

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.813 OF 2016

Shri Shektheen Sha

s/o Segu Naina Mohamed

..... Petitioner

V/s

V.S. Singh

The Principal Secretary

(Appeals and Security) & Ors.

..... Respondents

Mr. Dadhichi Sharadchandra Mhaispurkar for the Petitioner.

Mrs. M.H. Mhatre, APP for Respondents/State.

CORAM : A.S. OKA &

A.A. SAYED, JJ.

DATED : 14 JUNE 2016

ORAL JUDGMENT: (PER A.S. OKA, J.)

1 By this Petition seeking a writ of habeas corpus under Article 226 of the Constitution of India, the Petitioner has taken an exception to the order of detention of the detenu Segu Naina Mohamed Shektheen Sha in exercise of the powers under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA Act"). Essentially, there are two grounds of challenge pressed into service. Both the grounds are regarding non-placement of vital documents before the Detaining Authority and non-consideration of the said vital documents.

2 The learned Counsel appearing for the Petitioner pointed out that the Detaining Authority in the grounds of detention has relied upon the statement of the detenu recorded on 6 June 2015 under section 108 of the Customs Act, 1962. He pointed out that on 6 June 2015, the detenu made retraction statement before the learned Additional Chief Metropolitan Magistrate by stating that he will file a detailed retraction. He pointed out that only the said statement was placed before the Sponsoring Authority and detailed retraction application dated 8 July 2015 was not placed before the Detaining Authority by the Sponsoring Authority. His submission is that considering the contents of the said Application, it was a vital document which could have influenced the subjective satisfaction of the Detaining Authority one way or the other. The second submission is that the averments made in the Application for grant of bail made by the detenu will show that even the Application for grant of bail can be termed as a vital document which was not placed before the Detaining Authority. He invited our attention to the order passed by the learned Magistrate granting bail.

3 The learned Counsel appearing for the Petitioner relied upon the decision of a Division Bench of this Court in the case of **Errol Robert Lucien vs. State of Maharashtra and Others**.¹ He relied upon well known decision of the Apex Court in the case of **A. Sowkath Ali vs.**

¹ 2004 ALL MR (Cri) 305

Union of India and others.² He also relied upon another decision of a Division Bench of this Court in the case of **Smt. Madhurika C. Merchant vs. K.S. Dilipsinghji and others.**³

4 The learned APP opposed the Petition by pointing out the contents of the order granting the bail and submitted that the grounds set out in the Application for grant of bail find place in the order granting the bail which was considered by the Detaining Authority. As far as the second ground is concerned, she pointed out that the retraction statement dated 6 June 2015 was placed before the Detaining Authority. She submitted that the second retraction statement is nothing but the reiteration of what is stated in the first retraction statement. She pointed out that the second retraction statement refers to the statement dated 7 July 2015 and in fact, there is no such statement under section 108 of the Customs Act, 1962 of the detenu. She submitted that the first retraction Application was a vital document which was very much placed before the Detaining Authority. Hence, the second retraction document was not at all a vital document and, therefore, non-placement will not vitiate the impugned order of detention.

5 Firstly, we are dealing with the first submission made by the learned Counsel appearing for the Petitioner. The submission

2 (2000) 7 SCC 148

3 1985 CRI.L.J. 538

finds place in ground (U) of paragraph 14 of the Petition. There are Affidavits-in-Reply filed by Shri Sanjay D. Khedekar, Deputy Secretary, the Government of Maharashtra as well as Shri V.S. Singh, Principal Secretary (Appeals and Security) Government of Maharashtra. Shri Singh is the Detaining Authority. While dealing with the ground in paragraph 14 (U) of the Petition, it is stated by Shri Singh that second retraction Application dated 8 July 2015 filed by the detenu was received on 11 August 2015 by the Sponsoring Authority. He stated that at that time, the proposal for detention was pending for consideration before him. His contention is that it is not a vital document and non-placement thereof has not vitiated his subjective satisfaction.

6 At this stage, we may make reference to the well known decision of the Apex Court in the case of **A. Sowkath Ali**. Paragraph 20 of the said decision reads thus:

