
(1983) CriLJ 1305

Bombay High Court

Case No: Criminal Application No. 891 of 1981

Jaleel Khan

APPELLANT

Vs

Assistant Secretary,
Home Deptt. (Spl.),
Government of
Maharashtra and
another

RESPONDENT

Date of Decision: July 1, 1981

Acts Referred:

Constitution of India, 1950 – Article 22(5)

Citation: (1983) CriLJ 1305

Hon'ble Judges: Mehta, J; D.M. Rege, J

Bench: Division Bench

Judgement

Rege, J.

This is a petition under Art. 226 of the Constitution of India by detenu detained under the detention order dated 20th February,

1981 made under Conservation of Foreign Exchange Prevention of Smuggling Activities Act of 1974 (hereinafter referred to as COFEPOSA

ACT).

2. The petitioner was served with the order of detention on 20th February, 1981. Along with the detention order he was served with the grounds

of detention and copies of certain documents relied upon in the grounds.

3. The grounds of detention concern an incident of smuggling silver out of India. A consignment supposed to contain electronic goods was sent by

one New Era Electronics, Seepez Zone, Marol Andheri to M/s. New Era Gems Co. Hongkong. The consignment arrived at Hongkong by British

Airways A.B. 003. On arrival it was found that instead of containing electronic goods, for which it was declared, it contained silver weighing 194

kgs. In the form of 248 silver bars valued at H.K. Section 684 equivalent to Rs. 11 lacs approximately. As a result, the consignment was

confiscated.

4. Investigations disclosed that there was in fact no company by the name of New era Electronics at Seepez who had consigned the said package

from Seepez Zone Marol, Andheri (E), Bombay. The investigations, therefore, started from the point of issue of Airways bill. The principal agents

for the airways bills were M/s. B.V.C. Travel Agency and the sub-agents were M/s. Air Ways Travel and Cargo. In the course of further inquiries

on 20th November, 1980, the offices of the travel agents were searched, certain documents were searched, certain documents were seized and

the statements of one Amladi of B.V.C. Travel Agency and of one Mr. Pradeep Vipani of the sub-agents M/s. Ways Travel Cargo were

recorded. Both of them were also subsequently arrested. In the course of further investigations, the business premises and registered office of M/s.

Air Ways Travel Cargo were recorded. Both them were also subsequently arrested. In the course of further investigations, the business premises

and registered office of M/s New Era Gem Company, Hongkong were searched and to the detenu who was then in India but who had left behind

his business permit for being used by his nephew Mohamed Ismail who was carried on the business in the name of M/s. New Era Gems Co.

Hongkong. In the course of investigation statements of various persons including the detenu were recorded by the customs authorities. The detenu

was thereafter arrested on 3-12-1980, and was produced before the Metropolitan Magistrate and released in bail. While the said proceedings

were pending, the detenu who was then in India but who had left behind his business permit for being used by his nephew Mohamed Ismail who

carried on the business in the name of M/s New Era Gems Co. Hongkong. In the course of investigation statements of various persons including

the detenu were recorded by the customs authorities. The detenu was thereafter arrested on 3-12-1980, and was produced before the

Metropolitan Magistrate and released on bail. While the said proceedings were pending, the detenu order dated 20-2-1981 along with the

grounds of detention and copies of various documents on which the detaining authority is supposed to have relied in passing the detention order.

5. From amongst various contentions challenging the detention order taken up in the petition, the main contention raised by the learned counsel for

the petitioner, found in ground (k), of the petition was the non-supply of copies of some of the material documents referred to and relied upon by

the detaining authority in the grounds of the detention. For that purpose he referred to grounds in para 5 of the grounds is as under :

Further enquiries made revealed that the Airway Bill was given by M/s. B.V.C. Travel Agency to their sub-agents M/s. Airway Travel & Cargo, I

Parsiwada Sahar Road, Andheri (E), Bombay-99. Thereafter the premises of both M/s. B.V.C. Travel Agency as well as M/s. Airway Travels &

Cargo were searched on 4-11-1980 and certain incriminating documents were recovered. The statement of Shri Shashi Amladi, an employee of

M/s. B.V.C. Travel and Shri Pradeep Vipani were recorded. According to the statements dated 20-11-1980 of the the consignment was

prepared by him. Both these persons were arrested on 27th November, 1980 and released on bail by the Chief Metropolitan Magistrate, Bombay

on 1-12-1980.

