

HARIDAS AMARCHAND SHAH OF BOMBAY

v.

K.L. VERMA & ORS.

DECEMBER 9, 1988

[B.C. RAY AND K. JAGANNATHA SHETTY, JJ.]

*Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974: Section 3—Detention order—Detenu contending that failure to furnish bank pass books vitiated the detention order—Held that bank pass books were not vital and material documents in reaching subjective satisfaction of detaining authority—Detention order held valid.*

The house of the appellant-detenu was searched and currency notes, bank drafts, bank pass-books and loose sheets seized. The detenu's statement was recorded and he was arrested. Later, he made an application retracting his statement and the Magistrate made an order thereon: "Taken on record". He was subsequently released on bail with a condition that he would attend Enforcement Department Office every day. On his moving another application, the condition was varied.

Thereafter, an order of detention was made by respondent No. 1 against the appellant under s. 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The detenu thereupon filed a writ in the High Court challenging the order, which was dismissed.

Before this Court, it was contended on behalf of the detenu that (i) his application for variation of the condition of bail and the order thereon as well as his application retracting his statement and the order thereon were not placed before the Detaining Authority, and non-consideration of these vital documents vitiated the detention order; and (ii) copies of bank statements and loose sheets were not supplied to the detenu and this infringed his right to make an effective representation.

Dismissing the appeal, it was,

**HELD:** 1. The application for variation of condition of bail and the order passed thereon were not material or relevant documents and failure to produce the same before the Detaining Authority before

A arriving at his subjective satisfaction had not vitiated the detention order. [1035A]

*Asha Devi wife of Gopal Sherwal Mehta (detenu) v. Shiveraj, Addl. Chief Secretary to the Government of Gujarat & Anr.*, [1979] 2 S.C.R. 215, referred to.

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*Arvindbhai Purshottambhai Patel v. R.O. Iyer and Ors.*, Writ Petition No. 1304 of 1987 dated 25.2.1988, Bombay High Court, distinguished.

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2. Though the detenu's application retracting his statement and the Magistrate's order thereon was not placed before the Detaining Authority; his retraction letter and the reply of the Directorate of Enforcement had been placed before the Detaining Authority, and as such the Authority knew about these facts. [1035G; 1036A]

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3. There was no dispute that all the documents which were considered by the Detaining Authority in reaching his subjective satisfaction and referred to in the grounds of detention had been furnished to the detenu. It was not necessary to furnish copies of all the documents including the bank pass books which were not material and relevant for reaching the subjective satisfaction of the detaining authority merely because they were mentioned in the panchnama. [1036F-G]

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4. The bank pass books were not vital and material documents in reaching subjective satisfaction of the detaining authority and as such the failure to furnish the bank pass books to the detenu had not infringed any right of the appellant and the order of detention could not be questioned as illegal or vitiated on that account. [1037B-C]

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*Ashok Kumar v. Union of India*, [1988] 1 Scale 194, referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 627 of 1988.

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From the Judgment and Order dated 10.6.1988 of the Bombay High Court in Criminal Writ Petition No. 257 of 1988.

R.K. Garg and P.N. Gupta for the Appellant.

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Kuldip Singh, Additional Solicitor General, Arun Madan and P. Parmeshwaran for the Respondents.

The Judgment of the Court was delivered by

RAY, J. Special leave granted. Arguments heard.

This appeal on special leave is against the judgment dated 10th June, 1988 made by High Court of Allahabad dismissing Criminal Writ Petition No. 257 of 1988 instituted by the detenu.

