(1988) 04 CAL CK 0005

In the Calcutta High Court

Case No : Matter No. 103 of 1987

Lava Mishra APPELLANT

Vs

Collector of Customs RESPONDENT

Date of Decision : 06-04-1988

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 104, 108, 129A, 3, 74
Gold (Control) Act, 1968 — Section 71

Citation : (1989) 22 ECC 94 : (1989) 40 ELT 301

Hon'ble Judges : Baboo Lall Jain, J

Bench : Single Bench

Advocate : U.N. Mishra, for the Appellant;P.N. Roy, for the Respondent

Final Decision : Dismissed

Judgement

Baboo Lall Jain, J.—This is an application made by Lava Mishra under Article 226 of the Constitution of India inter alia for issue of a writ in the nature of Mandamus commanding the respondents to withhold and/or forbear from giving effect to or acting in terms of the purported order of detention passed under the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act (hereinafter also referred to as ''Cofeposa'') against the petitioner, a writ in the nature of certiorari, calling upon the respondents to produce before this Court, the records relevant to the purported order passed under the Cofeposa, so that conscionable justice may be done by quashing and/or setting aside the same. The petitioner also prayed for an injunction restraining the respondents from giving any effect to or taking any steps in furtherance of implementing the order of detention passed under Cofeposa against the petitioner as referred to in the petition. The other prayer in the said writ petition is for issue of a writ in the nature of Mandamus directing them to return the sum of Rs. 27,180/- seized by them from the petitioner and a mandatory injunction directing the respondents to return the seized sum of Rs. 27,180/- to the petitioner.

2. The case of the petitioner as made out in the writ petition is that he is a citizen of India carrying on business under the name and style of Bed Prakash Textile & Jay Prakash Chemicals at No. 85/1, Monohar Das Street Calcutta. The petitioner helds trade licence issued by Calcutta Municipal Corporation. The petitioner is a regular income- tax assessee. On or about 2nd of visited the business premises of the petitioner and search and seizure was carried out. The Customs Officers caused an almirah to be opened through a key maker and seized cash worth Rs. 27,180/-. It is alleged that the petitioner was not present and the said search and seizure was carried out in presence of Sarbeshwar Tewari, an employee of the petitioner. The Customs Officers seized the said sum of Rs. 27,180/-. The said Customs officers took the petitioner''s said employee Sarbeshwar Tewari to the petitioner''s residence and conducted another search there. The said Sarbeshwar Tewari and two others were then taken to the Customs House and detained for a considerable time. It is alleged that the said employee of the petitioner under coercion and duress signed some statements. On 4th of September, 1986, the said Tewari was produced before the Chief Metropolitan Magistrate and was directed to be remanded to jail custody. On 11th September, 1986 the said Tewari was released on bail by the Chief Judge City Sessions Court, Calcutta. The Learned Judge of the City Sessions Court directed the said Tewari to attend Customs House, every week. On 17th of September, 1986 the said Tewari made another statement confirming the previous one. On 18th of September, 1986 the said Tewari filed a petition before the Chief Metropolitan Magistrate, Calcutta inter alia alleging that he signed the statements under coercion and/or duress. The said Tewari further alleged that on 29th September, 1986 he was compelled by the Customs Officer under threat to write out and sign another statement confirming the previous statements. It is alleged by the petitioner that according to the said Tewari, the said statements are not voluntary statements and they are not legally binding on him or the said Tewari.

3. The petitioner has further alleged that he came to learn from an application made by the Superintendent of Customs (Preventive) with regard to the various allegations made against him by the Customs Officers. The copy of the said petition has been annexed to the said writ petition. The allegations made in the said petition of the Superintendent of Customs (Preventive) are summarised as follows :

Acting on specific information''s, the Customs Officers ambushed themselves on 2nd September, 1986 at Nandaram Market, Calcutta and successfully intercepted two persons who were about to enter a room of the said market. That, on interrogation of the said two persons, who gave out their names as Jagadish Prasad Agarwalla and Niranjan Sharma, it appeared that the said two persons were carrying contraband gold and as such for thorough examination of their persons, the said two persons were brought to customs house, where they were subjected to personal search and two packets of gold biscuits containing three pieces each having inscriptions indicative of their foreign origin were recovered from the waist. The said two persons on interrogation informed that they came from Gangarampur Dist. West Dinajpur with gold biscuits. The said gold biscuits were scheduled to be delivered to one Shri Lava Mishra of Sonapatti (Manohar Das Street). On being identified by accused Jagadish Agarwala the business premises of Lava Mishra at 85/1, Monohar Das Street, was searched on the strength of a search order issued by the competent authority and Sarbeswar Tewari was found present in the said Gaddi. The search resulted in the seizure of Indian currency amounting to Rs. 27,180/-and 5 anklets (which are used for carrying and concealment of foreign gold biscuits.) On search of a room on 10, Savaram Basak Street, where the said Tewari resided, another three pieces of anklets were recovered.

