

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 16.03.2011

+ **WP (CRL) 1565/2010**

LAXMAN DASS JALHOTRA

... Petitioner

versus

UNION OF INDIA & OTHERS

... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Uday V. Lalit, Sr. Advocate with Mr Vikram Chaudhary,
Mr Akshay Anand, Ms Sonam Nagrath and Mr Deepak Kumar
For the Respondents : Mr A. S. Chandhiok, ASG with Mr Jatan Singh, Mr Akshay
Kumar Srivastava, Mr Sandeep Bajaj and Ms Reeta Kaul

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE MANMOHAN SINGH

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

1. This petition has been filed by the father of the detenu (Manish Jalhotra) seeking a writ in the nature of habeas corpus for the release of the said detenu and for the quashing of the detention order dated 27.08.2010 issued by the respondent no. 2 purportedly under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'the COFEPOSA Act'). The detention order was executed on 01.09.2010.

2. The main ground of challenge to the detention order is that though the detention order is based upon, *inter alia*, the statement dated 09.03.2010 made by one Lokesh Garg and the statement dated 14.06.2010 made by the detenu, both purportedly under section 108 of the Customs Act, 1962 and both of which were allegedly retracted, the retractions were not placed before the detaining authority and, therefore, the detention order was vitiated. It is also contended that the detenu was not supplied with a copy of Lokesh Garg's retraction and that adversely affected his right to make a representation. It was also submitted on behalf of the detenu that documents sought for were not supplied to him and therefore his continued detention was bad on this count. The learned counsel for the petitioner placed reliance on the following decisions of the Supreme Court:-

1. *Ashadevi v. K. Shivraj, Addl. Chief Secy. to the Govt. of Gujarat: (1979) 1 SCC 222;*
2. *Deepak Bajaj v. State of Maharashtra: (2008) 16 SCC 14;*
3. *Union of India v. Ranu Bhandari: (2008) 17 SCC 348;*
4. *Kamleshkumar Ishwardas Patel v. Union of India: (1995) 4 SCC 51;*
5. *Kirit Kumar Chaman Lal Kundaliya v. Union of India: (1981) 2 SCC 436.*

3. On behalf of the respondents it was urged that the detenu's so-called retraction is undated and is not addressed to anyone. The retraction contained in the bail application was in the knowledge of the detaining authority inasmuch as the reply to the bail application was a relied upon document and was shown at serial no.2 of the relied upon documents.

Significantly, it was submitted that the detenu had made another statement on 23.07.2010 which had not been retracted and which did not contain any reference to the so-called retraction of the statement of 14.06.2010. It was thus contended that even if the statement of 14.06.2010 is ignored, the statement of 23.07.2010 is unretracted. The learned counsel for the Respondents had placed reliance on *Vinod K. Chawla v. Union of India: (2006) 7 SCC 337*; *Madan Lal Anand v. Union of India: (1990) 1 SCC 81*.

4. It is alleged that officers of Customs, ICD, Tughlakabad, New Delhi had received information that M/s Jai Sales Organisation was indulging in evasion of customs duty by way of mis-declaration of goods in the import documents and also by concealing goods in the containers. Apparently, on 11.02.2010 one container belonging to the said M/s Jai Sales Organisation was intercepted by the said customs officials. The goods were not as per the declaration in the bill of entry dated 04.02.2010 and there were also some additional goods – shoes, soaps, shampoos etc. The goods which were valued at Rs 1,52,21,390/- were seized on 15.02.2010 under section 110 of the Customs Act, 1962. It is alleged that the said Lokesh Garg is the mastermind behind these operations and that the detenu (Manish Jalhotra) is also actively involved. Lokesh Garg was arrested on 09.03.2010 and he is said to have made a statement under section 108 of the Customs Act, 1962 on that date itself. This statement dated 09.03.2010 was retracted by Lokesh Garg on 11.03.2010 before the learned ACMM, Patiala House, New Delhi. Lokesh Garg was subsequently released on bail by the learned ACMM by an

order dated 07.04.2010. The retraction dated 11.03.2010 was not placed before the detaining authority.