“20. There can be no doubt, it was not necessary, while considering the case of the petitioner detenu, to place all or any of the documents which are relevant and are relied on in the proceedings of a co-accused, but where the sponsoring authority opts out of its own volition to place any document of the other co-detenu, not merely as a narration of fact but reiterating in details the confession made by him, then it cannot be said it would not prejudice the case of the detenu. If this has been done it was incumbent for the sponsoring authority to have placed their retraction also. As

held in Rajappa Neelakantan case (supra), the placement of document of other co-accused may prejudices the case of the petitioner. In the first place the same should not have been placed, but if placed, the confessional statement and the retraction, both constituting a composite relevant fact both should have been placed. If any one of the two documents alone is placed, without the other, it would affect the subjective satisfaction of the detaining authority. What was the necessity of reproducing the details of the confessional statement of another co-accused in the present case? If the sponsoring authority would not have placed this then possibly no legal grievance could have been made by the detenu. But once the sponsoring authority having chosen to place the confessional statement, then it was incumbent on it to place the retraction also made by them. In our considered opinion, its non-placement affects the subjective satisfaction of the detaining authority. This Court has time and again laid down that sponsoring authority should place all the relevant documents before the detaining authority. It should not withhold any such document based on his own opinion. All documents, which are relevant, which have bearing on the issue, which are likely to affect the mind of the detaining authority should be placed before him. Of course a document which has no link with the issue cannot be construed as relevant.

(underline supplied)

7 In the case of **Errol Robert Lucien**, the order of preventive detention was passed under COFEPOSA Act. The Detaining Authority

relied upon statement of detenu recorded under section 108 of the Customs Act, 1962. There were two retractions by the detenu. The Division Bench came to the conclusion that even the second retraction statement was a vital document which was not placed before the Detaining Authority.

8 In the decision of the Division Bench in the case of **Smt. Sharifa Abubaker Zariwala v. The Union of India & Ors.**,⁴ the issue was regarding the non-placement of the second retraction statement. In the facts of the case, in the second statement, the detenu had reaffirmed what he has stated in the earlier statement. It was held that non-placement will not vitiate the subjective satisfaction. In a given case, if there are successive retraction applications/statements of the detenu and his first statement is placed before the Detaining Authority and if others are merely by way of confirmation or reiteration of the first retraction statement, there may not be any difficulty in accepting the submission made by the learned APP.

9 When a contention is raised regarding non-placement of alleged vital document before the Detaining Authority, it is necessary for the Court to examine the contents of the document and to come to a conclusion whether the document in question could have affected the subjective satisfaction of the Detaining Authority one way or the other.

4 1997 ALL MR (Cri) 528

10 In the grounds of detention, a specific reliance was placed on the statement of the detenu recorded on 6 June 2015 under section 108 of the Customs Act, 1962 wherein he had stated that he had concealed eight FM gold bars in reverse of the waste bin flapper of the rear toilet of the Aircraft by which he arrived in Mumbai. In the first retraction statement, there is no reference to the contents of the statement dated 6 June 2015. In clause 8 of the said retraction statement, the detenu stated that he will file a detailed retraction which ultimately was filed on 8 July 2015 before the learned Magistrate. It is true that in paragraph 4 of the said statement styled as retraction application, the detenu has referred to the statement dated 7 July 2015. However, in paragraph 3, there is a reference to the statement dated 6 June 2015. There is a specific allegation that the Custom Officer forced him write the statement. He stated that he had no opportunity to read the statement as the Custom Officer had assaulted him. In paragraph 5, he stated that he had never visited the toilet of the Aircraft either on 5th or 6th June 2015. In paragraph 6, he stated that as soon as he arrived at the CSI Airport, Mumbai he made inquiries on the counter of the concerned Airlines regarding mishandling of his luggage and lodged a complaint with the Airlines. In paragraph 7, he has stated that on 6 June 2015 itself, he lodged a complaint. He stated that he was not taken to the toilet of the Aircraft to witness the alleged recovery. These relevant facts stated by the detenu

do not find place in the earlier retraction statement. Looking into the statements made in the second retraction application, there is no option but to record a conclusion that the consideration of the said document could have affected the subjective satisfaction of the Detaining Authority one way or the other. Therefore, we will have to accept the contention that the retraction statement dated 8 July 2015 was a vital document. According to the Affidavit of the Detaining Authority, the same was received by the Sponsoring Authority on 11 August 2015. There is no explanation as to why the said vital document was not forwarded by the Sponsoring Authority to the Detaining Authority.

11 Thus, only on the basis of the above ground argued by the learned Counsel appearing for the Petitioner, the order of detention is vitiated. It is not necessary to record any finding on the other ground.

12 Accordingly, the Petition must succeed and we pass the following order:

(i) Rule is made absolute in terms of prayer clause (a) which reads thus:

“(a) That this Hon'ble Court be pleased to issue a Writ of Habeas Corpus or any other appropriate writ, order or direction quashing and setting aside the said order of detention bearing PSA-1215/CR-81/SPL-3(A), dated 19.9.2015 issued

by the Respondent No.1; and be pleased to direct that the detenu Shri Segu Naina Mohamed Shektheen Sha be set at liberty;”

(ii) All concerned to act upon an authenticated copy of operative part of this order/judgment.

(A.A. SAYED, J.)

(A.S. OKA, J.)

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