THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 28.05.2009

+ WP(CRL) 536/2009

RAMAN KUMAR SHARMA A.K.A. PANDIT ..... Petitioner

- versus –

UNION OF INDIA & ANOTHER ..... Respondents

Advocates who appeared in this case:
For the Petitioner : Mr Gaurav Pachnanda with Ms Renu Gupta and Mr Chetan Gupta
For the Respondents : Mr Satish Aggarwal with Mr Shirish Aggarwal

CORAM:-
HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MR. JUSTICE AJIT BHARIHOKE

1. Whether Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in Digest ? Yes

BADAR DURREZ AHMED, J (ORAL)

1. The petitioner, who is aged about 65 years, is under detention from 29.07.2008 pursuant to the impugned detention order dated 28.07.2008 passed by the Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue (COFEPOSA Unit) in purported exercise of powers conferred on the said authority under Section 3(1) of the Conservation of Foreign Exchange and Prevention

of Smuggling Activities Act, 1974 (hereinafter referred to as 'COFEPOSA'). It is pertinent to note that prior to the said detention order being passed, the petitioner was already in custody since 26.03.2008 in respect of the very same incident which has formed the basis of the detention order.

2. The said incident was that fake Indian currency to the extent of approximately Rs 13.36 lakhs was recovered from the possession of the petitioner on 25.03.2008. Further fake currency of approximately Rs 22.84 lakhs was also recovered from the co-accused Tahseem @ Akbar from Amritsar, Punjab. The learned counsel appearing on behalf of the petitioner stated that while both the petitioner and the said co-accused are being prosecuted under Section 135 of the Customs Act, 1962, the co-accused Tahseem @ Akbar has not been subjected to preventive detention and it is only the petitioner against whom the impugned order of preventive detention has been made.

3. It was also pointed out by the learned counsel for the petitioner that the representation made by the petitioner before the Advisory Board was rejected on 14.10.2008. He also submitted that immediately after the fake currency was allegedly recovered from the petitioner, the petitioner's residence as well as his office premises were searched. Nothing incriminating was found from either of the two premises. To

substantiate this plea, he drew our attention to paragraph 6 of the grounds for detention wherein it is so recorded.

4. On 22.04.2008, while the petitioner was in custody in respect of the prosecution under Section 135 of the Customs Act, 1962, the petitioner moved a bail application. On the very next day, i.e., on 23.04.2008, the petitioner was hospitalized at G.B. Pant Hospital on account of his medical condition which included diabetes and coronary heart disease. A certificate issued by the G.B. Pant Hospital has been placed on record at page 175 of the paper book. Despite the medical condition of the petitioner being serious, the learned ACMM, Patiala House, New Delhi rejected the bail application of the petitioner on 26.04.2008. He rejected the said application for bail on the ground that the allegations against the petitioner were very serious and despite the fact that the petitioner was not keeping good health, for which he had to be hospitalized, because of the seriousness of the allegations, bail could not be granted to the petitioner. On 08.05.2008, the Central Bureau of Investigation (CBI) informed the Department of Revenue Intelligence (DRI) that they had registered another FIR in respect of the very same incident of alleged recovery of fake Indian currency. This fact is also noted in paragraph 20 of the grounds of detention wherein it is indicated that the CBI had registered an FIR No. RCSIJ 2008 E on 08.05.2008 under Sections 120-B/489-B and 489-C of the Indian Penal

Code against both the petitioner and the co-accused Akbar for criminal conspiracy, possession and circulation of counterfeit / fake Indian currency notes. On 23.05.2008, the Department of Revenue Intelligence initiated the prosecution under Section 135 of the Customs Act. On 28.05.2008, cognizance of the Customs Act violation was taken by the learned ACMM, Patiala House, New Delhi. On 04.06.2008, the petitioner moved a second bail application. This application was also preferred on health grounds. During the pendency of this bail application, the petitioner, on 16.06.2008, had to undergo a triple coronary by-pass surgery at G.B. Pant Hospital. On 11.07.2008, the learned ACMM rejected the petitioner's second bail application also. However, on 24.07.2008, the petitioner filed a third bail application, once again on health grounds and this time before the Additional Sessions Judge. During the pendency of this third bail application, the impugned detention order dated 28.07.2008 came to be passed. The very next day, i.e., on 29.07.2008, the petitioner was formally taken into custody pursuant to this detention order. On 19.08.2008, the petitioner's third bail application was also rejected by the Additional Sessions Judge.

