Alipur, Calcutta. Even though he succeeded in obtaining an order of his release on bail from the High Court of Calcutta, but the conditions imposed were quite onerous i.e. furnishing of two sureties of Rs. 1 lakh each, one of which must be a local. Being a foreign national, and prima facie a smuggler, it was just not possible for the petitioner to comply with the conditions for his release on bail. For that matter, he was served with the order of detention while in jail custody. The circumstances do indicate that there was no compelling necessity on the part of the detaining authority to pass the order of detention which has proceed to be a case of double detention. In similar circumstances, the Supreme Court in case reported as Binod Singh v. District Magistrate, Dhanbad, Bihar and others, , held as under :-

> "Where the order of detention under Section 3(2) of the National Security Act was served upon the detenu, when he was already in jail in respect of a murder case and there was no indication that this factor or the question that the said detenu might be released to that there was such a possibility if his release, was taken into consideration by the detaining authority properly and seriously before the service of the order of detention, the continued detention of the detenu under the Act would not be justified. The power of directing preventive detention given to the appropriate

> authorities must be exercised in exceptional cases as contemplated by the curious provision of the different statutes dealing with preventive detention and should be used with great deal of circumspection. There must be awareness of the facts necessitating preventive custody of a person for social defense. If a man is in custody and there is no imminent should not be exercised. And if that is the position, then however disreputable the antecedents of a person might have been, without consideration of all the aforesaid relevant factors, the detenu could not have been put into preventive custody."

The above said Judgment is on all fours to the second contention of the petitioner that it is a case double detention and is liable to be quashed.

16. The last attack relates to the delay of near-about 3 months in passing the order of detention. According to learned counsel, there is absolutely no worth while explanation of this delayed action which would render the order of detention as invalid. Learned counsel for the respondent, however, submits that in the counter, a satisfactory explanation has been furnished justifying the making of the detention order. On this aspect, the counter discloses, "There is no undue delay in passing the order which was passed on 3-11-1986, thus being passed in less than 3 months from the date of the incident. This time gap of nearly 3 months was due to investigation and examination of the case at various stages. Lastly, the investigation continued till 9-10-1986. The statements of co-detenus namely Auer Raimund Joseph Berheard and Raginald Clyde Fulton were recorded on 9-10-1986. Therefore, the case after having been examined and scrutinized at various levels was placed before the detaining authority who passed the detention order on 3-11- 1986. It is also pertinent to submit that before the pausing of the detention order, some time was also spent in seeking certain clarifications by the detaining authority from the sponsoring authority. Besides, some time was also consumed in making copies of several documents numbering 145 which were to be supplied to the detenu immediately after his detention."

This explanation, if it can be so termed, leaves much to be desired. Admittedly, the petitioners was arrested and detained on 7-8-1986. Almost all the documents came into existence on the same day. Nothing more was required to be done. It may be that the statements of Auer Raimund Joseph Berheard and Regainald Clyde Fulton were recorded again on 9-10-1986 but in this, they only confirmed their recorded again on 9- 10-1986 but in this, they only confirmed their previous statements recorded on the day of the incident. This step appears to have been taken in the garb of investigation to justify the long delay which has occasioned on the part of the respondents. Even then, this explanation does not fill in the long gaps. It is not explained as to how many witness were examined and, if so, on what dates. It is also not stated as to much time was consumed in translating the copies of the documents and by who.

The affidavit of the persons concerned from whom clarifications were sought and the time taken by them should have been placed on record indicating the number of days it consumed in communicating the desired information. In fact, there is no explanation in the eye of law and this delay of three months is quite fatal to the order of detention.

17. The delay of 2-1/2 months was held to be fatal in the judgment of our own High Court reported as Bhupinder Singh v. Union of India and others, 1985 D.L.T. 493. The Division Bench on its this aspect concluded thus :

> "As noticed earlier, in the return there is no explanation about the delay in the official record from 14-12-1984 to 28-2-1985. We find ourselves unable to agree with the counsel for the respondents that in the file, there is an explanation much less satisfactory explanation. In our opinion, the gap between 14-12-1984to 28-2-1985 reveals a complete disregard of the requirements of urgently dealing with cases involving preventive detention. The official record is silent as to who was handling it between the said two dates. We cannot accept the arguments of Mr.Bagai that this period of 2-1/2 months was utilised for preparing the draft grounds. We consequently hold that the delay in this case remains unexplained."

18.Useful reliance can also be placed on the judgments reported as Sk. Abdul Munnaf v. The State of W.B., MAN C/0210/1974; Laxman Khatik v. State of West Bengal, ; Rabindra Kumar Ghosel v. The State of West Bengal, AIR 1975 SC 108 and Md.Sahabuddin v. The District Magistrate, 24 paragons and others, . Applying the said ratio to the facts of the case in hand, I have no hesitation to hold that the detailing authority has not acted swiftly in the matter and there was no probity between the prejudicial activity and the detention order. There is no worthwhile explanation for the delayed action. On this ground alone, the petitioner must succeed.

19. No other point has been urged nor requires going into.

20. As a result of the above discussion, I accept the petition and quash the order of detention. The petitioner be set at liberty forthwith unless required to be detained under any order of a competent court or authority.