4. The said 6 pieces of gold were bearing foreign markings and weighed 10 tollas each. The said 60 tollas of gold was valued at Rs. 1,58,527/- and the same were seized under belief that it was liable to confiscation. The Indian currency amounting to Rs. 27,180/- were also seized as the same was believed by the Customs Officers to be sale- proceeds of smuggled gold. The said three persons i.e. Jagadish Prasad Agarwala, Niranjan Sharma and Sarbeswar Tewari, were arrested u/s 104 of the Customs Act, 1962 on 3.9.1986 and they were produced before the Chief Metropolitan Magistrate on 4th September, 1986. The said Customs Officer opposed any prayer for bail if made and prayed for remand in jail custody.

5. According to the petitioner Lava Mishra the said sum of Rs. 27,180/- was a part of the cash in hand. Income tax returns as on 31st March, 1986, showed cash in hand of Rs. 38,835.98 P. and the said amount found on second September, 1986 was part of the said cash in hand and not proceeds of smuggled gold.

6. It is further alleged that on 29th of December, 1986 some Customs Officers came to the residence of the petitioner Lava Mishra and showed a copy of some order under Cofeposa and stated that they would return to arrest the petitioner. It is alleged that there is no material before the authorities to come to their satisfaction to invoke the provisions of Cofeposa. It is alleged that there is no case against the petitioner and the authorities have been trying to implicate the petitioner in a most arbitrary, capricious and high handed manner. In the affidavit-in-opposition affirmed by Adesh Kumar Singh, who is the Assistant Collector of Customs (Preventive), the very same allegations as were made in the petition of the Respondent No. 3 i.e. Superintendent of Customs (Preventive), before the Chief Metropolitan Magistrate are repeated. It has been further alleged that on investigation it was revealed that the said 6 pieces of gold under seizure were for delivery to Lava Mishra the petitioner herein. It was further revealed that the said Lava Mishra was habitual recipient of smuggled gold biscuits. It has been stated that at the time of search, none of the employees of Lava Mishra had informed the Customs Officers that Lava was away in his native village in Bihar. On the other hand on 3.9.1986 the son of the

petitioner, Deb Mishra stated before the Customs Officers that his father Lava Mishra had returned home at 7, Cross Road, Calcutta, on the previous evening on 2.9.1988 and thereafter he had not seen his father. It has been further stated that the search was conducted in accordance with law and resulted in recovery and seizure of Indian currency amounting to Rs. 27,180/- believed to be the sale proceeds of smuggled gold and 5 pieces of knee caps (anklets) old and used believed to be used for carrying and concealment of smuggled foreign gold bars and biscuits. It is further alleged that the search at 10, Sova Ram Basak Street, resulted in recovery of another 3 pieces of old and used knee caps believed to be used for carrying smuggled golds. It is further stated that from the evidence and records, it appears that the petitioner had been dealing in smuggled golds and as such he was summoned under Article 108 of the Customs Act, 1962, to appear before the Superintendent of Customs on 4.9.1986 and again on 1.10.1986 but he neither appeared nor gave any lawful excuse for such non-appearance. It has been denied that on 29th of December, 1986 the concerned Customs Officers had threatened the wife of the petitioner or that she was shown a copy of any order or that they had allegedly stated that they would soon return to arrest the petitioner. It has been denied that there was no material before the detaining authority, on which he could have arrived at the satisfaction in respect of the petitioner or to make the order of detention or that the satisfaction is an alleged one or that the order is a purported one.

