
(1987) 06 DEL CK 0002

In the Delhi High Court

Case No : Criminal Writ Appeal No. 56 of 1987

Kuldip Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 01-06-1987

Acts Referred:

Citation : (1987) ILR Delhi 327

Hon'ble Judges : M.K. Chawla, J

Bench : Single Bench

Advocate : Kapil Sibal, N.C. Chawla, Trilok Kumar and U.L. Watwani, for the Appellant;

Judgement

M.K. Chawla, J.

(1) On 14th October. 1986 the officers of the Customs, attached to the Preventive Unit, Mangalore intercepted and detained a lorry bearing Registration No. Usw 7438. near Katpadi Petrol Pump. At that time, the lorry was being driven by the petitioner, Kuldip Singh while two other persons Bhupender Singh and Arak Bahadur were sitting in the cabin. On examination of the lorry the Officer observed that the cargo loading portion of the lorry had a false bottom covered with wooden planks of about one inch thickness. On removal of one of the planks they found brick shaped heavy substance scantily packed in gunny bags. On removal of one of the gunny wrapped packages the officers observed that it contained silver ingots .For detailed examination lorry was brought to the old Custom House, Bunder, Mangalore. All the planks were got removed and 120 silver ingots weighing 3818.273 kgs. valued at Rs. 1,64,18,573 neatly packed in gunny wrapper were removed. In the presence of the Punch witnesses the Superintendent seized the lorry as well as the contraband smuggled silver ingots after the petitioner failed to produce any document for its lawful possession.

(2) During the course of interrogation of the petitioner and his colleagues, it transpired that Kuldeep Singh, who is a resident of New Delhi, had studied up to

8th standard and could read, write and speak Punjabi and Hindi. He purchased the present lorry with a loan assistance from Union Bank of India, Saharanpur Branch about a month back. He came across a person by the name of Mohammed of Mainapore and during the discussion Shri Mohammed offered to engage the petitioner for transporting foreign origin goods from Mangalore to Delhi on good premium freight. The petitioner accepted the proposal. Shri Mohammed then desired that the petitioner should reach Mangalore with the lorry on 13th October, 1986. In compliance with this direction the petitioner reached and contacted Shri Mohammed, at a fixed place at Mangalore. The petitioner and Shri Mohammed took the lorry to a shore point 15-20 kms. away, for the loading of silver ingots. The loading of 120 silver ingots were completed during the night. The petitioner along with his companions left the shore at about 3.00 A.M. Shri Mohammed got down from the lorry when it reached the highway crossing, and instructed the petitioner to take the consignment to Delhi. The petitioner had hardly gone about 30-35 kms. on the National Highway when the Officers of the Preventive Department sitting in a jeep gave a signal for stopping of the truck. The petitioner, however, ignored the signal and continued the running of the vehicle. The officers chased the lorry and were able to stop it at some place? distance. It was then that the silver ingots were discovered and taken into possession.

(3) The statement of Bhupiader Singh, cousin brother of the petitioner and Arak Bahadur, cleaner of the truck corroborated the version of Kuldeep Singh. On the basis of this material the detaining authority came to the conclusion that notwithstanding the action that may be initiated against the petitioner under the Customs Act, 1962, the detention of the petitioner is 1923 necessary under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereafter referred to as "COFEPOSA") with a view to preventing him from engaging, concealing and transporting the smuggled goods. The detention order is dated 9th December, 1986. The grounds of detention along with copies of the documents relied upon by the detaining authority were duly served upon the petitioner. On that very material a declaration u/s 9(1) of the Cofeposa was issued on 12th January, 1987 by Shri M. L. Wadhwan, Additional Secretary to the Government of India :

" I, the undersigned, hereby declare that I am satisfied that the aforesaid Shri Kuldeep Singh is likely to engage in transporting and concealing smuggled goods in the inland area fifty kilometers in width from the coast of India falling within the territories of the State of Karnataka which is an area highly vulnerable to smuggling The order of detention and declaration u/s 9(1) of the Cofeposa are under challenge in the present . writ petition.

(4) Even though numerous grounds have been urged in the writ petition for the quashing of the impugned orders but the learned counsel for the petitioner has confined his arguments to three main points.

(5) The first and foremost submission is that to a large extent the order of

detention is based on the statements of the witnesses recorded u/s 108 of the Customs Act. Such statements are required to be recorded by a Gazetted Officer. In this case the name of the officer who recorded the statements of the witnesses has never been published in the official Gazette Notification. This very fact was not in the knowledge of the detaining authority who relied upon the statement and passed the order of detention. Such a lapse is fatal and the impugned orders cannot be allowed to stand.

