

(1997) 10 BOM CK 0052

In the Bombay High Court

Case No : Criminal Writ Petition No. 348 of 1997

Bhavesh Kantilal Jain

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 22-10-1997

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)

Citation : (1998) BomCR(Cri) 728 : (1998) 1 MhLj 353

Hon'ble Judges : D.D. Sinha, J;A.D. Mane, J

Bench : Division Bench

Advocate : M.G. Karmali and Jayant Chitnis, for the Appellant; A.M. Kanade, Public Prosecutor, for the Respondent

Judgement

A.D. Mane, J.—The brother of the detenu Lalit Kantilal Jain has filed this criminal writ petition challenging the order of detention dated 9-6-1997 issued by the respondent No. 2- Secretary to the Government of Maharashtra, Home Department (Preventive Detention) and Detaining Authority, Home Department (Special), Mantralaya, Mumbai, in exercise of the powers conferred on him u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974) (for short, hereinafter, COFEPOSA Act).

2. The detenu was served with grounds of detention on 9-6-1997, a copy of which is annexed at Annexure "Bill to the writ petition, tt emerges from the grounds of detention that the detenu met one Mukesh Jain having his office at Room No. 12 at 40/42 Modi Street, above Vinod Lunch Home, Fort, Mumbai and offered him a job at Mumbai since August, 1996. The detenu took job with said Mukesh on salary of Rs. 2,000/-. On instructions of Mukesh detenu used to wait on the ground floor of the building, in which Mukesh's office was situated. One Raju Jain was also employed with said Mukesh. Both, Raju Jain and Detenu used to remain on the ground floor. Detenu knew that Mukesh was dealing in smuggled gold and foreign currencies.

3. It further reveals that on 28-9-1996 at about 7.30 p.m. Raju Jain and detenu were called by Mukesh to his office room and they were instructed to go to the shop of Royal Gems situated at 296, Shahid Bhagat Singh Marg, Opposite Vijaya Bank, Fort Mumbai to take delivery of packets containing gold. They were instructed to wait outside the building for Mukesh after collecting gold. Accordingly, on 28-9-1996 at about 8 p.m. detenu and his companion both reached shop of M/s Royal Gems. In the shop two foreign ladies, one fat and another thin, were present. One person, Sitaram was also present in the shop. Sitaram gave two packets, each, containing gold to Raju and the detenu. They concealed those packets on the waist. After collecting the packets detenu and his companion came out from the building and were waiting near the building for Mukesh. No bill or customs duty receipt was given with the said gold.

4. While the detenu and his companion were waiting outside on the road, they were apprehended by D.R.I. Officers. During their personal search 194 foreign marked gold bars were recovered from them i.e. the detenu and his companion. The detenu was to get Rs. 5,000 besides his salary for delivery of gold bars to Mukesh.

5. The detenu was arrested on 28-9-1996 itself along with others. He was produced before the Court on 30-9-1996. He came to be released on bail on 25-10-1996. On the aforesaid material, the detaining authority came to the conclusion that the detenu had indulged in possessing smuggled gold.

6. The order of detention issued on 9-6-1997 however, recites that the detaining authority is satisfied that with a view to prevent the detenu in future from smuggling of goods, it is necessary to make an order of detention and accordingly, the detenu was directed to be detained under COFEPOSA Act.

7. Now, the petitioner submits that the incident in question took place on 28-9-1996. The detenu was immediately arrested and his statement came to be recorded on 29-9-1996, second statement was recorded on 29-8-1996, third statement was recorded on 4-10-1996 and fourth statement was recorded on 6-11-1996. Therefore, according to the petitioner, entire investigation was over on 6-11-1996. However, the order of detention was issued on 9-6-1997 i.e. after a period of seven months from the date of completion of investigation and about after eight months from the date of the incident. It is submitted that if at all the detenu was required to be detained 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 smuggling goods, the detenu should have been detained immediately without any delay. The petitioner further submits that issuing order of detention after a period of eight months from the date of incident goes to prove that the sponsoring authority as well as the detaining authority have snapped the live link between the prejudicial act and the need for preventive detention. Therefore, according to the petitioner, the detention order issued after the period of eight months from the date of incident deserves to be revoked, inasmuch as according to the petitioner, the gross delay in issuing the

detention order renders it a punitive rather than a preventive measure.

