

(1983) 03 BOM CK 0013

In the Bombay High Court

Case No : Criminal Writ Petition No. 666 of 1982

Amirali Sadak Thamby

APPELLANT

Vs

The State of Maharashtra and others

RESPONDENT

Date of Decision : 22-03-1983

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (1983) 2 BomCR 55

Hon'ble Judges : S.N. Khatri, J;R.R. Jahagirdar, J

Bench : Division Bench

Judgement

Jahagirdar, J.—This petition under Article 226 of the Constitution seeks to invoke also the jurisdiction of this Court u/s 482 of the Cri.P.C. for challenging an order passed by the Government of Maharashtra detaining the detenu u/s 3 of the conservation of Foreign Exchange and prevention of Smuggling Activities Act, hereinafter referred to as "the COFEPOSA Act." Article 227 is inapplicable : Section 482 of the Cri.P.C. which mentions the inherent powers of the Court cannot also be invoked for the purpose of challenging a detention Order. We must, therefore, proceed to hear this petition as one under Article 226 of the Constitution.

2. The facts as disclosed in the petition as well as in the return filed by the respondents in reply to the rule issued by this Court disclose that on 19th March, 1982 the detenu's flat situated on the third floor of a building known as Mistry Park, Warden Road, Bombay 400 026, was raided by the Customs Officers and a sum of Rs. 50,000/- and U.S. currency of 425 was seized. The detenu was a tenant of the said flat bearing No. 36. From the said flat the detenu was taken to another building which is not near the flat of which the detenu is the occupant or the tenant. That building is called Papad Chawl and Room No. 15 of the said chawl was opened with the key provided by the detenu. In that room there was a

cupboard. The key of the cupboard was also provided by the detenu. After the officers opened the cupboard they found in it a pillow in which certain packets were concealed. When opened, those packets were found to contain certain shining objects. They were seized by the Customs Officers. When these objects were sent to the Customs appraiser, he gave the opinion that they were diamonds weighing 1121.58 carats valued at Rs. 30,43,840/-. This opinion of the Customs appraiser was given on 22nd March, 1982. On 18th September, 1982 the order of detention was passed and on the same day the grounds of detention were provided.

3. It may be stated at this stage that the material which has been relied upon by the detaining authority himself discloses that one Sayed Hamid Jubair was present at the time the raid of Room 15 in the Papad Chawl was carried out. The statement of the said Sayed Hamid Jubair was recorded on 19th March 1982 on which date the statement of the detenu was also recorded. On four more subsequent dates again the statements of the detenu were recorded. The car bearing No. MRG-372 registered in the name of Sayed Hamid Jubair was also seized. Subsequently on 23rd March, 1982 the detenu was arrested and released on bail. On 10th September, 1982 a notice was issued to the detenu to show cause why the goods which were taken possession of from Room No. 15 of the Papad Chawl should not be forfeited to the Government and why penalty should not be imposed upon him. It needs to be mentioned that the order of detention and the grounds of detention were prepared on 16th September, 1982 but were served upon the detenu on 18th September, 1982.

4. The detenu made a representation on 25th October, 1982 and reply was received from the Central Government on 8th November, 1982, while the reply of the State Government is of 10th November, 1982. On 24th November, 1982 the order of detention was confirmed after the opinion of the Advisory Board was received by the Government. It is this order of detention which is the subject matter of challenge in this petition.

5. That the diamonds valued over Rs. 30,00,000/- were seized from Room No. 15 of the Papad Chawl is an admitted position. Further, that the key of the said room and the key of the cupboard from which diamonds were recovered were provided by the detenu, are also admitted facts. It has not been disputed that the value of the diamonds was over Rs. 30,00,000/-. Several questions were put to the detenu. To the question which was put to the detenu as to how he came in possession of such a large quantity of diamonds, he has not given any satisfactory reply. He has mentioned that Sayed Hamid Jubair would be knowing the answers to the questions which were put to him. It has also come on record that the said Sayed Hamid Jubair is absconding having run away from Room 15 when the raid of the said room was being carried out by the Customs Officers. From the narration of facts which we have thus made, it is clear that the diamonds worth over Rs. 30,00,000/- were concealed in a pillow case which was in turn put in a cupboard in a room of Papad Chawl. Admittedly, the room was

not standing in the name of the detenu. However, the keys of the room and the cupboard were in possession of the detenu.