5. On 14.06.2010, the detenu (Manish Jalhotra) was arrested and he is said to have made a voluntary statement under section 108 of the Customs Act, 1962 on that date itself. He was produced before the learned ACMM on 15.06.2010, on which date he allegedly retracted the statement dated 14.06.2010. Annexure P-6 is a copy of his written retraction in Hindi, the English translation whereof reads as follows: - *“I have been falsely implicated in this case. I was forced to write the statement – when I was ill.”* The detenu had also moved a bail application on 15.06.2010 before the learned ACMM. In paragraph 4 of the said bail application it was, *inter alia*, stated as under:-

“That the statements of the applicant / accused, alleged to have recorded under Section 108 of the Customs Act, 1962 by the department, are in fact involuntary in nature, which is also apparent from the fact that he was carrying medical certificate of RML Hospital, New Delhi, from where he was getting his treatment, which he duly supplied to the Customs department with the request to record his statement after few days. However, no heed was paid to this request of his. And he was dictated the statements contrary to his wishes and he was forced to write those statements in his own hand...”

(emphasis supplied)

The written retraction, as well as the bail application which also indicated that the statement of 14.06.2010 was not voluntary, were not placed before the detaining authority.

6. The grounds of detention indicate that the mind of the detaining authority was greatly influenced by the so-called voluntary statements of Lokesh Garg dated 09.03.2010 and of the detenu (Manish Jalhotra) dated 14.06.2010. Insofar as Lokesh Garg's statement dated 09.03.2010 is concerned, it has been referred to in detail in paragraph 5 of the grounds of detention. It is stated therein that Lokesh Garg admitted in his said 'voluntary' statement about his involvement and the involvement of the detenu (Manish Jalhotra). The statement dated 14.06.2010 attributed to the detenu has been referred to in even greater detail in paragraphs 10, 11 and 16 of the grounds of detention. The retractions, however, of these statements have not been mentioned in the grounds of detention. In the counter affidavit it is stated that as the retraction dated 11.03.2010 by Lokesh Garg was addressed to the ACMM and no copy was endorsed to the Customs Department (the sponsoring authority), the same could not be placed before the detaining authority. But, it was stated that the bail application of Lokesh Garg which had a mention of the retraction by him was placed before the detaining authority. Therefore, as per the counter affidavit, the detaining authority was aware of the retraction. We cannot agree with this. It is an admitted position that the customs department was represented before the ACMM in the bail matter. They cannot feign ignorance of the retraction by Lokesh Garg. The letter dated 11.03.2010 containing the retraction was available in the file of the learned ACMM. We also do not agree with the submission that just because the bail application which had a mention of the retraction was placed before the detaining authority, she was aware of it. No

such inference can be drawn inasmuch as there is no reference to the retraction in the grounds of detention.

7. With regard to the retraction of the detenu on 15.06.2010, it has been stated in the counter affidavit that the written retraction is not addressed to anyone, it is undated and a copy has not been endorsed to the customs department. Consequently, it was not 'feasible' for the sponsoring agency to place a copy of the retraction before the detaining authority. It is also admitted that the bail application dated 15.06.2010, which contained the retraction, was not placed before the detaining authority. But, the reply to the bail application was placed before the detaining authority. Therefore, it was contended, the detaining authority was aware of the contentions made in the bail application. Here, again, we cannot agree with the respondents. The bail application was clearly available with the sponsoring agency, even if it is assumed that the undated written retraction was not. The said bail application also contained a retraction of the statement of 14.06.2010. But, the bail application was not placed before the detaining authority. A question may be asked as to why only the reply was placed before the detaining authority and not the bail application? The respondents have no answer to this. It is also not discernible from the grounds of detention that the detaining authority was aware of the retraction.

8. Given this factual position, let us examine the case law cited by the parties. In *Ashadevi (supra)*, the Supreme Court, *inter alia*, observed as under (at page 228):-

“7. In the instant case admittedly three facts were not communicated to or placed before the detaining authority before it passed the impugned order against the detenu, namely, (i) that during interrogation of the detenu, in spite of request, neither the presence nor the consultation of the Advocate was permitted; (ii) that in spite of intimation to the Advocate in that behalf the detenu was not produced before the Magistrate on December 14, 1977 and (iii) that the confessional statements were squarely retracted by the detenu on December 22, 1977 at the first available opportunity while he was in judicial custody; the first two had a bearing on the question whether the confessional statements had been extorted under duress from detenu or not, while the third obviously was in relation to the confessional statements which formed the main foundation of the impugned order and as such were vital facts having a bearing on the main issue before the detaining authority...”