(6) The case of the respondents is that the Superintendents of Customs and Central Excise are Gazetted Officers vide Government of India. Ministry of Finance Notification No. 10 C12) Easter.(Special) 48 dated 30th September. 1948. Shri S V. Pandit who recorded the statement of the detenu u/s 108 of the Customs Act was promoted as Superintendent of Customs and Central Excise vide Establishment Order No. 79 82 dated 4th May, 1982. Therefore he was competent to record the statements. It hardly matters if his name is not published in the official Gazette Notification after promotion. On this ground the order of detention cannot be held illegal.

(7) It is true that the name of Shri S. V. Pandit was not published in the Gazette after his promotion as Superintendent but with what effect ? Section 108 of the Customs Act provides that the statement of the persons should be recorded by a Gazetted Officer. It is no where lays down that his name must appear in the Official Gazette. On this appeal, the latest judgment of the Supreme Court reported as Pushpadevi M. Jatia Vs. M. L. Wadhawan, Additional Secretary, Government of India & Ors., Jt. 1987 (2) S.C. 299 is a complete answer. Though this case is on Fera violation but the principle is the same. It lays down that :

"THE word "Gazetted" does not imply that the appointment of such officer should be published in the official gazette. All that is required by Section 40(1) of the Fera, that such officer recording the statement must be holding a gazetted post of an officer of Enforcement, in contradistinction to that of an Assistant Officer of Enforcement which is a non-gazetted post. What is of significance, it is said, is that at the time when the officer recorded the. statement he was holding the gazetted post of an enforcement officer and discharging the functions attached, to the post....." "..... that where an officer exists under the law. it matters not how the appointment of the incumbent is made, so far as validity of its acts are concerned. It is enough that he is clothed with the insignia of an officer, and exercises its powers and functions. The official acts of such persons are recognised as valid under the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief.... ." The above said observation fairly applies to the facts of the present case. From the counter it can safely be inferred that Shri S. V. Pandit who recorded the statements was working as Superintendent of Customs and Central Excise which post is a Gazetted post. The non-publication of his name in the official Gazette will not invalidate the statements recorded by him. This objection thus has no force.

(8) The next ground of attack is that the representation of the detenu dated 26th December, 1986 addressed to the detaining authority i.e. the Governor, State of Karnataka has not been-considered at all. The detenu has not received any communication. except the order of rejection of his representation from Shri K. N. Karantha, Under Secretary to Government, Home Department (COFEPOSA CELL) on 8th January, 1987 (Annexure "F"). This is not in compliance of the requirements of Cofeposa Act. The submission is that, if the representation has not been placed before the detaining authority which in this case is the Governor, State of Karnataka, then the order of detention must be quashed. To support this argument, learned counsel" referred to the order of detention dated 9th December, 1986 and pointed out that though the order bears the signatures of the Secretary to the Government of Karnataka, Home Department but is issued, "by order and in the name of the Governor of Karnataka". It comes to that the detaining authority in this case is the Governor, State of Karnataka and none else. For that purpose, a copy of his representation was forwarded to the Secretary to the Governor of Karnataka. Governor's Secretariat, Raj Bhawan, Bangalore. This is clear from the letter of the Under Secretary to the Government of Karnataka, Home Department (COFEPOSA CELI) dated 6th January, 1987. The fate of this representation according to the learned counsel, is not known to the detenu which by itself is a violation of the safeguard under Article 22(5) of the Constitution of India. In support of this submission, reliance was placed on the judgment reported as Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI) and Others, , wherein on this aspect it was observed that where detaining authority is Home Minister, but detenus representation is rejected by the Secretary held, that the Secretary had no jurisdiction to consider or pass any orders on the representation and hence the continued detention of the detenu becomes void.

(9) On this aspect the submission of the learned counsel for the respondent is that the order of detention was passed by the Home Minister and the representation of the detenu was also considered and rejected by the Home Minister. However, the rejection communication was sent to the detenu by the Tindar Secretary to Government, Home Department (COFEPOSACELL) in accordance with the Allocation of Business Rules, of the State of Kamataka. The Governor, State of Karnataka do not come in the picture at all, though all the acts are to be done "by order and in the name of the Governor of Karnataka" as per the transactions of Business Rules, 1977 issued by the State of the Karnataka Government.