5. In the grounds for detention, one of the grounds, which led the detaining authority to pass the detention order, was that there was imminent likelihood of the petitioner being released on bail in the case

pending against him under the Customs Act. This can be easily discerned from paragraph 22 of the grounds of detention which reads as under:-

> "22. In view of the above, it is clear that you, Shri Raman Kumar Sharma @ Pandit have shown the propensity and inclination to indulge in smuggling of FICN and transportation of smuggled FICN in an organized manner. You are in judicial custody and I am aware that you applied for bail twice before the Ld. ACMM, New Delhi which were rejected. I am also aware that you have been suffering from heart ailment and; that applications were filed by you or on your behalf and by your brother-in-law, Shri Ashok Kumar in the Court of Ld. ACMM, New Delhi, from time to time since your remand in Judicial Custody, citing your ailment and praying for relief or directions to the concerned authorities and the Orders passed by the Court of Ld. ACMM, New Delhi, on those applications. I am further aware that you were treated at DDU Hospital as well as at G.B. Pant Hospital and also that you were operated upon for your heart ailment at G.B. Pant Hospital on 16.06.2008 and you were discharged from that Hospital on 09.07.2008; that the Ld. Court allowed your brother-in-law, Shri Ashok Kumar to be your attendant in view of your ailment and; further that your Judicial Remand has been extended by the Metropolitan Magistrate by visiting the Hospital where you are admitted in view of your non-production in the Court by the Jail Authorities. I am also aware that your second bail application was rejected by the Court of Ld. ACMM, New Delhi, on 11.07.2008. I am further aware that another application for bail has been filed by you in the Court of Additional Sessions Judge, New Delhi on 24.07.2008 reiterating the plea taken in your previous bail applications, reply to which is yet to be filed by the DRI. However, nothing prevents you from filing further bail applications before the appropriate Court and in case you file a bail application, the possibility of your release on bail in near future cannot be ruled out. In case bail is granted, you are again likely to engage yourself in such activities in future. I am satisfied that you ought to be detained under the COFEPOSA Act, 1974 with a view to

preventing you from abetting the smuggling of goods and engaging in transporting and keeping smuggled goods."

(underlining added)

6. The learned counsel for the petitioner submitted that the law with regard to validity of a detention order in respect of a person who is already in custody requires three conditions to be fulfilled. The first condition, which is obvious, is that the person must be in custody. The second condition is that there must be imminent likelihood of the person being released from such custody. The third and the final condition is that upon such release there should be a likelihood of the person in custody indulging in prejudicial activities. He referred to the following decisions:-

i) ***Surya Prakash Sharma v. State of U.P. and Others*****: 1994 Supp (3) SCC 195** ;

ii) ***Rajesh Gulati v. Government of NCT of Delhi and Another*****: 2002 (7) SCC 129** ;

iii) ***T.V. Sravanan alias S.A.R. Prasana Venkatachaariar Chaturvedi v. State and Another*****: 2006 (2) SCC 664**;

iv) ***Ramesh Yadav v. District Magistrate, Etah and Others*****: 1985 (4) SCC 232**.

7. After referring to the said decisions, the learned counsel submitted that the second and the third conditions necessary for validating the detention order are absent in the present case. He submitted that since the bail applications of the petitioner had

repeatedly been rejected, there was no likelihood of the petitioner being released on bail. He also submitted that the antecedent activities of the petitioner also did not disclose that there was any likelihood of the petitioner indulging in any prejudicial activities if he was released from custody. He submitted that it is only the solitary incident of the alleged recovery of fake Indian currency representing a value of Rs 13.36 lakhs from the petitioner that has formed the basis of the preventive detention order. According to him, that by itself did not enable the detaining authority to jump to the conclusion that in case the petitioner is not detained, he would continue to indulge in prejudicial activities, particularly with regard to dealing in fake currency notes. Consequently, the learned counsel for the petitioner submitted that the detention order was bad and ought to be set aside. He also pointed out that the petitioner has already been in continuous custody since 26.03.2008, first of all, under the Customs Act offence and, secondly, by way of preventive detention with effect from 29.07.2008.

8. The learned counsel appearing on behalf of the respondents submitted that all the conditions necessary for the detention order to be a valid one have been satisfied. He submitted that there was an imminent likelihood of the petitioner being released on bail. He made this submission on the basis of the provisions of Section 437(6) of the Code of Criminal Procedure, 1973 which stipulates that in cases triable

