Burhanuddin Pahevali Bilaspurwala vs Administrator, Union Territory Of ... on 10 March, 1993

Equivalent citations: 51(1993)DLT468

JUDGMENT

Sat Pal, J.

(1) In this case the petitioner was detained pursuant to order of detention bearing No. F.5/60/91-Home (P-11 dated 16/08/1991. passed by the Administrator of Union Territory of Delhi in exercise of powers conferred by Section 3(1) read with Section 2(f) of the Conservation of Foreign Exchange's Prevention of Smuggling Activities Act, 1974 (for short called 'COFFPOSA'). The order of detention was served on the petitioner on 19/08/1991 while he was in custody. It appears that a declaration under Section 9(1) of Cofeposa was also issued though a copy of the same has not been placed on the file.

(2) Briefly stated the facts of the case are that on 2/06/1991 the petitioner arrived at Igi airport. New Delhi from Kualalampur and opted for green channel and when he reached near the exit gate, he was intercepted by the customs officers on suspicion and was diverted for screening of thebaggage. On screening of the briefcase one red white colour plastic envelope was found concealed between the upper hard top and inner lining of thebriefcase. The said envelope was opened and two packets wrapped with black colour carbon papers were recovered. On un-wrapping the carbonpapers, two gold bars of one kg., each of foreign markings were recovered.A certified goldsmith was called on the spot who certified the recovered gold to be of 24 carat purity and the gold was valued at Rs. 7,40,000.00. The said gold was seized under Section 110 of the Customs Act, 1962 and a detailed panchnama dated 2-6-1991 was also drawn. On 2-6-1991 the petitioner in his statement under Section 108 of the Customs Act, 1962, admitted the recovery and seizure of the said gold and stated that the recovered gold belonged to one Suleman Noor Mohammed who travelled with him from Kualalampur It is further alleged that the petitioner was to hand over the said gold to said Suleman outside Delhi airport and in case he could not doso, he was to visit Prakash Hotel, Paharganj to deliver the gold to Suleman.However, the said statement was retracted by the petitioner vide an application dated 17/06/1991 filed in the Court of the learned Acmm, NewDelhi.

(3) The petitioner was arrested on 2-6-1991 and was remanded to judicial custody till 17-6-1991 by Acmm, New Delhi on 3-6-la91. The remand was further extended till 29-6-1991 and thereafter up to 12-1-1991.It may also be pointed out here that the petitioner filed a bail application on 17/06/1991 in the Court of Acmm, New Delhi which was rejected vide order dated 19/06/1991.

(4) It has been stated in para 7 of the writ petition that the residential premises of the petitioner were searched at Bombay by the officers of the customs and the aforesaid search resulted in nil recovery which was evident from the panchnama, a copy of which is Annexure-D to the writ petition.

(5) The petitioner has challenged the order of detention in this writ petition on the basis of various grounds mentioned in the writ petition.Ms. Sangeeta Nanchahal, learned Counsel for the petitioner, however, confined her submissions to the following contentions :- 1.That the residential premises of the petitioner were got searched but nothing incriminating article was recovered but the panchnama showing nil recovery was not placed before the Detaining Authority and the same being a vital document could influence the mind of the detaining authority. The detention order, therefore.stands vitiated due to non-application of mind by the detainingauthority.2. That there was no material before the detaining authority necessitating the detention of the petitioner who was already in judicial custody and his only bail application had been dismissed on19-6-1991 by the Acmm, New Delhi.