8. In this context, the petitioner points out that not only the order of detention was issued after eight months from the date of the incident but it was executed on the detenu after a period of eleven months from the date of incident. The order was served on the detenu on 29-8-1997. According to the petitioner, it is thus clear that neither sponsoring authority nor the detaining authority were ever serious to serve the order of detention on the detenu promptly. Therefore, the delay in execution of the detention order of 11 months, has rendered the impugned order of detention mala fide, null and void.

9. The another ground, which according to the petitioner, equally important is that the subjective satisfaction of the detaining authority stands vitiated for want of material placed before it, on the basis of which the detaining authority could have been justifiably satisfied that the detenu had "smuggled" any goods or that the detenu was "smuggling" any goods. It is submitted that the detaining authority could not have clamped down preventive detention on the detenu with a view to preventing the detenu from "smuggling" goods. In the alternative, it is also submitted by the petitioner that assuming whilst denying that the impugned order of detention was warranted to be issued, the same at the best, could have been issued with a view to preventing the detenu from engaging in transporting smuggled goods or with a view to preventing the detenu from dealing in smuggled goods otherwise than by engaging in transporting, concealing and keeping smuggled goods. It is further contended that, the impugned order of detention, as issued suffers from the vice of non-application of mind. It is based on non-existent facts and material. It is accordingly mala fide, null and void.

10. The petitioner has also raised some other grounds. Since Shri Karmali, learned Counsel for the petitioner has restricted his arguments in support of the aforesaid two grounds to invalidate the order of detention, we do not think it necessary to refer those grounds.

11. Shri Karmali, learned Counsel for the petitioner vehemently urged that the order of detention is bad in law for two grounds, firstly, that the subjective satisfaction arrived at by the detaining authority is vitiated on account of unexplained and long delay in passing the order of detention. The learned Counsel further urged that the impugned order is also illegal as it suffer from vice of non-application of mind. In this context, our attention has been invited to ground No. 6(v) of the grounds of detention, wherein it has been stated by the detaining authority that,

"...I am, however not impressed by your claim as the facts and circumstances of the case, including statements of different persons involved, clearly establish that the gold found with you and your associates possession was smuggled gold...."

With reference to the provisions contained in section 3(1) of the COFEPOSA Act. It is. urged by the petitioner that it was incumbent on the detaining authority to

specify the act alleged against the detenu as covered under any of the clauses of section 3(1) of the said Act. It is not enough to state vaguely that case of detenu was covered under sub-section (1) of section 3 of the said Act. In this regard, Shri Karmali, learned Counsel for the petitioner relies on the judgment delivered on 29-10-1991 in Criminal Writ Petition No. 1112/1991, (to which, one of us was party) besides the judgment in Criminal-Writ Petition No. 1001/1995 decided on 12-7-1996 by this Court (Coram : A.V. Savant and O.K. Deshmukh, JJ.).

12. The return filed by the respondent No. 2 dealing with the grounds of attack to the impugned order requires mention. The respondent No. 2 in answer to ground No. 4(i) of the petition, in the first place, denies that there has been any delay in issuing the order of detention. The respondent No. 2 has stated that the proposal was submitted in respect of the detenu along with the documents mentioned in the list of documents, which was received in the Home Department on 11-11-1996. Additional information about bail application, bail certificate etc. was received on 4-12-1996 and 25-12-1996. It is further stated that the additional information about activities of two Russian women and role of Sitaram and Mukesh in the case was received on 10-1-1997. The file was submitted by the Desk Officer to the Joint Secretary and to the respondent No. 2 on 27-1-1997. It is further stated that he considered the proposal on 15-2-1997. Additional documents were received on 20-2-1997 and after considering the proposal and the documents by him, draft grounds of detention were formulated on 27-2-1997. It is further stated that after typing of the detention order, grounds of detention etc. it was found that there were many mistake and some pages were not legible and therefore, the grounds of detention were re-typed on 19-5-1997. It has been further contended that as four other cases were also linked with the case at hand, it took considerable time for typing, correction, preparation of sets of documents etc.

