(2015) 08 RAJ CK 0116

In the Rajasthan High Court

Case No : Criminal Writ Petition Nos. 40 and 41 of 2013

Lakshman Sindhi and Others APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 18-08-2015

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3
Constitution of India, 1950 — Article 22, 226, 32
Customs Act, 1962 — Section 108, 111(i), 82

Citation : (2015) 08 RAJ CK 0116

Hon'ble Judges : Kanwaljit Singh Ahluwalia, J;Banwari Lal Sharma, J

Bench : Division Bench

Advocate : Suresh Sahni and R.M. Sharma, for the Appellant; R.D. Rastogi, Additional Solicitor General and Ashish Tiwari, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Kanwaljit Singh Ahluwalia, J—Lakshman Sindhi S/o. Late Ramchander and his brother Kishore Sindhi have preferred two separate writ petitions in this court bearing D.B. Criminal Writ Petition No. 40/2013 and D.B. Criminal Writ Petition No. 41/2013. In both the writ petitions filed under Article 226 of the Constitution of India, they have prayed that writ in the nature of certiorari be issued and impugned orders dated 30.5.2013 and 16.7.2013 whereby the petitioners were ordered to be detained and kept in custody in Central Jail, Jaipur with a view to prevent them to indulge in smuggling activity in future, be quashed. On 16.7.2013, Joint Secretary, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau (COFEPOSA Unit) had passed orders under Subsection (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 for detaining the petitioners. Petitioners before their arrest at pre-execution stage have approached this court praying that the above said two impugned orders be quashed.

2. Petitioners alongwith the writ petitions have annexed various show cause

notices issued to them from time to time. Annexure-1 is photocopy of the show cause notice dated 17.10.2011, Annexure-2 is photocopy of the show cause notice dated 24.10.2011, Annexure-4 is photocopy of the show cause notice dated 24.4.2012 and Annexure-5 is photocopy of the revised show cause notice dated 18.1.2013 served upon the petitioners. A perusal of the show cause notices issued to the petitioners reveal that certain consignments purportedly comprising of Glass Chatons and Iridium arrived as a postal parcel through Foreign Post Office, Jaipur in the name of M/s. Esdire International, House No. 2305, Ghee Walon Ka Rasta, Johari Bazar, Jaipur. Postal parcels bearing EMS No. 055266881 HK and 055266895 HK were consigned to M/s. Esdire International. Case of the Department is that in case of goods imported through post, it is mandatory as per Section 82 of the Customs Act, 1962 that label or declaration should be accompanied with description, quantity and value of goods for the purposes of entry. In the present case, Iridium weighing 6.080 kg seized by the Directorate of Revenue Intelligence was not specified in the declaration as required under Section 82 of the Customs Act, 1962 and was in excess of goods viz. Glass Chatons included in the entry. The Department seized iridium weighing 6.080 kg., market value of which was approximately Rs. 1.0 crore. Such seizure was made under Section 111(i) & (m) of the Customs Act, 1962. During investigation it surfaced that previous eleven consignments cleared under eight invoices contained in excess 57.04 kg. goods suspected to be Iridium and same were not declared as per the declaration prescribed under Section 82 of the Customs Act, 1962. The Department had formulated an opinion that in case petitioners are not detained as a preventive measure, they will continue to indulge in similar smuggling activities in future.

3. Notice of the writ petitions was issued. Joint Secretary (COFEPOSA), Central Economic Intelligence Bureau, Department of Revenue, Ministry of Finance, Government of India, New Delhi filed a counter affidavit to the writ petition. In the said counter affidavit, it has been averred that the Directorate of Revenue Intelligence (DRI-Sponsoring Authority) had found sufficient material regarding involvement of proposed detenues in the smuggling activities and they had also taken into consideration the propensity of the petitioners to indulge in the smuggling activities in future and thus, the detaining authority had issued detention order dated 30.5.2013 against the petitioners with a view to prevent them from engaging themselves in smuggling of goods in the future.

