
(2002) 06 BOM CK 0090
In the Bombay High Court
Case No : Criminal W.P. No. 279 of 2002

Gulam Kadar Gulam Rasool	Vs	APPELLANT
State of Maharashtra and Others		RESPONDENT

Date of Decision : 26-06-2002

Acts Referred:

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

Citation : (2002) 4 MhLj 398 : (2003) 1 RCR(Criminal) 345

Hon'ble Judges : D.G. Deshpande, J;A.S. Aguiar, J

Bench : Division Bench

Advocate : A.N.Z. Ansari, for the Appellant; D.S. Mhaispurkar, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

A.S. Aguiar, J.—This petition is filed under Article 226 of the Constitution of India by the petitioner who describes himself as brother of the detenu, namely, Gulam Nadar Gulam Rasool, impugning the order dated 23rd January 2002, annexure A to the petition, passed by the detaining authority i.e. second respondent Ranjana Sinha, Secretary to the Government of Maharashtra detaining the said detenu u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA Act" for short). The said order of detention along with grounds of detention both dated 23rd January 2002 were served on the detenu on 23rd January 2002 itself. The detenu was also served with the list of documents and copies of documents set out in the said list which are purported to have been placed before the detaining authority and on the basis of which documents the detaining authority has purportedly issued the impugned order of detention.

2. The said order of detention dated 23rd January 2002 sets out the satisfaction of the detaining authority which prompted it to issue the impugned order and states that with a view to prevent the detenu in future from smuggling of goods

and acting in a manner prejudicial to the conservation of foreign exchange it was necessary to detain the said detenu Gulam Kadar Gulam Rasool under the COFEPOSA Act.

3. The detention order came to be passed pursuant to the incident dated 19th July 2001 when the Custom Officers of the respondents apprehended the detenu along with one Usman Gani Kumbhar and Noor Mohamed from room No. 5 of a hostel at Dongri where he had gone to collect the parcel containing a television set which on being opened was found containing 21 bags of counterfeit Indian currency notes. The facts pertaining to the incident are set out in the order. The statement of the detenu was recorded u/s 108 of the Customs Act, 1962 as set out in para 4 of the petition.

4. Although a number of grounds have been taken up in the petition and the learned counsel for the petitioner Mrs. Ansari has made submissions on all the said grounds, we are of the opinion that the petition can be disposed of on the main ground of challenge set out in para 4(ii) on pages 7 and 8 of the petition. It is submitted by the petitioner that even assuming that the detention order was warranted, the detaining authority at best could have issued the order of detention with a view to preventing the detenu from engaging in transporting smuggled goods and not with a view to preventing him from smuggling of goods and acting in a manner prejudicial to the conservation of foreign exchange. There is no material existing and nothing was placed before the detaining authority to show that the detenu was engaged in smuggling activity and hence the impugned order of detention issued with a view to preventing the detenu from smuggling of goods and acting in a manner prejudicial to the conservation of foreign exchange is unwarranted. The said order of detention is issued on the basis of non-existent and illusory facts and material and therefore mala fide, null and void.

5. It is the contention of the petitioner that the role attributed to the detenu was only of transporting the television set containing counterfeit currency notes. Therefore, the charge should not be u/s 3(1)(i) but u/s 3(1)(iii). In fact, the statement of the detenu recorded u/s 108 of the Customs Act on which the detaining authority is relying clearly shows that one Aziz informed the detenu to come to his residence at Bhayandar as one Nissar had got work for him i.e. the detenu. The detenu thereupon went to Aziz's residence at Bhayandar where Nissar was also present. Nissar told the detenu that one passenger from Dubai would be arriving at Mumbai on 19th July 2001 and the passenger would be carrying one television set given to him by Aftab Bakti, that counterfeit Indian currency notes would be concealed inside the said television set and the said passenger after clearance from the Airport would go to the hostel at Dongri. Nissar told the detenu to go to the hostel at Dongri and ask for one Usman and collect the television set from him and get the same to his (detenu's) residence and that the said Nissar will collect the same from his residence. Accordingly, the detenu went at the appointed time to the hostel at Dongri to room No. 5 and

introduced himself to Usman. At that time the Customs Officers came into the room and apprehended the detenu and the said Noor Mohammed. It is clear that the detenu had not even collected the television set containing counterfeit Indian currency notes and, therefore, no act of smuggling could be attributed to him. Neither did he go to the Airport to clear the goods nor did he transport the same and, therefore, the detenu could not be charged even u/s 3(1)(iii) for transportation or smuggling of goods.

