

(1993) 08 DEL CK 0039

In the Delhi High Court

Case No : Criminal Writ Appeal No. 374 of 1991

Duvinder Nath Sahi

APPELLANT

Vs

The Administrator Union Territory of Delhi

RESPONDENT

Date of Decision : 20-08-1993

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 2, 3(1)
Customs Act, 1962 — Section 104, 108, 111, 111(1), 12

Citation : (1993) 3 AD 549 : (1994) 28 DRJ 188

Hon'ble Judges : Sat Pal, J

Bench : Single Bench

Advocate : Ashok Arora, Kiran Jain and P.S. Sharma, for the Appellant;

Judgement

Sat Pal, J.

(1) In this writ petition the petitioner has challenged the order of detention dated 15th May, 1991 made against him by the Administrator of the Union Territory of Delhi in exercise of powers conferred upon him u/s 3(1) read with Section 2(f) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the Act) with a view to preventing the petitioner from smuggling goods and also preventing him from engaging in transporting, concealing and keeping smuggled goods.

(2) Without "waiting for the grounds of detention being served upon him, the petitioner filed the present petition challenging the order of detention. Along with writ petition the petitioner has annexed only a copy of the impugned order dated 15th May, 1991 and has not annexed a copy of the grounds of detention.

(3) Briefly stated the facts of the case are that on 9th July, 1990 the petitioner arrived from Dubai by Air India Flight A1-752. While going out of the Customs Arrival Hall along with his baggage, the petitioner was asked by the custom officers whether, he was carrying any contraband items like gold etc. on his person to

which he replied in the negative. The petitioner was passed through door frame metal detector which gave a weeping sound. Thereafter a hand metal detector was applied on the body of the petitioner which when taken near his rectum gave a sound indicating the presence of some metallic item. At that stage he was asked whether he was carrying gold in his rectum to which he replied in the affirmative and eased out three packets from his rectum, washed and handed over to the customs officer. In these packets three gold biscuits of 10 tolas, all foreign marked were recovered and those gold biscuits were found to be of 24 carats collectively weighing 349.900 gms valued at Rs.1,11,966.00 (MV). The petitioner could not produce Reserve Bank of India permission for the lawful import of those gold biscuits and accordingly the said gold biscuits were seized.

(4) In his voluntary statement dated 10th July, 1990 recorded u/s 108 of the Customs Act, 1962, the petitioner admitted the recovery and seizure of gold from his person in the manner stated hereinabove and he stated that the gold recovered from him was taken on loan from some shopkeeper from where he used to purchase other goods at Dubai. He further stated that he was to sell the gold in Delhi and with that money he would have bought and taken ready made garments to Dubai so that he could pay back the money to that shopkeeper after selling those readymade garments and he could have earned a profit of Rs.15,000.00 after selling the gold in Delhi. He also stated that he had gone abroad five times during the month of June and July, 1990 on his present passport issued on 7th June, 1990. He also stated that on his previous passport he had gone aboard about four times and he used to take readymade garments abroad and sell them there, purchase goods from there and he used to earn Rs.2,000.00 to 2,500.00 .

(5) The petitioner was arrested on 10th July, 1990 u/s 104 of the Customs Act, 1962 and was remanded to judicial custody till 24th July, 1990 which was further extended till 9th August, 1990. He was, however, admitted to bail by the Court of Addl. Chief M.M., New Delhi on 26.7.90.

(6) The petitioner was issued a show cause notice dated 7th September, 1990 calling upon him to show cause and explain within 15 days of the receipt of the notice as to why the gold under seizure should not be confiscated u/s 111(d) and 111(1) of the Customs Act, 1962 and as to why penalty would not be imposed upon him u/s 12 of the Act. There after by order dated 29th October, 1990 the adjudicating authority passed orders to confiscate the gold and imposed personal penalty of Rs.10,000.00 on the petitioner.

(7) A criminal complaint was also filed against the petitioner in the Court of Additional Chief M.M. Delhi. in July, 1990 and the proceedings in this case are still pending in the said Court.

(8) On 15th May, 1991 the order of detention was passed against the petitioner. As stated herein above the petitioner has filed the present writ petition challenging the order of detention without service of order of detention upon

him. Vide order dated 10th July, 1991 a Division Bench of this Court issued rule. By this order it was also directed that the impugned detention order would not be executed till the next date. The petitioner was, however, restrained from leaving the Country without the permission of the Court. The interim order was confirmed on 21st August, 1991.