6. The material which was before the detaining authority also discloses that the detenu had no ostensible means of living. The detenu himself has admitted in his statement before the Customs Officers that he was not carrying on any business. The two persons who were working as servants in the detenu's flat at Warden Road have made statements to the Customs Officers that the detenu was not employed anywhere nor was he carrying on any business. From this it was clear to the detaining authority that the detenu did not have any ostensible means of living. It was also found by the detaining authority, on the material that was placed before him, that the Fiat Car, though registered in the name of Sayed Hamid Jubair, was in the custody of the detenu inasmuch as the registration book of the said car was found in Room No. 15 in Papad Chawl to which the detenu had access having the key of the same. All this material has been mentioned by the detaining authority in his grounds of detention dated 16th September, 1982. In the second para of the said grounds the fact of the raid carried out at the flat of the detenu at Warden Road has been mentioned as also the facts of the raid carried out in Room No. 15 of Papad Chawl. The fact of the recovery of diamonds valued at over Rs. 30,00,000/- has been narrated in para 2 of the grounds of detention. Para. 3 mentions of the panchanamas which have been drawn at the time of the two raids. Para. 4 of the grounds mentioned that the detenu was for some time carrying on the business in gems but since the year 1980 the detenu was not doing any business. In para. 5 of the grounds reference has been made to the statement of the detenu wherein the detenu has admitted that the keys of the premises at Nagdevi Street had been kept with him at the Warden Road flat. It has also been mentioned that the premises at Nagdevi Street belong to one Amin Saheb. Proceeding further, the detaining authority has mentioned that when asked about the diamonds, the detenu failed to produce any documents showing as to how the diamonds were received by the detenu. Thereafter the detaining authority proceeds to mention as follows :

"Your only explanation was that Jubair might be knowing about it. Government considers that this explanation is extremely unsatisfactory. The diamonds were found in a cupboard, the key to which was in your possession. Government is of the view that it is your duty when contraband like diamond is seized in your premises to show that the goods were not smuggled goods."

The fact that the detenu has consistently failed to give any satisfactory explanation as to how he came in possession of such a large quantity of diamonds has been repeated in para. 5 of the grounds of detention.

7. Para. 6 of the grounds mentions about the Fiat Car and a television set both standing in the name of Sayed Hamid Jubair but the documents in respect of which were said to be in possession of the detenu. Para. 7, however, has to be reproduced in full. It is as follows :-

"The statements of Jainool Abidin, the cook, employed by you and Jagbar Sadiq, another servant in your premises at 77, Warden Road, were recorded on 20-3-1982. Both of them stated that as far as they knew you were not employed, nor were you carrying on any profession. You were, however, apparently, living in style, owning a fiat car and a T.V. Government considers that the reasonable inference which can be drawn is that you were engaged in illegal activities of smuggling in diamonds which were found in your possession and about which you could not give any satisfactory account."

Thereafter the detaining authority proceeds to mention as follows :-

"From all the above circumstances, Government has come to the conclusion that you are actively involved in the illegal business of smuggling in diamonds. Government is of the view that the value of the diamonds seized from you is also very high. Government is of the view that in order to stop these activities of yours it is necessary to detain you under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act. Government is satisfied that unless you are so detained your prejudicial activities will continue."

8. Mr. Karmali, the learned Counsel appearing in support of the detenu, has urged several grounds for challenging the order of detention. However, it is not necessary for us to refer to all of them. Suffice it to say that he has with considerable justification contended that the material which was before the detaining authority did not warrant an inference that the diamonds which were seized from Room 15 of Papad Chawl were contraband diamonds. According to Mr. Karmali, the detaining authority has assumed what is to be inferred by mentioning that when a large contraband was found in possession of the detenu, the burden of proving that it was not smuggled was upon the detenu. This is a circular reasoning contained in this statement of the detaining authority. If the detaining authority proceeds, in the first place, to assume that what was seized was contraband then the question of proving that it was smuggled goods does not arise at all. In this respect the detaining authority has committed an error vitiating the subjective satisfaction of the detaining authority.

9. Mr. Kotwal, the learned public prosecutor appearing for the State has however contended that the detaining authority was justified in raising a presumption that what was seized from Room 15 of Papad Chawl at Nagdevi Street was smuggled goods because they were so seized by the Customs Officers under a reasonable belief that they were smuggled goods. Recourse is being taken by the learned public prosecutor to section 123 of the Customs Act wherein it is provided that where any goods to which the said section applied are seized under the Customs Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods lay upon the person from whose possession the goods are seized. Sub-section (2) of section 123 mentions that the said section applies to, among other things, diamonds. In the instant case what has been seized is diamonds and since they were seized by the Customs Officers under a reasonable belief that they were smuggled goods the burden of proving

that they were not smuggled was upon the detenu who has failed to discharge the burden despite the opportunity which was given to him by the Customs Officers. In none of the five statements which he gave to the Customs authorities the detenu has given any explanation which would displace to the smallest extent the presumption which arises u/s 123 of the Customs Act.