7. After the search and seizure, on 2nd September, 1986 Lava Mishra was summoned to appear before the Superintendent of Customs (Preventive) West Bengal, Calcutta on 4-9-1986. Shri U.N. Mishra, Advocate, on behalf of Smt. Sushila Mishra, wife of Lava Mishra by a letter dated 4-9-1986 informed that Lava Mishra, was lying in Nursing Home, the address of which is not known to Sushila Mishra wife of Lava Mishra. In support of illness of Lava Mishra one Doctor''s certificate was produced. Summons u/s 108 of the Customs Act, 1962, were subsequently issued to Lava Mishra on all the available addresses including the address of the Doctor who certified the illness of Lava Mishra with direction to appear before the Customs authorities to 1-10-1986 at 12 hour. However, Lava Mishra neither appeared in response to the said summons nor gave any lawful excuse for such non-appearance.

8. It appears that an order was made on 12th December, 1986 under the Cofeposa for the preventive detention of Shri Lava Mishra and also of Sarbeswar Tewari. Inspite of the said order, the said Lava Mishra was not traceable on 7th of January, 1987. The present application was moved by Lava Mishra, before this Court and an interim order was passed in terms of prayer "F of the petition till 31st January, 1987. On 27th of January, 1987 Mr. P.N. Roy, Advocate, appearing on behalf of the respondents stated that the respondents do not want to use any affidavit, for vacating the interim order. In that view of the matter the Court directed that the matter will be heard on 30th January, 1987 at 2 p.m. when the respondents shall produce the relevant records before this Court.

9. Prayer ''F of the petition reads as hereunder :

"Injunction restraining the respondents and each of them and/or their servants, agents and/or subordinates from giving any effect to or taking any steps in furtherance of implementing the order of detention passed under Cofeposa against the petitioner as referred to in the petition till the disposal of this application."

10. On 30th of January, 1987 the interim order was directed to continue till the disposal of this application and directions were given for filing of the affidavit.

11. On 5th February, 1987, an affidavit-in-opposition affirmed by Assistant Col lector of Customs, Shri Adesh Kumar Singh was filed. The petitioner filed an affidavit- in-reply affirmed in March, 1987.

12. During the course of the hearing, the petitioner produced before me a copy of the grounds served on Sarbeswar Tewari on which order of detention of said Sarbeswar Tewari under Cofeposa was made. It has been submitted that another order for detention has been made in respect of Lava Mishra and the same is also dated 12th of December, 1986 and that most of the grounds contained in the said order respecting Tewari, are likely to be common. The petitioner also produced before me copy of the two show cause memos issued by the office of the Assistant Collector of Customs dated 24th February, 1987. The said show cause memos have been issued under various provisions of the Customs Act and also of the Gold Control Act. The petitioner had also produced before me a copy of his reply dated 11th June, 1987 to the said show cause memos. The petitioner had also produced a copy of the order dated 10th August, 1987 whereby orders for confiscation of the gold biscuits and also of Indian currency amounting to Rs. 27,180/- were made. Various penalties were also imposed under the Customs Act, 1962. The said order also directs confiscation of the said gold biscuits u/s 71 of the Gold (Control) Act, 1968 and personal penalties u/s 74 of the Customs Act. It has not been stated, as to whether any appeal u/s 129A of the Customs Act, 1962, has been filed against the said order dated 10th August, 1987. However, it does not appear that such an appeal was at all preferred by Lava Mishra or any one else.

13. The present application was inter alia to obtain relief against the order passed under Cofeposa. Before the time when the writ petition was moved and the interim order was obtained, the order under the Cofeposa had not been served nor was the petitioner detained under Cofeposa prior to the present application. In view of the interim order to further steps by respondents were possible. Naturally the grounds of detention also were not served on the petitioner, prior to the making of the present application. As a matter of fact the petitioner was not factually made aware about the factum of the order made. The petitioner of course apprehended, that such an order might have been made against him, which of course terms out to be correct.

14. The principles governing interference by the Writ Court in a case like this

where the petitioner comes to the court before the detention has been made and before the grounds thereof have been served, on the petitioner, have been laid down in a recent unreported judgment of the Division Bench of this court, delivered on 1st April, 1987 in the case of Kanailal Bhagnani v. Union of India and Ors. in F.M.A.T.No.748 of 1987. In the said judgment the Division Bench of this Court observed inter alia as follows:-

"After considering the respective contentions made by the learned Counsels of the parties, it appears to us that the Writ Court should not normally interfere with an order of detention passed under Cofeposa before the said order is served and the person is detained. The Writ Court should bear in mind the distinction between a preventive Act and a punitive Act. There is however, no doubt that in exceptional cases if the Writ Court is satisfied that there is no material whatsoever on the basis of which any person can reasonably form an opinion that an order of detention can be validly passed under Cofeposa the Writ Court may interfere and prevent service of the order of detention and the consequential detention of the applicant."