by a Magistrate, if 60 days have elapsed from the first date fixed for taking evidence, then the Magistrate is to release the accused on bail unless he decides not to do so for reasons to be recorded. Secondly, the learned counsel submitted that the third bail application which was pending at the time when the detention order was passed was not before the learned ACMM, but before a higher authority, i.e., the Additional Sessions Judge and, therefore, there was a greater likelihood of the petitioner being released on bail. Apart from this, the learned counsel also submitted that the detaining authority was fully satisfied that in case the petitioner is set at large, he would indulge in prejudicial activities. He referred to the Supreme Court decision in the case of ***Chowdarapu Raghunandan v. State of Tamil Nadu and Others*****: 2002 (3) SCC 754**, wherein the Supreme Court has observed that even a single incident may lead to the prognosis that a person may, in the future, indulge in prejudicial activities. There is no hard and fast rule about this and that it has to be determined from case to case and ultimately it is the subjective satisfaction of the detaining authority that has to be viewed in the light of the supporting material. The learned counsel also placed reliance on the decision of the Supreme Court in the case of ***Ibrahim Nazeer v. State of T.N. and Another*****: AIR 2006 SC 3606**, wherein the Supreme Court noted that whether the prayer for bail would be accepted or not depends on the circumstances of each case and no hard and fast rule can be applied. The only requirement is

that the detaining authority should be aware that the detenu is already in custody and is likely to be released on bail. The Supreme Court stressed that the conclusion that the detenu may be released on bail cannot be the mere *ipse dixit* of the detaining authority and that it is on the basis of the material before him that the detaining authority comes to a conclusion as to whether there is a likelihood of the detenu being released on bail. The Supreme Court observed that this is the subjective satisfaction of the detaining authority based on materials and that normally such satisfaction is not to be interfered with.

9. The learned counsel for the petitioner, in rejoinder, submitted that the argument based on Section 437(6) of the Code of Criminal Procedure, 1973 cannot be considered at this stage because this was not a ground on the basis of which the detaining authority thought that there was imminent likelihood of the petitioner being released on bail. Secondly and, more importantly, he submitted that in the third bail application, the petitioner had not taken the ground of Section 437(6), CrPC for seeking release on bail. The learned counsel for the petitioner also pointed out that the first date fixed for taking evidence in the Customs Act prosecution was 13.10.2008, which was much after the detention order and, therefore, this could not have been in the contemplation of the detaining authority. In fact, the six month period, even if 13.10.2008 is taken as the starting point for the purposes of

Section 437(6), CrPC, would end on 12.04.2009 which was far into the future insofar as the detaining authority is concerned. Consequently, the learned counsel for the petitioner submitted that no grounds for a valid detention order have been made out and, therefore, the impugned detention order ought to be set aside.

10. In ***Surya Prakash Sharma*** *(supra)*, the Supreme Court referred to its earlier Constitution Bench decision in ***Rameshwar Shaw v. District Magistrate, Burdwan and Another*****: 1964 (4) SCR 921 = AIR 1964 SC 334** and ***Dharmendra Suganchand Chelawat and Another v. Union of India and Others*****: 1990 (1) SCC 746** and quoted the following words from the latter decision:-

> "The decisions referred to above lead 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 despite 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 implied 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 future 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 in such activities."

11. From the above extract, it is apparent that when a detention order is passed in respect of a person already in custody, two conditions have to be satisfied. The first being that the detaining authority should be aware that the detenu is already in detention. The second is that there are compelling reasons justifying detention despite the fact that the detenu is already in detention. This condition is being further split up into two sub-conditions, they being that (a) the detenu is likely to be released from custody in the near future and; (b) taking into account the nature of the antecedent activities of the detenue, 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 in such activities. It is, therefore, clear that unless and until the detaining authority is satisfied that the detenu is likely to be released from custody in the near future, a detention order against a person already in custody cannot be said to have been validly passed. In ***Surya Prakash Sharma*** *(supra)*, the second condition, i.e., of the likelihood of the person in custody indulging in prejudicial activities was considered and it was found that on the basis of a solitary murder, it could not be extrapolated that the person in detention would, in future also, indulge in such prejudicial activities.

12. In ***Rajesh Gulati*** *(supra)*, the Supreme Court observed as under:-

> "12. It cannot be over emphasized that the object of detention under the Act is not to punish but to prevent the commission of certain offences. Section 3(1) of the Act allows the detention of a person only if the appropriate detaining authority is satisfied that with a view to preventing such person from carrying on any of the offensive activities enumerated therein, it is necessary to detain such person. The satisfaction of the detaining authority is not a subjective one based on the detaining authority's emotions, beliefs or prejudices. There must be a real likelihood of the person being able to indulge in such activities, the inference of such likelihood being drawn from objective data.
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> 13. In this case, the detaining authority's satisfaction consisted of two parts-one: that the appellant was likely to be released on bail and two: that after he was so released the appellant would indulge in smuggling activities. The detaining authority noted that the appellant was in custody when the order of detention was passed. But the detaining authority said that "bail is normally granted in such cases". When in fact the five applications filed by the appellant for bail had been rejected by the Courts (indicating that this was not a 'normal' case), on what material did not detaining authority conclude that there was "imminent possibility" that the appellant would come out on bail? The fact that the appellant was subsequently released on bail by the High Court could not have been foretold. As matters in fact stood when the order of detention was passed, the 'normal' rule of release on bail had not been followed by the courts and it could not have been relied on by the detaining authority to be satisfied that the appellant would be released on bail. [See: in this context *Ramesh Yadav v. District Magistrate*: 1985 (4) SCC 232)."

