
(1999) 04 GUJ CK 0011

In the Gujarat High Court

Case No : Special Civil Application No. 10326 of 1998

Harishchandra Amarsinh Jadeja

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 08-04-1999

Acts Referred:

Citation : (1999) CriLJ 3874 : (2000) 4 GLR 225

Hon'ble Judges : D.C. Srivastava, J

Bench : Single Bench

Advocate : B.B. Naik, for the Appellant; N.D. Gohil, A.G.P. Pleader for Respondent No. 1, 2, for the Respondent

Final Decision : Dismissed

Judgement

D.C. Srivastava, J.—These two writ petitions involving common questions of law and almost identical questions of fact are proposed to be disposed of by a common order.

2. The two petitioners in two petitions are real brothers. An order for their detention was passed by the detaining Authority under the provision of Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA"). The said order could not be served on the petitioners till date. The period of five years has elapsed. Now the petitioners chose to file these writ petitions in the year 1998 challenging the aforesaid order with prayers that the said order be quashed and the respondents be restrained permanently from executing the order passed by the respondent No.2 against the petitioners.

3. Brief facts essential for disposal of these two petitions are as under :

On 14.2.1993 on the basis of specific intelligence information given by the Police of Bhuj-Kutch District that two trucks bearing No.GJ-12-T-7401 AND GJ-12-T-7296 were to carry contraband silver from Kutch to Mumbai by road, in the early hours of 14.2.1993 both trucks were intercepted at the check post by the Custom Authorities near Ramdevpir Temple, Nr. village Smakhiali in Kutch

district. Six persons occupying the trucks were apprehended. On preliminary investigation it was found that the trucks were carrying salt bags and beneath the salt bags silver slabs were concealed. 135 silver slabs, 200 salt bags and Indian currency notes worth Rs.9100/- were recovered from one truck and 140 silver slabs and 200 bags of salt and Indian currency note worth Rs.9000/- were recovered from other truck. Thus in all 275 silver slabs worth Rs.5,86,06,620/- were seized besides Indian currency aforesaid and salt bags. The detention order was passed on 17.3.1994 against 11 persons. Nine persons were actually detained at the relevant time, but the petitioner and his brother absconded and till date they could not be apprehended nor served with the order of detention.

4. The contention of the petitioners relevant for disposal of these petitions is that the detention order is proposed to be executed against wrong person and that the petitioners were not involved in smuggling activities. The case of the petitioners Pragji Amarsing Jadeja is that instead of Pragji Jadeja he is going to be detained under the impugned order and thus the order is to be executed against wrong person. Similarly the case of other petitioner Harishchandra Amarsinh Jadeja is that he was not involved in smuggling activity of silver slabs and that the witnesses never knew him and the material against him is insufficient and he is being falsely implicated.

5. Learned Counsel for the petitioners and the learned A.G.P. were heard.

6. Learned A.G.P. raised preliminary objection that such petitions challenging the detention order at pre-execution stage are not maintainable. In support of his contention the learned A.G.P. relied upon the Apex Court's verdict in Union of India and Others Vs. Parasmal Rampuria, . In this case two Honourable Judges of the Apex Court laid down the law that while challenging the detention order at pre-execution stage the detenu must surrender before filing writ petition and the High Courts are not justified in granting interim stay of proposed order which had remained unserved. It was also observed that after surrendering it will be open to the detenu to amend his writ petition and to take all possible legal ground to challenge the detention order. He can also take the plea by proper amendment to the writ petition that non-execution of the detention order during the period when no stay was in operation rendered the detention order stale. This is however general law on the subject. The Larger Bench of the Apex Court consisting of three Honourable Judges in the case of Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, observed as under :

"Judicial review being a part of the basic structure of the Constitution the power of the High Court under Article 226 of the Constitution cannot be circumscribed in any way by any law including detention law. The detention order, therefore, can be challenged at any stage, and the artificial distinction between pre-decisional and post-decisional challenge is inconsistent with and alien to the wide powers conferred under Articles 226 and 32.

This case was not even referred in subsequent Apex Court's decision in *Union of India v/s. Parasmal Rampuria (Supra)* nor it has been held that the verdict of the Apex Court in *Additional Secretary v/s. Alka Subhash Gadia* stands diluted. The Apex Court in *Additional Secretary, Government of India v/s. Alka Subhash Gadia (supra)* laid down certain situation when the detention orders can be challenged at pre-execution stage also. The Apex Court in *Additional Secretary v/s. Alka Subhash Gadia (supra)* proceeded to observe that the courts have power to entertain grievance against any detention order prior to its execution and they have used it in proper cases although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz. 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 was further observed that the refusal by the Courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other grounds does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.

7. It is, therefore, clear from the Apex Court's verdict that in five cases enumerated above the order of detention can be challenged at pre-execution stage and it is not necessary that all the five grounds must exist simultaneously. Even if one ground is shown to be existing prima facie then the detention order can be challenged at pre-execution stage. I am, therefore, not impressed with the contention of the learned A.G.P. that in no case the detention order can be challenged at pre-execution stage. Of course as a rule every petition challenging the detention order at pre-execution stage is not maintainable. However, if the case falls under one of the five grounds enumerated above by the Apex Court in *Additional secretary, Government of India v/s. Smt. Alka Subhash Gadia (supra)* the petition can be entertained at pre-execution stage.

8. It has now to be examined whether any of the five grounds exist for quashing the detention order at pre-execution stage.