10. It has been contended on the other hand by Mr. Karmali that to the proceedings under the COFEPOSA Act section 123 of the Customs Act cannot be made applicable at all. Certain authorities were cited by the learned Counsel for both sides. For example, Mr. Kotwal relied upon the judgment of the Calcutta High Court in *Ram Chandra Thakorlal Mehta v. Secretary of Home Department, Govt. of West Bengal* (1976) 80 Cal WN 954. In this judgment which deals with several other points arising out of the detention of several persons during emergency the question of applicability of Section 123 while taking action under the COFEPOSA Act was referred to. In fact the judgment refers to an earlier judgment of the same Court given by Basak, J. The reference to this judgment is to be found at pp. 974 and 975 of the report. Basak J. had observed in the earlier judgment to which a reference was made that as far as Section 123 of the Customs Act was concerned it did not make any difference whether Section 123 has any application or not. However, it was found in the case before Basak J. that there was material before the detaining authority to enable him to reach his subjective satisfaction independently as he did. Proceeding further it was held that it was true that Section 123 of the Customs Act had no application by itself in respect of the COFEPOSA Act. The goods having been seized by the Customs Officers under the reasonable belief that they were smuggled goods, the seizure was obviously held to be under the Customs Act. Basak J. then observed as follows :-

"Accordingly the said section applied to the case of such seizure. It was open to the detaining authority passing an order under the said Act (i.e. the Cofeposa) to take into consideration the fact that in respect of seizure of the said goods under the Customs Act the persons concerned had not been able to discharge the burden of proof. The detaining authority is entitled to take same into consideration irrespective of the question whether Section 123 of the Customs Act as such applied to the case of a detention under the said Act (i.e. the Cofeposa)."

From one sentence extracted by us above, Mr. Kotwal wants to contend that the presumption u/s 123 of the Customs Act can be raised by the detaining authority while passing orders u/s 3 of the COFEPOSA Act. On the other hand Mr. Karmali has relied upon a judgment of the Karnataka High Court in Writ Petn. No. 23 of 1982. That judgment was delivered on 12th October, 1982 by the Division Bench consisting of the Acting Chief Justice and Mr. Justice S. G. Doddakale Gowda, X"rox copy of the certified copy of the judgment has been made available to us for our perusal. In the said judgment the following is to be found :-

"The statutory presumption alone cannot form the basis of subjective

satisfaction. The Supreme Court in Shalini Soni's case (1980 Cri LJ 1487) emphasise the application of mind of the detaining authority to the facts and materials placed before it, facts pertinent and proximate and should not adopt mechanical approach without the application of mind. Communication of grounds embody all the constituent facts and materials that went to make up the mind of the statutory functionary and not merely the inferential conclusion. The principles enunciated by the Supreme Court squarely apply to the facts of the present case. Except the satisfaction being based on his failure to discharge the burden cast u/s 123 of the Act, no basic material on which he has arrived at the conclusion is disclosed. Learned Counsel is right in his criticism that the detenu is informed about the position of law and not of facts."

11. Reliance was also placed by Mr. Karmali on M.G. Abrol and Another Vs. Amichand Vallamji and Others, . In particular he referred to certain observations which are to be found on p. 1071. These observations suggest that the question of discharging the burden is thrown only when show cause notice is issued by the Customs authorities. If that is so, the presumption cannot be acted upon till an opportunity is given to the person concerned of rebutting the presumption. On the facts of this case, however, we find it unnecessary to decide the question as to whether the presumption under S. 123 of the Customs Act is available to the authority acting under S. 3 of the COFEPOSA Act. In our opinion, the detaining authority himself in the instant case has not relied upon the presumption arising under S. 123 of the Customs Act. There are two reasons as to why we are of this opinion. In the first place, in para 5 of the grounds of detention he has mentioned as follows :-

"Government is of the view that it is your duty, when contraband like diamonds is seized in your premises to show that the goods were not smuggled goods."

