
(2007) 08 BOM CK 0104

In the Bombay High Court

Case No : Criminal Writ Petition No. 2096 of 2006

Mabelaranah Niranjana Puthran

APPELLANT

Vs

The State of Maharashtra and Detaining Authority, The
Superintendent of Prison, The Mumbai Central Prison and The
Superintendent of Prison

RESPONDENT

Date of Decision : 08-08-2007

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 2, 3, 3(1)
Customs Act, 1962 — Section 111, 113, 2, 2(39), 77
Penal Code, 1860 (IPC) — Section 107

Citation : (2007) 109 BOMLR 1749

Hon'ble Judges : Roshan Dalvi, J;Ranjana Desai, J

Bench : Division Bench

**Advocate : Maqsood Khan, for the Appellant; D.S. Mhaispurkar, Assistant Public
Prosecutor, for the Respondent**

Judgement

Ranjana Desai, J.—The petitioner is the wife of one Niranjana Puthran (for short, "the detenu"), who is detained under order of detention dated 16/8/2006 issued by respondent 2, the Principal Secretary, (Appeals & Security), Home Department, Government of Maharashtra u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, "the COFEPOSA Act") with a view to preventing him in future from smuggling goods. The order of detention along with the grounds of detention and the material in support thereof was served on the detenu on 2/11/2006.

2. Admittedly, the detenu is a Custom House Agent. The grounds of detention indicate that based on a specific intelligence that two import consignments in the name of M/s. Orbit International (IEC No. 0392022320) and M/s. Drashti Overseas (IEC No. 0300007442) which have arrived in Mumbai on board Cathay Pacific Airlines on 18/19th February, 2006 and which have been declared to contain "plastic parts of toys" are actually containing analog watch movements.

The officers of DRI, Mumbai, traced the two consignments which had arrived at Air Cargo Complex, Sahar, Mumbai, under IGM No. 2072/06 dated 18/2/2006 vide HAWB 162151 in the name of M/s. Orbit International and HAWB 162152 in the name of M/s. Drashti Overseas and detained the same on 20/2/2006 for detailed examination. The said two consignments covered under B/E No. 546584 dated 20/2/2006 of M/s. Orbit International and B/E No. 546586 dated 20/2/2006 of M/s. Drashti Overseas were examined on 21/2/2006, in detenu's presence as CHA of M/s. Swastik Shipping Agency and Shri M.S. Rawat, Asstt. Security Manager, Airports Authority of India (AAI). The said two consignments were declared to contain "plastic parts of toys and on examination the same were revealed to actually contain 400000 pieces of analog watch movements. The said two consignments totally containing 400000 analog watch movements, valued at approximate Rs. 68,00,000/(IMV) were seized.

3. During the course of investigation, number of statements came to be recorded. The statements of the detenu revealed the role played by him. It appears to be the case of the detaining authority that the above consignments were imported by one Umesh Shetty. The Import Export Code of M/s. Orbit International and M/s. Drashti Overseas is in the name of one Yogesh Merchant. Umesh Shetty was introduced to the detenu at Sahar Air Cargo by one NRI Mohan. Umesh Shetty told the detenu that he was planning to import analog watch movements by mis-declaring the same as parts of plastic toys in the import documents and he told the detenu to manage the clearance of the same. Umesh Shetty also told him to arrange for Import Export Code. The detenu knew that Yogesh Merchant had two Import Export Codes. The detenu offered those Codes to Umesh Shetty for importing the consignments of analog watch movements and Umesh Shetty agreed for the same. Umesh Shetty agreed to give Rs. 1 lac to the detenu. According to the detaining authority, on the basis of the said Codes, the consignments were imported. On the basis of the material placed before the detaining authority, the detaining authority was satisfied that the detenu had actually participated in the acts of smuggling of goods. She was satisfied that unless detained, the detenu will continue to indulge in similar activities in future and, therefore, she issued the impugned order of detention. In the petition, the said order is under challenge.

4. We have heard Mr. Khan, the learned Counsel appearing for the petitioner and Mr. Mhaispurkar, the learned A.P.P. appearing for the State. Mr. Khan assailed the impugned order on the ground that it is vitiated on account of gross nonapplication of mind on the part of the detaining authority. He pointed out that in the grounds of detention, the detaining authority has clearly stated that the detenu has facilitated illegal imports. In fact, all the statements indicate that the detenu only facilitated smuggling. He has no role to play in the actual smuggling of the goods. He submitted that the goods originated from Hong Kong. Import documents were prepared in Hong Kong. The misdeclaration was done in Hong Kong. The detenu has nothing to do with the misdeclaration. The detenu is not concerned with the illegal bringing of the goods to India. He is not even