The facts giving rise to this appeal are that on August 25, 1987 the house of the appellant was searched by the officers of the Enforcement Directorate under Section 37 of Foreign Exchange Regulation Act, 1973 and they seized currency notes of Re.1 lakh and four bank drafts amounting to Rs.30,000, bank pass book and loose sheets Nos. 1 to 44 as per item No. 2 in panchnama dated August 25, 1987. The statement of detenu was recorded and he was arrested on the same day. On August 26, 1987 the detenu made an application in the Court of Addl. Chief Metropolitan Magistrate, 8th Court at Esplanade retracting his statement. The Magistrate made an order thereon that "Taken on record". An application for bail was moved on September 15, 1987 and an order had been made on that day releasing him on bail of Re.1 lakh with a condition imposed that he would attend Enforcement Department Office every day between 11 a.m. to 2 p.m. until further order. The detenu filed an application on September 22, 1987 for variation of the said conditional order and the condition was varied by the Magistrate by directing that the detenu may attend the Enforcement Department as and when required. The Enforcement Directorate sent a letter directing the detenu to collect his passport deposited during the time of questioning. The passport however, remained with the Enforcement Department. Thereafter, on February 9, 1988 the impugned order of detention of the detenu in Central Prison, Bombay was made by the respondent No. 1, the Joint Secretary, Government of India. The order of detention was served on the detenu on February 19, 1988 and the grounds of detention were furnished to him.

A Criminal Writ Petition No. 257 of 1980 was filed before High Court, Bombay for quashing the said detention order on the grounds *inter alia* that certain vital documents such as the application dated September 21, 1987 for variation of the condition of bail as well as the order passed by the Chief Metropolitan Magistrate varying the condition, the application dated August 26, 1987 retracting the statement by the detenu filed before the Magistrate and non-consideration of the same, as well as the non-supply of the copies of Bank pass books and loose papers seized from the residence of detenu and mentioned in

A panchnama dated August 25, 1987 which were placed before the detaining authority etc. vitiated the subjective satisfaction of the detaining authority on consequently the order of detention is illegal and bad. A Rule Nisi was issued.

B A return was filed by the respondent No. 1 wherein the detaining authority denied the allegations and stated that all vital and material documents which had been considered in forming his subjective satisfaction and mentioned in the grounds have been supplied to him and as such the impugned order of detention is not illegal and bad. The criminal writ petition was, therefore, dismissed.

C Aggrieved by the judgment of the High Court, the instant appeal on special leave has been filed.

D It was firstly contended on behalf of the appellant that the application for bail and the order dated September 15, 1987 by the Metropolitan Magistrate granting conditional bail of Re.1 lakh with one surety of like amount though placed before the detaining authority, the application for variation of the condition and the order made thereon by the Magistrate on September 21, 1987 was not produced before the detaining authority. This is a vital document and non-consideration of the same by the detaining authority results in the order being illegal. The decision in *Ashadevi wife of Gopal Ghermal Mehta (detenu) v. K. Shiveraj, Addl. Chief Secretary to the Government of Gujarat & Anr.*, [1979] 2 SCR 215 was cited at the bar. In this case it has been observed by this Court that documents which are vital and necessary for formation of subjective satisfaction which is the pre-requisite for making an order of detention having not been placed before the detaining authority before making the detention order, the order of detention will get vitiated. The detention was to prevent the detenu from indulging in Hawala business i.e. making various payments to various persons in this country on receiving instructions from Rafiq from Dubai. The application for variation of condition of bail and the order passed by the Metropolitan Magistrate varying the condition of bail is, in our opinion, not a vital and material documents in as much as the granting of bail by the Magistrate enabled the detenu to come out and carry on his business activities as before. Condition imposed by the Magistrate directing the detenu to appear before the office of the Enforcement Department every day between 11 a.m. to 2 p.m. has been varied to the extent that "the accused to attend Enforcement Department as and when required". The condition imposed by the Magistrate has no relation to the activities carried on

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by the detenu and as such the High Court after considering all the circumstances held that the order varying the condition of bail was not a relevant document and failure to produce the document before the detaining authority before arriving at his subjective satisfaction had not vitiated the order. We agree with the same.

The judgment delivered by the High Court, Bombay in Criminal Writ Petition No. 1304 of 1987 entitled *Arvindbhai Purshottambhai Patel v. R.C. Iyer and Ors.*, on February 25, 1988 was referred to us. In this case the detenu was arrested for smuggling prohibited articles and the detenu was prosecuted for smuggling. He was granted bail by Magistrate on certain condition. Subsequently that order was varied. The initial order granting bail was placed before the detaining authority, but the subsequent order of variation was not placed. It was held by the Division Bench of the High Court that the order of modification might have influenced the detaining authority in forming his subjective satisfaction and as such the non-placement of the same would vitiate the order. That was a case of smuggling of prohibited articles and the condition in the bail was that he could not leave the shores of the country and so he could not have indulged in smuggling activities pending decision of the case. This condition was relaxed by the subsequent order. In that context it was observed by the Court that the order of variation is a material document which might affect the formation of subjective satisfaction before passing the order of detention and the failure to place that document vitiated the detention order. This observation was made in the facts of that case. This case has no relevance in the facts of this case as we have held that in the present case the order of variation is not a relevant and vital document.

