

(2006) 03 P&H CK 0038
In the Punjab And Haryana At Chandigarh
Case No : L.P.A. No. 17 of 2006

Adishwar Jain

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 30-03-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100A
Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 3(3), 5A, 7(1)
Constitution of India, 1950 — Article 22, 22(5), 226
Customs Act, 1962 — Section 108, 2(39)
Government of India Act, 1915 — Section 108

Citation : (2006) CriLJ 3193 : (2006) 2 RCR(Criminal) 561

Hon'ble Judges : D.K. Jain, C.J.;Surya Kant, J

Bench : Division Bench

Advocate : H.S. Mattewal, Pardeep Jain and Vikram Chaudhary, for the
Appellant; M.S. Guglani, Central Govt. Counsel (for No. 1), for the Respondent

Final Decision : Dismissed

Judgement

This Judgment has been overruled by : Adishwar Jain Vs. Union of India (UOI) and Another, (2006) 112 ECC 328 : (2006) ECR 328 : (2006) 9 JT 432 : (2006) 10 SCALE 553 : (2006) 11 SCC 339 : (2006) 7 SCR 801 Supp : (2006) 2 UJ 1353

D.K. Jain, C.J.—This appeal, under Clause X of the Letters Patent, is directed against judgment and order dated 23-11-2005, passed by the learned single Judge, dismissing the writ of Habeas Corpus, filed by the appellant.

2. The appellant is the Managing Director of one M/s. Sundesh Springs Pvt. Ltd., Ludhiana. Specific information was received by the Directorate of Revenue Intelligence, Regional Unit, Ludhiana that the appellant was engaged in availing fraudulent credits under the Duty Entitlement Pass Book scheme (for short, "DEPB scheme"), introduced by the Government of India, with the object of encouraging exports. It was alleged that the appellant was misdeclaring the

value and description of the goods exported by procuring fake and false bills through one Prabhjot Singh, who was operating three firms, under the name and style of M/s. S. P. Industrial Corporation; M/s. Aaysons (India) and M/s. P. J. Sales Corporation, Ludhiana. The information indicated that non-alloy steel bars, rods etc. of value ranging from Rs. 15/- to Rs. 17/- per kilogram were exported in the guise of alloy steel forgings, bars, rods etc. by declaring the value thereof at Rs. 110/- to Rs. 150/- per kilogram. The export proceeds over and above the actual price were being routed through Hawala Channel.

3. Based on the said information, the Directorate of Revenue intelligence searched the factory as well as the residential premises of the appellant and that of Prabhjot Singh. During the course of investigation, statements of the appellant, his employees and said Prabhjot Singh were recorded, wherein they are stated to have admitted misdeclaration of the value and description of the goods exported and use of Hawala Channel for remittance as well as over valuation. In his statement, recorded u/s 108 of the Customs Act, 1962, Prabhjot Singh admitted that he had supplied fake bills to the units owned and controlled by the appellant on commission basis, without actually supplying any goods. The appellant had declared the goods exported as "alloy steel", whereas after the tests were conducted by the Central Revenue Control Laboratory, New Delhi, the goods were found to be "other than alloy steel", i.e. non-alloy. The Consul (Economic), Consulate General of India at Dubai also confirmed the existence of a parallel set of export invoices. Invoices with a higher value were presented before the Indian Customs in order to avail DEPB incentives, but invoices, with a lower value, were presented for clearance.

4. Statements of major suppliers of raw materials of non-alloy steel as well as alloy steel to the units of the appellant were also recorded and it transpired that majority of the supplies related to non-alloy steel items and that the material, purchased by the appellant, was of much lower in value than declared by him. In order to cover the bogus exports, the appellant procured false and fake invoices from the units of Prabhjot Singh and the amounts, realised by the export proceeds over and above the actual value, were routed through Hawala Channel through one Raju. It was also discovered that accounts in the name of Prabhjot Singh's firms were actually operated by the appellant through his employees, who confessed to the said fact. Some blank cheques, signed by Prabhjot Singh, were also recovered from the appellant. Enquiries made from the Production Manager of appellant's company also revealed that at no point of time, "alloy steel" had been processed and that no facility whatsoever existed in their factory for making alloy steel goods.

5. It was on these facts, briefly referred to above, in exercise of powers conferred u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, "COFEPOSA Act") the Detaining Authority passed an order of detention against the appellant on 5-4-2005, The order of detention is based on the subjective satisfaction of the Detaining

Authority that with a view to prevent him from smuggling goods in future, it was necessary to detain the appellant. Questioning the said order of detention, writ petition, under Article 226 of the Constitution of India, praying for issuance of Habeas Corpus was filed. As noted above, the writ petition has been dismissed by the impugned order. Hence, the present appeal.