concerned with the disposal of the goods in India. He has merely facilitated the clearance of goods. He could, therefore, never have been detained with a view to preventing him from smuggling goods. Mr. Khan also drew our attention to the affidavit of the detaining authority. He pointed out that in paragraph 6 of the affidavit, the detaining authority has clearly stated that in order to facilitate smuggling of goods, the detenu has taken active part by procuring the IEC Code of one Yogesh Merchant. Therefore, it is the case of the detaining authority that the detenu merely facilitated smuggling. Drawing our attention to Section 107 of the Indian Penal Code, the learned Counsel contended that Section 107 defines the term "Abetment of a thing". The learned Counsel contended that the Explanation 2 thereof, states that whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act. Mr. Khan submitted that, therefore, the detenu may at the most be called an abettor. In support of his submission, he relied on the judgments of this Court in *Rajaram Singh v. State of Maharashtra and Ors.* in Criminal Writ Petition No. 529 of 2002 decided on 11/12/2002 and in *Mahinder Singh Balwant Singh Oberai v. The State of Maharashtra and Ors.* in Criminal Writ Petition No. 2610 of 2005 decided on 4/8/2006.

5. Mr. Mhaispurkar, the learned A.P.P. appearing for the State on the other hand submitted that the detenu's activities are not merely restricted to facilitating smuggling. He has taken active part in the smuggling. Procuring of Import Export Code itself is a part of smuggling activity. Mr. Mhaispurkar contended that if the Import Export Code was not procured, the goods could not have been smuggled into India. He submitted that the activities of the detenu overlap. He is engaged in smuggling activities as well as in abetting smuggling. The learned A.P.P. contended that the affidavit of the detaining authority is sought to be read out of context. He submitted that if the averments are read in proper context and perspective, it would be evident that what the detaining authority wishes to convey is that the detenu has not merely facilitated smuggling but actively taken part in smuggling. In support of his submission, the learned A.P.P. relied on the judgment of the Supreme Court in *Narendra Purshotam Umrao Vs. B.B. Gujral and Others*, .

6. To understand the submissions of the learned Counsel, it is necessary to first have a look at the definition of the term "smuggling" as found in the Customs Act. Smuggling is defined u/s 2(39) of the Customs Act, which reads thus:

2(39). "smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation u/s 111 or Section 113.

Section 111 pertains to confiscation of improperly imported goods. Section 113 pertains to confiscation of goods attempted to be improperly exported. We are concerned here with goods improperly imported. Section 111 states under what circumstances goods brought from a place outside India are liable to be confiscated. If goods are brought to India under circumstances stated in Clauses

(a) to (p), they are liable to be confiscated. Smuggling is complete when such goods are brought in India from a place outside India.

7. Section 2(e) of the COFEPOSA Act defines smuggling as follows:

2(e) Smuggling has the same meaning as in Clause 39 of Section 2 of the Customs Act and all its grammatical variations and cognate expressions shall be construed accordingly.

8. u/s 3 of the COFEPOSA Act, a person can be detained with a view to preventing him from (i) smuggling goods or (ii) abetting the smuggling of goods or (iii) engaging in transporting or concealing or keeping smuggled goods or (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods or (v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods. Each activity is a distinct head. It is argued that if a person is indulging in abetment of smuggling of goods, he cannot be detained with a view to preventing him from smuggling goods.

9. Since Mr. Mhaispurkar has heavily relied on the judgment of the Supreme Court in Narendra Umrao's case (supra), it is necessary to refer to it. In that case, the detenu was detained with a view to preventing him from smuggling goods. It was urged that there was non application of mind on the part of the detaining authority because the actual smuggling was done by someone else. The detenu had merely instigated, organized and facilitated the act of smuggling. He could have been, therefore, detained with a view to preventing him from abetting the smuggling of goods but not with a view to preventing him from smuggling goods.

10. The Supreme Court negated this contention. The Supreme Court noted that the goods belonged to the detenu; he had gone to Dubai to purchase the goods; he had taken delivery of the goods in Dubai; he had then loaded them in a vessel belonging to him; he took charge of the vessel as a tindaar. The Supreme Court observed that in a case like the present, where there is a widespread network employed by a person, it cannot be said that he is not engaged in the act of smuggling even though it was accepted that he had instigated, organised and facilitated the smuggling.

11. The Supreme Court observed that there is, no doubt, a distinction between an act of smuggling and abetting the smuggling of goods for purposes of preventive detention u/s 3(1) of the COFEPOSA Act. Nonetheless, the term "smuggling" as defined in Section 2(e) of the COFEPOSA Act has the same meaning as in Section 2(39) of the Customs Act, which when read with Section 111 of that Act, is wide enough to include and make liable not only the actual smuggler but also persons abetting the smuggling of goods as well as all persons dealing in such goods, etc. The Supreme Court further observed that though Clauses (i) and (ii) of Sub-section (1) of Section 3 of the COFEPOSA Act may operate on different fields, they may sometimes overlap, with a view to broaden

the scope of preventive detention.

12. Dealing with the facts before it, the Supreme Court observed that the detenu's activities were such that his case would be covered by both Clauses (i) and (ii) of Section 3(1) of the COFEPOSA Act. The Supreme Court further observed that assuming the detenu was merely an abettor still his activities afforded sufficient grounds for the prognosis that he would have himself indulged in actual smuggling if not detained.