4. Shri R.D. Rastogi, learned Additional Solicitor General, assisted by Shri Ashish Tiwari has relied upon a judgment delivered by the three Judge Bench of Hon''ble Apex Court in Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, (1991) 72 CompCas 336 : (1991) 53 ELT 481 : (1991) 1 JT 549 : (1990) 2 SCALE 1352 : (1992) 1 SCC 496 Supp : (1990) 3 SCR 583 Supp to contend that at pre-execution stage, power of the High Court is very limited, scope of entertaining such writ petition at pre-execution stage is very narrow and only on five grounds enumerated in the case of Alka Subhash Gadia (supra), High Court can cause interference:-

"30. As regards his last contention, viz., that to deny a right to the proposed detenu to challenge the order of detention and the grounds on which it is made before he is taken in custody is to deny him the remedy of judicial review of the impugned order which right is a part of the basic structure of the Constitution, we find that this argument is also not well-merited based as it is on absolute assumptions. Firstly, as pointed out by the authorities discussed above, there is a difference between the existence of power and its exercise. Neither the Constitution including the provisions of Article 22 thereof nor the Act in question place any restriction on the powers of the High Court and this Court to review judicially the order of detention. The powers under Articles 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences. However, the courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary, extraordinary and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which these extraordinary powers are used and are declined to be used by the courts. To accept Shri Jain''s present contention would mean that the courts should disregard all these time-honoured and well-tested judicial self-restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibbal for the appellants, as far as detention orders are concerned if in every case a detenu is permitted to challenge and seek the stay of the operation of the order before it is executed, the very purpose of the order and of the law under which it is made will be frustrated since such orders are in operation only for a limited period. Thirdly, and this is more important, it is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. The courts have the necessary power and they have used it in proper cases as has been pointed out above, 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. The refusal by the courts to use their extraordinary power 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."

5. To counter the above submission made by Shri Rastogi, Shri Suresh Sahni, learned counsel for the petitioners, has relied upon Subhash Popatlal Dave Vs. Union of India (UOI) and Another, (2013) CriLJ 4166 : (2013) 298 ELT 3 : (2013) 3 RCR(Criminal) 858 : (2013) 9 SCALE 295 : (2014) 1 SCC 280 to contend that the grounds enumerated in Alka Subhash Gadia (supra) are only illustrative and not exhaustive. Shri Sahni has further contended that the detention order passed by the authorities is bad in the eye of law as it has been passed on vague, extraneous and irrelevant grounds, thus the case of the petitioners will fall under ground No. (iv) specified in the case of Alka Subhash Gadia (supra).

6. Shri Sahni has further relied upon the judgment rendered by the Hon''ble Apex Court in Deepak Bajaj Vs. State of Maharashtra and Another, AIR 2009 SC 628 : (2008) 11 JT 609 to contend that in the detention order, the detaining authority has taken into consideration the confession made by Ram Prasad, a postal employee, but has ignored subsequent retraction of the confession by Ram Prasad, an employee of the Postal Department. To buttress this argument, Shri Sahni has read following paras from the two Judge Bench judgment of the Hon''ble Apex Court rendered in Deepak Bajaj''s case (supra):-

"31. Most of the retractions were made to the DRI, and it belongs to the same department as the sponsoring authority, who is the Additional Director, Revenue Intelligence. Hence, it was the duty of the DRI to have communicated these retractions of the alleged witnesses to the sponsoring authority, as well as the detaining authority. There is no dispute that these retractions were indeed made by persons who were earlier said to have made confessions. These confessions were taken into consideration by the detaining authority when it passed the detention order. Had the retractions of the persons who made these confessions also been placed before the detaining authority it is possible that the detaining authority may not have passed the impugned detention order. Hence, in our opinion, the retractions of the confessions should certainly have been placed before the detaining authority, and failure to place them before it, in our opinion, vitiates the detention order.

