

(2001) 04 AHC CK 0002

In the Allahabad High Court

Case No : Criminal Misc. Writ Petition No. 2068 of 2001

Balbir Singh Sethi

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 10-04-2001

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 2, 3, 3(1)
Constitution of India, 1950 — Article 21, 226
Customs Act, 1962 — Section 111, 113, 124, 2(39), 3(1)
Foreign Trade (Regulation) Rules, 1993 — Rule 11

Citation : (2002) CriLJ 1569 : (2002) 2 RCR(Criminal) 653

Hon'ble Judges : S.R. Singh, J; R.K. Dash, J

Bench : Division Bench

Advocate : Shashank Shekhar Giri, for the Appellant; Standing Counsel, for the Respondent

Judgement

S.R. Singh, J.—This petition under Article 226 of the Constitution of India seeks issuance of a writ of certiorari quashing the detention order bearing no. 673/80/2000-Cus. VIII dated 16-2-2001, Government of India, Ministry of Finance, Department of Revenue (COFEPOSA ACT Section) New Delhi dated 16th Feb. 2001 (Annexure 1 to the petition). The order aforesaid has been made by the detaining authority in exercise of powers u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (abbreviated to COFEPOSA ACT) on being satisfied with respect to the petitioner "with a view to preventing him from abetting smuggling of goods as well as engaging in keeping smuggled goods in future", it is necessary to direct the petitioner to be detained and kept in custody in the Central Jail, Meerut.

2. Though the grounds of detention have not been filed, it would appear that the impugned detention order has been made in the backdrop of an incident in which two trucks loaded with ball bearing of foreign origin were seized from the premises of M/s Dooab EXIM, Meerut valued at Rs. 3.6 crores (MV) by the D.R.I,

on 18/19 July 2000 involving evasion of custom duty to the tune of Rs. 85 lacs. A show cause notice dated 5-6-2001 (Annexure 10) was issued with the prior approval of the Director General Revenue, New Delhi who happens to be the Chief Commissioner of Customs, in terms of Notification No. 30/97-Cus (NT) dated 7-7-97 as amended by the subsequent notification dated 10-10-2000 as per third proviso to Section 3(1) of the Customs Act, 1962. The show cause notice has been issued u/s 124 of the Customs Act, 1962 read with proviso to Section 28(1) without prejudice to any other action that may be taken against the notice under the Act or any other law for the time being in force. The petitioner happens to be noticee no. 2. According to the said notice delivery of goods as noted in Entry No. 0026 dated 17-7-2000 was found to be of the value of Rs. 1,52,88,769.00 CIF as against the declared value of Rs. 27,61,027.00.

3. The order impugned herein has not yet been executed and it being still in embryonic stage, it is intriguing how the petitioner manoeuvred to wangle a Xerox copy of the order for canvassing its validity in the writ petition. However, when the matter came up before a Division Bench of this Court on 10-4-2001, an objection having the complexion of a preliminary objection was raised by Sri Sanjai Kumar Singh, Addl. Standing counsel appearing for Union of India that the petition was not maintainable the impugned order being at pre execution stage. A Division Bench of this Court, taking aid of the decision of the Apex Court in Additional Secretary to the Government of India v. Smt. Alka Subhash Gadia 1992 (1) SCC 496, held the view that "there cannot be any absolute proposition in law that a person challenging a detention order under the N.S.A. or COFEPOSA ACT must in all cases surrender before he files a petition". After overruling the preliminary objection, the Court directed that "till the next date of listing, the petitioner shall not be arrested in pursuance of the impugned detention order dated 16-2-2001". The Union of India instituted SLP (Crl.) No. 6802/2001 before the Apex Court canvassing the order aforesaid. After hearing the counsel for the parties, the Apex Court set aside the order of the High Court and while forbearing from making any observation on the merits of the contention, relegated the matter to the High Court for disposal of the petition within four weeks and providing that in the meantime, appellant therein "will not execute the detention order for a period of four weeks from the date of the order" which was made on Nov. 9, 2001. It was in observance of the said direction given by the Apex Court that an application being Cri. Misc. (Urgency) Application No. 98498 of 2001 was put forth on 24-11 -2001 praying therein that the writ petition be disposed of in the week commencing 26th Nov. 2001. The said application was directed to be listed on 28-11 -2001 as a First case on the board of the appropriate Bench. The matter, however, came up for hearing by this Bench on 3-12-2001 and 4-12-2001 and Sri A. D. Giri, Senior Advocate appearing for the petitioner and Sri Sanjai Kumar Singh, Addl. Standing Counsel representing the Union of India were heard at prolix length. Learned counsel representing the Union of India, initiated repetition of the preliminary objection raised by him and canvassed that in the fact situation of the instant case, the

