
(1989) 09 DEL CK 0025

In the Delhi High Court

Case No : Criminal Writ Petition No. 263 of 1989

Avtar Chand Kehar

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 11-09-1989

Acts Referred:

Citation : (1990) CriLJ 481 : (1990) 26 ECR 330 : (1989) 2 RCR(Criminal) 616

Hon'ble Judges : Rabindranath Pyne, J;D.P Wadhwa, J

Bench : Division Bench

Judgement

D.P. Wadhwa, J.—By this petition the petitioner, a detenu under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (for short "the Act"), seeks to have the order of detention quashed. The petitioner was detained in pursuance of an order dated 13-10-1988 made by Mr. K. L. Verma, Joint Secretary to the Government of India, specially empowered under S. 3(1) of the Act. The order was made with a view to preventing the petitioner from smuggling goods. The petitioner was communicated the grounds on which the order of his detention had been made as required under sub-section (3) of S. 3 of the Act. This is for the purpose of Clause (5) of Art. 22 of the Constitution.

2. There are various grounds challenging the detention of the petitioner but before us attack has been confined only to one ground as set out in para 11 of the petition, and this is as under :-

"11. That the petitioner is advised that detenu's detention and continued detention is vitiated for patent non-application of mind on the most relevant fact of the detention of the detenu's passport with custom authorities immediately on his arrest. The grounds are conspicuously silent about this relevant and important fact and it is clear that there was no application of mind on the part of the detaining authority to this relevant and important fact, which assumes paramount importance in view of the purported purpose of detenu's detention.

The petitioner submits that the above fact coupled with the fact that the detenu

had clean antecedents and no particular inclination and/or propensity to indulge in such like activity was a material circumstance which could have weighed the mind of the detaining authority either way. Besides, the condition of bail i.e. the detenu shall not leave the country except for the written permission of the Court made the above consideration about the passport of paramount importance and non consideration of the fact of the detention of the detenu's passport vitiated the subjective satisfaction so as to render the detention and continued detention of the detenu bad in law."

3. At this stage, itself, reply of respondents Nos. 1 and 2 to this ground may be stated and it is as under :-

"In reply to para 11 of the writ petition, it is denied that there was non-application of mind on the part of the detaining authority towards the fact that detenu's passport was with the customs authorities. The detaining authority was aware of this fact and it had considered this fact as this fact was specifically mentioned in the application for bail moved by the petitioner on 30-6-1988 and the detaining authority has relied upon this. It has in fact specifically mentioned this application in the grounds of detention. The fact that the detenu had clean antecedents does not point out that there is no particular inclination and/or propensity to indulge in such activities taking into account the material facts and circumstances available to the detaining authority. Further, in spite of the conditional bail, indulgence by the petitioner in similar illegal activities cannot be ruled out. The detaining authority before passing the order of detention considered and took into account all the facts and circumstances and came to subjective satisfaction to pass the impugned detention order. As such the same is perfectly valid in law."

4. To understand the rival contentions it will be appropriate to refer in brief, to the grounds of detention which are in the narrative form. It is stated that on 29-5-1988 the petitioner arrived from Dubai at Indira Gandhi International Airport, New Delhi, by an Emirates Airlines flight. He was carrying a suit case as checked in baggage, & a brief case, hand bag and a radio cassette recorder, a polythene bag, all as hand baggage. He reported at the red channel counter and paid customs duty amounting to Rs. 525/-. He was intercepted at the exit gate and asked if he was carrying any contraband items like gold, watches, etc. in his baggage or on his person. He replied in the negative. His baggage was subjected to search in the presence of witnesses. Four one band transistor radios were found in excess and when examined these resulted in the recovery of four gold pieces in stripped form affixed in place of ferrite rods near the speakers. Radio cassette recorder when examined resulted in the recovery of -

- (i) One gold bar used as ferrite rod.
- (ii) One gold piece in circular form fixed inside the cavity of motor chamber (coated with white substance).
- (iii) One gold strip in the burnt form of sleeve between motor and its housing

(coated with white substance).

(iv) One gold patti in rectangular form concealed under the cassette rotator (coated with white substance).

Examination of the brief case also resulted in the recovery of three pieces of gold wire coated with white substance and concealed under the aluminium strips around the body of the brief case. All these gold pieces were found to be of 24 carat purity and weighed 810 gms. having market value of Rs. 2,50,200/- and international value of Rs. 1,57,950/-.