32. It has been repeatedly held by this Court that if a confession is considered by the detaining authority while passing the detention order the retraction of the confession must also be placed before him and considered by him, otherwise the detention order is vitiated. Thus in Ashadevi Mehta (Detenu) Vs. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat and Another, AIR 1979 SC 447 : (1979) CriLJ 203 : (1979) 1 SCC 222 : (1979) SCC(Cri) 262 : (1979) 2 SCR 215 : (1979) 11 UJ 92 this Court observed (vide SCC pp. 228-229, para 7) :

"7. Further, in passing the detention order the detaining authority obviously based its decision on the detenu''s confessional statements of 13-12-1977 and 14-12-1977 and, therefore, it was obligatory upon the Customs Officers to report the retraction of those statements by the detenu on 22-12-1977 to the detaining authority, for, it cannot be disputed that the fact of retraction would have its own impact one way or the other on the detaining authority before making up its mind whether or not to issue the impugned order of detention. Questions whether the confessional statements recorded on 13-12-1977 and 14-12-1977 were voluntary statements or were statements which were obtained from the detenu under duress or whether the subsequent retraction of those statements by the detenu on 22-12-1977 was in the nature of an afterthought, were primarily for the detaining authority to consider before deciding to issue the impugned detention order but since admittedly the aforesaid vital facts which would have influenced the mind of the detaining authority one way or the other were neither placed before nor considered by the detaining authority it must be held that there was non-application of mind to the most material and vital facts vitiating the requisite satisfaction of the detaining authority thereby rendering the impugned detention order invalid and illegal."

It may be noted that in the above decision, this Court has held that it was the duty of the Customs Officer to have reported the retraction of the statements to the detaining authority. Hence, even if the retractions in the present case were not placed before the detaining authority that will not be of any avail to the respondents since it has been held that it was the duty of the authorities before whom the retractions were made to have forwarded them to the detaining authority and the sponsoring authority. We entirely agree with the above view.

33. In Adishwar Jain Vs. Union of India (UOI) and Another, (2006) 112 ECC 328 : (2006) ECR 328 : (2006) 9 JT 432 : (2006) 10 SCALE 553 : (2006) 11 SCC 339 : (2006) 7 SCR 801 Supp : (2006) 2 UJ 1353 this Court observed that where the relevant documents have not been placed before the detaining authority, issuing of the detention order itself would become vitiated. The same view was taken in V.C. Mohan Vs. Union of India and Others, AIR 2002 SC 1205 : (2002) 80 ECC 241 : (2002) 7 ELT 141 : (2002) 2 JT 365 : (2002) 2 SCALE 381 : (2002) 3 SCC 451 : (2002) 37 SCL 754 : (2002) 2 SCR 144 : (2002) 1 UJ 641 : (2002) AIRSCW 984 : (2002) 2 Supreme 152 .

34. In Alka Subhash Gadia''s (supra) this Court followed its earlier decision in Rajinder Arora''s case (supra) in which case it was held that failure to place the retraction of the confession before the detaining authority vitiated the detention order. The same view was taken by this Court in P. Saravanan Vs. State of T.N. and Others, (2001) CriLJ 3285 : (2001) 10 SCC 212 , Ahamed Nassar Vs. The State of Tamil Nadu and Others, AIR 1999 SC 3897 : (2000) CriLJ 33 : (1999) 4 Crimes 358 : (1999) 66 ECC 295 : (1999) 8 JT 252 : (1999) 6 SCALE 539 : (1999) 8 SCC 473 : (1999) 3 SCR 657 Supp : (1999) AIRSCW 3985 : (1999) 9 Supreme 198 , Sita Ram Somani Vs. State of Rajasthan and Others, AIR 1986 SC 1072 : (1986) CriLJ 860 : (1986) 2 Crimes 233 : (1986) 1 SCALE 148 : (1986) 2

SCC 86 , etc."

7. Shri Sahni relying on the case of Deepak Bajaj (supra) has contended that retraction of confession which is a relevant material, has not been taken into consideration by the detaining authority, thus authorities have relied upon irrelevant material, therefore it is to be assumed that the detaining authority has passed the detention order on vague, extraneous and irrelevant grounds as the most relevant ground i.e. retraction of the confession was not considered by the authorities. Thus, Shri Sahni has vehemently canvassed before us that ground No. (iv) enumerated in Alka Subhash Gadia (supra) stand violated by the detaining authority and thus, at a pre-execution stage, we should follow Depak Bajaj''s case (supra) to cause interference and quash detention orders.