15. In another Full Bench decision of the Gujarat High Court reported in AIR 1987 Gujarat 253, the said Full Bench held as follows: -

"From the foregoing discussion, it is clear that a detenu cannot ordinarily seek a writ of mandamus in cases where he has not surrendered nor has been served with an order of detention and he cannot ordinarily invoke the jurisdiction of the High Court under Article 226 of the Constitution. But in exceptional cases and in rarest of rare cases wherein the order of detention appears to be ab-initio void the detenu can invoke the jurisdiction of the High Court under Article 226 of the Constitution even before he surrenders and even before the order of detention is served upon him, subject to the limitation indicated in this judgment."

16. As observed in the aforesaid judgments, it is only in exceptional cases, when the Writ Court is satisfied that there is no material whatsoever on the basis of which any person can reasonably form an opinion to the effect that an order of detention can validly be passed under Cofeposa, that the Writ Court should interfere and prevent ser vice of the order of detention and the consequential detention of the applicant. As the Full Bench of the Gujarat High Court held, that it is only in the rarest of the rare cases, wherein the order of detention, appears to be ab-initio void, that the detenu can invoke Article 226 of the Constitution even before he surrenders and even before the order of detention is served upon him.

17. Even looking into the scheme of the Cofeposa, the said Act provides for preventive detention and it is not necessary that it should be proved before the authority concerned that the person is actually guilty of having committed such an offence as provided u/s 3 of the said Act. The whole intention of the Act is to provide for preventive detention. In the instant case eight old and used anklets which are ordinarily used for carriage of smuggled gold bars and biscuits, have

undisputably been recovered from the guddi as well as from the tenanted premises of the petitioner at No. 10, Sovaram Basak Street. There are statements of various persons showing that smuggled goods have been sold to the petitioner on earlier occasions also. There are also statements that the gold biscuits which were seized were intended ton be delivered to the petitioner. There are statements from petitioners employees stating the purpose for which the seized anklets were used. The petitioner did not appear pursuant to the summons u/s 108 of the Customs Act for quite some time. It is only on 7th January, 1987 that the present application was moved.

18. In the facts of this case, it cannot be said that there are no materials whatsoever on the basis whereof an order of detention can be made. It also cannot be said that the order has been made mala fide or in an arbitrary manner. Whether the materials are sufficient or not and whether the grounds whereunder the order has been made are sufficient or not, was a matter for the appropriate authority to consider, in the first in stance. The grounds have not yet been served on the petitioner and he cannot at this stage, submit as to whether the same are sufficient or not. In a case like present one, I do not think that it would be proper for this Court to interfere, at this stage, under the provisions of Article 226 of the Constitution of India. I have not gone into the truth or otherwise of the allegations made against the petitioner. All that is being held is that this is not a case of the nature wherein the Court''s interference should be made at this stage. In the premises this application is dismissed and all interim orders were vacated. This will not however, prevent the petitioner from making any fresh application to this Court, if at all he is detained and if at all he is so advised either under the Cofeposa or to this Court under Article 226 of the Constitution of India, after the grounds for detention are served upon him and he is advised that the same do not warrant his detention.

19. So far as the question with regard to the confiscation of the sum of Rs.27,180/- is concerned, I feel that the petitioner did not obtain any order for stay of the proceedings before the Customs authorities. The order for confiscation was made, on 10th August, 1987 which was much after the making of the present application. The petitioner had a remedy open to him to go in appeal from the said order. It cannot be said that the issuing of the summons u/s 108 of the Customs Act was invalid. The petitioner did submit his reply to the show cause notice, which was much after the making of the present application. I do not think that in the facts and circumstances of this case, the Court should interfere specially when the proceedings under the Customs Act were al lowed to go on and no stay thereof was obtained even at the time of the making of the present application or even thereafter. The petitioner had his remedies open under the Customs Act, by way of preferring an appeal, and it was upto the petitioner to take recourse thereto.

20. In that view of the matter this application is dismissed and the rule if issued is discharged. All interim orders are vacated. There will be no order as to costs.