petition was not maintainable, the detention order having been impugned at pre-execution stage. It has been contended by Sri Sanjai Kumar Singh that a petition challenging preventive detention order can be entertained in exceptional circumstances as laid down by the Apex Court in *Alka Subhash Gadia* 1992 (1) SCC 496 (supra), but none of the exceptional circumstances in which a petition can be entertained at pre execution stage is intended for application to the facts of the present case.

4. In *Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another*, the Apex Court held the view in no delphic terms that though power of the Court under Article 226 of the Const of India are wide in amplitude and untrammelled by any external restraints and can reach any executive order resulting in civil or criminal consequences but at the same time, the Apex Court added for emphasis that jurisdiction of the Court by its very nature is to be used sparingly and in the circumstances where no other efficacious remedy is available. "The Courts cannot", it was further observed, "disregard all these time honoured and well tested judicial self restraint and norms and exercise their said powers in every case, before the detention order is executed". The Supreme Court further observed that if the detenu is permitted to challenge and seek stay of the operation of the detention order before it is executed, the very purpose of the order and of the law under which it is made will stand stultified since such orders are in operation only for a limited period. The Apex Court has however held that the Courts have power to entertain grievances against any detention order prior to its execution where the Courts are prima facie satisfied - (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. It has been made clear that refusal by the Courts to use its extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said powers or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question. In *Meena Jayendra Thakur Vs. Union of India and Others*, , it has been held that if the detaining authority arrives at the requisite satisfaction as to the necessity of passing an order of detention on the basis of the materials placed before it and thereafter passes an order, the same cannot be held to be void because of subsequent infraction of the detenu's right or of non-compliance with the procedure prescribed under law. In *Manju Ramesh Nahar Vs. Union of India and Others*, , it has been held that twin requirements of satisfaction and necessity of passing the order with a view to preventing the detenu from carrying any prejudicial activities are satisfied, the order of detention "has to be passed and implemented forthwith so that prejudicial activities carried on by the person against whom the order has been passed, may be stopped immediately or at the earliest."

5. The principles aforesaid as laid down in *Alka Subhash Gadia*, have been reiterated in subsequent decisions rendered by the Supreme Court in *Administration of National Capital of Delhi v. Prem Singh* 1996 SCC 54, wherein it has been held in no uncertain terms that unless and until anyone of the grounds has been established, the Court is powerless to interfere. In other words, no interference on pre-detention stage is permitted on any other ground; otherwise the very object of preventive detention is thwarted. In an earlier decision rendered by the Supreme Court in *N. K. Bapna v. Union of India* 1992 ACC 561, it has been held that the courts can interfere before the detention order is served sparingly in rare cases and detenu is necessarily required to wait till an order of preventive detention is served.

6. It is thus evident that a petition challenging the detention order prior to its execution is maintainable though on qualified grounds set forth above. The question that surfaces for consideration is as to whether any of the exceptional grounds on which a petition challenging the detention order at pre-execution stage is maintainable, matches with the grounds as indicated by the Apex Court qua the grounds set forth in the instant petition. Sri A. D. Giri, Senior Counsel appearing for the petitioner, to begin with canvassed that the writ petition was maintainable inasmuch as the grounds on which the impugned detention order hinged, do not extend coverage to the ambit of COFEPOSA ACT. The submission is predicated on the assumption that the incident from which stems the impugned detention order does not make out a case of "smuggling of goods" or "abetting the smuggling of goods" within the meaning of Section 3(1) of COFEPOSA ACT read with Section 2(39) of the Customs Act. Sri A. D. Giri further propounded that "smuggling", according to Section 2(39) of the Customs Act, 1962, in relation to any goods denotes any act or omission which will render such goods liable to confiscation u/s 111 or Section 113 of the Customs Act, 1962. It being a case of export, Sri A. D. Giri submitted that unless the goods imported in the present case, are held liable to confiscation in proceedings u/s 124 of the Customs Act, 1962, no order of preventive detention u/s 3(1) of COFEPOSA ACT can be passed. To re-phrase it, the submission made by Sri A. D. Giri is that an adjudication with regard to goods imported being smuggled goods, is a sine qua non for invoking the powers u/s 3(1) of the COFEPOSA Act when the purpose sought to be achieved by the detention order is to prevent detenu "from abetting the smuggling of goods as well as engaging in keeping smuggled goods in future." Sri Sanjai Kumar Singh, learned Addl. Standing counsel, for Union of India, on the other hand canvassed in opposition that for the purposes of arriving at requisite satisfaction within the ambit of Section 3(1) of the COFEPOSA Act, the detaining authority could be justified in arriving at the requisite satisfaction on the basis of materials placed before it by the sponsoring authority ex-facie disclosing that the imported goods are liable to confiscation on any of the grounds enumerated in Section 111 of the Customs Act, 1962. The learned counsel in enforcing above contention, further submitted that in the instant case, the petitioner who had presented the bill of entry for home consumption in which

