(1990) 02 P&H CK 0074

In the Punjab And Haryana At Chandigarh

Case No : Criminal Writ No. 41 of 1990

Ashok Kumar Anand APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 08-02-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 2, 3(1), 9, 9(1)
Constitution of India, 1950 — Article 22(5), 32
Customs Act, 1962 — Section 111, 113, 2, 2(39)

Citation : (1990) CriLJ 1386 : (1990) 1 RCR(Criminal) 605

Hon'ble Judges : Jai Singh Sekhon, J

Bench : Single Bench

Advocate : Amar Singh Sandhu, for the Appellant; Jai Shree Anand, for the Respondent

Final Decision : Dismissed

Judgement

Jai Singh Sekhon, J.—Shri Ashok Kumar Anand is being detained with effect from 7-10-1988 vide detention order dated 30-9-1988 Annexure P-1 passed by the Joint Secretary to the Government of India, the detaining authority, u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the COFEPOSA Act). The grounds of detention Annexure P-2, were served upon the detenu on 7-10-88. After obtaining the opinion of the Advisory Board, the confirmation order Annexure P-3 was passed on 13-3-1989 by the concerned authority. The representations filed by the petitioner to the Central Government and detaining authority were rejected on 9-12-1988 vide communication Annexure P-5. The detaining authority passed the declaration u/s 9(1) of the COFEPOSA Act. The petitioner had earlier challenged the above referred detention order by filing Criminal Writ Petition No. 1258 of 1989 which was dismissed by Mr. Justice S.D. Bajaj on 2-5-1989 in view of the pendency of similar writ petition in the Delhi High Court. The Division

Bench of the Delhi High Court vide order dated 17-3-1989 has also dismissed Criminal Writ Petitions Nos. 545 and 576 of 1988 filed by the petitioner along with other detenus challenging the above referred order of detention as well as order of declaration passed u/s 9(1)(a) of the COFEPOSA Act respectively. The SLP filed by the petitioner against the judgment of the Delhi High Court is pending in the Supreme Court of India. It is also admitted at the bar that a criminal writ petition filed by the petitioner is also pending before the Supreme Court.

2. The petitioner has filed this writ petition on fresh grounds which were allegedly not taken in any of the earlier petitions.

3. It is, inter alia, maintained that the detention order against detenus Naresh Chadha and Krishan Lal Chawla detained on the same grounds was revoked by the detaining authority on the opinion of the Advisory Board but this fact was not brought to the notice of the concerned authority while passing the confirmation order regarding the detention of the petitioner. It is further maintained that the representation filed by the petitioner was illegally rejected by the detaining authority and that before passing the declaration order u/s 9 of the COFEPOSA Act, only the statement of Madan Lal Anand co-detenu was supplied and the remaining documents relied upon by the concerned authority were not supplied and thus it is maintained that the declaration is bad in the eyes of law. It is further contended that the detention order is also liable to be quashed being vague as it is not mentioned under which clause of Section 3(1) of the COFEPOSA Act, the activities of the detenu fell and thus it shows non-application of mind of the detaining authority.

4. In the counter-affidavit filed by Shri A. C. Sharma, Assistant Collector (Prevention), Central Excise Collectorate, on behalf of the Union of India, it is, inter alia, maintained that the writ petitions of the detenu having been dismissed by the Delhi High Court as well as by the Punjab High Court, no action is called for on the present writ petition. It is further maintained that the matter being sub judice before the Supreme Court in SLP as well as in writ petition filed by the detenu-petitioner, the present writ petition was not maintainable even on fresh grounds because the petitioner can take the same grounds by amending the petition before the Supreme Court. It is further maintained that Criminal Writ Petition No. 222 of 1989 and Criminal Appeal No. 671 of 1989 arising out of the SLP of Madan Lal Anand, co-detenu of the petitioner, against the judgment of the Delhi High Court having been dismissed by the Supreme Court as reported in Madan Lal Anand Vs. Union of India and others, , the present writ petition was not maintainable as the order of detention was being assailed by Madan Lal Anand on similar grounds as taken by the petitioner in the present case. Thus it is maintained that the writ petition be dismissed.

5. The brief resume'' of facts relevant for the disposal of this petition as apparent from the grounds of detention is that Shri Ashok Kumar Anand, petitioner, along with his father Shri Ved Pal Anand and uncle Madan Lal Anand floated firm M/s.