(6) Now I proceed to examine the contentions urged by the learned Counsel for the petitioner. Firstly. I examine the second contention urged by the learned Counsel for the petitioner. In support of this contention the learned Counsel drew my attention to paras 9 and 10 of the writ petition. It has been stated in para 9 of the petition that there was no immediate need to detain the petitioner preventively because he was already in judicial custody and his only bail application was already dismissed on 19-6-1991. In para 10it has been stated that there is non-application of mind as the conclusion of the detaining authority that the possibility of the petitioner getting released on bail could not be ruled out in the near future as he was making efforts for being released on bail, was not based on any material and the same washypothetical. Learned Counsel for the petitioner relying on these averments contended that the conclusion arrived at by the detaining authority was hypothetical as there was no material before the detaining authority that the petitioner was making efforts for being released on bail. In support of this contention the learned Counsel placed reliance on a Supreme Court judgment in Shri Dharmendra Suganchand Chelawat through his sister Kumari Archana Chelawat v. Union of India and Others, .

(7) A counter affidavit has been filed on behalf of the respondents and in reply to paras 9 and 10 it has been submitted that the petitioner had moved an application for bail which was rejected on 19-6-1991 and possibility of filing another application in future and consequent release could not be ruled out. It was further submitted that the passport of the petitioner revealed that he had gone to Dubai three times earlier for short visits and he might have brought gold on earlier occasions also. The law on the point whether an order of detention can be passed against a person who is already in custody was laid down by a Constitution Bench of the Supreme Court in Rameshwar Shaw v. District Magistrate, Burdwan, .Following the law laid down in this case and after a review of subsequent decisions a three Judges Bench of the Supreme Court in the case of N. Meera Rani v. Government of Tamil Nadu and Another, summarised the position of law as follows :- "We may summarise and reiterate the settled principle. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order etc.ordinary it is not needed when the detenu is already in custody, the detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order, but, even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be

detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made even in anticipation to operate on his release. This appears to us,to be the correct legal position."

(8) The principle of law as summarised in the case of N. Meera Rani(supra) was reiterated in a subsequent judgment of the Supreme Court in Shri Abdul Sathar lbrahim Manik v. Union of India and Others, which has been relied upon by the learned Counsel for respondent No. 2. Even in the case of Dharmender (supra) relied upon by the learned Counsel for the petitioner, same principle has been reiterated. From the grounds of detention it is clear that the detaining authority was aware of the fact that the petitioner was in judicial custody and was further of the view that possibility of his getting released on bail could not be ruled out in the near future as he was making efforts for release on bail. It has also been stated in the grounds of detention that in fact the petitioner filed a bail application dated 17-6-1991 which was rejected by the Acmm, New Delhi on19-6-1991. It has further been stated therein that the scrutiny of passport revealed that the petitioner had visited Dubai thrice in 1988 and visited Kualalampur once in 1991. Relying on these facts, it was stated that the detaining authority has arrived at conclusion that the petitioner had been indulging in smuggling activities and unless prevented he was likely to indulge in the smuggling activities in future when released on bail. Keeping in view these facts mentioned in the grounds of detention, I do not find any force in this contention urged by the learned Counsel for the petitioner and accordingly the said contention is rejected.

(9) As regards the first contention, the learned Counsel for the petitioner referred to para 7 of the writ petition wherein it has been stated that the residential premises of the petitioner by searched at Bombay by the officers of the customs and the said search resulted in nil recovery as is evident from the copy of the panchnama of search which is Annexure-D to the writ petition. It has further been stated that the said panchnama was a relevant and vital material which has been with held by the sponsoring authority and was not placed before the detaining authority at the time of passing of the detention order and this has vitiated the continued detention of the petitioner. It may be relevant to point out here that in reply to thisaverment, it has been stated in the counter affidavit filed on behalf of the respondents that no information regarding search of the residential premises of the petitioner was received from the customs department and the customs department may reply to this para. However, no separate reply on behalf of the customs department has been filed.

(10) In support of this contention the learned Counsel for the petitioner has placed reliance on the following judgment in Asha devi v. K.Shivraj and Mr., Air 1979 Sc 447, P.U. Abdul Rahtman v Union of India and Others, , Maninder Singh v. Union of India and Others,1990 (2) Dl 232 and Amar jeet Singh v. Union of India and Others, .

