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(1992) 12 KL CK 0040

High Court Of Kerala

Case No: O.P. (H.C.) No. 13114 of 1992-S

B. Subaida — APPELLANT

Vs

State of Kerala and Others — RESPONDENT

Date of Decision: Dec. 17, 1992

Acts Referred:

- Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - Section 3(3), 5A
- Constitution of India, 1950 - Article 19(1), 21, 22, 22(5)

Citation: (1993) 1 KLJ 489

Hon'ble Judges: M. Jagannadha Rao, C.J; P. Krishnamoorthy, J

Bench: Division Bench

Advocate: M.N. Sukumaran Nair, for the Appellant; Cyriac Joseph, A.A.G. and C.N. Radhakrishnan, Additional Central Government Standing Counsel, for the Respondent

Final Decision: Dismissed

Judgement

M. Jagannadha Rao, C.J.

This is an application for the issue of a writ of habeas corpus. The Petitioner is the wife of one Moidu, S/o. Mammu Haji, who has been detained under the provisions of the Conservation of Foreign Exchange Prevention of Smuggling Activities Act, 1974 (The ''COFEPOSA''). The detenu landed at Trivandrum International Airport from Abu Dubai by Air India flight on 23rd April 1991. He was having two baggages, one is a suit case and the other is and zipper bag. On a detailed examination of one of the baggages, 455 grams of gold in strip form were recovered and the detenu was taken into custody. The baggage and other belongings were locked and entrusted with the Superintendent of Customs (Intelligence) for Safe-custody. On 23rd April 1991 he gave a confessional statement before the customs authorities. Later he was produced before the Additional Chief Judicial Magistrate for Economic Offences, Ernakulam, pursuant to a bail application filed by him. In the bail application dated 24th April 1991, he retracted from the confession given before the

customs authorities. He was subsequently released on bail subject to certain conditions. On 15th May 1991 he was brought before the customs authorities for inspection of the remaining baggage. On inspection of the remaining baggage 938 gms. of gold was recovered in laminated form. On that day, the detenu gave a further confessional statement before the customs authorities. However, on the very next day that is on 16th May 1991, he retracted from the said confession. Thereafter on 15th November 1991 Ext. P-1 order of detention was issued by the State Government under the COFEPOSA and the detenu was arrested on 13th June 1992. The grounds of detention were served on him on 14th June 1992. The matter was referred to the Advisory Board which have its report on 15th July 1992 and the detention was confirmed on 22nd July 1992. Thereafter the Petitioner gave a representation, Ext. P-4 which was dated 29th September 1992 and which was corrected as 7th October 1992 to the State Government, stating that He did not receive copies of various documents. These copies were given subsequently. The representation of the Petitioner for release was rejected on 19th October 1992 by the State Government. The above said detention orders have, been challenged by the Petitioner on various grounds.

2. The Petitioner raised three grounds; namely, there was delay in the service of order of detention, that Ext. P-1 is vitiated by non-application of mind to the two retractions and non-furnishing of copy of the second retraction dated 16th May 1991 and that there is no provision for referring the matter to the screening committee and that there was delay before the screening committee. However, at the time of arguments, learned Senior counsel confined his case to the one point, namely, that the detaining authority did not apply its mind to the two retractions, and the second retraction dated 16th May 1991 was not communicated to the Petitioner.

3. The point that arises for consideration is whether Ext. P-1 order of detention, the subsequent confirmation thereof, and the rejection of the Petitioner''s representation, Ext. P-4, are vitiated on account of the detaining authority not applying its mind to the first-retraction (in regard to first confession dated 23rd April 1991 contained in the bail application dated 24th April 1991), and the second retraction dated 16th May 1991 (in regard to second confession dated 15th May 1991).

4. Therefore, it emerges that the detenu gave one confessional statement on 23rd April 1991 before the customs authorities, but retracted therefrom in the bail application filed before the Additional C.J.M., Ernakulam on 24th April 1991. The confession and retraction related to the recovery of 455 gms. of gold from his baggage on the date of his arrival on 23rd April 1991. The detenu gave a second confessional statement on 15th May 1991 before the customs authorities, when the remaining baggage was searched and 938 gms. of gold in laminated form were recovered. However, he retracted from the said confessional statement again on

16th May 1991. It was not in dispute that the detenu was furnished with a copy of first retraction contained in the bail application filed by him on 24th April 1991 before the Additional C.J.M., Ernakulam, and also a copy of the order of the said judicial authority granting bail. But a copy of the second retraction statement dated 16th May 1991 has not been furnished to the detenu, nor is there any material to show that the same has been placed before the detaining authority.

5. On the facts of the case, it is therefore clear that there were two independent grounds relating to two recoveries, one in respect of 455 gms. of gold on 23rd April 1991, and the other in respect of 938 gms. of gold on 15th May 1991. Each of these recoveries was covered by a confessional statement and a retraction. In our view, each can be treated as a separate ground. But, according to the learned Counsel for the Petitioner, both the recoveries amount to a single ground and the non-application of mind in relation to the retraction dated 15th May 1991 will vitiated the said sole ground.