Jasmine in the name of their servants Naresh Chadha and Krishan Lal Chawla. They also floated M/s. Expo. International showing it to be the sole proprietary concern of aforesaid Naresh Chadha. Both these concerns applied to the Joint Chief Controller of Imports and Exports, New Delhi, for the issuance of advance licences by disclosing the location of their factory at Khasra No. 694/205 of village . Lado Sarai, New Delhi. M/s. Jasmine obtained 5 ''Actual User'' advance licences in the financial years 1984-88 from the Joint Chief Controller of Imports and Exports, New Delhi, for the import of polyester filament yarn and polyester fibre free of customs duty under the Duty Exemption Entitlement Certificate Scheme subject to the conditions, inter alia, that they would manufacture (a) ready made garments (resultant product) out of the imported, polyester filament yarn and (b) polyester spun yarn out of the imported polyester fibre and export the resultant products abroad within a period of six months from the date of first clearance of the imported consignment in terms of the conditions of the advance licences and the conditions of the Notification No. 117/78-Cus-dated 9-6-78 as amended. Similarly M/s. Expo. International also obtained 5 ''Actual User'' licences in the financial years 1984-88 from the Joint Chief Controller of Imports and Exports, New Delhi, for the import of similar material and under similar obligation to export it within six months. Both these concerns imported different quantities of filament yarn etc. on different occasions under the above referred licences but instead of fulfilling its obligation and exporting the resultant product, they started selling it in the local market. On the basis of some information regarding the sale of polyester filament yarn and polyester fibre by these two concerns in the local market, the enforcement staff of the Department of Revenue came into action and after recording the statements of various persons came to the conclusion that Ashok Kumar Anand, present petitioner, along with Shri Ved Pal Anand and uncle Madam Lal Anand were actually controlling those firms and had taken active part in the import and sale of filament yarn and polyester fibre and that they have been visiting the above referred premises depicted as factories of these two concerns. It was also found that after obtaining the licences, these two firms had shown the shifting of their factory to 374, Ram Darbar Industrial Area, Phase 2, Chandigarh, but Shri Jaswinder Singh, the landlord of that premises, stated that only 10 or 12 sewing machines were kept initially for manufacturing readymade garments but later on the same were removed and no such garments were manufactured there. The enforcement staff also recorded the statements of various cloth manufacturing concerns which were contacted by the Anand family for the sale of polyester filament fibre and yarn. Under these circumstances on the move of the enforcement staff, the Joint Secretary, Central Government, had passed the impugned detention order u/s 3(1) of the COFEPOSA Act.

6. I have heard Shri Amar Singh Sandhu, Advocate for the petitioner, and Mrs. Jai-shree Anand, Advocate for the respondent-Union of India, besides perusing the judgment of the Delhi High Court as well as of the Supreme''Court reported as Madan Lal Anand Vs. Union of India and others, . The copy of the grounds of

the writ petition filed by the petitioner before the Delhi High Court was also tendered by Mrs. Anand in order to establish that similar grounds were taken by the petitioner in Writ Petitions Nos. 545 and 576 of 1988 before the Delhi High Court.

7. Regarding the maintainability of this petition it transpires that the principles of res judicata or constructive res judicata enshrined in Section 11 of the CPC are not applicable to the habeas corpus petition challenging the order of detention. The observations of the Apex Court in Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others, , can be referred in this regard. In that case in para No. 13 it was held as under:

"The position that emerges from a survey of the above decisions is that the application of the doctrine of constructive res judicata is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Article 32 of the Constitution on fresh grounds, which were not taken in the earlier petition for the same relief."

8. Thus if the petitioner had not taken any of the grounds in the earlier writ petition, he cannot be debarred from taking the same in the present writ petition on the principle of constructive res judicata or estoppel. Consequently the present petition is maintainable only on the grounds which were not taken by the petitioner in the writ petition filed before the Delhi High Court.

9. Mr. Amar Singh Sandhu, the learned counsel for the petitioner, had raised the preliminary objection that the detaining authority having not controverted the allegations of the petitioner by filing a counter-affidavit, it should be taken that the allegations of the petitioner in the petition have been accepted. There appears to be no force in this contention as in the petition, no allegations of mala fide or bias have been made by the detenu against the detaining authority.

On the other hand, counter-affidavit filed by Shri A. C. Sharma, well conversant with the facts of the case, is sufficient to counter the allegations of the petitioner. Moreover, this very controversy was settled by the Apex Court in Madan Lal Anand Vs. Union of India and others, . After elaborate discussion and relying upon the earlier view of the Apex Court in P.L. Lakhanpal Vs. Union of India (UOI) and Others, ; Asgar Ali Vs. District Magistrate Burdwan and Others, and Suru Mallick Vs. State of West Bengal, , it was held in a relevant portion of paras Nos. 32 and 35 as under:

"32. No personal allegation of mala fide or bias has been made by the detenu against the detaining authority. If such an allegation had been made, in that case, the detaining authority should have himself sworn the counter-affidavit either in this Court or in the High Court....."