8. We have perused the show cause notice (Annx.4) dated 24.4.2012 issued by the Directorate of Revenue Intelligence, Delhi Zonal Unit. In Para-11 of the show cause notice, the authorities have observed as under:-

"11. Shri Ram Prasad Gujjar vide his letter dated Nil received in DRI office on 06.06.2011 [RUD-8] retracted his statements recorded by DRI under Section 108 of the Customs Act, 1962 stating that his statements were obtained by using coercive methods. Reply to the retraction denying the allegation was sent to Shri Ram Prasad on 16.06.2011 [RUD-9] by DRI. It was found to be false, baseless, misleading and after thought."

9. Shri R.D. Rastogi to counter the argument raised by Shri Sahni has submitted that he is in possession of grounds of detention and from a perusal of the grounds of detention it is apparent that the detaining authority was aware of the retraction of confession made by Ram Prasad Gujjar. It is contended that once the authorities record in the detention order that Ram Prasad Gujjar has retracted his confession and are aware about this fact, it necessarily implies that it was subject matter of consideration of the detaining authority.

10. Having heard the learned counsel for the parties, we are of the view that the scope of this court to exercise jurisdiction under Article 226 of the Constitution of India at pre-execution stage is very limited. We are neither in appeal nor in revision to examine the merits of the detention order. Needless to say, the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 provides necessary mechanism for redressal of the grievances of the petitioners. In Alka Subhash Gadia (supra), in Para-28 the Hon''ble Apex Court has observed as under:-

"28. It is to prevent the possible abuse of this draconian measure that the legislature has taken care to provide certain salutary safeguards such as (i) the obligation to furnish to the detenu the grounds of detention ordinarily within five days and in exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of detention, (ii) the right to make representation against the order of detention, (iii) the Constitution of Advisory Board consisting of persons who are or have been qualified to be appointed as judges of the High Court, (iv) the reference of the case of the detenu to the Advisory Board within 5 weeks of the date of detention, (v) the hearing of the detenu by the Advisory Board in person and the submission by the board of its report to the government within 11 weeks from the date of detention, (vi) the obligation of the government to revoke the detention order if the Advisory Board reports that there is in its opinion no sufficient cause for the detention of the person concerned, (vii) the provision of the maximum period for which a person can be detained and (viii) revocation of the detention order by the government on the representation of the detenu independently of the recommendation of the Advisory Board, etc. In addition, the detenu or any one on his behalf has a right to move the High Court and the Supreme Court by way of a habeas corpus petition challenging the detention on various grounds which are already pointed out above while discussing the various authorities. It must further be appreciated that the validity of the Act in question being permitted to be enacted by the Constitution, has also been upheld by this Court with all its present provisions as they stand. However, repugnant the notion of preventive detention may be to the champions of individual liberty, it has also to be remembered that the power to make such a law even during peace time has been incorporated in the Constitution by the framers of the Constitution many of whom had tasted the bitter fruits of such detention law during the struggle for freedom. Whatever may, therefore, be one''s own notions about the dimensions of individual liberty, one must accept the provisions of the Constitution as enacted by the mature vision and seasoned experience of the Constitution makers. We must also not lose sight of the fact that over the years, by and large, the judiciary has interpreted the Act and the orders made thereunder strictly so as to give to the detenu the benefit of every unexplained error of omission and commission and has either struck down the order itself or has held its further operation illegal."

11. Therefore, being cautious of our limited scope and self evolved judicial policy that the aggrieved person should first follow the due operation and implementation of the concerned law and exhaust the remedy provided by it, before approaching the High Court, we will not exercise our discretionary extraordinary and equitable jurisdiction under Article 226 of the Constitution of India, being cautious that our powers are to be used sparingly and only in those circumstances where no other efficacious remedy is available. Thus, at pre-execution stage of the detention order we are hesitant to cross the Lakshman Rekha of which the High Court has been reminded by the Hon''ble Apex Court in plethora of judgments.

12. Consequently, we hold that the petitioners have failed to make out a case for exercising our jurisdiction at pre-execution stage.

13. Thus, both the writ petitions, being devoid of merit, are hereby, dismissed.