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Court : Delhi

Decided On : Feb-19-1990

Reported in : 40(1990)DLT475

Judge : P.K. Bahri, J.

Acts : Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - Sections 3(1)

Appeal No. : Criminal Writ Petition No. 759 of 1989

Appellant : Barski Marek

Respondent : Union of India and ors.

Advocate for Pet/Ap. : Harjinder Singh and; Sangeeta Nanchaha, Advs

Judgement :

P.K. Bahri, J.

(1) The petitioner by filing this petition has challenged the detention order dated October 19, 1989 passed under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short 'COFEPOSA Act', by respondent No. 2 with a view to preventing the petitioner from abetting the smuggling of goods.

(2) It is not necessary to refer to various grounds pleaded by the petitioner in support of the petition as this petition is liable to succeed on a very short point.

(3) The detention order dated October 19, 1989, was admittedly served on the detenu in Jail on October 27, 1989. It is recorded in the grounds of detention that the detaining authority was aware that the petitioner is in judicial custody but, however, the possibility of the petitioner filing bail application and getting enlarged on bail cannot be ruled out and unless prevented the petitioner may indulge in prejudicial activities in the similar manner or otherwise. A bail application dated October 16, 1989, moved on behalf of the petitioner was pending in the court and the same is one of the relied upon documents but still the detaining authority in the grounds of detention did not make any reference to the factum of any bail application being pending on the date the detention order was passed. At any rate, the bail application came to be rejected on October 19, 1989, but still the said fact was not brought to the notice of the detaining authority before service of the retention order on the detenu in Jail. The Supreme Court in its latest judgment in the case of Dharmendra Suganchand Chelawat v. Union of India & others, : 1990 CriLJ1232 , has now settled the law and laid down as follows :

'THE decisions referred to above led to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention dispute the fact that the detenu is already in detention. The expression 'compelling reasons' in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near further and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging is such activities'.

(4) The aforesaid judgment clearly lays down that there must be cogent material present for coming to the subjective satisfaction that the detenu is likely to be released on bail in the near future. It is evident that before the order of detention is served on the detenu such cogent material should be available for the subjective satisfaction of the detaining authority in order to come to the conclusion that the petitioner is likely to be released on bail in the near future. It this factum of rejection of the bail application had been brought to the notice of the detaining authority before the detention order was served on the detenu in Jail, it may have swayed the mind of the detaining authority that no useful purpose would be served by keeping alive the detention order till there becomes any likelihood of the detenu being released down in possible in the near future. The Supreme Court has also laid on bail Binod Singh v. District, Magistrate Dhanbad, Bihar & Others, : 1986 CriLJ1959 , as follows :-

'IN this case there were grounds for the passing of the detention order but after that the detenu has surrendered for whatever reasons, thereforee the order of detention though justified when it was passed but at the time of the service of the order there was no proper consideration of the fact that the detenu was in custody or that there was any real danger of his release. Nor does it appear that before the service there was consideration of this aspect properly. In the facts and circumstances of this case, thereforee, the continued detention of the detenu under the Act is not justified.'

(5) SO. it is evident that even before service of the detention order, which may have been passed sometime earlier, the material fact can come into existence which needs to be considered by the detaining authority. The said fact must be brought to the notice of the detaining authority to reconsider the matter whether the detention order should be passed or not against the detenu who is in judicial custody. So, I hold that in the present case the fact of petitioner's bail application having been rejected on October 19, 1989, not being brought to the notice of the detaining authority prior to service of the detention order on the petitioner on October 27, 1989, vitiates the subjective satisfaction of the detaining authority on the point that the petitioner is liable to be released on bail in future as the subjective satisfaction would be deemed to have been arrived at without

application of mind to the material fact.

(6) I allow the writ petition, make the rule absolute and quash the detention order and direct that the petitioner be released from Jail, if not required to be detained in any other case.

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