5. In his statement recorded under S. 108 of the Customs Act 1962, the petitioner admitted the recovery of gold and stated he belonged to village Daulatpur in Himachal Pradesh where he was having a shop from 1971 to 1983 and that in 1983 he got a visa for Dubai where he went on 23-3-1983 and got employment with a construction company there on a monthly salary of 1050 DM. He came back to India on 10-2-1985 on leave and brought tape recorder and certain other articles and paid customs duty amounting to Rs. 1700/-. He went back to Dubai on 7-6-1985 and again came on leave to India on 1-5-1987 but this time though he was having some textiles etc. he did not pay any customs duty. He returned to Dubai on 27-8-1987. He again came to India on 29-6-1988 when gold was recovered from him as aforementioned. In his statement the petitioner described his family and said he was sending money to his wife through bank draft after every three or four months and that his wife and children stayed with his brother in the village. He said he received a telegram from his wife that she had received injuries and called him home. He said he happened to know one person from Kerala in Dubai who was named "Sali". This Sali used to say that if someone went towards Punjab side he would give him free air ticket and in turn he would have to carry some of Sali's goods like textiles, tape recorder, etc. and some of the goods would be booked in cargo on that ticket which the person availing the free ticket would have to clear on his passport. The petitioner said that on receipt of the telegram of his wife he contacted Sali and told him that he was to go to Punjab and was short of funds. Sali provided him the air ticket at Dubai airport on 20-6-1988 and also gave him certain goods like textiles, four transistors, hair dryer, tape recorder, etc., and the petitioner was asked to take those to Delhi.

6. The petitioner was arrested on 29-6-1988 under S. 104 of the Customs Act 1962 and was produced before the Addl. Chief Metropolitan Magistrate, New Delhi, on the same day. He was in judicial custody till he was ordered to be released on bail by order dated 23-7-88. One of the conditions of his release was that he would not leave the country except with the written permission of the Court. He was asked to furnish personal bond in the sum of Rs. 50,000/- with one surety in the like amount. The petitioner was on bail when the impugned detention order was clamped upon him. Then, the grounds of detention recite that a complaint for offences under S. 132 and S. 135(1)(a) of the Customs Act 1962 had been filed against the petitioner. It was then stated that from the

foregoing facts and circumstances it was evident that the petitioner had engaged himself in smuggling goods into India and unless prevented he would continue to do so in future "in the same manner "or otherwise". It was lastly stated that although departmental proceedings were likely to be initiated and proceedings under the Customs Act 1962 had been initiated against the petitioner and he had been released on bail, the detaining authority was satisfied that it was necessary to detain the petitioner under the provisions of the Act with a view to preventing him from smuggling goods.

7. Mr. Trilok Kumar, learned counsel for the petitioner, in support of his submission referred to a Full Bench decision of this Court in Mohd. Saleem Vs. Union of India and Others, , (Criminal Writ No. 412 of 1988 decided on 17-7-1989). In that case the detenu had come from Dubai and was found carrying gold bangles, gold pieces and six gold biscuits of foreign origin of 24 carat purity and weighing 1117.40 gms. and valuing Rs. 3,52,088 10 p.m. in local market. The detenu was carrying old in a concealed manner. He admitted recovery of gold in his statement recorded under S. 108 of the Customs Act 1962 and stated how the old had been given to him by certain person by the name Balbir Singh for selling the same at Delhi. He said a fortnight earlier to his apprehension, Balbir Singh had given to him for getting his scooter painted and in conversation Balbir Singh learnt that the detenu used to go to Dubai for bringing certain textiles for selling" the same at Delhi and on this Balbir Singh offered him free air passage and free lodging and boarding in Dubai if the detenu could bring old for him from Dubai to India. The detenu in his statement said that on that arrangement he had gone to Dubai and had Brought the gold which had been recovered from him. During search the passport of the detenu had been taken into possession by the authorities. In the present case before us as well it is admitted that the passport of the petitioner had been taken into possession by the customs authorities. One of the questions in Mohd. Saleem's case (supra), which was the subject-matter of reference to the Full Bench was, question No. 5, which is as under :-

"Whether no reasonable person could reach subjective satisfaction that the detention order should be passed on the sole ground that passport of the detenu had been seized when particularly the detenu is at large ?"