13. The respondent No. 2, further, in his return, contended that two letters dated 10-5-1997 from Kantawala and Company, Advocates and Solicitors, Mumbai were received in the Home Department on 12-6-1997 in which the Advocate informed the Government that Raju R. Jain and Lalit Jain have filed Criminal Writ Petition No. 290/1997 IN THE HIGH COURT OF BOMBAY, which has been adjourned to 16-6-1997 and further requested the State Government to await further for further orders from the High Court. It was further contended that therefore, file was again submitted to the respondent No. 2 on 20-5-1997 for consideration and orders, whether the grounds of detention should be revised and whether reference should be made in the grounds of detention about writ petition filed by the detenu in the High Court. The respondent No. 2 has further contended that, as it was found that the writ petition does not form part of the documents taken into consideration for reaching subjective satisfaction and as there was no stay from the Honourable High Court, he called opinion of the Law and Judiciary Department on 21-5-1997. The Law and Judiciary Department opined on 30-5-1997 that it is not necessary to make references in the grounds of

detention about the writ petition filed by the detenu, as there is no stay from the High Court.

14. Lastly, in the return of the respondent No. 2, it is stated that after finalisation of other connected cases detention order was issued on 9-6-1997 and the detenu was detained under the COFEPOSA Act, on 29-8-1997. He, therefore, denied that there is any delay in issuance of detention order and that the detention order is punitive rather than preventive. He also denied that due to the delay in issuance of the detention order the live link has been snapped in the case as alleged by the petitioner. We may, however, mention that there is no answer to other grounds, including the ground of non-application of mind in passing the order of detention, in the return filed by the detaining authority

15. Coming to the ground of delay, we may mention that, delay ipso facto in passing an order of detention after an incident is not fatal to the detention of a person, for in certain cases, delay may be un-avoidable and reasonable. What is required by law is that the delay must be satisfactorily explained by the detaining authority. In the present case, there is no dispute that the detention order was passed after lapse of eight months from the date of incident and 2 1/2 months after the issue of show cause notice, which was issued on 24-3-1997, under the provisions of the Customs Act; and almost seven months after the detenu was released on bail on 25-10-1996. In the present case, the sponsoring authority appears to be in know of the urgency in acting promptly in submitting the proposal to the detaining authority, almost immediately after the detenu was released on bail. In the return filed by the respondent No. 2, according to the detaining authority, additional information about bail application, bail certificate etc. was received on 4-12-1996 and 25-12-1996. Secondly, it was stated that additional information about activities of two Russian women and role of Sitaram and Mukesh in the case was received on 10-1-1997. The file was then submitted by the Desk Officer to the Joint Secretary and then to the detaining authority on 27-1-1997. It is only on 15-2-1997 the detaining authority considered the proposal. That means the proposal was not in consideration right from 11-11-1996 till 15-2-1997. There is nothing on record to show that additional information was necessary for reaching a subjective satisfaction of the detaining authority and the explanations offered by the detaining authority, to our mind, does not appear to be reasonable and acceptable.

16. In this context, we may mention that the prejudicial activity is more serious than there is a greater reason why the detaining authority should act expeditiously. The prejudicial activities of smuggling are detrimental to the interest of the country, but that fact does not give charter to the detaining authority to exercise power according to the convenience at leisure of the authority.

17. What transpired after 15-2-1997 is another interesting event. The detaining authority, in his affidavit in reply, has stated that,

"...Additional documents were received on 20-2-1997. After considering the proposal and the document by me I formulated the draft ground of detention on 27-2-1997. After typing of the detention order, grounds of detention etc. it was found that there were many mistakes and some pages were illegible. The grounds of detention were re-typed on 19-5-1997....."

We find the list of documents accompanying the sponsoring authority's proposal in compilation of this writ petition. The only document which is included is the show cause notice dated 27-3-1997. That means, the explanation offered on the point of delay, as occasioned for calling additional information and/or document, cannot be accepted at its face value. The affidavit does not throw light on the nature of additional information sought for and the reason for un-explained delay, in supplying with the information after 15-2-1997.

18. It is well settled that the liberty of the citizen cannot be deprived merely because the detaining authority is busy with several activities connected with the Government work or enough staff is not available. The law of preventive detention is departure from the general rule, that no person, should be detained without any enquiry or trial and if resort is to be made to this power, then the authority concerned with exercise of power must act with promptitude and failure to do so is bound to result in vitiating the order. Reliance, in this respect, can be placed on the judgment of this Court in Criminal Writ Petition No. 480/1991, Smt. Pushpa Trilokchand Chopda v. State, decided on 4-9-1991 (to which, one of us was party). Therefore, the further explanation which is sought to be given by the detaining authority cannot, be considered as a valid explanation in support of the order of detention.