6. It is the contention of the respondents that the detenu was fully aware of the nature of parcel containing counterfeit Indian currency notes which he was required to transport from room No. 5 of the hostel at Dongri to one Nissar. The respondents have referred to mobile print out of cellular phone No. 98204 66081 used by Gulam Kadar i.e. the detenu from M/s Hutchison Max Mumbai from which it is clear that the said detenu had made a number of calls from his mobile telephone to Dubai at the telephone No. 00971506757923 during the period 24th June 2001 to 18th July 2001 and the detenu had also received several calls from the said mobile telephone No. 00971506757923 during the period from 25th June 2001 to 19th July 2001 and that the said printout shows that the detenu had received three phone calls just before the incident. It is thus contended that the detenu was a part of smuggling ring and was fully aware that he was playing a part in the smuggling of the counterfeit Indian currency notes.

7. The conclusion of the detaining authority that the detenu was aware that he was playing a part in the smuggling activities because of the telephones made to Aftab at Dubai and telephones received by him is unwarranted. Firstly, there is nothing to show that these telephone calls were in connection with the smuggling of goods, particularly, the counterfeit Indian currency notes which were discovered in the television set recovered from room No. 5 of the hostel at Dongri. Furthermore, the role of the detenu in respect of the said counterfeit Indian currency notes was to transport the counterfeit notes which action was aborted as the Customs officers seized the goods even before the detenu could receive the same for transportation. Therefore, the detenu even could not be said to be guilty of transporting or keeping the smuggled goods u/s 3(1)(iii) of the COFEPOSA Act. Furthermore, the incident of seizure of the counterfeit Indian currency notes concealed in the television set in the presence of the detenu is the only material upon which the detaining authority has relied for arriving at the satisfaction that it was necessary to keep the detenu in detention with a view to preventing him in future from smuggling the goods and acting in a manner prejudicial to the conservation of foreign exchange.

8. The judgment of this Court in Criminal Writ Petition No. 329/1984 is apposite to the facts of the present case, wherein, this Court by its order dated 12th November 1984 observed as follows :

"..... For the purpose of basing an order of preventive detention activities contemplated by Clauses (i) and (v) are distinct activities and even though generally speaking activities contemplated by Clauses (i) to (iv) may come within

the purview of Section 2(e), these activities cannot be considered as smuggling of goods within the meaning of Clause (i), smuggling of goods contemplated by Clause (i) of Sub-section (1) of Section 3 would, therefore, mean all activities of smuggling other than those mentioned in Clauses (ii) to (v). Hence a person found indulging in the activities mentioned in Clauses (ii) to (v) cannot be detained for smuggling of goods or abetting smuggling of goods, unless the activities are of such nature and volume that they lead to the conclusion that not only the detenu was indulging in those activities but was also smuggling goods or was abetting smuggling thereof.

9. In the present case, on the basis of material placed before it, the detaining authority came to the conclusion that the detenu was indulging in smuggling of goods. However, admittedly, the goods i.e. counterfeit Indian currency notes were not recovered from the possession of the detenu but from the room in the hostel at Dongri where the detenu had allegedly gone to collect the television set for transportation. Admittedly, the role of the detenu was restricted to transportation of the counterfeit Indian currency notes which action was aborted by the Customs officers seizing the goods before delivery could be taken by the detenu. Obviously, therefore, the detenu could not be charged u/s 3(1)(iii) nor could be charged u/s 3(1)(i) for smuggling the goods or Section 3(1)(ii) for abetting the smuggling of goods as no knowledge could be attributed to the detenu that he was aware that counterfeit Indian currency notes were being smuggled from Dubai by one Nissar who had asked the detenu to collect the television set. The telephonic calls recorded in the print out of the detenu's cellular phone from some person in Dubai is a very tenuous piece of evidence to attribute knowledge of the detenu of activities of smuggling of the said counterfeit currency notes. Except for the seizure of the counterfeit currency notes on 19th July 2001, there is absolutely nothing to show that the detenu was involved in smuggling of goods at any time in the past nor were smuggled goods recovered from the detenu's possession at any time. Hence it cannot be said that the detenu was dealing with smuggled goods and therefore he should be deemed to have smuggled the goods himself. The order of detention, which seeks to prevent the detenu in future from smuggling of goods and acting in any manner prejudicial to the conservation of foreign exchange, has absolutely no nexus to the grounds of detention and the material placed before the detaining authority does not justify the detaining authority in coming to the conclusion that the petitioner was indulging in smuggling of goods. The detention order must, therefore, be quashed on this ground alone. Hence we pass the following order.

ORDER

The petition is allowed.

Rule is made absolute in terms of prayer Clause (a). The impugned order of the detaining authority dated 23rd January 2002 is quashed and set aside.

The detenu is directed to be released from the detention forthwith unless

required in any other case.