(2006) 07 DEL CK 0033

In the Delhi High Court

Case No : Writ Petition (Criminal) 2169 of 2005

Jigyasa Aggarwal APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 28-07-2006

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 108

Citation : (2007) CriLJ 371 : (2006) 132 DLT 408 : (2006) 92 DRJ 594

Hon'ble Judges : R.S. Sodhi, J;P.K. Bhasin, J

Bench : Division Bench

Advocate : R.K. Anand and Herjinder Singh, Piyush Kumar, Navneet Panwar, Shivani Lal, Aparna Dviwedi and Rakesh Nautiyal, for the Appellant; Richa Kapoor and Vivek Singh, for the Respondent

Judgement

R.S. Sodhi, J.—Writ Petition (Criminal) 2169/2005 has been filed with a prayer for issue of writ of habeas corpus calling for the records vis-a-vis the detention order F. No. 673/02/2005-Cus VIII dated 08.09.2005 vide which the detenu has been detained since 21.09.2005.

2. It is contended by counsel for the petitioner that the petitioner is a well wisher of the detenu and is filing the petition under Article 226 of the Constitution for the immediate release of the detenu, Shri Rajesh Aggarwal, who has been detained pursuant to detention order F. No. 673/02/2005-Cus VIII, dated 08.09.2005 u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974, passed by the detaining authority, the second respondent.

3. The facts of this case as set out in the counter-affidavit are as under:

On the basis of intelligence gathered, it came to light that one Shri Sita Ram Aggarwal, proprietor of M/s. G & S International had been indulging in activities prejudicial to the augmentation of foreign exchange resources of the country by acquiring foreign currency illegally from the market and depositing the same in cash in his bank account by showing the same falsely as advance payments for exports made by him. Further inquiries revealed that another company, namely M/s. A.S. Raj International, owned by his son, also indulged in similar prejudicial activities. The method adopted by both the companies was that photocopies of passports of foreigners visiting India were obtained from several sources. From these photocopies, the signatures of the foreign tourists were copied and with copied signatures forged request letters from foreign tourists, were prepared. Subsequently, Currency Declaration Forms (CDFs) issued by Customs Department to such tourists, who on arrival in India, declared import of foreign exchange in excess of the stipulated amount, were also fabricated. The fabricated CDFs were then submitted to the bank along with large sums of foreign currency in cash on behalf of fictitious buyers. These deposits were then declared as advance payments against export orders. Actually, the foreign currency was acquired locally from unauthorized sources. On the basis of these deposits, Foreign Inward Remittance Certificates from the bank were obtained and submitted to the Customs Department and export incentives thereon were claimed under Duty Exemption Pass Book and Duty Drawback Schemes. Shri Rajesh Aggarwal was not available for recording his statement in spite of several summons issued to him. However, the involvement of Shri Rajesh Aggarwal in the prejudicial activities to the tune of Rs. 2.41 crores approximately on behalf of M/s. A.S. Raj International was corroborated by the records of Foreigners Regional Registration Office (FRRO) & Intelligence Bureau (I.B.), statements from bank officials and the detenue''s agents. The Detention Order was issued against Shri Rajesh Aggarwal on 8.9.2005 and he was served the Detention Order on 21.9.2005. Grounds of Detention & Relied Upon Documents were served on him on 23.9.2005 and his acknowledgment thereof was also obtained.

4. The detention order dated 08.09.2005 was accompanied with grounds of detention. It was contended by counsel for the petitioner that the detention order suffers from non-application of mind. From a perusal of the grounds of detention along with the order dated 08.09.2005, it is evident that the same relates to some order issued by the second respondent in August, 2005 and not to the instant order dated 08.09.2005, under which the detenu has been detained. He also contended that in paragraph 5 of the grounds of detention, the detaining authority refers to statement of Ravinder Rajurkar, dated 16.07.2004, where it is alleged to have stated that the detenu used to come and tender the CDFs and other documents along with foreign currency, whereas no reference to detenu has been made by Shri Rajurkar in his statement of that date.