(10) There is much substance in the stand of the respondents. Learned counsel for the respondents has taken me through the concerned file. On perusal thereof, I find that the order of detention was approved by the Home Minister. Later on the representation of the detenu was also considered and rejected by the order of the Home Minister. It may be that the order of rejection was communicated by the Under Secretary to Government, Home Department (COFEPOSA CELL) but to my mind it is in accordance with the Karnataka Government (Allocation of

Business) Rules. 1977. In Schedule IX of the said Rules the powers of the Home Department are definite. One such power is preventive detention falling under the head "LAW And ORDER". Rule 14 of the Karnataka State (Transactions of Business) Rules, 1977 lays down that the Minister In-charge shall be primarily responsible for the disposal of the business pertaining to his department. Rule 19 of the said Rules provides as to how the orders of the Governor are to be communicated. This rule reads as under :

"19(1)Orders and instruments made and executed in the name of the Governor of Karnataka, shall be authenticated by the signature of a Secretary, an Additional Secretary, a Special Secretary, a Joint Secretary, a Deputy Secretary, an Under Secretary, or by such other officer as may be specially empowered in that behalf by the Governor in the manner specified below, and such signature shall be deemed to be the proper authentication of such order or instrument :- By Order and in the name of the Governor of Karnataka. (Signature) Name and designation of the Officer authorised to sign." This procedure appears to. have been meticulously followed in the case of the present detenu. The order of rejection, though is of the .Home Minister, but it has been authenticated and communicated to the detenu, under the signature of the Under Secretary. There is no illegality on this score. Under similar circumstances the rules of Business of Government of Maharashtra, came in for consideration in the judgment reported as Smt. Masuma Vs. State of Maharashtra and Another, . The operative portion of the judgment is reproduced below :

"WHERE the order of detention was made by the Secretary to Government in exercise of powers conferred u/s 3(1) the order could not be said to be invalid merely because the representation made by the detenu against the order of detention was . considered and disposed of by the Minister of State for Home Affairs. When the Order was not made by the Secretary to Government in his individual capacity as an Officer of the State Government but it was made by him as representing the State Government it was the State Government which made the order of detention acting through the instrumentality of the Secretary to Government who was authorised so to act for and on behalf of and in the name of the State Government under the Rules of Business. There is no requirement express or implied in any provision of the Cofeposa Act that the same person who acts for the State Government in making the order of detention must also consider the representation of the detenu. Further, when the Secretary of Government was authorised under standing order of the Chief Minister to deal with and dispose of the case and it was in exercise of the authority thus conferred that he acting for the State Government made the order of detention against the detenu u/s 3(1), it was the State Government which made the order of detention and not the Secretary of Government in his individual capacity. Further, when the order. of detention was made in the name of the Governor of the State and was authenticated by the Under Secretary to the Government and recited in so many words that it was the State Government which was confirming the order of detention and continuing the detention it could not be said that the

decision to confirm the order of detention and continue the detention was not taken by the State Government as required by Section 8(f) when the correctness of the order was not displaced by the detenu". This ratio is fully applicable to the facts of the present case, except that, here it is the State of Kamataka, whereas in the reported judgment it was State of Maharashtra. Both the State have their own Rules or Business and Allocation or Business Rules. There is thus no force in this submission also.

(11) The last submission of the learned counsel for the petitioner is that the order under challenge is not preventive but punitive. The detaining authority while arriving at a subjective satisfaction to detain the petitioner failed to take note of the fact that it was a solitary incident, and the petitioner was not in a position or the capacity to indulge in such like activities in future. The submission is that the detenu is an ordinary resident of Delhi. He is a truck driver by profession, and not a man of means." In order to earn his livelihood he purchased the truck after taking loan from Union Bank of India, Saharanpur. There is no previous history of such activities to his credit, There is no material on record to suggest that in future he is likely to engage himself in keeping concealing and transporting the smuggled goods, particularly when his vehicle has since been seized. In view of these circumstances, the detention is not preventive but punitive. The stands of the respondents is that the subjective satisfaction of the detaining authority was arrived at on the material before it and the same cannot be made the subject matter of attack. The detaining authority was fully aware of the propensity of the petitioner in indulging in such like activities in future. The order is based on facts. It is valid and legal. It does not call for any interference.