The Full Bench was of the opinion, however, that the question formulated did not directly arise in the case before it though it was likely to arise in a number of cases and proceeded to answer the same. It was argued on behalf of the detaining authority before the Full Bench that the detenu in that case if not prevented by making of the impugned order would have or was likely to (assuming that there was possibility of his being released on bail) go abroad on a forged passport or without a passport for the purpose of smuggling goods into India. This plea was, however not taken and also there was no such ground in the grounds of detention and was, Therefore, held to be not falling for consideration. The Full Bench then observed (at p. 351) :-

"38. There can be no doubt that in a given case on awareness of such a ground, as is pleaded before us, requisite satisfaction formed in making the detention order with a view to preventing the detenu from smuggling goods cannot be said to be vitiated. The duty of the Court is to examine only whether the facts and material which influenced the mind of the detaining authority were communicated to the detenu. Necessarily, Therefore, those facts and material on which the order is based have to find mention in the grounds of detention. As per the mandate of Art. 22(5) of the Constitution, the detenu must be informed of all the grounds of detention. A basic postulate of that provision is that the "grounds" meaning all the basic facts and material, have to be communicated to the detenu. If in a case that mandate has not been complied with, the detention order is liable to be set aside.

39. A reasonable person's subjective satisfaction that a detenu whose passport has been seized is likely to travel abroad clandestinely to smuggle goods cannot be objectively examined, but whether the material on which such a satisfaction has been arrived at was communicated to the detenu is open to judicial scrutiny. A detention made on undisclosed grounds to the detenu is not permissible.

To the question formulated above, the Full Bench gave the following answer (at p. 352) :-

"5. Although the subjective satisfaction arrived at by the detaining authority cannot be substituted by the Court, yet the Court is empowered to scrutinise it to a limited extent as laid in Khudiram Das Vs. The State of West Bengal and Others, . As long as the fact that a detenu, whose passport has been seized, is likely to travel abroad clandestinely for purpose of smuggling is reflected in the grounds of detention and communicated to the detenu, the subjective satisfaction arrived at cannot be substituted."

8. In the case before us, grounds of detention do not show any awareness on the part of the detaining authority of the fact that the passport of the petitioner had been seized and in the absence of the passport the petitioner would not be able to go to Dubai, where he was employed, and return to India. When in the grounds of detention it is stated that unless the petitioner was prevented by detaining him under the Act he would continue to do smuggling of goods in future in the same manner would show non-application of mind by the detaining authority. The use of the words "or otherwise" makes the matter still worse. How is the petitioner to know the state of mind of the detaining authority that in spite of his being prevented from going abroad he would smuggle goods "otherwise" as well ? The words "or otherwise" used in the grounds of detention are too vague for the petitioner to understand their scope and intent making it impossible for him to make any effective representation against his detention. Rather, it appears to us, there was no basis for the detaining authority to use the words "or otherwise". There is no indication in the grounds of detention that in spite of the passport of the petitioner having been seized, how he would still indulge in smuggling of goods.

9. We are in agreement with Mr. Rajinder Dutt, learned counsel for respondents Nos. 1 and 2, that the aforesaid Full Bench decision is not an authority for the proposition that whenever the passport of a detenu is seized there must always be awareness of that fact on the part of the detaining authority mentioned or even reflected in the grounds of detention. This would depend upon the facts of each case. The question of seizure of the passport will become relevant only with reference to the particular activity alleged against the detenu as mentioned in sub-section (1) of S. 3 of the Act. As to what is meant by "smuggling" one does not have to look for its dictionary meaning, and for smuggling goods one has not necessarily to go abroad with or without passport whether genuine or fake. Under S. 2(e) of the Act "smuggling" has the same meaning as in clause (39) of S. 2 of the Customs Act 1962. "Smuggling", under the Customs Act 1962, in relation to any goods, means any act or omission which will render such goods liable to confiscation under S. 111 or S. 113. S. 111 deals with confiscation of improperly imported goods etc., and S. 113 with confiscation of goods attempted to be improperly exported, etc. In the present case, we are concerned with S. 111 only. There are various clauses, namely, clauses (a) to (p) in this section, which make the goods brought from a place outside India liable to confiscation and that would, Therefore, amount to "smuggling" within the meaning of S. 2(39) read with S. 111 of the Customs Act 1962.

10. In the present case before us, the petitioner was a shopkeeper in a village till the year 1983 when he went abroad to Dubai to take up employment. First time he returned to India in 1985 on leave and the Second time in May 1987, again on leave. It was on his third visit to India that he was apprehended, as aforesaid. Once his passport is seized it is difficult to see how he will again go abroad and smuggle goods which heretofore he is stated to have been doing. There is nothing in the grounds of detention to suggest that the petitioner is such a character that he would leave India without a passport or on a fake passport in order to smuggle goods. We are, therefore, of the opinion that the principle laid down in the Full Bench decision of this Court in Mohd. Saleem's case, (1989) 3 DL. 77, (supra) is applicable in the present case.

11. Accordingly, we quash the order of detention dated 13-10-1988 passed against the petitioner and direct that on that account he be set forth at liberty forthwith. Rule is made absolute.

12. Order accordingly.