"35. Thus, merely because the detaining authority has not sworn an affidavit, it will not in all circumstances be fatal to the sustenance of the order of detention.

The contention in this regard is, therefore, unsound and is rejected."

In the case in hand, certainly no personal allegations of mala fide or bias have been alleged against the detaining authority.

10. There is no force in the contention of the petitioner that the order of confirmation of detention of the petitioner dated 13-3-1989 by the Central Government is vitiated as the revocation of detention of Naresh Chadha and Krishan Lal Chawla on similar grounds on the opinion of the Advisory Board was not brought to the notice of the confirming authority because the perusal of the original record reveals that the Finance Minister of the Government of India had confirmed the detention of the petitioner in the same order wherein the advice of the Advisory Board regarding the revocation of the detention order of aforesaid Naresh Chadha and Krishan Lal Chawla was accepted.

11. The contention of the learned counsel for the petitioner that the representation of the petitioner having been disposed of by the detaining authority had resulted in rendering the detention void is also not acceptable as this argument appears to be misconceived. No doubt in the counter-affidavit Shri Sharma had admitted that the representation was disposed of by the Additional Secretary, Revenue, yet all the same the perusal of the original file shows that the representation addressed to the Central Government by the detenu was disposed of by the Finance Minister and not by the Joint Secretary, Revenue, or the Additional Secretary, Revenue.

12. The third ground of attack pertaining to non-supplying all the documents along with the declaration u/s 9 of the COFEPOSA Act is also not acceptable as all the documents relied upon while passing the detention order and figuring in the grounds of detention had already been supplied to the detenu. The only additional document thereafter was the statement of Madan Lal Anand, co-detenu of the petitioner, and a copy of the same was supplied to the detenu-petitioner along with the said declaration. Thus it cannot be said that the continued detention of the petitioner in view of declaration u/s 9 of the COFEPOSA Act is bad in the eyes of law. Mrs. Jaishree Anand maintained that this ground of attack was not available to the petitioner as he had not specifically taken the same in the grounds of petition. There appears to be no force in this contention also as strict rules of pleadings are not applicable to writ petitions challenging the order of detention. On the other hand, the onus lies upon the detaining authority to prove that the detention order was well based under the circumstances of the case. The Apex Court in Mohinuddin alias Moin Master Vs. District Magistrate, Beed and Others, , had also settled this controversy by observing as under in a portion of para 4 of the judgment:

"It was an improper exercise of power on the part of the High Court in disallowing the writ petition on the ground of imperfect pleadings. Normally, writ petitions we decided on the basis of affidavits and the petitioner cannot be permitted to raise grounds not taken, in the petition at the hearing. The same rule cannot be applied to a petition for grant of a writ of habeas corpus. It is enough for the detenu to say that he is under wrongful detention and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This Court on more occasions than one has dealt with the question and it is now well-settled that it is incumbent on the State to satisfy the Court that the detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Article 22(5)."

13. To appreciate the controversy whether the order of detention is vague due to the omission in mentioning specific clauses of Section 3 of the COFEPOSA Act under which the activities of the detenu fell, it is conducive to reproduce the provisions of Section 3(1) of the COFEPOSA Act:

"The Central Government or the State Government or any other officer of the Central Government not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from--

(i) smuggling goods, or

(ii) abetting the smuggling of goods, or

(iii) engaging in transporting or concealing

or keeping smuggled goods, or

(iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or ?

(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods;

it is necessary so to do, make an order directing that such persons be detained."

14. The bare perusal of the above referred five clauses of this sub-section leaves no doubt that the Legislature had envisaged five modes of smuggling and abetting the smuggling of goods. In the case in hand, the detention order Annexure P-l reads as under:

"Whereas, I, K.L. Verma, Joint Secretary to the Govt. of India, Specially empowered u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (as amended), am satisfied with respect to the person known as Shri Ashok Anand s/o Shri Ved Pal Anand, House No. 3045, Sector 21D, Chandigarh that with a view to preventing him from abetting the smuggling of goods and dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, it is necessary to make the following order.

Now, therefore, in exercise of the powers conferred by Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (as amended), I direct that the said Shri Ashok Anand, be detained and kept in custody in the Central B-Jail, Tihar, New Delhi."