(12) Preventive detention unlike punitive .detention, which is to punish for the wrong done, is to protect the society by preventing wrong being done. The preventive action postulates if timely step is not taken, the person sought to be prevented will indulge in an activity, by engaging, concealing and transporting of smuggled goods thereby acting prejudicial to the augmentation Of foreign exchange resources of the country. In other words if the activity is not interdicted by the preventive detention order such an activity is likely to be repeated. The problem before this court is that if it is shown that the petitioner detenu has already been effectively prevented, inasmuch as, has been incapacitated by the seizure of his vehicle meant for trans-ported the smuggled goods, then was there any need to pass the order of detention. In this case, in my opinion there was urgent need for immediate action. The detenu is a dryer by profession. His area of operation was Delhi and adjoining States. The lure of easy money led him to fall prey to the attraction offers of one Mohammed and agreed to carry out the illegal activities, of transporting smuggled goods from a far of State to Delhi. In order to achieve this object, he purchased the "truck after obtaining loan from Union Bank of India, Saharanpur Branch. He was aware of the nature of the goods to be transported. With that end in view he paid a sum of Rs. 1000 to a carpenter for creating a false bottom in the truck to conceal the

consignment. While going from Mangalore to the site of loading near the sea-shore the detenu intentionally smeared the number plate of his truck to avoid detection. The loading of silver ingots was completed during the dead darkness. For transporting the previous metal to Delhi he charged Rs. 15,000 instead of normal freight of Rs. 6000. The petitioner took all possible precautions for this daring adventure but unfortunately the mission failed. Although the participation in the act of carrying and transporting the smuggled goods has been voluntary.

(13) Now the question for determination is as to whether a single solitary act attributed to the petitioner is sufficient to warrant an inference that he will repeat his activity in future also ? Its answer will determine the fate of the petitioner.

(14) The order of detention is essentially a precautionary measure and it is based on a reasonable prognosis of the future behavior of a person based on his past conduct judged in the light of surrounding circumstances. Such past conduct may consist of one single act or of a series of acts. But whatever it be, it must be of such a nature that an inference can reasonably be drawn from it that the person concerned would be likely to repeat such acts to as to warrant his detention (see : Debu Mahato Vs. The State of West Bengal,).

(15) This Very observation was affirmed in the later judgment of the Supreme Court reported as Mrs Saraswathi Seshagiri Vs. State of Kerala and Another, . The relevant observation on this aspect is reproduced below :

"WE must of course make it clear that it is not out view that in no case can a single solitary act attributed to a person form the basis for reach ing a satisfaction that he might repeat such acts in future and in order to prevent him from doing so, it is necessary to detain him. The nature of the act and the attendant circumstances may in a given case be such as to reasonably justify an inference that the person concerned, if not detained, would be likely to indulge in commission of such acts in future .The order of detention is essentially a precautionary measure and it is based on a reasonable prognosis of the future behavior of a person based on his past conduct judged in the light of the surrounding circumstances. Such past conduct may consist of one single act or of a series of acts. But whatever it be, it must be of such a nature that an inference can reasonably be drawn from it that the person concerned would be likely to repeat such acts so as to warrant his detention".

(16) In the present case, to my mind, the detaining authority was well aware of the requirements of law and the precautions which they were expected to take before exercising the power of detention. The impugned order is based on the past conduct of the petitioner, showing his tendencies and inclinations that he is likely even in future to act in a manner prejudicial to the Conservation of Foreign Exchange resources.

(17) It may be that his truck has been sized by Customs Preventive Staff, but that by itself is not enough to dampen his energies in future adventures. He is basically a truck driver by profession. It does not matter for him, if he is not the

owner of a vehicle but there is nothing to stop him in engaging himself in the transporting or smuggled goods in the vehicles of others. He will certainly engage himself in such like activities in future to wipe off the damages he has suffered in the last attempt.

(18) According to the learned counsel for the respondent previously also, the activities of the petitioner have come to the adverse notice of the officers of the Directorate of Revenue Intelligence. Inasmuch as, he was caught, charged and proceeded against for smuggling hashish and heroin from Nepal to India. It was so stated while opposing the bail application before the Chief Judicial Magistrate, Mangalore. It comes to that the present is not the solitary incident. He is a regular defaulter, and will go to any extent. On the pretext of making easy money. He will certainly perform much better in future also as and when an occasion arises.

(19) The petitioner in this case was caught in the act of concealing and transporting the smuggled goods i.e. Silver ingots, in his truck. The circumstances in which the silver ingots were being smuggled, as also the facts, which have come to the knowledge of the respondent during interrogation clearly indicate that the detenu was engaged in the activity of smuggling precious metal and if that be so, it could not be said, that the order of detention was passed by the authority without applying its mind to the facts of the case. The order of detention, to my mind, was passed plainly and indubitably with a view to preventing the detenu from continuing the activity of smuggling and it was, Therefore, a perfectly valid order of detention. The satisfaction of the detaining authority is based on the material placed before it, and does not call for interference.

(20) No other point has been raised nor requires going into. I see no force in the petition and the same is hereby dismissed.