“..... Further, in passing the detention order the detaining authority obviously based its decision on the detenu’s confessional statements of December 13 and 14, 1977 and, therefore, it was obligatory upon the Customs Officers to report the retraction of those statements by the detenu on December 22, 1977 to the detaining authority, for, it cannot be disputed that the fact of retraction would have its own impact one way or the other on the detaining authority before making up its mind whether or not to issue the impugned order of detention. Questions whether the confessional statements recorded on December 13 and 14, 1977 were voluntary statements or were statements which were obtained from the detenu under duress or whether the subsequent retraction of those statements by the detenu on December 22, 1977 was in the nature of an after-thought, were primarily for the detaining authority to consider before deciding to issue the impugned detention order but since admittedly the aforesaid vital facts which would have influenced the mind of the detaining authority one way or the other were neither placed before nor considered by the detaining authority it must be held that there was non-application of mind to the most material and vital facts vitiating the requisite satisfaction of the detaining authority thereby rendering the impugned detention order invalid

and illegal. For these reasons we set aside the impugned detention order.”

(emphasis supplied)

9. In *Deepak Bajaj* (*supra*), the Supreme Court, *inter alia*, held as under (at page 29):-

“29. **The most important of these documents which were not placed before the detaining authority were the retractions given by Kuresh Rajkotwala to DRI dated 4-12-2006, Kuresh Rajkotwala’s affidavit filed before the learned Additional Chief Metropolitan Magistrate, Esplanade, Mumbai, Bharat Chavhan’s retraction to DRI dated 9-5-2008, Bipin Thaker’s retraction to DRI dated 19-1-2008, Sharad Bhoite’s retraction dated 24-4-2007** before the Additional Chief Metropolitan Magistrate, Esplanade, Mumbai and his affidavit filed before the same authority, etc.

30. **Shri Naphade, learned counsel submitted that these retractions were made before DRI and the Additional Chief Metropolitan Magistrate, and not before the sponsoring authority who was the Additional Director of Revenue Intelligence. Shri Naphade submitted that the sponsoring authority was not aware of these retractions and hence, it could not have placed them before the detaining authority. We find no merit in this submission.**

31. Most of the retractions were made to DRI, and it belongs to the same department as the sponsoring authority, who is the Additional Director, Revenue Intelligence. Hence, it was the duty of DRI to have communicated these retractions of the alleged witnesses to the sponsoring authority, as well as the detaining authority. There is no dispute that these retractions were indeed made by persons who were earlier said to have made confessions. **These confessions were taken into consideration by the detaining authority when it passed the detention order. Had the retractions of the persons who made these confessions also been placed before the detaining authority it is possible that the detaining authority may not have passed the impugned detention**

order. Hence, in our opinion, the retractions of the confessions should certainly have been placed before the detaining authority, and failure to place them before it, in our opinion, vitiates the detention order.

32. It has been repeatedly held by this Court that if a confession is considered by the detaining authority while passing the detention order, the retraction of the confession must also be placed before him and considered by him, otherwise the detention order is vitiated....”

“....It may be noted that in the above decision, this Court has held that it was the duty of the Customs Officer to have reported the retraction of the statements to the detaining authority. Hence, even if the retractions in the present case were not placed before the detaining authority that will not be of any avail to the respondents, since it has been held that it was the duty of the authorities before whom the retractions were made to have forwarded them to the detaining authority and the sponsoring authority. We entirely agree with the above view.”

(emphasis supplied)

10. In the light of these decisions, it is clear that as the detaining authority had placed great reliance on the statements of 09.03.2010 and 14.06.2010, it was obligatory upon the sponsoring authority to place the retractions of these statements before the detaining authority. Indirect or oblique references contained in the reply to the bail application are no substitute for the direct retractions. Had the retractions been placed before the detaining authority, perhaps she would have come to a different conclusion. What might have been her ultimate view, we cannot say. But, we can say one thing for sure that the retractions were of vital importance and were certainly something which could have altered the satisfaction of the detaining authority. Thus,

non-placement of the retractions before the detaining authority clearly vitiated the detention order.