(9) The petition came up for hearing on 14th August, 1992 and on that date Mr Ashok Arora, the learned counsel for the petitioner stated that he should be permitted to withdraw his power of attorney. Accordingly, a notice was issued to the petitioner. The said notice was received back unserved with the remarks that the petitioner had shifted from that house. By order dated 11th February, 1993 I directed the learned counsel for the petitioner to furnish the latest address of the petitioner. I also directed that a fresh notice be sent to the petitioner on that address for 25th February, 1993. On 25th February, 1993 Mr. Arora, the learned counsel submitted that he had not been able to find the present address of the petitioner. He, however, gave the address of the surety of the petitioner and I directed that actual date notice be issued to the petitioner at the address of the surety. The case again came up for hearing on 29th March, 1993. From the records it was found that the notice addressed to the petitioner at the address of the surety had also been received back with the remarks that the petitioner had already sold his own house and as such notice could not be served. In view of these facts, I directed Mr. Arora to assist the Court and argue the matter on behalf of the petitioner. Accordingly, Mr. Arora the learned counsel made his submissions on behalf of the petitioner.

(10) Though the order of detention has been challenged on the basis of various grounds mentioned in the writ petition, Mr. Arora, the learned counsel appearing on behalf of the petitioner, however, confined his arguments on the following contentions only:-

(i) that the impugned order of detention has been passed for a wrong purpose as there is substantial and unexplained delay in passing the said order; (ii) The order of detention is not sustainable as there is substantial and unexplained delay in execution of the said order; (iii) The impugned order of detention has been passed on extraneous and irrelevant grounds.

(11) The learned counsel submitted that the above mentioned contentions could be urged to challenge an order of detention at pre-execution stage in terms of the law laid down by the Supreme Court in the case of Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another,

(12) In support of the first contention learned counsel drew my attention to ground No.- 1 wherein it has been stated that although the alleged incident happened on 9th July, 1990, the order of detention was passed after a lapse of more than 10 months i.e. on 15th May, 1991. It is further stated that the criminal complaint in this case was filed against the petitioner in the month of July, 1990 and adjudication proceedings were initiated pursuant to the show

cause notice dated September, 1990. Thus there had been long and undue delay in passing the impugned order of detention. The learned counsel, Therefore, contended that the long time gap between the date of alleged incident and date of passing of the impugned order of detention has snatched the nexus between activity alleged and activity sought to be curbed by passing the impugned order of detention. In support of his contention learned counsel placed reliance on a Division Bench judgment of this Court in the case of Subhash Chander Vs U.O.I., 1991 1 CRI 745 and my Judgment in the case of Sunil Kumar Kamra Vs. Union of India and Others, , since reported in 1993(3) DL 24.

(13) As regards the second contention, the learned counsel drew my attention to ground No.4 of the writ petition wherein it has been slated that though the impugned order was passed on 15th May, 1991 yet the same was not executed till the filing of the petition i.e. 6th July, 1991. The learned counsel submitted that the failure on the part of the respondent to serve the order of detention on the petitioner shows their non-seriousness and laxity in dealing with the case. He, Therefore, contended that the very object or purpose of the detention order has been frustrated on account of inaction on the part of the respondent in this case. In support of this contention also he placed reliance on the decision in the case of Subhash Chander (supra).

(14) As regards third contention, the learned counsel drew my attention to ground No.3 wherein it has been stated that as per allegations, the petitioner was engaged in smuggling of goods whereas vide the impugned order he has been sought to be detained with a view to preventing him from engaging in transporting, selling and keeping smuggled goods. The learned counsel, Therefore, contended that this shows non-application of mind on the part of the detaining authority and renders the impugned order illegal and void.

(15) In the counter-affidavit filed on behalf of the respondent a preliminary objection has been raised that the case of the petitioner does not fall under any of the exceptions mentioned in Alka Subhash Gadia case (supra) and as such the writ petition is liable to be dismissed. On merits it has been slated that there is no unexplained delay in passing the impugned order of detention. It has been stated that the proposal turn detention dated 25.9.90 was received in the office of the detaining authority on 1.10.90 and the meeting of the screening committee was held on 10.1.91. It has further been stated that additional documents were called for from the sponsoring department from-time to time and last of such documents were received on 19th April, 1991 and thereafter the case was put up before Deputy Secretary/Secretary (Home) on 6.5.91 and on 7.5.91 the File was sent to Lt. Governor who passed the order of detention on 8.5.91. In reply to the allegations that there is substantial unexplained delay in the execution of the impugned order, it has been stated that the petitioner initially deliberately avoided the service of the order of detention and thereafter obtained the injunction restraining the respondent from executing the order of detention.