the goods were shown of Chinese origin whereas the goods were actually of Japan origin and the goods of Chinese origin being of value lesser than the value of the goods of Japan origin, the Custom authorities were prima facie satisfied that there was evasion of custom duty to the tune of Rs. 85 lacs. It brooks no dispute that the petitioner was one of the partners of the Firm M/s Dooabi EXIM to whom the goods were consigned. It has also not been repudiated that custom duty to the tune of Rs. 85 lacs was paid under protest besides Rs. 75000/- as interest. Section 46(4), it has been submitted by the learned counsel, postulates in no uncertain terms that the importer while presenting a bill of entry shall at the foot thereof make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods. Reliance has been placed on Rule 11 of Foreign Trade (Regulation) Rules 1993 which enjoins a duty on the owner of imported goods to state value, quality and description of such goods to the best of his knowledge and belief and certify that the quality and specification of the goods as stated in those documents are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the goods are being imported and shall subscribe a declaration of the truth of such statement at the foot of such bill of entry. The declaration in the bill of entry presented by the petitioner himself, according to the learned counsel for the Union of India, was false and evasion of custom duty was ferreted out by the custom authorities for which show cause notice dated 1-2-2001 (Annexure no. 10) notifying seizure of misc. ball bearing of foreign origin seized from the premises of M/s Dooab EXIM Meerut valued at Rs. 3.6 crores by the Directorate of Revenue Intelligence on 18/19-7-2000, was issued and the proceedings are still under-way before the appropriate authority under the Customs Act. The detaining authority, it was submitted by the learned Addl. Standing Counsel for Union of India, was not exacted to wait till final adjudication under the Customs Act. The Adjudication about imported goods being smuggled ones, it was submitted by Sri Sanjai Kumar Singh, was not the condition precedent for passing the detention order u/s 3(1) of the COFEPOSA ACT for preventing the detenu from abetting smuggling of goods. The course suggested by Sri A. D. Giri, it is submitted by Sri Singh, if followed, would defeat the very object and purpose sought to be achieved by COFEPOSA ACT.

7. We have given our anxious considerations to the submission made across the bar. In our firm view, the detaining authority can arrive at the requisite satisfaction u/s 3(1) of the COFEPOSA Act even before adjudication under the Custom Act about the nature of imported goods being smuggled ones. The grounds of detention in the instant case are not before us and one can visualise the difficulty in our failure to record any opinion as to whether the requisite satisfaction of the detaining authority is founded on valid material or not. The contention of Sri A. D. Giri that a prior adjudication of the goods being smuggled one is a condition precedent for passing an order of detention u/s 3(1) of the COFEPOSA Act with a view to preventing the detenu from "abetting the

smuggling of goods as well as engaging in keeping smuggled goods in future", is wide of the mark and cannot be countenanced. The detaining authority in fact, is not expected to prejudice the issues, which are yet to be decided by the authority under the Customs Act. All that the detaining authority is required to do is to apply its mind to the material placed before it by the sponsoring authority and satisfy itself as to whether, it is necessary to detain a person in order to prevent him from "abetting smuggling of goods as well as engaging in keeping smuggled goods in future" and/or doing any other prejudicial activity. The word "smuggling" as nailed down in Section 2(39) of the Customs Act is of wide connotation in that it denotes any act or omission which will render such goods liable to confiscation under Sections 111 and 113 of the Customs Act. It being a case of imported goods, Section 111 of the Customs Act, 1962, would apply. Clause (m) of Section 111, clearly envisages that any goods which do not correspond in respect of value or other particulars with entry made under the Act or in the case of baggage with the declaration made u/s 77 in respect thereof "shall be liable to confiscation". Section 111(m) read with Section 46(4) of the Customs Act, 1962 and Rule 11 of the Foreign Trade (Regulations) Rules 1993, if applied to the facts of the case particularly with reference to the facts stated in the show cause notice are sufficient to attract the provisions of Section 3(1) of the COFEPOSA ACT when the purpose of detention is to prevent the detenu from "abetting smuggling of goods and engaging in keeping smuggled goods in future." Section 124 of the Customs Act only provides procedural safeguards in the matter of confiscation of goods. The contention of Sri A. D. Giri that unless an order of confiscation is passed after complying with the provisions of Section 124 of the Customs Act, 1962, no order of preventive detention can be passed u/s 3(1) with a view to preventing the detenu from smuggling of goods or abetting smuggling of goods, is wide of the mark and does not commend us for acceptance.