It has been submitted that the detenu made an application on August 26, 1987 in the Court of Addl. Chief Metropolitan Magistrate, 8th Court, Esplanade retracting his statement whereon an order was made that "taken on record". This application was not placed before the detaining authority and this has vitiated the detention order as this vital document was not considered before arriving at the subjective satisfaction by the detaining authority. It may be convenient to mention that in the counter-affidavit to the writ petition the respondent No. 1 has stated in para 5 that the application dated August 26, 1987 and the order passed thereon was not placed before him as the Sponsoring Authority did not know about the said application dated August 26, 1987 and the order thereon. The Enforcement Directorate was not aware of the said application and the order thereon. In any case, the respondent No. 1 has already stated that the retraction letter

A of detenu dated September 20, 1987 and the reply of the Directorate of Enforcement to the said letter of the detenu dated August 26, 1987 was placed before the detaining authority. This submission, therefore, has no merit as the detaining authority knew about the retraction statement and the order made thereon before making the order of detention.

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It has been contended that the Enforcement Department in course of search of the house of detenu on August 25, 1987 attached bank drafts and cheques, bank pass books of State Bank of India, Kandivali Branch, New India Co-operative Bank and Bank of Baroda, Dahisar, loose sheets bunched together and marked 'C' containing pages 1 to 44 and seized under panchnama but did not place before the detaining authority and if placed copies of those documents were not given to the detenu. It has been submitted that the failure to supply these documents infringed his fundamental right to make an effective representation and so the impugned order is required to be quashed.

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In reply to this submission the detaining authority filed a return stating that all documents mentioned in panchnama were placed before him.

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But only relevant and vital documents were taken into consideration for reaching subjective satisfaction. These documents have been referred to in the grounds of detention and copies of all the said documents have been furnished to the detenu. It has been strenuously contended on behalf of the appellant that Bank pass books and some pages out of 1

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to 44 of the loose sheets bunched together and referred to in the panchnama were not given to him and so he could not make an effective representation. This has infringed his right. In support of his submission the decision of this Court in *Ashok Kumar v. Union of India and Ors.*, [1988] 1 Scale 194 (to which one of us is a party) has been cited at the bar. There is no dispute that all the documents which were

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considered by the detaining authority in reaching his subjective satisfaction and referred to in the grounds of detention have been furnished to the detenu. It is not necessary to furnish copies of all the documents including the bank pass books which are not material and relevant for reaching the subjective satisfaction of the detaining authority merely because they were mentioned in the panchnama.

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Moreover, no application had been made before the detaining authority for giving the detenu the copies of the bank pass books necessary for making an effective representation against the order of detention.

In *Ashok Kumar's* case (supra) wherein this Court held that the order of detention had been vitiated due to non-supply of bank pass books of the detenu and his wife seized in course of search of some houses

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wherefrom foreign currency as well as primary gold with foreign mak-

ings were recovered, as it was held that these documents were vital and material documents. The detenu in that case made an application for furnishing him the bank pass books in order to enable him to make an effective representation against the order of detention stating that the houses from which the alleged foreign currency as well as primary gold with foreign markings had been recovered did not belong to or owned by the detenu. In that background this Court held that non-supply of the bank pass books infringed the detenu's right to make an effective representation. In the instant case as we have said hereinbefore that the bank pass books are not vital and material documents in reaching subjective satisfaction of the detaining authority and as such the failure to furnish the bank pass books to the detenu has not infringed any right of the appellant and the order of detention cannot be questioned as illegal or vitiated on that score.

No other points have been urged before us.

For the reasons aforesaid we dismiss the appeal. There will be no order as to costs.

R.S.S.

Appeal dismissed.