

(1992) 11 DEL CK 0026

In the Delhi High Court

Case No : Criminal Writ Petition No's. 147 and 185 of 1992

K.K. Gupta

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 06-11-1992

Acts Referred:

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

Citation : (1993) 1 Crimes 420 : (1993) 50 DLT 285 : (1993) 1 ILR Delhi 541

Hon'ble Judges : Mohd. Shamim, J

Bench : Single Bench

Advocate : Kapil Sibal, J.K. Srivastava, Manmohan and Jyoti Singh, for the Appellant;

Judgement

Mohd. Shamim, J.

(1) The petitioners R. K. Gupta and Trilochan Singh have approached this Court through Criminal Writs Nos. 185/92 and 147/92 under Articles 226 and 227 of the Constitution of India for quashment of the detention orders F. No. 673/38/92-Cus. VIII. dated 12-2-92 and F. No. 673/ 39/92-Cus. Viii, dated 12-2-1992 passed u/s 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA") passed by the Joint Secretary, Government of India, against the petitioners.

(2) The above two petitions are being taken up together as the common question of law and facts are likely to arise while disposing them of.

(3) Brief facts which led to the presentation of the above two petitions are as under, that the officers of the Directorate of Revenue Intelligence, on receipt of a secret information were keeping a watch on a consignment of eight packages (consisting of two wooden boxes, one refrigerator and five cardboard cartons) which were sent from Dubai by Emirates Flight No. EK- 702 dated 15-1-1992 under Airway Bill No. 176-90895276 I.G.M. No. 414/92. The above said

consignment was booked by "A1-Naimia General Trading P.O. Box No. 16633 Dubai U.A.E." on 12-1-1992 for delivering to Mr. Khalid A1-Shorabi, Attache. Embassy of State of Palestine, D-1/27, Vasant Vihar, New Delhi. A search of the said packages resulted in the recovery and seizure of 500 pieces of foreign marked gold bars of 10 tolas each valued at Rs. 2,81,70,975 from a cooking range and washing machine kept in the two wooden boxes. The statement of Mr. Khalid Ahmed A1-Shorabji, Attache. Embassy of the State of Palestine, was recorded on 25-1-1992. He stated therein that it was Shri Trilochan Singh petitioner who made arrangement for the import of the household goods for him. He pretended his ignorance with regard to the ownership of the above said 500 gold bars. He also identified the petitioner Trilochan Singh. The statements of both the petitioners were recorded u/s 108 of the Customs Act. The houses of both the petitioners were searched on the above said date. However, nothing incriminating; was recovered from the houses of both the petitioners. Both the petitioners were arrested on 25-1-1992. They were produced before the Duty Magistrate on the next day i.e. 26-1-1992. Both of them retracted their statements made by them u/s 108 of the Customs Act, alluded to above. Detention orders were passed against both the petitioners on 12-2-1997. u/s 3 of the COFEPOSA by the Joint Secretary, Government of India, New Delhi.

(4) Petitioner R. K. Gupta made a representation against his above said detention order to the President of India on 36-3-1992. No reply has so far been received with regard to the said representation. Thereafter he made another representation to the President of India on 31-3-1992. The said representation was rejected on 11-5-1992. petitioner Trilochan Singh made a representation against his order of detention on 9-3-1992. The representation of the petitioner Trilochan Singh was rejected on 22-4-1992 by the Finance Minister.

(5) The above detention orders are illegal and invalid inasmuch there was an inordinate delay in deciding the said representations which rendered the said detention orders at illegal and invalid. The said detention orders were not passed in accordance with law inasmuch as the detaining authority while passing the said detention orders took into consideration certain documents which have absolutely no nexus whatsoever with the alleged prejudicial activities of the petitioners. It goes a long way to show and prove that the detaining authority did not apply its mind properly while passing the said impugned orders of detention, It had thus been prayed that the said detention orders be quashed and the petitioners be set at liberty.

(6) The respondents in their counter have not challenged the factum of the recovery of 500 sold bars from the cooking range and the washing machine valued at Rs. 2,80,70.975. which formed part of the consignment adverted to above, which was sent to Mr. Khalid Ahmed A1-Shorabi, Attache, Embassy of State of Palestine. Both the petitioners admitted in their statements u/s 108 of the Customs Act their involvement in the smuggling activities. According to the respondents, the detention orders are perfectly legal and valid The same were

passed after due deliberation, taking into consideration the relevant material on record. Hence, the two writ petitions in question are liable to be dismissed.