11. The learned counsel for the respondents had placed reliance on the Supreme Court decision in the case of ***Vinod K. Chawla*** (*supra*) to contend that the non-placement of a retraction was not fatal to the detention order. It is true that in that case the Supreme Court held that the non-placement of the retraction made by the detenu's son (Asheesh Chawla) did not vitiate the subjective satisfaction of the detaining authority. The Court also observed that the law does not require that every document or material in the possession of the sponsoring authority must necessarily be placed before the detaining authority. But, a closer examination of the said decision reveals that it does not in any way advance the case of the respondents in the present case. In ***Vinod K. Chawla*** (*supra*), the retraction in question was that of the detenu's son Mr Asheesh Chawla. The Supreme Court noted that a reading of the whole of the detention order clearly showed that the detaining authority had placed reliance entirely upon the statement of the detenu, Vinod K. Chawla, himself and the documents and materials recovered from the business premises and godowns of the firms which were admittedly owned by the detenu. The Court further observed that there was only a passing reference to the statement of Asheesh Chawla and that the detention order was not at all based upon the statement of Asheesh Chawla. In this backdrop the Supreme observed as under:-

“... It is important to note that the alleged retraction of statement has not been made by the appellant but by his son Asheesh

Chawla. As mentioned earlier, the detention order is not based upon the statement of Asheesh Chawla but merely makes a passing reference to the same. **Had the appellant retracted from his statement and the said retraction had not been placed before the detaining authority, the position may have been different as in such a case it could be urged that the formation of opinion by the detaining authority and his subjective satisfaction in that regard had been affected. But such is not the case here.** The retraction of the statement by Asheesh Chawla has no bearing at all as it in no way could affect the formation of opinion and the subjective satisfaction of the detaining authority...”

(emphasis supplied)

12. Clearly, the decision in *Vinod K. Chawla* (*supra*) is of no help to the respondents. Unlike the statement of Asheesh Chawla in that case, in the present case the statements of Lokesh Garg and the detenu (Manish Jalhotra) are the mainstays of the detention order. The subjective satisfaction of the detaining authority places a heavy reliance on these statements. Consequently, the retractions would be of vital significance. In fact, the said decision of the Supreme Court, far from coming to the aid of the respondents, emphasises the importance of placing the retraction of a relied upon statement before the detaining authority.

13. We now come to the argument on behalf of the respondents that even if the statement of the detenu of 14.06.2010 is ignored, his subsequent statement of 23.07.2010 is un-retracted. From a reading of the grounds of detention it is apparent that a far greater reliance has been placed on the statement of 14.06.2010 than on the statement of 23.07.2010. Furthermore, though the two statements deal with different aspects, there is a clear linkage

between the two statements insofar as the overall context is concerned and, to that extent, do not constitute distinct and severable grounds. One cannot hazard a guess as to how the detaining authority would have firmed up her mind in the absence of one or the other statement. It is obvious that the subjective satisfaction is arrived at upon the totality of circumstances. Therefore, we cannot say for sure that even if the statement of 14.06.2010 is ignored, the detaining authority would have come to the conclusion that she did, solely on the basis of the statement of 23.07.2010. It is for this reason that the decision in *Madan Lal Anand (supra)*, on which the respondents had placed reliance, would be inapplicable in the facts of the present case.

14. This discussion makes it clear that the non-placement of the retractions of 11.03.2010 and 15.06.2010 before the detaining authority has vitiated the detention order. In view of this conclusion of ours, we are not considering the other pleas of the parties.

15. Consequently, the impugned detention order no. 673/26/2010-Cus. VIII dated 27.08.2010 in respect of the detenu (Manish Jalhotra) is quashed. The respondents are directed to release the said detenu (Manish Jalhotra) forthwith unless he is required to be in custody in some other case. The writ petition is allowed accordingly. There shall be no order as to costs.

BADAR DURREZ AHMED, J

MANMOHAN SINGH, J

MARCH 16, 2011

HJ