19. The matter, however, does not rest here. The detaining authority further went on explaining that after the order of detention and grounds of detention were typed on 19-5-1997 some more time was required to consider four other cases linked with the case at hand. Not only that but by that time, according to the authority, on 10-5-1997 two letters were received from the Advocates and Solicitors M/s Kantawala and Company, in which it was informed that the detenu and co-detenu have filed Criminal Writ Petition No. 290/1997 in the High Court and it was adjourned to 16-6-1997. Thereby, the detaining authority wants to suggest that the delay which was occasioned even after 19-5-1997 was due to filing of the writ petition by the detenu and co-detenu so also it was required to consider whether those documents were needed to be included in the list of documents for the purpose of reaching subjective satisfaction of the detaining authority. The affidavit in reply, itself, gave reply or answer that even those documents were unnecessary. The detaining authority admitted in his affidavit that those documents were unnecessary, inasmuch as there was no stay from the High Court. To our mind this will not furnish a proper explanation for the delay caused in issuing detention order. This is merely an excuse and it may be termed as white wash.

20. We are, therefore, of the view that there is no satisfactory explanation

offered by the detaining authority on the point of delay caused in issuing the detention order. The delay in passing the order of detention over a period of seven months is unsatisfactory and un-explained. Such a delay would throw a considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to the legitimate inference that the detaining authority was not really and genuinely satisfied as regard's the necessity for detaining the detenu, with a view to preventing him in future from smuggling the gold. In our view, therefore, the order of detention becomes illegal on this count alone.

21. Coming to the another ground, there is no dispute that section 3(1) of COFEPOSA Act consists live sub-heads for which power to make an order of detention of certain persons would be exercised. Section 3(1) so far as it applies to the facts of the present case, gives power to make an order of detention with a view to preventing a person 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

22. The provisions of section 3(1) of the COFEPOSA Act are considered in Criminal Writ Petition No. 1112/1991 decided on 29-10-1991, Smt. Arunabai Jayantilal Jain v. State of Maharashtra, (to which Judgment one of us was party), and it has been held that,

"...Section 3 of the COFEPOSA Act entitles detention of any person with a view to prevent 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 (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping the smuggled goods. There is clear distinction between cases of smuggling goods and cases of dealing in smuggled goods under sub-section (1)(i) and sub-section (1)(iv) of section 3.. The grounds of detention clearly establish that the detaining authority was satisfied that the detenu was dealing in smuggled goods inasmuch as the foreign marked gold was purchased from.... There is not even a whisper of complaint or suggestion in the grounds of detention that the detenu himself was smuggling goods. It is, therefore, obvious that the detaining authority was desirous of exercising power with a view to prevent the detenu from dealing in smuggled goods but in stead had exercised powers for preventing the detenu from smuggling goods. Shri Karmali, therefore, is right that the detaining authority is guilty of non-application of mind and consequently the order of detention cannot be sustained."

23. In the present case also as seen from the grounds of detention that the detaining authority was satisfied that the detenu and his associates were found in possession of the smuggled gold but the order of detention is with a view to

preventing him in future from smuggling of goods. Therefore, the ratio laid down by the judgment of this Court in Criminal Writ Petition No. 1 112/1991 (cited supra) squarely applies to the case at hand.

24. Shri Kanade, learned Additional Public Prosecutor, however, submits that there is no need to specify in the order of detention whether the order of detention is with a view to preventing the detenu either from smuggling goods, as specified in sub-section (1), when it is a case that the order of detention is issued with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange. We are, however, not in agreement with the submissions made by Shri Kanade, learned Public Prosecutor because, if that would have been the intention of the Legislature, then there was no need to specify the activities in sub-section (1) of section 3 of the said Act. The order of detention, in the present case, becomes bad in law on this grounds.

25. The result, therefore, is that the criminal writ petition is allowed. The impugned order of detention is quashed and set aside and the detenu is directed to be released from detention forthwith. He shall be set at liberty forthwith, if not required in any other case. Rule is accordingly made absolute.

26. Petition allowed.