6. In our view, the above submissions cannot be accepted. As to the meaning of the word ''grounds'' used in the context of Article 22(5) of the Constitution of India and in Section 3(3) of the COFEPOSA, the Supreme Court observed in Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others, , as follows:

As has been said by Benjamin Cardozo, ''A Constitution states or ought to state not rules for the passing hour, but principles for an expanding future''. The concept of ''grounds'' therefore, has to receive an interpretation which will keep it meaningfully in tune with the contemporary notions of the realities of the society and the purpose of the Act in question in the light of concepts of liberty and fundamental freedoms guaranteed by Articles 19(1), 21 and 22 of the Constitution. Reviewing several decisions in the case of Hansmukh Vs. State of Gujarat and Others, , this Court held that a democratic Constitution is not to be interpreted merely from a lexicographer''s angle but with a realisation that it is an embodiment of the living thoughts and aspirations of a free people. The concept of ''grounds'' used in the context of detention in Article 22(5) of the Constitution and in Sub-section (3) of Section 3 of COFEPOSA, therefore, has to receive an interpretation which will keep it meaningfully in tune with a contemporary notions. While the expression ''grounds'' for that matter includes not only conclusions of the fact but also all the ''basic facts'' on which those conclusions were, founded, they are different from subsidiary facts or further particulars or the basic facts.

Therefore it is clear that one has to consider the basic facts and the conclusions and reasons thereon ''as grounds''. In the light of the said principle, we are clearly of the view that the initial recovery of 455 gms. of gold from the baggage of the detenu on 23rd April 1991 after the search of the baggage and the absence of any explanation even by the detenu coupled with the confession statement given by him on 23rd April 1991 can be treated as a single ground. Likewise, the subsequent search of the

baggage of the detenu on 15th May 1991 and the recovery of 938 gms. of gold from the baggage and the absence of any explanation coupled with the second confession statement dated 15th May 1991 can be treated as an independent ground. Section 5A of the COFEPOSA is attracted.

7. The question then is whether reliance by the detaining authority oh the two grounds is in any manner vitiated.

8. Taking the second ground first, it relates to recovery of 938 gms. of gold on 15th May 1991 and the confessional statement dated 15th May 1991 attached thereto. But we do not find any mention in the counter-affidavit that the retraction dated 16th May 1991 in respect of this second confession dated 15th May 1991 was placed before the detaining authority. We also find that the copy of the said retraction dated 16th May 1991 has not been communicated to the detenu. Therefore, the second ground is clearly vitiated. But inasmuch as Section 5A of the COFEPOSA applies, we can see if the first ground is sufficient to sustain the order.

9. Coming to the first ground, it is not in dispute that a copy of the retraction statement dated 24th April 1991 as contained in the bail application dated 24th April 1991, the said retraction which is a retraction of the confessional statement dated 23rd April 1991, was communicated to the detenu. The only point that is urged in respect of the first retraction contained in the bail application is that there is no evidence in the order of detention that the detaining authority had applied its mind to the said bail application. Learned Counsel for the Petitioner would submit that though there is a reference at two places to the bail order and the release of the detenu in the grounds of detention that cannot be treated as a sufficient proof of the detaining authority applying its mind to the retraction contained in the bail application. It is contended that the grounds of detention do not contain any express reference to the application for bail. Mere reference to the grant of bail is not, it is contended, an indication that the detaining authority applied its mind to the contents of the bail application.

10. On the other hand, it is contended by learned Addl. Advocate General that the above said decision of the Supreme Court would clearly establish that a reference to the bail application arid to the bail order would indicate that the detaining authority applied its mind to the contents of the bail application also. He also relied upon a statement towards the end of the detention, order which reads as follows:

Copies of the documents and statements relied upon are enclosed.

(emphasis supplied)

Admittedly, one of the documents is the bail application and the other is the order on the bail application. In fact, the order on the bail application is written by hand on the docket of the bail application itself. Item 7 of the documents furnished along with the grounds of detention contains an independent reference to the bail

application as a distinct document from the order of the said application.

11. In M. Ahamedkutty Vs. Union of India (UOI) and Another, the Supreme Court has clearly stated that an observation in the order of detention to the effect that the detenu was remanded to judicial custody and was subsequently released on bail was sufficient to indicate that the detaining authority applied its mind to the contents of the bail application also. This is what is stated in the said decision; adverting to the grounds of detention:

... It was clearly said: "You were remanded to judicial custody and you were subsequently released on bail". From the records it appears that the bail application and the bail order were furnished to the detaining authority on his enquiry. It cannot, therefore, be said that the detaining authority did not consider or rely on them. It is difficult, therefore, to accept the submission of Mr. Kunhikannan that those were not relied on by the detaining authority....