5. Counsel further contended that in paragraph 16 of the grounds of detention a statement dated 13.08.2004 of Shri Anup Joshi is allegedly recorded where, according to the detaining authority, he has stated that the relevant documents for exports were received from the detenu. Counsel contended that nowhere in his statement dated 13.08.2004, Shri Anup Joshi has stated that the detenu

gave any documents to him. All this reflects non-application of mind by the detaining authority rendering the detention order non est.

6. For the benefit of the judgment the following paragraphs of the Writ Petition are quoted:

Paragraph IV:

That later, on perusal of the impugned communication dated 08.09.2005 the Detenu realized that the same relates to some order issued by the Learned Respondent No. 2 in August, 2005 and not to the instant order dated 08.09.2005 under which the Detenu has been detained. The petitioner respectfully submits that neither a corrigendum and/or addendum has been issued in respect of the aforesaid communication nor any other ground has been served upon Detenu in respect of order dated 08.09.2005.

Paragraph Xxviii.

That in Para 5 of the Grounds, the Detaining Authority has recorded that Shri Ravindra Rajurkar has stated in his statement dated 16.07.2004 that the Detenu used to come and tender the CDF''s and other documents along with foreign currency whereas no such statement was made by Shri Rajurkar in his statement dated 16.07.2004. This clearly illustrates non-application of mind on part of Detaining Authority thus rendering the impugned detention order non-est. Typed copy of Statement is attached herewith and marked as Annexure P-14.

Paragraph XXIX:

That in Para 16, the Detaining Authority has recorded that the Clearing Agent - Shri Anup Joshi has stated that the relevant documents for exports were received from the Detenu, however, nowhere in his statement dated 13.08.2004 Shri Anup Joshi has so stated, on the contrary, he has categorically stated in the aforesaid statement that the documents pertaining to both the firms i.e. M/s. G & S International and M/s. A.S. Raj International were received from Shri Sita Ram Agarwal. Typed Copy of Statement of Shri Anup Joshi in attached herewith as Annexure P-15.

7. In reply to the corresponding grounds of challenge in the petition, the detaining authority has replied as under:

..IV. In reply to paragraph 3(IV) of the petition, it is submitted that the Grounds of Detention was also dated 08.09.2005 the same as that of the Detention Order viz., 673/02/2005-Cus. VIII dated the 08.09.2005. As such there is no confusion as to the Grounds of Detention served on the detenue were relevant to him. As regards the words "August 2005" appearing on the subject portion of the Grounds of Detention, it is humbly submitted that the same words should not have found a place therein and should have been substituted as 08.09.2005 or at least should have been erased. The same was a clerical error and the same may kindly be pardoned/ignored. Notwithstanding, the appearance of the words

"August 2005" in the subject portion does not materially affect either the application of mind of the Detaining Authority or his subjective satisfaction in coming to a conclusion that unless prevented the detenue would have continued to indulge in the activities prejudicial to the augmentation of the foreign exchange resources of the country.

Xxviii. In reply to para 3(Xxviii) of the petition, it is submitted that the Detaining Authority arrived at his subjective satisfaction as to the need for preventing the detenue from carrying on his prejudicial activities, was based on the fact that foreign currency equivalent of Rs. 2.41 crores approximately was deposited in the account of M/s. A.S. Raj International for which the detenu was the proprietor.

Smt. Archana Bhardwaj (teller) in the Bank in her statement dated 30.7.2004 had inter-alia stated that one Shri Pramod Gupta was introduced to her by the detenue and she was instructed that only he would come with all bearer cheques issued by M/s. A.S. Raj International and the entire cash should be delivered to him. This practice of issuing one token for all bearer cheques was corroborated by Shri Rajesh Kumar Gupta, Asstt. Manager of the Bank. (para 10 & 11 of GoD). Shri Rajurkar, an Officer of the Bank in his statement dated 30.7.2004 inter-alia stated that in the case of the detenue''s firm viz. M/s. A.S. Raj International, most of the payments were received in advance. Payments were submitted by the detenue and in his absence by his father i.e. Shri Sita Ram Agarwal. However, payment was accepted upon confirmation from the detenue. (para 13 of GoD). The above references in GoD confirmed that the deposits into the account of M/s. A.S. Raj International were made with the full knowledge/ instructions of the detenue. Hence, the contention that the Detaining Authority had no conclusive evidence as to the fact that foreign currency deposits were made in the detenue''s account, is not borne out by facts.