8. Sri A. D. Giri, then switches over to submission that the impugned order of detention has been passed without authority of law. This submission of Sri A. D. Giri too proceeds on the fallacy that the goods seized in the instant case were not smuggled ones. We are unable to subscribe to the contention of Sri A. D. Giri. We have already held that detaining authority will be clothed with the power to pass a detention order with a view to preventing the detenu from "abetting smuggling of goods" even before the goods are held to be smuggled ones by custom authorities under Customs Act, 1962. The authority to pass the detention order u/s 3(1) of the COFEPOSA Act is derived on the strength of satisfaction of the detaining authority that it is necessary to detain a person with a view to preventing him from acting in a prejudicial manner. The authority is conferred by COFEPOSA Act. The submissions made by Sri A. D. Giri about lack of authority is, in our opinion, untenable.

9. The third and the last submission of Sri A. D. Giri is that the order impugned herein has been "passed for a wrong purpose in that proceeds the submission, the objective of the detaining authority in passing the order impugned herein

was to make the petitioner take the bitter lesson deep to his heart for approaching this Court under Article 226 of the Constitution for issuance of a direction to decide the confiscation proceedings under the Customs Act. It would appear that in Civil Misc. Writ Petition No. 168 of 2001 Ashwani Kumar Jain v. Union of India, a Division Bench of this Court had directed the Commissioner of Customs and Central Excise Meerut I who was party respondent no. 2 to the said petition, to dispose of the matter "as expeditiously as possible in accordance with law." In the fact situation of the instant case set out hereinabove, we find it difficult to countenance the contention of Sri A. D. Giri that the order impugned herein has been passed for a wrong purpose i.e. to teach a lesson to the petitioner for daring to approach this Court as stated supra. The satisfaction arrived at by the detaining authority being subjective one, can of course be taken in challenge on the ground of mala fide or on ground that it has been passed for a wrong purpose or on extraneous consideration but the facts in the instant case do not make out any such ground vitiating the subjective satisfaction arrived at u/s 3(1) of the COFEPOSA Act.

10. Before parting with, we would like to observe that the present case requires a thorough investigation by a responsible Investigating agency to ascertain as to how the detention order before being signed and executed, could reach the hands of the petitioner. It need hardly be emphasised that in the matter like the one in hand, secrecy should be maintained at all costs. The officials or the persons entrusted with the duty to maintain secrecy if pass on copy of the orders or any document, to a person which may ultimately go against the interest of the State and defeat the very purpose of law, for in the process there may be delay in the execution of the order, then the guilty in such matters should be suitably punished. Here in the present case, we have no hesitation to observe that there seems to be nexus between the economic offenders and the Government officials in the Ministry of Finance and the matter therefore, needs to be thoroughly investigated by an independent and responsible investigating agency so that everything should come to light to punish the person/persons who have betrayed the trust. We therefore, direct the Director, C.B.I. New Delhi, to get the matter enquired into and take appropriate action as law demands and submit report within four months to this Court.

11. As a result of the foregoing discussion, we find no valid ground for entertaining the writ petition challenging the detention order at its pre-execution stage and accordingly, the petition is dismissed in limine with costs quantified at Rs. 5000/-subject, of course, to the above directions. The case shall be listed on 12th April, 2002 before this Bench for post decisional order.

R.K. Dash, J.