It has not been mentioned by him that the goods were seized under the Customs Act under a reasonable belief that they are smuggled goods. Mr. Kotwal, however, wants us to read into the said sentence that the detaining authority had in his mind the reasonable belief which has been mentioned in the panchanama and to which reference has been made in the earlier paragraphs of the grounds of detention. For example, it has been mentioned in para 2 of the grounds of detention as follows :

"The Customs officers seized all these goods in the belief that the diamonds and the dutiable goods were smuggled."

Despite the fact that such mention is to be found in para 2 and at another place in the grounds of detention, we find that there is no material at all before the detaining authority to hold that the Customs Officers seized the goods in the reasonable belief that they were smuggled goods. For example, there is no writing of the Customs authorities wherein it has been mentioned that they acted in the circumstances mentioned in S. 123 of the Customs Act nor is there any statement by any Customs Officer who took part in the raid of Room 15 in the

Papad Chawl to the effect that they acted in the circumstances giving rise to the presumption under S. 123 of the Customs Act. Mr. Kotwal, however, insists that the fact that the goods were seized in the reasonable belief that they were smuggled goods has been mentioned in the relevant panchanama and other material may be relied upon by the detaining authority to come to the conclusion that the seizure was in the circumstances mentioned in S. 123 of the Customs Act. We are unable to accept Mr. Kotwal's contention in this regard because the panchanama is a statement of facts mentioned by the panchas - the facts which they saw and heard : reasonable belief is a state of mind of the Customs Officers about which they alone could have spoken. If for example, it had been mentioned in the panchanama that the Customs Officers or any one of them had told that they were carrying out the raid for the purpose of seizure of the goods under the reasonable belief that they were smuggled goods the detaining authority could have been possibly justified in holding that there was material before him giving rise to the presumption under S. 123 of the Customs Act. The recitals in the panchanama of the state of mind of the Customs Officers cannot be regarded as material which can be legitimately relied upon for raising presumption under S. 123 of the Customs Act. It is true, as Mr. Kotwal says, that the law of evidence is not applicable when the detaining authority is arriving at a conclusion which enables him to pass the necessary detention order. Hearsay evidence, for example, could be relied upon by the detaining authority. One cannot quarrel with this proposition but in the instant case it has not been said by anyone who effected the seizure that he had done so in the reasonable belief that the goods which were being seized were smuggled goods.

12. Once it is held, as we are holding, that the presumption under S. 123 of the Customs Act was not available to the detaining authority on the facts of this case, then, in our opinion, there is no other material which can show that the diamonds which were seized from Room 15 of Papad Chawl were contraband. It is an admitted position that the diamonds are not notified goods under Chap. IV A of the Customs Act. The learned Public Prosecutor, however, was not in a position, as indeed he could not, to show that the diamonds by themselves can be regarded as smuggled goods. For example, reading S. 2(a) along with S. 111 of the Customs Act, it is not possible to dub the diamonds to be found with any person in India as smuggled goods without showing that they fell under one or the other classes of S. 111 of the Customs Act. It has not been shown to us and it has not been contended before us that mere possession of diamonds amounts to possessing any smuggled goods.

13. Mr. Kotwal however, argued that several circumstances which have been relied upon by the detaining authority can legitimately lead to an inference that the diamonds which were seized from the detenu were smuggled goods. We have already enumerated circumstances which appear to be against the detenu. For example value of the diamonds is high, they were concealed in a secret place; the detenu had access to that secret place; that secret place was not the normal place of residence of the detenu. Even if every one of these facts is held to be

true, we do not see how diamonds in that place could be regarded as smuggled goods.

14. Mr. Kotwal has also attacked the reasoning contained in Para 7 of the grounds of detention on the ground that the reasoning contained in the said paragraph is hopelessly irrational which could not be the basis of any detention order. The fact that the detenu was not gainfully employed has been mentioned in para 7 of the order of detention. This fact alone could not be regarded as a relevant factor while determining the nature of the goods found in Room 15 of the Papad Chawl. The inference contained in para 7 of the grounds of detention, in our opinion, cannot be sustained on the reasons contained in the said paragraph. To this extent Mr. Karmali's criticism is justified. After considering all the facts and circumstances of the case, we are of the opinion that the order of detention passed in the instant case is unsustainable and has to be set aside.

In the result, the petition is allowed. The order of detention No. SPL. 3(A)/PSA. 0182/122-I, dated 16th September, 1982, passed by the Government of Maharashtra, is set aside. The detenu is entitled to be released forthwith unless otherwise required in any other case.

15. Petition allowed.