XXIX & XXX. In reply to Para 3(XXIX & XXX) of the petition, it is submitted that the documents submitted to Shri Anup Joshi, the Clearing Agent pertained to the detenue''s firm, viz. M/s. A.S. Raj International. This fact was corroborated by the statement of Shri Joshi. It is, Therefore, immaterial whether the detenue himself submitted the documents or through his representative. Even though, the detenue''s father admitted that he was looking after the affairs of both the firms i.e. his own and that of the detenue, the detenue cannot be absolved of the activities carried in the name of his firm. The detenue will thus be held responsible for activities carried in the name of his proprietorship firm, namely, M/s. A.S. Raj International.

8. We have heard learned Counsel for the parties and have carefully gone through the affidavits placed before us. The caption of the grounds of detention annexed to the order No. F. No. 673/02/2005/Cus VIII dated 08.09.2005 reads as under:

No. 673/02/2005-Cus.VIII

Government of India

Ministry of Finance

Department of Revenue

Central Economic Intelligence Bureau

----- B Wing, Janpath Bhawan,

Janpath, New Delhi-110001.

8th September 2005,

Shri Rajesh Aggarwal,

S/o Sita Ram Aggarwal,

C-17, Satyawati Colony,

Ashok Vihar Phase II,

New Delhi.

GROUNDS ON WHICH THE DETENTION ORDER No. 673/02/2005-CUS.VIII DATED AUGUST 2005 HAS BEEN ISSUED AGAINST SHRI RAJESH AGARWAL u/s 3(1) OF THE CONSERVATION OF FOREIGN EXCHANGE AND PREVENTION OF SMUGGLING ACTIVITIES ACT, 1974.

9. From a reading of the grounds of detention it appears that a reference has been made to detention order F. No. 673/02/2005/Cus VIII, dated August 2005, issued against Shri Rajesh Aggarwal. Evidently, there is no such order and the detaining authority according to their affidavit admits this to be a clerical error but no corrigendum or addendum has been issued. Obviously, the detaining authority has not cared to read the order before passing the order of detention.

10. Grounds of detention under attack in the petition may also be quoted as under:

5. While questioning Shri Ravindra Rajurkar, an officer of your Banker viz., United Western Bank, Karol Bagh, New Delhi, on 16.07.04 it also came to light that you used to come and tender the CDFs and other documents along with foreign currency. He also informed that the passport holder did not accompany either you or Shri Pramod Gupta. Therefore, he could not remember the face of the passport holder.

16. A statement of your Clearing and Handling Agent viz. Shri Anup Joshi was also recorded on 13.08.2004 by the Customs Department. In his statement he accepted to have made custom clearances of both the firms M/s G & S International and M/s A.S. Raj International through IGI Airport (Export Shed) and admitted that instructions with relevant documents for exports were received by him from you through Shri Pramod Gupta.