12. I have gone through the judgment of my esteemed brother S. R. Singh, J and I fully subscribe to the findings and ultimate conclusion arrived at by him. However, in view of the significance of the issue involved, I feel it desirable to express the views in my own words. The undisputed factual matrix of the case is

that the petitioner being one of the partners of M/s Dooab EXIM Meerut received consignment of goods loaded in two trucks containing ball bearing of foreign origin. The allegations imputed to him and others are that the ball bearings were shown of Chinese make whereas those were of Japanese make and thereby they evaded custom duty to the tune of Rs. 85 Lacs. A proceeding under the Customs Act, 1962, has been initiated and a notice has been issued on 5-1-2001 to show cause why the goods be not confiscated. One A. K. Jain claiming him-self to be the owner of those goods, approached this Court in Civil Misc. Writ Petition No. 168 of 2001 arraying Union of India through Addl. Secretary to the Government of India, Ministry of Finance, Department of Revenue and three others as respondents. A Division Bench of this Court at the stage of admission, disposed of the said writ petition with a direction to the respondent no. 2 therein namely Commissioner Customs and Central Excises, Meerut to dispose of the confiscation proceeding as expeditiously as possible in accordance with law. Sri. A. D. Giri, learned Senior Counsel appearing for the petitioner has strenuously contended that instead of complying with the aforesaid directions, the Government of India, Ministry of Finance took a decision to detain the petitioner u/s 3 of the COFEPOSA Act and if the said decision is levied execution it would impinge upon the personal liberty of the petitioner which is a precious right under Article 21 of the Constitution. According to Sri Giri, the detention order is contingent upon the finding to be recorded by the Competent Authority in the aforesaid proceedings that there was evasion of custom duty. Therefore, so long as the proceeding is not decided finally there cannot be curtailment of personal liberty of the petitioner under COFEPOSA Act on the basis of mere suspicion and in that view of the matter, the Court uninfluenced by seriousness of the accusation should quash the detention order in exercise of extra-ordinary writ jurisdiction under Article 226 of the Constitution. This submission of Sri Giri, in my considered opinion, is barely to be noted and rejected.

13. The definition of the word "smuggling" in Section 2(e) of the COFEPOSA Act, which has been borrowed from Section 2(39) of the Customs Act reads as under :-

(39) "smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation u/s 111 or Section 113;

The goods improperly imported are liable to confiscation as envisaged in Section 111 of the Customs Act. Clause (m) of the said Section inter alia provides that any goods which do not correspond in respect of value or any other particular with the entry made under the Act or in the case of baggage with the declaration made u/s 77 in respect thereof, are liable to confiscation. In view of such statutory provision, learned counsel for the respondents contends that the goods seized were the smuggled goods within the meaning of Section 2(39) of the Customs Act as those did not correspond in respect of value and particulars made in the bill of entry (Annexure 2). Since the detention order has not yet been brought in to action and the petitioner is still a free bird, any observation

made as to the contentions advanced by the counsel for the parties, may prejudice the issues involved in the confiscation proceedings and influence the Courts in any pending or future proceedings. As far as the contention of Sri Giri that detention order is contingent upon final adjudication of the confiscation proceedings, no authority has been cited in support thereof. The orders for confiscation and detention order are passed by two different authorities and passing of detention order is not contingent upon the findings recorded in the confiscation proceedings. The gravity of the accusation that there was evasion of custom duty to the tune of Rs. 85 lacs and the petitioner is alleged to be one of the perpetrators of the crime, has not influenced us to take a decision contrary to law. The courts are never swayed by emotions or moral approach. They decide the "Us" in the manner their legal conscience founded upon law dictates. It need not be emphasised that legal conscience never contravenes law and the conscience of a Judge in law Court depends upon law. In the present case, we have given our anxious consideration to the questions raised for arriving at a decision as law demands. The detention order (Annexure no. 1) which is unsigned one has not been given effect to. The grounds of detention being not before us, it is difficult to visualise that the detention order is based on surmises and conjectures. The Apex Court in *Alka Subhash Gadia* 1992 (1) SCC 496 has categorically laid down that the Court can interfere with the order of detention in rare cases at pre-execution stage on the grounds that (i) it is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed on vague extraneous and irrelevant grounds or (v) that it is passed for a wrong purpose, (iv) that the authority which passed it had no authority to do so. The petitioner's case does not fall within any of the grounds as aforestated. Therefore, we are not inclined to interfere with the detention order on its pre execution stage in exercise of extra-ordinary jurisdiction under Article 226 of the Constitution. In the conspectus of the above discussion, I agree to the conclusions arrived by brother S. R. Singh, J.