9. Coming to the first ground, according to the Apex Court, the detention order can be quashed at pre-execution stage, when such order is not passed under the Act under which it is purported to have been passed. This ground does not exist in the instant case because the impugned order was passed under COFEPOSA and the purpose of detention order was to prevent smuggling activities in contraband silver slabs. The order was therefore passed under the Act under which it was purported to have been passed. This ground is therefore non-existent in the instant case.

10. The second ground will be dealt with later on because this ground was

pressed in service by the learned Counsel for the petitioner that the order is sought to be executed against a wrong person.

11. The third ground is also not available because it was not passed for wrong purpose. The purpose of passing the detention order was to prevent the petitioners from indulging in smuggling activities. As such this ground is non-existent in the present petitions.

12. The fourth ground is also not available, because at this stage nothing could be shown that the order was passed on vague, extraneous or irrelevant grounds or consideration.

13. The fifth ground is also not available because it is not the case of the petitioner that the authority which passed it had no authority to do so.

14. Thus, the only point to be examined is as to whether the impugned order are proposed to be executed against a wrong person.

15. After considering the writ petitions and counter Affidavit and other material on record I am of the view that it is not a case where the impugned orders have been passed which are sought to be executed against wrong person. The controversy that the detention order in one of the cases was passed against Pragji Jadeja is imaginary for the reason that the name of one of the petitioners is Pragji Amarsinh Jadeja. The learned A.G.P. has pointed out that there is no other person, named Pragji Jadeja in the village and it is a very small village and the witnesses have testified that the two petitioners were engaged in unlawful activities of smuggling contraband silver and on 14.2.1993 six persons who occupied the truck have confirmed before the authority that the two petitioners were involved in loading and unloading of silver. In addition to this the driver and the cleaner of the truck also testified the said fact before the Sponsoring Authority. The two petitioners could not be apprehended on 14.2.1993. The zerox copies of photographs of the petitioners were shown to the driver and cleaner and they confirmed that the petitioners were the persons who were engaged in smuggling activities of contraband silver. The learned Counsel for the petitioners pointed out that it is surprising how the zerox copies of photographs of the petitioner could be identified before the concerned Authority. The complete answer to this argument is to be found at page : 28 of the compilation in Special Civil Application No. 10326 of 1998. This is representation from the other petitioner Harishchandra Amarsing Jadeja of village Vinjan, Taluka Nalida, addressed to Chief Minister of Gujarat State. At page : 2 of this representation it was admitted that the photographs excluding the photograph of Harishchandra have been collected from the house and obtained false signature on it and involved him falsely. Thus, collection of photographs from the house of Harishchandra Amarsing Jadeja has been admitted. The identity of the petitioners in the mind of those witnesses were confirmed from the photographs shown to them. Thus, it cannot be said that it was a case of mistaken identity of the two petitioners on the part of the witnesses who were interrogated by the

custom authorities.

16. From the materials on record it is further clear that the payment was made by the petitioner to the drivers of the two trucks. The drivers had therefore an occasion to see the faces of the petitioners at the time of unloading the truck and at the time of payment of freight to them. If the witnesses had opportunity to see the faces of the petitioners their statements cannot be viewed with suspicion at this stage inasmuch as this court is not going to sit as a Court of Appeal over the subjective satisfaction of the detaining Authority.

17. Learned Counsel for the petitioners argued that the notice and summons from the customs authority could not be served on the petitioner at their houses and that the summons were served on the brother of the petitioner. There is however no material to create doubt about the identity of the petitioner and to infer that the detention order is sought to be executed against wrong person. A person may or may not own a house, but may reside in other's house to conceal himself. If summons was issued at that address it does not amount that the identity of the petitioner was at any time in doubt in the mind of the sponsoring authority. It was rightly argued by the learned A.G.P. that the petitioner had been absconding. Subsequent conduct of the petitioners may not be from relevant in determining the question of their identity, but certainly this conduct shows that they were absconding for a period of five years right from the date of search, seizure and recovery. This reflects malafide on the part of the petitioners. If they were confident that the detention order was proposed to be executed against wrong persons, they should have, without loss of time approached before this Court. It is not a case where life and liberty of the petitioners was being curtailed at pre-execution stage. In the matters where the detention order is challenged at pre-execution stage the conduct of the petitioners has also to be taken into consideration. If there are indications of malafide, the petitioners are not entitled to any discretion from this Court under Article 226 of the Constitution of India. It is not a case where Habeas corpus petition was filed after actual detention that the matter should be strictly examined under Article 226 to find out strict compliance of Article 22(5) of the Constitution of India.

18. It may also be noted that from the writ petition it appears that the petitioners are aware of the date of the order and also to some extent about some of the grounds of the detention order. The detention order has not yet been served on them. It is then surprising how they came to know of the detention order or the grounds of detention. This indicates that they have links with other detenues, who were detained regarding the same incident.

19. Thus, considering the entire material on record I am satisfied that it is not one of those cases where the detention order is sought to be executed against wrong person. Consequently this ground also becomes non-existent.

20. In the result none of the five grounds exists on which the detention order at pre-execution stage can be challenged as laid down by the Apex Court in

Additional Secretary to the Government of India v/s. Smt. Alka Subhash Gadia & anr. (supra). The two writ petitions are therefore devoid of force and are liable to be dismissed. The two writ petitions are accordingly dismissed.