17. A Statement of Sh. Ravinder Rajurkar of M/s United Western Bank Ltd. Was again recorded u/s 108 of the Customs Act, 1962 on 16.08.2004, in response to the summons issued to him on 06.08.2004. In his statement, he inter-alia, confirmed the procedure for accepting the foreign currency in cash and explained the procedure for issue of FIRC in lieu thereof. He was shown CDFs submitted by your firm along with photocopies of the passenger''s passport and photocopy letters from the buyers/tourists and was asked to ascertain whether the signatures on all three documents in fact tallied. He admitted that the signatures on the CDFs did not match with signatures on the photocopies of the passport and request letters. He was shown CDFs in original, which were accepted by their Bank from your firm along with foreign currency on behalf of tourist buyers as advance payments towards the exports done by the firm. He admitted that all these CDFs purported to have been issued on different dates over a period of more than two years were written in single handwriting only. This itself aroused serious doubts about the genuineness of these CDFs. He also admitted that the signatures on the photocopies of the request letters had been lifted from photocopies of the request letters had been lifted from photocopies of the passports through Xerox, which he could have easily detected on careful visual examination. He admitted negligence on his part in matching the signatures. He also admitted the gross irregularities in accepting foreign currency from your and your father''s firms. He further admitted the fact that there were deviations from the normal practice in accepting foreign currency from your firm, but denied any ulterior motive on his part or on the part of any other official of the Bank.

30. By depositing foreign exchange in cash on the basis of fake CDFs, you did not receive foreign exchange from foreign tourist buyers as claimed by you but acquired the same from unauthorized local sources. The export proceeds, which would have augmented the foreign exchange resources of the country, were not realized from the exports thereof. Instead, the foreign exchange already available in the country was acquired illegally and deposited against export proceeds on the basis of fake CDF''s. This amounted to an activity prejudicial to the augmentation of the foreign exchange resources of the country.

11. In grounds of detention No. 5 and 17 reference is made to the statement dated 16.07.2004 of Sh. Ravindra Rajurkar, an officer of the United Western Bank, Karol Bagh, New Delhi. This statement forms the basis of the material for drawing of the grounds of detention. A bare perusal of the statement dated 16.07.2004 of Sh. Ravindra Rajurkar shows that the detaining authority has not cared to see the material which is sought to be made the basis of the grounds of detention. The statement nowhere connects the detenu, as is sought in ground 5, and exonerates the detenue from the activities sought to be made out in ground 17.

12. Grounds of detention No. 16 is based on the statement of Sh. Anup Joshi dated 13.08.04 where, purportedly, Sh. Anup Joshi is stated to have received relevant papers for export from the detenu through Sh. Pramod Gupta. A perusal

of the statement of Shri Anup Joshi dated 13.08.2004, nowhere shows that the export papers were received by Sh. Anup Joshi from the detenu through Sh. Pramod Gupta. This, once again, indicates that the detaining authority has not cared to go through and consider the material which forms the basis of the grounds of detention which satisfied him to pass the detention order.

13. From the above, we are of the considered view that the detaining authority has either misread or not cared to go through the statements dated 13.08.2004 and 16.07.2004 while formulating the grounds of detention which clearly amounts to non-application of mind. Yet another ground which, in the present case may be available to the detenu, is the delay in passing of the detention order which has been passed after over a year of the last activity. This ground in itself may not have been fatal, had the detaining authority cared to explain the delay in its counter-affidavit. But, we find that the counter-affidavit is devoid of any Explanation, whatsoever, as to why the detention order has been issued after such a long time. The said question has not been examined by the authorities before issuing the order of detention.

14. From a careful perusal of the affidavit filed by the petitioner as also counter-affidavit of the detaining authority and in view of the discussion above, we have no hesitation in holding that detention order No. F. No. 673/02/2005-Cus VIII dated 08.09.2005 is bad on account of non-application of mind. There is hardly any necessity of going into the other grounds which learned Counsel for the petitioner has addressed arguments on. Since we are convinced that the order of detention is based on grounds which find no support from the material sought to be made the basis of the grounds of detention, the detention order cannot be allowed to stand. We find no necessity of loading this judgment with precedent, suffice it to say, the facts are glaring enough to hold that the detention order is bad on account of non-application of mind. Consequently, we quash the detention order No. F. No. 673/02/2005-Cus VIII dated 08.09.2005. The writ petition is allowed and the Rule made absolute. The detenu be set at liberty forthwith, if not wanted in any other case. Writ Petition (Criminal) 2169/2005, stands disposed of.