6. It is not disputed that the copies of the statements of Shashi Amladi and the copies of the documents seized referred to as "incriminating

documents" in the said para 5 of the grounds have not been supplied to the detenu.

7. It is the contention of the learned counsel for the petitioner that by reasons of the fact that the copies of the documents of Shashi Amladi though

referred to and relied upon by the detaining authority in the said grounds before passing the detention order, and copies of the documents seized

not having been supplied to the detenu along with the grounds of detention, the detenu was not able to make an effective representation and hence

the order of detention was visited.

8. The detaining authority in para 14 of his affidavit in reply has stated that the panchnamas of searches of M/s B.V.C. Travel Agency office as well

as Air Ways Travel Cargo were placed before him and the copies of the said panchnamas have been given to the detenu. He has further stated

that the statement of Shashi Amladi was not relied upon by him while passing the order of detention. The detaining authority further goes on to state

in the said para :-

.. I say that the statement of Shashi Amladi was not relied on by me while passing the order of detention. I say I have made a casual and passing

reference to the statements of Shri Amladi in the course of narration of the facts. I further say that all the documents seized from M/s. B.V.C.

Travel Agency as well as Airway Travel & Cargo were not relied on for passing the order of detention. The copies of the documents relied on by

me were given to the detenu. The reference to the documents is made casually in the course of narration of the facts. I deny that non supply of the

alleged material or statements rendered the detention order bad in law and illegal as alleged by the petitioner.

9. The only question, therefore is whether the non-supply of the statement of Shashi Amladi and the documents seized in the searches referred to

as investigation "incriminating documents" referred could be said to have vitiated the detention order ?

10. In view of the said averments in the affidavit in reply, the said contention of the learned counsel for the petitioner will have to considered in two

parts viz. (1) as regards non-supply of the documents, referred to as "incriminating documents" seized from the office of B.V.C. Travel Agency

and Airways Travel and cargo Agency and (2) as regards the non-supply of a copy of the statement of Amladi.

11. As regards the documents seized, it is evident from the affidavit in reply that the documents by themselves were not placed before detaining

authority, but the only thing that was put before him was the panchnamas which only referred to the said documents without setting out the contents

thereof. It could not have been, therefore, possible for the detaining authority without knowing the contents thereof to determine before passing the

detention order, whether or not they were material and would have influenced him one way or the other in making the detention order. The very

fact that in the grounds of detention the said documents are referred to or described as ""incriminating documents"", would show that even according

to the detaining authority the documents were such as would incriminate the petitioner. They would be, therefore, material to be considered before

making the detention. Therefore, without having an opportunity to consider the said documents before making the order, the detaining authority

cannot be heard to say, and that too, at the stage of filing the affidavit in reply that the said documents were not relied upon by him for passing the

order or that such reference was casual in the course of narration. If the said documents were material to be considered before passing the order,

which we think it was, then it was for the detaining authority to consider them before making the order and at that time to determine whether they

would or would not have influenced him in making the said order. That could not be done by him at the stage of filing the affidavit-in reply. In this

case admittedly the said documents not having been placed before the detaining authority and he not having had an opportunity to consider the

same before making the order of detention, the order, in our view, suffered from non application of mind.

12. The learned P.P. for the State has contended that the said documents referred to as "incriminating documents" as well as the said statements of

Amladi were not material for being considered by the detaining authority before making the order and that in fact they were not relied upon by the

detaining authority in making the order but the reference there to in para 5 of the grounds was merely casual and in the course of narration and the

same had nothing to do with the charge smuggling against the detenu.

13. In the circumstances of this case, the said contention of the learned P.P. for the State cannot be accepted. The grounds of detention show that

the arrest of the detenu in respect of the said incident of smuggling mentioned in the grounds, was as a result of the investigations wherein several

statements, including that of the said Amladi and the detenu was recorded documents referred to as "incriminating documents" were seized and

several persons were arrested and charge-sheeted in the proceeding pending in the Criminal Courts. The statement of Amladi so also the said

"incriminating documents" seized formed a material part of the investigation which ultimately led to the arrest of the detenu as well as the others

including Amladi on the charge of being involved in one and the same incident of smuggling. In that view, the investigations and proceedings

referred to in the grounds of detention cannot be separated into two parts as suggested by the learned P.P. viz. dealing with the investigation

against Amladi and Vipani wherein the documents were seized, and, (2) the other investigation leading to the arrest of detenu, cannot be accepted.