(7) Learned counsel for the petitioners Mr. Kapil Sibbal and Mr. Sunil Mehta have assailed the legality and the validity of the impugned detention orders on two grounds. It has been urged for and on behalf of the petitioners that the detaining authority while passing the impugned detention orders took into consideration documents which were in no way connected with the alleged smuggling activities of the petitioners. The contention of the learned counsel proceeds further that if this is so, it vitiated the subjective satisfaction of the detaining authority and the impugned detention orders are liable to be quashed on this ground alone. The learned counsel in support of their arguments have led me through various authoritative pronouncements made by the Hon'ble Supreme Court and this Court. This aspect of the matter as to what is the material which is to be considered by the detaining authority while forming the subjective satisfaction about the passing of the detention order came up for consideration before their Lordships of the Supreme Court in *Smt. Shalini Soni v. Union of India*, 1980 Cr. L.J. 1487. Their Lordships were of the view" It is an unwritten rule of the law, constitutional and administrative, that whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote."

(8) Their Lordships of the Supreme Court as far back as the year 1975 laid down the guidelines to be followed by a detaining authority while arriving at a subjective satisfaction at the time of the passing of the detention order, as reported in *Sadhu Roy v. The State of West Bengal* 975 SAR 919. "(2) The satisfaction, though attenuated by "subjectivity" must be real and rational, not random divination, must flow from an advertence to relevant factors, not be a mock recital mechanical chant of statutorily sanctified phrases."

(9) A similar matter to the matter in hand came up for consideration before a single Judge of this Court as reported in *Diwan Singh Verma, v. Union of India & Ors.* 1988 (2) Delhi Law 197.. "(3) In the present case, both in the grounds of detention as also in the return the detaining authority insists that it has relied on this set of documents also in arriving at subjective satisfaction. The documents are the same as are appearing at pages 63 to 72 of the Writ Petition and I have already indicated that there is nothing in these documents which would show any link of the detenu or his accomplice with the alleged prejudicial activity. If the detaining authority had really applied its mind and if the subjective satisfaction was really based on proper application of mind the detaining authority would not have said that it has also relied on this set of documents. There was nothing to prevent the detaining authority from stating that these documents were also placed before it but they were not relied upon. However, that type of statement could only be made if the detaining authority had really applied its mind. This clearly goes to show that the application of mind in the present case is totally

casual and mechanical and it is not the type of the application of mind which the law insists upon. If the detaining authority says that it has also relied on a set of documents which provided no evidence against the detenu, it naturally follow that he has not cared to go into the material."

(10) It can be safely concluded from the authorities adverted to above that the detaining authority is under an obligation to place reliance only on discerning few documents which are connected with and related to the alleged prejudicial activity of the detenu. In case they also take into consideration documents which have no nexus with the alleged smuggling activities of the detenu then it will clearly go to show that there was no proper application of mind and the detaining authority dealt with the matter which relates to the freedom and liberty of an individual in a casual, mechanical and perfunctory manner.

(11) With the above background let us now see as to whether the detaining authority in the instant case arrived at a conclusion that the petitioners are to be detained after fully applying its mind. Learned counsel for the petitioners have in this connection led me through para 18 on page 11 of the petition, in CrI. Writ No. 147/92, R. K. Gupta v. Union of India and others. A perusal of the same reveals that the detaining authority while passing the impugned detention order took into consideration as many as ten documents which are in no way connected with the alleged prejudicial activities of the petitioner R. K. Gupta. The said documents are summonses issued to Tribhovan Nath, statement of Tribhovan Nath, application dated 26-1-1992 for "R" Class moved by petitioner R K. Gupta, application dated 28-1-1992 for "B" Class moved by Shri R. K. Gupta, application dated 28-1-1992 for "B" Class presented by petitioner Trilochan Singh, application for payment of Income Tax, advance tax moved by R. K. Gupta petitioner, application dated 4-2-1992 for return of personal search of R. K. Gupta, application dated 3-2-1992 by R. K. Gupta for permission to meet his relations, free English translation of the statement of Tribhovan Nath and application dated 10-2-1992 moved by counsel for D.R.I. to inspect the file of the court.

(12) The reply to the said para of the petition is at page 4, para 16 of the counter affidavit filed by the respondents. The respondents in their reply have nowhere denied the factum of the consideration of the said documents. Rather they have insisted on saying that the above said documents were very essential and as such, were considered at the time of the passing of the detention orders.

(13) The petitioner Trilochan Singh has taken up the above said plea through para 9(e) of the petition. According to the petitioner Trilochan Singh, the detaining authority while passing the impugned detention order took into consideration the documents i.e. application dated 23-1-1992 moved by R. K. Gupta for ".B" Class, application dated 28-1-1992 moved by the petitioner Trilochan Singh, application for the payment of Income Tax advance tax by R. K. Gupta, application dated 4-2-1992 for return of jama talashi by R. K. Gupta, application dated 3-2-92 .moved by R. K. Gupta for permission to meet his

relations, wireless message dated 7-2-1992 from Deputy Superintendent. Central Jail, to the court of C.M.M. letter dated 10-2-1992 from Shri K. C. Lohia, A.C.M..M. to the Superintendent Jail, Tihar, application dated 10-2-1992 from the Department of Revenue Intelligence to inspect the file.