12. The above decision is therefore a clear authority for the proposition that reference to the remand to judicial custody and the subsequent release on bail can be treated as an indication of application of mind by the detaining authority not merely to the order granting bail but also to the contents of the bail application, which contained the retraction.

13. Learned Counsel for the Petitioner however sought to distinguish the above observations in M. Ahamedkutty Vs. Union of India (UOI) and Another, contending that the Supreme Court laid down the above proposition in a case where the retraction contained in the bail application was not furnished to the detenu and that the above said principles cannot be attracted to the case where the retraction (first retraction contained in the bail application dated 24th April 1991) was furnished to the detenu. We are unable to agree. The above said decision of the Supreme Court clearly lays down the principle that reference to grant of bail raises a presumption that the detaining authority applied its mind to the contents of the bail application. The said presumption not dependent upon whether subsequently copy of the bail application is given to the detenu or not. Therefore above said decision of the Supreme Court cannot be distinguished.

14. The Supreme Court has laid down the same proposition in other cases also. In Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another, , the Supreme Court observed as follows:

7. The second submission made on behalf of the detenu that the detaining authority had not before it the circumstance that the four persons who had made statement implicating the detenu had later, but long before the order of detention, resiled from their statements, is also devoid of force. The proposition that the failure to place before the detaining authority relevant and material facts which may influence the mind of such authority one way or the other will vitiate the order of detention is unexceptionable. But a perusal of the first ground of detention shows that the

detaining authority took into consideration the circumstance that there were ''adjudication'' proceedings, that the currency was confiscated and that a penalty of Rs. 5,000/- was imposed on the detenu. It was not disputed and it was not alleged in the petition that the order of adjudication by which the currency was confiscated and penalty, was imposed did refer to the circumstance that persons who had made incriminating statements against the detenu had resiled from those, statements. The circumstance that persons who had earlier incriminated the detenu had later resiled from those statements was therefore, before the detaining authority. There is thus no factual foundation for this submission of the learned Counsel, which we accordingly reject.

The above said observations would clearly show that reference to the order of adjudication in that case was itself treated as an indication of the detaining authority applied its mind to the statements made by the detenu during the said adjudication proceedings. In State of Gujarat Vs. Sunil Fulchand Shah and Another, , the Supreme Court observed as follows:

9. ...We do not find any merit in this contention and hold that it is not necessary to mention in the grounds the reaction of the detaining authority in relation to every piece of evidence, separately. Besides, the recital in Annexure B that the detaining authority formed his opinion after consideration of the aforesaid document by itself clearly implied that he was not impressed by the statement therein. The detenu cannot, therefore, be heard to say that he was prejudiced in any manner.

We have already referred to the statement at the end of grounds of detention to the following effect:

Copies of the documents and statements relied on are enclosed.

Admittedly the copy of the bail application and the order on the bail application is contained in item No. 7 of the list. Therefore it is clear that the detention order itself shows that the said document was considered by the detaining authority.

15. For the aforesaid reasons, we reject the contention of the learned Counsel for the Petitioner that there was non-application of the mind by the detaining authority in respect of the first retraction contained in the bail application dated 24th April 1991. That would be sufficient to uphold the order of detention in view of Section 5A of the COFEPOSA.

16. Learned Counsel for the Petitioner however sought to submit that both the recoveries must be treated as a single recovery and placed relianced on K. Satyanarayan Subudhi Vs. Union of India, and others, . We are unable to agree. It will be noticed that in that case 13 pieces were recovered in a single recovery and there was a single confusion, and a single retraction. Therefore that decision can be of no help to the Petitioner. Nor do we find the decision in Madan Lal Anand Vs. Union of India and others, , in favour of the Petitioner. On the other hand, that

decision shows that even if the subsequent retraction was not placed before the detaining authority, the detention order could be justified on other grounds.

17. We may also add that in 1888, the same detenu, when he indulged in a similar act of smuggling, was arrested and the gold confiscated. Later, he changed his name and obtained a fresh passport. This is also mentioned in the grounds of detention by the detaining authority.

18. For all the aforesaid reasons, we hold that the detaining authority had applied its mind to the application for bail which contained the first retraction in respect of the first confession statement made on 23rd April 1991 referrable to the recovery of 455 gms. of gold on 23rd April 1991. The said recovery and the confession statement constitute an independent ground separable from the subsequent recovery on 15th May 1991 of 938 gms. of gold. No doubt, the non-application of mind by the detaining authority to the second retraction in respect of the second confession statement referrable to the second recovery of 938 gms. of gold vitiates the second ground namely, recovery of 938 gms. of gold, but that has no bearing on the ground of recovery of 455 gms. of gold and the confession statement made on 23rd April 1991, referrable thereto.

For the aforesaid reasons, the Writ Petition is dismissed.