14. Under the circumstances, as regards the statement of Amladi a copy of which was admittedly not supplied to the detenu, the contention of the

detaining authority in the affidavit in reply that he had not relied upon the said statement of Amladi and a reference to the same was a casual and in

passing, is not borne out by the circumstances of this case and cannot be accepted. The said entitled to be given copies of the documents relied

statement of Amladi referred to in the grounds was equally one of the documents relied upon the detaining authority before making the order. Now

it is well settled under the decisions of the Supreme Court that the detenu was entitled to be given copies of the documents relied upon in the

grounds of detention to be accompanied with the grounds in order to enable him to make effective representation. (See S. Gurdip Singh Vs. Union

of India (UOI) and Others, In this case if the detaining authority had relied upon the said statement of Amladi and the documents, then the failure to

supply copies thereof to the petitioner would vitiate the detention order as violative of Article 22(5) of the Constitution.

15. It was further contended by the learned counsel for the petitioner, relying on the decision of the Supreme Court in the case of Kirit Kumar

Chaman Lal Kundaliya Vs. Union of India (UOI) and Others, that the detenu was entitled to get copies of the documents not only relied upon in

the grounds of detention but also of those even referred to in the grounds.

16. In that case the Supreme Court after relying on its previous decision in the case of Ramchandra A. Kamat Vs. Union of India (UOI) and

Others, and Shri. Tushar Thakker Vs. Union of India (UOI) and Others, held :

Once the documents are referred to in grounds of detention, it becomes the bounden duty of the detaining authority to supply the same to the

detenu as part of the grounds or pari passu the grounds of detention. There is no particular charm in the expression "relied on" referred to" or

"based on" because ultimately all the expressions signify one thing, namely that the subjective satisfaction of the detaining authority has been arrived

at on the documents mentioned in the grounds of detention. The question whether the grounds have been referred to, relied on, based on, is merely

a matter of describing the nature of the grounds. This not having been done in the present case the continued detention of the petitioner must be

held to be void.

17. The learned counsel has, therefore, relying on the said decision contended that in this case in any event, since the said statement of Amladi and

the "incriminating statements" seized were at least referred to in para (5) of the grounds, the detenu was entitled to copies thereof to enable him to

make an effective representation.

18. However, as against that the learned P.P. has contended relying on the latest decision of the Supreme Court in the case of Mst. L.M.S. Ummu

Saleema Vs. Shri B.B. Gujaral and Anr, that the detenu was not entitled to be furnished with the copies of those documents to which only a casual

or passing reference was made in the course of narration of facts and which are not relied upon by the detaining authority while making the order of

detention and that by reason of non-supply of the copies of such documents which were referred to only casually or in passing, the detenu could

not be said to have been prevented from making effective representation. According to him, therefore, since in this case while passing the detention

order the detaining authority has not relied upon the said documents seized but the same were only referred to in passing, the detenu was not

entitled to the copies of the said documents. He has further contended that the court itself can look to the documents in this case to find out

whether the said statement of Amladi could have influenced the mind of the detaining authority in making the detention order. Further he has

contended that the court should follow the latest judgment of the Supreme Court which he has cited in preference to the earlier decision of the

Supreme Court cited by the learned counsel for the petitioner.

19. In the view, that we have taken above as regard the said documents i.e. the statement of Amladi and the seized documents being material and

being in fact relied upon by the detaining authority in the grounds of detention, the said controversy is not of much relevance and we do not think it

necessary to consider the same.

20. In that view of the matter, the detention in this case appears to suffer from two vices, (i) non-application of the mind to the document seized

before making the order; (ii) non-supply of copies of relevant documents to enable the detenu to make effective representation. In our view, on

both the said grounds, the order of detention was violative of Article 22(5) of the Constitution and was vitiated.

21. The result, therefore, is that the petitioner is allowed. Rule is made absolute. Detention order is set aside and the detenu is ordered to be released forthwith, unless required in some other case.

22. Petition allowed.