15. Thus there is no doubt that the detention of the petitioner was ordered on the ground of preventing the petitioner from abetting the smuggling of goods and dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, which in turn implies that this order has been passed under Clauses (i) and (ii) of Sub-section (1) to Section 3 of the COFEPOSA Act. The mere non-mentioning of specific Clauses (i) and (ii) will not render the detention order vague especially when the specific circumstances attracting the provisions of Clauses (i) and (ii) figure therein. It is note-worthy that Clauses (iii) and (iv) deal with altogether different contingencies than Clauses (i) and (ii) of this sub-section.

16. The learned counsel for the petitioner then relied upon a decision of the single Bench of this Court in Parduman Singh v. State of Punjab (1988) 2 Recent Cri R 423, in support of the proposition that where the order of detention is silent as to under which clause of Section 3(1) of the COFEPOSA Act, the activities of the detenu fell, it amounts to non application of mind on the part of the detaining authority is of no consequence in this case because in that case the order of detention was held vague as therein it was simply mentioned that the detenu has been indulging in dealing and keeping smuggled goods. There was no mention as to the manner in which the detenu in that case was dealing and keeping smuggled goods.

17. Similarly the decision of the single Bench of this Court in Puran Singh v. State of Punjab (1988) 2 Recent Cri R 519 is of no help to the petitioner in the case in hand as therein also the detenu was held to be indulging in smuggling of goods simply without qualifying the actual facit of smuggling.

18. The ratio of the decision of the single Bench of this Court in Massa Singh v. State of Punjab (1988) 1 Recent Cri R 498 is also not attracted to the facts of the case in hand as therein the detention order was held vague as that simply stated that it is a fit case to detain the detenu under COFEPOSA Act with a view to preventing him, from indulging in nefarious activities of smuggling. Thus from these words it was not ascertainable as to under which clause of Section 3(1) of the COFEPOSA Act the activities of the detenu fell whereas in the case in hand as already discussed, the wording of the detention order is specific and clearly shows that the detaining authority had passed the order u/s 3(1) and Clauses (i) and (ii) after taking into consideration the specific activities of the detenu.

19. The controversy that the act of the petitioner in selling the polyester filament fibre or yarn against the conditions of licence would not amount to smuggling or abetting the smuggling has been set at rest by the Supreme Court in the writ petition filed by Madan Lal Anand, co-detenu of the petitioner in Madan Lal Anand Vs. Union of India and others, in paras 14 and 15 of the judgment which read as under:

"14. It has been already noticed that one of the conditions of the advance licences issued to the said firms was that the importer would manufacture ready-made garments out of the imported filament yarn and polyester fibre and export the resultant products abroad within a period of six months from the date of first clearance of the imported consignments in terms of the conditions of the advance licences. With reference to the said conditions in the licences, it is urged by Mr. Sibal, learned Counsel appearing on behalf of the appellant, that there was no smuggling of goods or any abetment of the smuggling of goods, as alleged in the order of detention. In support of this contention, the learned Counsel has placed reliance upon the definition of "smuggling" as contained in Section 2(e) of the COFEPOSA. Act. Section 2(e) provides that "smuggling" has the same meaning as in Clause (39) of Section 2 of the Customs Act, 1962 and all its grammatical variations and cognate expressions shall be construed accordingly. Section 2(39) of the Customs Act defines "smuggling" in relation to any goods as meaning any act or omission which will render such goods liable to confiscation u/s 111 or Section 113 of the Customs Act. It is not disputed that the relevant provision is Clause (o) of Section 111 which provides as follows :--

"111. The following goods brought from a place outside India shall be liable to confiscation :--

(o) Any goods exempted subject to any condition from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which a condition is not observed unless the non-observance of the condition was sanctioned by the proper officer."

"15. In view of Clause (o) of Section 111, if any goods exempted from payment of duty is imported without observing the condition, subject to which the exemption has been made, it will be a case of smuggling within the meaning of Section 2(e) of the COFEPOSA Act."

20. Lastly the learned Counsel for the petitioner contended that the grounds of detention being merely a verbatim copy of the report supplied by the Sponsoring Authority, the detaining authority has not applied its mind to the facts and circumstances of the case. The petitioner had not taken up this ground specifically in this petition. The perusal of the writ petition No. 545 of 1988 filed by this petitioner before the Delhi High Court shows that similar ground was taken as ground No. (W) in the grounds on merit. Thus it cannot be said that this is a fresh ground taken by the petitioner or that it was not agitated before the Delhi High Court. The petitioner, if aggrieved by the order of the Delhi High Court

in Criminal Writ Petition No. 545 of 1988 can agitate this matter before the Supreme Court as his SLP as well as the writ petition are still pending before that Court.

21. For the foregoing reasons, there being no merit in this Writ Petition it is dismissed.