(16) Mr. Sharma, the learned Standing counsel appearing on behalf of the respondent reiterated the submissions made in the counter affidavit as stated hereinabove. He further submitted that even assuming that delay in passing the order of detention was not satisfactorily explained, it necessarily does not give rise to an inference that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. He also submitted that the petitioner is alleged to have concealed the gold in his rectum and as such there was a rational connection between the grounds and the order of detention. In support of his contention, the learned counsel placed reliance on two judgments of the Supreme Court in the cases of *M. Ahamedkutti Vs. Union of India (UOI)* and *Another*, and in *Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others*, .

(17) I have given my thoughtful consideration to the submissions made by the learned counsel for the parties and I have perused the records including the file of the respondent containing the order of detention.

(18) The law is now well settled that a detention order can be challenged even at a pre-execution stage but the grounds of challenge are very limited in scope and number. As held in *Alka Subhash Gadia's case (supra)* the grounds of challenge are "(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."

(19) As stated above, one of the grounds available to challenge the order of detention at pre-execution stage is that the order has been passed for a wrong purpose. In the present case the order of detention has been challenged on this ground, and it has been alleged that there is a substantial un-explained delay between the date of alleged incident and the date of passing of the detention order and further there is such delay in execution of the impugned order also. In view of these allegations the preliminary objection raised by the respondent is not sustainable.

(20) Now the question for examination is as to whether there is in fact a substantial and un-explained delay in passing the order of detention as well as in execution of the said order. It has been held by the Supreme Court in *Alka Subhash Gadia's case (supra)* that in a case where challenge to the order of detention is at the pre-execution stage, the satisfaction of the courts has to be *prima facie*. Accordingly, it has to be seen as to whether keeping in view the facts and the circumstances of this case, there is a substantial delay in passing the order of detention or in execution of the said order. Having regard to the averments made in the counter affidavit filed on behalf of the respondent as explained hereinabove, I am of the view that *prima facie* it can not be said that there is a substantial and un-explained delay in passing the order of detention. In the case of *Rajendra kumar Natwarlal Shah (supra)* it was held by the Supreme

Court that even unexplained delay (which was five months in that case) in making the order against economic offender under the Cofeposa Act would not be sufficient to vitiate the order if the grounds were not stale and the nexus between the grounds and the order of detention still existed. As per allegations made in the grounds of detention, the petitioner concealed the gold in his rectum and keeping in view this allegation as well as other allegations such as his five visits abroad in June and July 1990 , the detaining authority came to the conclusion that the petitioner had the inclination and propensity in the matter of indulging smuggling activities in an organized and clandestine manner. From this it cannot be said that the nexus between the grounds and the order of detention did not exist on the day when the order of detention was issued. The ratio of the judgment in the case of Sunil Kumar Kamra (supra) is not applicable to the facts of the present case as in that case no Explanation whatsoever was given by the respondent turn the delay in passing the detention order which was about 13 months from the date of the alleged incident.

(21) As regards the contention of the learned counsel for the petitioner that there is substantial unexplained delay in execution of the order of detention, I do not find any merit in this contention, in the affidavit filed on behalf of the respondent it has clearly been stated that the petitioner, at the initial stage deliberately avoided the .service of the order of detention and in the meanwhile he obtained the injunction from this Court on 10th July, 1991. It may be pointed out here that even during the pendency of the writ petition, various notices sent by this Court to the, petitioner on the last known address, were received back unserved with the remarks that "the petitioner was not available". In the case of M. Ahamedkutty (supra) it was held by the Supreme Court that where the passage of time is caused by the detenu himself by absconding, the satisfaction of the detaining authority cannot be doubled and the detention cannot be held to be bad on that ground.

(22) The last contention urged by the learned counsel for the petitioner that the impugned order of detention has been passed on extraneous and irrelevant grounds is without any merit as the grounds of detention have not yet been served on the petitioner.

(23) In view of the above discussion the writ petition is dismissed. It may, however, be clarified that my conclusions are prima facie for the decision of" the present petition only.