13. It is pertinent to note that in that case, five applications for bail had been filed by the appellant which had all been rejected by the courts and yet the detaining authority had concluded that there was an imminent possibility of the appellant therein being released on bail. The Supreme Court rejected such a plea on the part of the detaining authority and was of the view that it could not be the satisfaction of the detaining authority that the appellant would be released on bail in the near future.

14. In ***T.V. Sarvanan*** *(supra)*, the Supreme Court, after quoting the aforesaid passage from ***Rajesh Gulati*** *(supra)*, observed as under:-

> "14. We are satisfied that for the same reason the order of detention cannot be upheld in this case. The bail applications moved by the appellant had been rejected by the Courts and there was no material whatsoever to apprehend that he was likely to move a bail application or that there was imminent possibility of the prayer for bail being granted. The "imminent possibility" of the appellant coming out on bail is merely the ipse dixit of the detaining authority unsupported by any material whatsoever. There was no cogent material before the detaining authority on the basis of which the detaining authority could be satisfied that the detenue was likely to be released on bail. The inference has to be drawn from the available material on record. In the absence of such material on record the mere ipse dixit of the detaining authority is not sufficient to sustain the order of detention. There was, therefore, no sufficient compliance with the requirements as laid down by this Court. These are the reasons for which while allowing the appeal we directed the release of the appellant by order dated 13-12-2005."

15. In ***Ramesh Yadav*** *(supra),* the Supreme Court observed as under:-

> "6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed. We are inclined to agree with counsel for the petitioner that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles indicated by this Court in series of cases relating to preventive detention. The impugned order, therefore, has to be quashed."

16. After having considered the decisions placed before us by the counsel for the parties, we are of the view that it must be shown that the detaining authority had the material before him / her which could enable him / her to arrive at the satisfaction that there was imminent likelihood of the person in custody being released on bail. Insofar as the facts of the present case are concerned, we find that the petitioner was seriously ill. He had moved his first bail application and immediately thereafter he had been hospitalized in respect of both ailments, namely, diabetes as well as coronary heart disease, yet the learned ACMM had rejected his bail application on the ground of

seriousness of the offence involved. Thereafter, the petitioner had moved a second bail application, once again on the grounds of ill-health and during the pendency of that bail application, the petitioner had, in fact, undergone a triple by-pass surgery at G.B. Pant Hospital. Despite these facts, the learned ACMM rejected the second bail application on 11.07.2008. Thereafter, during the pendency of a third bail application, the detaining authority passed the said detention order. The detaining authority, as is clear from the earlier portion of this decision, stated that she was aware that another bail application had been filed by the petitioner in the court of the Additional Sessions Judge, New Delhi on 24.07.2008 "reiterating the plea taken" in the petitioner's previous bail applications and that a reply to which was yet to be filed by the Department of Revenue Intelligence. The detaining authority further stated that – "However, nothing prevents you from filing further bail applications". We feel that in the circumstances as narrated above, there was no material before the detaining authority whereby she could have come to the conclusion that the bail application would be allowed and that there was an imminent likelihood of the petitioner being released on bail. Consequently, the purported satisfaction of the detaining authority that there was a likelihood of the petitioner being released on bail was not founded on any material and was the mere *ipse dixit* of the detaining authority herself.

17. As regards the argument raised by the learned counsel for the respondents based upon the provisions of Section 437(6) CrPC, we agree with the submissions made by the learned counsel for the petitioner that such an argument is not available to the respondents. The first reason being that the petitioner had not taken this ground in the third bail application which was pending before the learned Additional sessions Judge at the time when the detention order was passed. Secondly, in any event, the first date of taking evidence had not been fixed when the detention order was passed. The first date of taking evidence was fixed much later and the same was 13.10.2008. Therefore, it could not have been in the contemplation of the detaining authority. In any event, there is nothing in the grounds of detention to suggest that such a factor weighed with the detaining authority.

18. We have not embarked upon an examination of the detaining authority's 'satisfaction' with regard to prejudicial activities because we find that this ground itself, i.e., of imminent likelihood of the petitioner being released on bail, is sufficient to decide the present petition. Since we have come to the conclusion that there was no material before the detaining authority on the basis of which she could have arrived at the satisfaction that there was imminent likelihood of the petitioner being released on bail, the detention order is liable to be set aside. It is so set aside. The petitioner is entitled to be released

provided he is not required in any other case. The writ petition stands allowed to this extent. There shall be no order as to costs.

BADAR DURREZ AHMED, J

AJIT BHARIHOKE, J

MAY 28, 2009
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