6. Although in the writ petition, the validity of the order of detention had been challenged on several grounds, but before us, Mr. H.S. Mattewal, learned senior counsel appearing for the appellant has assailed the detention order mainly on the ground that there was inordinate unexplained delay in passing the detention order as well as in its execution and therefore, the live proximate link between the grounds of detention and the purpose of detention stood snapped. It is also argued that a vital document, namely, a communication, dated 20-12-2004, between the Directorate of Revenue Intelligence and the Joint Director, Foreign Trade, was not placed before the Detaining Authority, with the result that his subjective satisfaction stood vitiated on account of non-application of mind on the relevant material.

7. Per contra, Mr. M. S. Guglani, learned Counsel appearing for the Detaining Authority, while supporting the impugned order, has raised a preliminary objection to the maintainability of the appeal on the ground that the present appeal arises out of criminal jurisdiction of this Court and therefore, appeal under Clause X of the Letters Patent against such an order is not maintainable. It is argued that Letters Patent Appeal lies only against a judgment rendered in civil proceedings.

8. We shall first deal with the preliminary objection with regard to the maintainability of the appeal.

9. The issue of nature of proceedings, under Article 226 of the Constitution, and the scope of an intra-Court appeal, provided under Clause 15 of the Letters Patent of the Bombay High Court, which is in pari materia with Clause X of the Punjab High Court Letters Patent, came up for consideration before the Supreme Court in *Umaji Keshao Meshram and Others Vs. Radhikabai and Another*, . Tracing the history of writ jurisdiction, vested in the High Courts, and drawing support from various decisions of the High Courts and Privy Council, their Lordships of the Supreme Court observed thus (paras 86, 91):

There has also been unanimity among the Chartered High Courts that the word "judgment" in clause 15 embraces not only judgments given in the exercise of jurisdictions specifically mentioned in the Letters Patent but also in the exercise of jurisdictions not so mentioned. For instance, the jurisdiction to commit for contempt is not expressly mentioned in the Letters Patent but the Calcutta High Court in *Mohendra Lall Mitter v. Anundo Commar Mitter* ILR (1897) Cal 236 and the Bombay High Court in *The Collector of Bombay Vs. Issac Penhas*, have held that an order made by a single Judge committing a person for contempt is appealable under Clause 15. Similarly, in *Mahomedalli Allabux Vs. Ismailji*

Abdulali, the Bombay High Court held that an appeal lay from an order passed by a single Judge directing a writ of habeas corpus to issue and in *Raghunath Keshav Khadilkar Vs. Poona Municipality*, it held that an appeal lay under Clause 15 of the Letters Patent against the issue of a writ of certiorari by a single Judge.

The position which emerges from the above discussion is that under Clause 15 of the Letters Patent of the Chartered High Courts, from the judgment (within the meaning of that term as used in that clause) of a single Judge of the High Court an appeal lies to a Division Bench of that High Court and there is no qualification or limitation as to the nature of the jurisdiction exercising by the single Judge while passing his judgment, provided an appeal is not barred by any statute (for example, Section 100-A of the Code of Civil Procedure, 1908), and provided the conditions laid down by Clause 15 itself are fulfilled. The conditions prescribed by Clause 15 in this behalf are : (1) that it must be a judgment pursuant to Section 108 of the Government of India Act of 1915, and (2) it must not be a judgment falling within one of the excluded categories set out in Clause 15.

The Court further observed as under (para 100 of AIR):

By Article 226 the power of issuing prerogative writs possessed by the Chartered High Courts prior to the commencement of the Constitution has been made wider and more extensive and conferred upon every High Court. The nature of the exercise of the power under Article 226, however, remains the same as in the case of the power of issuing prerogative writs possessed by the Chartered High Courts. A series of decisions of this Court has firmly established that a proceeding under Article 226 is an original proceeding and when it concerns civil rights, it is an original civil proceeding.

(Emphasis supplied)

10. We feel that notwithstanding the fact that the said decision was rendered in the context of a writ petition, wherein an order under the Tenancy Act had been questioned, yet the decision brings into focus the nature of the proceedings under Article 226 of the Constitution. It clearly lays down that when proceedings under Article 226 concern civil rights, these are original civil proceedings falling within the ambit of Clause X of the Letters Patent.

11. Undoubtedly, a detention under the COFEPOSA Act, being purely preventive without any trial in a criminal Court, challenge to such detention is for enforcement of a fundamental civil right and therefore, a writ petition under Article 226 for issue of Habeas Corpus in such like matters cannot be considered as proceedings under the criminal jurisdiction, even though the writ petition is identified as a criminal writ under the High Court Rules and Orders. Support to this view is also lent by a Bench decision of the Delhi High Court, dated 4-3-1994, in L.P.A. No. 86 of 1993 (*Harvinder Singh v. Union of India*).