(11) Mr. Jagdev Singh, the learned Counsel for respondent No. 2.However, submitted that even if the Panchnama indicating nil recovery from the residential premises of the petitioner was not placed before the detainingauthority, the detention order could be sustained on the basis of the other grounds mentioned in the said order. In support of his contention he placed reliance on two Supreme Court judgments in Prakash Chand Mehtav. Commissioner and Secretary, Government of Kerala and others, and Madan Lal Anand v. Union of India and Others, It 1989 (Supp)SC 295.

(12) Now I may consider the cases relied upon by the learned Counselpetitioner. In the case of Asha Devi (Supra) it was held that the subjective satisfaction requisite on . the part of the detaining authority will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or theother, are ignored or not considered by the detaining authority before issuing the detention order.

(13) In the case of Pu Abdul Rahman (Supra) the Supreme Court reiterated the law laid down in an earlier judgment in the case of M. Abdul Kutty v. Union of India, 1990 (2) Scc 1, that if the bail application and the order granting bail which were vital material for consideration are not considered, the satisfaction of the detaining authority would be impaired.

(14) In the case of Maninder Singh (Supra) a learned Single Judge of this Court held that a panchnama showing nil recovery from the residence of the detenu was a vital document which could have swayed the mind of the detaining authority and since such a document was not placed before the detaining authority, the detention order stood vitiated. The same view was taken by another learned Single Judge of this Court in the case of Amar jeet Singh (Supra).

(15) In the case of Prakash Chand Mehta (Supra) relied upon by the Counsel for respondent No. 2, it was held that when the detention order has been made on two or more grounds such order of detention shall be deemed to have been made separately on each of such ground and accordingly if one irrelevant or inadmissible ground had been taken into consideration, that would not make the detention order bad. It was, therefore,held that even if the detaining authority had not taken into consideration the fact regarding the retraction of the statement by the detenu there were other facts and good enough material to come to the prima facie belief that the detention of the detenu was necessary. The said principle of law was reiterated by the Supreme Court in its subsequent judgment in the case of Madan Lal Anand (Supra).

(16) From the law laid down by the Supreme Court in the cases relied upon by the learned Counsel fur respondent No. 2, it is clear that incase a confession made by a detenu in his statement recorded under Section 108 of the Customs Act was subsequently retracted and the said felt was not placed before the detaining authority at the time of passing of the detentionorder, this will not make the detention order bad in case such an order is sustainable on the basis of other grounds.

(17) But in the. present case the real question in issue is whether a document indicating nothing incriminating recovered from the residential premises of the detenu, was a relevant and material document which could have influenced the mind of the detaining authority if it had been placed before him at the time of passing the detention order. I think answer to this question is found in the judgments of this Court in the Cases of Maninder Singh (Supra) and Amarjit Singh (Supra), wherein it was held that such a document was a vital and releva.nt document and in case the same was not placed before the detaining authority, the detention order stood vitiated (18) In this connection it will be relevant to refer to the following conclusion in Shri Abdul Sathar Ibrahim Manik (supra) : "IN a case where detenu is released on bail and it is at liberty atthe time of passing the order of detention, the defSSSaming authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and granting bail should

necessarily be placed before the authority and the copies should also be supplied to the detenu."

(19) In view of the above discussion, I am of the view that the Panchnama showing nil recovery from the residence of the petitioner was a vital and relevant document and since the said document was admittedly not placed before the del lining authority while passing the detention order, the subjective satisfaction on the part of the detaining authority not vitiated as the said document could have influenced the mind of the detaining authority one way or the other. The view I have taken, is also supported by the judgment of the Supreme Court in the case of Asha devi (Supra).

(20) Accordingly, I allow the writ petition and make the ruleabsolute. The impugned order of detention dated 16-8-1991 is quashed andI direct the petitioner be set at liberty, if not required to be detained in any other case.