(14) The respondents in their reply vide para 8(e) of their counter, have nowhere alleged that they did not take into consideration the documents alluded to above. On the other hand, they have stated that the documents in fact were taken into consideration.

(15) It is manifest from above that this is not the defense of the respondents that the list of documents relied upon found a mention of certain documents which were. irrelevant and as such, were not taken into consideration at the time of the passing of the impugned detention order. On the contrary, they have taken a stand that the said documents were very much relevant and material and as such, were considered at the time of the passing of the impugned detention order. This goes a long way to show and prove that the respondent dealt with the matter of detention of the petitioners in a mechanical, casual and perfunctory manner. They did not apply their mind properly while arriving at the subjective satisfaction by separating the relevant from the irrelevant i.e. the grain from the chaff. This proves that the detaining authority relied upon a set of documents which provided no evidence against the petitioners. Hence, it naturally follows that the detaining authority did not carefully go into the matter. It thus vitiated the subjective satisfaction of the detaining authority.

(16) The next limb of the argument put forward by the learned counsel for the petitioners is that the representations made by the petitioners were not considered with promptitude with which they should have been disposed of. There was an inordinate delay in the disposal of the said representations. Hence, the impugned detention orders are liable to be set aside on this ground as well. The said plea has been taken up by petitioner R. K. Gupta vide para 26 of his petition, at page 16. He has stated therein that he made a representation on 16-3-1992. He had neither received any reply to the said representation nor he was furnished with the documents and the information for which he requested therein (vide Annexure "H"). The respondents have replied to the said para vide para 21 of their counter. According to the respondents the representation was received in the COFEPOSA Unit of the Ministry on 17-3-1992 and comments were called on 18-3-1992. The detaining authority did not submit the necessary comments up to 31-3-1992 and reminder was issued to them on the said date to expedite the matter at their end. The second representation was made by the petitioner on 31-3-1992 addressed to the President of India (vide Annexure "J"). The respondents in reply to the said para have stated in their counter dated 31-3-1992 that the said representation was received from the President's Secretariat on 10-4-1992 and the comments were called on the same day.

(17) It is manifest from above that there is a delay of 13 days in the disposal of the representation dated 16-3-1992 and there is a delay of 10 days in the

disposal of the representation dated 31-3-1992.

(18) The grievance of petitioner Trilochan Singh with regard to the inordinate and unexplained delay finds a mention in para 8(n) of the petition, being Crl. Writ No. 147/92. He moved the said representation on 9-3-1992 (vide Annexure "Y"). The said representation was replied to and the petitioner was informed with regard to its rejection vide letter dated 22-4-1992 (vide Annexure "Y1"). Thus, there was a delay of 43 days in the disposal of the said representation.

(19) Now, the question which comes to the to of the tongue is as to what is the effect of the said inordinate and unexplained delay ? Would it render the detention to the petitioners illegal and invalid ? The above said question came up turn consideration before their Lordships of the Supreme Court in *Jayanarayan Sukul Vs. State of West Bengal, . . .*" (4) The reason for immediate consideration of the representation is too obvious to be stressed. The persona] liberty of a person is at stake. Any delay would not only be an irresponsible act on the part of the appropriate authority but also unconstitutional because the Constitution enshrines the fundamental right of a detenu to have his representation considered and it is imperative that when the liberty of a person is in peril immediate action should be taken by the relevant authorities." Their Lordships of the Supreme Court cited with approval the said observations, alluded to above, in *Mahesh Kumar Chauhan alias Banti Vs. Union of India and others*,

(20) It is crystal clear from above that a duty has been cast on the shoulders of the authorities who detain a particular person to explain the delay of each and every day since it is a matter which is connected with the liberty of a citizen. In case the authorities failed to explain the delay in the consideration of the representation of a detenu in that eventuality his detention would become illegal, and invalid. Every person has got a fundamental right to have his representation considered with all promptitude at the command of the detaining authorities. Non consideration of the representation of the petitioner with the promptitude which it is entitled to would be vocative of Article 22 of the Constitution.

(21) A matter very much akin to the matter in hand came up for consideration before a Single Judge of this Court as reported in 1989 (2) Delhi Lawyer 337, *Kishore Kumar Mundhra v. Union of India & Others*, (6) A representation moved by a detenu in the said case dated 7-11-1988 which was delivered in the President's Secretariat took 10 days in reaching the COFEPOSA Unit, as is the case in the present case. In the instant case the representation was delivered in the Secretariat of the President on 31-3-1992 but the same was delivered in the COFEPOSA Unit on 10-4-1992. It was held that there was no Explanation of the said delay, hence the detention of the petitioner was held to be illegal.

(22) In the circumstances stated above, the petitioners arc entitled to succeed. The two petitions i.e. Criminal Writ Petition Nos. 147 & 185 of 1992 are allowed. The detention orders dated 12-2-1992 are hereby quashed. The petitioners be set at liberty in case they are not required in any other case.