12. We are, therefore, of the view that in the light of the authoritative pronouncement, the issue raised by learned Counsel for the Detaining Authority

is no more *res integra*. Consequently, we reject the preliminary objection and hold that an appeal under the Letters Patent is maintainable against the judgment of a single Judge in the petition, praying for issuance of Habeas Corpus.

13. We shall now advert to the three grounds urged by learned Counsel for the appellant.

14. While dealing with the question of inordinate delay in passing the order of detention, the learned single Judge has observed that the delay occasioned because of investigations involving a large number of witnesses, recording of statements, recovery of documents, physical examination of the goods exported and the incident of tampering of the original statements by the appellant, which led to the lodging of an FIR. It has also been noticed that the delay was on account of numerous suits, filed by the appellant, leading to the orders directing return of the original documents. The learned Judge has observed that the Detaining Authority, while considering the question of delay, has recorded a finding that the nexus between the act, complained of, and the object, sought to be achieved, continued to exist. Thus, the authority was fully conscious of the delay while recording the satisfaction that propensity of the appellant to commit an act of smuggling had not diminished with the passage of a period of one year and six months. It was strenuously urged by Mr. Mattewal that there being not even a whisper as to what happened after 11-10-2003, the last prejudicial activity taken into consideration by the Detaining Authority, the live link between the incident and the detention stood snapped.

15. We are unable to persuade ourselves to agree with the learned Counsel. It is trite that unexplained delay may vitiate an order of detention if the Court can infer that on account of that delay the nexus between the incident and the detention order has snapped. But there is no hard and fast rule regarding the length of time which can be regarded as sufficient to snap the nexus. It is well-settled that the Detaining Authority is not obliged to explain the delay to the detenu but is obliged to explain the appellant had also tampered with the records of the case and an FIR had to be filed against him. From the list of dates furnished, we find that searches, at the residential premises of the appellant and other persons, were conducted on 11-1-2003 and thereafter several statements were recorded; samples were sent for testing; overseas enquiries were made and reports from the Laboratory were received on 21-1-2004 and 25-2-2004; statement of the appellant was again recorded on 21-7-2004, after the reports on overseas enquiries were received on 12-5-2004; some time was consumed in proceedings before the Civil Court; proposal for detention was made on 2-12-2004 and the first meeting of the Screening Committee was held on 6-12-2004 and after some more enquiries on 14-2-2005, proposal for detention of the appellant was approved. After obtaining further information from the Directorate of Revenue Intelligence, Ludhiana, ultimately the Detaining Authority passed the order on 5-4-2005. We are in complete agreement with the learned single Judge that there was no unexplained delay in passing of the order of

detention and that the nexus between the incident and the detention had not been snapped.

16. Coming the question of alleged delay in the execution of the detention order, it needs little emphasis that the Detaining Authority as well as the executing authority have to be vigilant in executing the order of detention because any indifferent attitude on their part would defeat the very purpose of the detention and frustrate the entire proceedings. Inordinate delay, for which no adequate explanation is furnished, leads to the assumption that the live and proximate link between the grounds of detention and the purpose of detention is snapped. At the same time, the delay in executing a detention order, if satisfactorily explained, cannot vitiate the detention. Delay to be fatal must be of such length and remain unexplained so as to snap the nexus between the incident and the detention. It is also well-settled that if the detenu was, in spite of frequent search, not found at his known residential address, that could be a valid explanation for delay in execution of the order. In any case, the delay in arresting a detenu cannot vitiate the detention order, if the detenu was himself absconding and trying to evade the arrest. (See : Syed Farooq Mohammad Vs. Union of India and another,).

18. In the instant case, after the order of detention was passed on 5-4-2005, it was sent to the Senior Superintendent of Police, Ludhiana on 7-4-2005 with the clear directions to report the arrest of the appellant within a period of 35 days. It is pointed out that after the order was sent by the office of the Senior Superintendent of Police to the Superintendent of Police, Ludhiana, a raid was conducted at the house of the appellant on 16-4-2005, when his wife informed the police officer that the appellant had gone out in connection with his business. Raids were again conducted at his house on 18th and 26th April, 2005, but the appellant was still not available. Having failed to receive any response from the Senior Superintendent of Police, a notification u/s 7(1)(b) of the COFEPOSA Act was issued by the Central Government on 12-5-2005. Ultimately, the appellant was apprehended on 18-5-2005. As regards the plea of the appellant that he had appeared before the Court in connection with the anticipatory bail, it is stated that anticipatory bail was granted to the appellant without any notice to the Directorate of Revenue Intelligence or its standing counsel and therefore, appearance before the Court was not in the knowledge of the Revenue Intelligence.

19. On these facts, we are satisfied that the appellant was evading his arrest and a proper explanation for the delay in execution has been furnished and therefore, the nexus between the incident and the detention was not snapped.

20. Lastly, it was argued by Mr. Mattewal, learned senior counsel for the appellant that a very vital document, namely, letter dated 20-12-2004, issued by the Directorate of Revenue Intelligence to the Joint Director, Foreign Trade, in connection with the civil suit filed by M/s. Girnar Impex Ltd., Ludhiana and the orders passed by the Court was not placed before the Detaining Authority and

therefore, non-consideration of the said document has vitiated the detention order. The submission is that the said document was bound to influence the mind of the Detaining Authority in one way or the other whether to make or not to make the detention order.

21. Indubitably, the said document was not placed before the Detaining Authority and therefore, was not taken into consideration. Nevertheless, the question for consideration is whether or not non-placement and consequent non-consideration of this document by the Detaining Authority tantamounts to non-application of mind on the facts of the case, vitiating the subjective satisfaction of the Detaining Authority.

22. Preventive detention is recognized and permitted by our Constitution, but it has to be resorted to strictly within the constitutional safeguards. Article 22 of the Constitution ensures protection against arrest and detention in certain cases. Clause (5) of Article 22 has two facets : (i) communication of the grounds on which the order of detention has been made and (ii) opportunity of making a representation against the order of detention. Obviously, communication of the grounds pre-supposes the formulation of grounds and formulation of grounds requires application of mind by the Detaining Authority to the facts and material before it. The meaning of the word "grounds" in Article 22(5) was succinctly explained by the Apex Court in *Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others*, . Their Lordships of the Supreme Court observed that "grounds" under Article 22(5) of the Constitution do not mean mere factual inferences but mean factual inferences plus factual material, which led to such factual inferences.

23. The concept of the word "grounds" with reference to Section 3(3) read with Section 5-A of the COFEPOSA Act was again explained by the Supreme Court in *Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others*, . Referring to the afore-mentioned observation in *Smt. Shalini Soni's* case (supra), the Supreme Court observed thus (para 73):

The concept of "grounds" used in the context of detention in Article 22(5) of the Constitution and in Sub-section (3) of Section 3 of COFEPOSA, therefore, has to receive an interpretation which will keep it meaningfully in tune with a contemporary notions. While the expression "grounds" for that matters includes not only conclusions of fact but also all the "basic facts" on which those conclusions were founded, they are different from subsidiary facts or further particulars or the basic facts.

(Emphasis added)

24. In the instant case, the satisfaction of the Detaining Authority that the detention is necessary with a view to prevent the appellant from smuggling goods in future has been arrived at as inference from several facts, enumerated in the grounds of detention. Thus, the question for consideration is that even if the facts, stated in letter dated 20-12-2004, were allegedly ignored, can the

inference be still drawn from other independent and objective facts that the appellant had indulged in the act of smuggling. In other words, are the relevant grounds still available on record from which an inference can reasonably be drawn for the satisfaction of the Detaining Authority for detaining the appellant for the purpose of Section 3(1) of the COFEPOSA Act ?

25. In the present case, the transaction of smuggling within the meaning of Section 2(39) of the Customs Act, 1962 involved various primary facts, namely, (i) procuring false invoices/bills without actual purchase of alloy steel and non-alloy steel items; (ii) issue of bearer cheques to the parties issuing false invoices and then withdrawing the money against these cheques; (iii) preparation of two parallel sets of invoices, showing different values - one with the inflated price for goods of alloy steel for the Custom Department and the other with the actual price of non-alloy steel goods for the consignee; (iv) confessional statements and (v) settlement of accounts through Hawala Channels and so on. Each of these facts and the inference drawn therefrom will be a "ground" within the meaning of Section 3(3) of the COFEPOSA Act and in the context of detention in Article 22(5) of the Constitution. Therefore, the act relating to smuggling cannot be considered as a single ground, as is sought to be pleaded on behalf of the appellant. We are of the considered view that relevant material was available to the Detaining Authority, on the basis whereof he could justifiably entertain reasonable belief or conviction that the appellant had indulged in smuggling of goods and therefore, the subjective satisfaction of the Detaining Authority is not vitiated merely because letter dated 20-12-2004 was not considered by it. In our view, there were other offending and incriminating facts, relevant to the allegation of smuggling and the detention can be sustained by resort to Section 5-A of the COFEPOSA Act. Neither the learned single Judge nor can we go into the question of sufficiency of the material.

26. No other point was urged before us,

27. For all these reasons, the appeal is devoid of any merit and is dismissed accordingly, with no order as to costs.