13. It is clear, therefore, that though Section 3 of the COFEPOSA Act provides for distinct grounds of detention, in a given case, the activities can overlap. A wide meaning will have to be given to the word "smuggling" within the meaning of Section 2(e) of the Customs Act with a view to broaden the scope of preventive detention. This does not, however, mean that where overlapping is not possible some linkage should be established between actual smuggling and steps taken to facilitate smuggling. The facts will have to be closely scrutinized to ascertain whether the detention order is issued on correct grounds.

14. In the present case, the detenu is a Custom House Agent. The seized consignments were imported by one Umesh Shetty, who was introduced to the detenu at Sahar Airport. Umesh Shetty told the detenu that he was planning to import analog watch movements by mis-declaring them as parts of plastic toys. He told the detenu that he needed Import Export Code for importing the said analog watch movements and he should arrange for them. The detenu knew Yogesh Merchant. Yogesh Merchant had two Import Export Codes i.e. M/s. Orbit International and M/s. Drashti Overseas. The detenu offered them to Umesh Shetty for importing analog watch movements. Umesh Shetty agreed to pay the detenu Rs. 1 lac for each consignment.

15. Yogesh Merchant has in his statement stated that in August, 2005, the detenu met him and told him that he had a person who wanted to import some goods from China and that this person did not have an Import Export Code. The detenu asked him whether he can give the Import Export Code of his firms for importing the goods to that person and in return he would get Rs. 2,000/to Rs. 2,500/per consignment. Yogesh Merchant agreed for this arrangement. Yogesh Merchant has further stated that the detenu took details of both the firms and details of the Import Export Codes. The detenu used to take his signatures on the import documents including letterheads and declarations in the name of his firms. Yogesh Merchant has stated that he never met the person who had caused the imports to be made and all his dealings were with the detenu.

16. In his statement, Umesh Shetty has stated that the detenu was introduced to him by one Mohan. He told the detenu that he was planning to import analog watch movements which could be declared as "parts of plastic toys" in the import documents. He told the detenu to arrange for Import Export Code. The detenu accordingly procured Import Export Code from Yogesh Merchant. Thereafter, consignments misdeclared as plastic toys were imported by Umesh Shetty and

were cleared by the detenu.

17. It is clear, therefore, that the goods belonged to Umesh Shetty. They were misdeclared by him and imported on the Import Export Code of Yogesh Merchant. The detenu procured Yogesh Merchant's Import Export Code and cleared the goods.

18. We have already noted that in this case, Section 111 of the Customs Act is attracted. Since the goods were misdeclared and imported, Section 111(1) and (m) may be attracted. Section 77 of the Customs Act provides for declaration. It has to be made by owner of the goods. Therefore, the detenu is not concerned with misdeclaration. We find that till the goods landed in India, the detenu had nothing to do with them. It is Umesh Shetty who is the importer. Import Export Code may have been procured by the detenu. But Umesh Shetty made use of it and brought the goods illegally to India. The activities of the detenu are, therefore, not covered by the definition of "smuggling" as found in Section 2(39) of the Customs Act read with Section 2(e) of the COFEPOSA Act. There is no overlapping as stated by the Supreme Court in Narendra Umrao's case (*supra*). In that case, the goods belonged to the detenu and he had taken active part in smuggling. The said judgment, therefore, cannot be applied to the facts of this case.

19. The view expressed by us is supported by the judgment of this Court in Mahinder Singh's case (*supra*). In that case, the detenu was detained with a view to preventing him from dealing in smuggled goods otherwise than by engaging in, transporting or concealing or keeping smuggled goods. The detenu had allowed his Import Export Code number to be used for smuggling goods from Dubai. This Court observed that there appears to be no overact by the detenu for smuggling goods or otherwise dealing with them other than by allowing his license to be used for the purpose of import. This Court observed that the detenu's activities are in the nature of abetment of smuggling activities by allowing the use of his Import Export Code number and there was no material to show that he dealt with the smuggled goods. Therefore, merely procuring Import Export Code was considered as abetting of smuggling of goods. In the present case also, the detenu has arranged for Import Export Code. His other activities pertain to clearance of the goods. There is nothing to indicate that the detenu had actually smuggled goods to India. There is no material to indicate that he had anything to do with the said goods prior to their landing in India.

20. In the judgment of the Division Bench of this Court, to which one of us (Smt. Ranjana Desai, J.) was a party, in Rajaram's case (*supra*), similar view is taken. In that case, the detenu was detained with a view to preventing him from smuggling. The role attributed to the detenu was collecting the gold bars near the aerobridge and get those passed on to him outside the airport and then deliver them to one Ashok. This Court observed that the detenu was not involved in the activity of smuggling but he was abetting the smuggling. He was helping persons involved in smuggling gold. In our opinion, the present case is covered

by this judgment. It is pertinent to note that in an affidavit, the detaining authority has also stated that in order to facilitate the smuggling of goods, the detenu has taken active part by procuring the Import Export Code of one Yogesh Merchant. It is clear, therefore, that the detenu can be said to have abetted the smuggling of goods but it cannot be said that he was concerned with the smuggling of goods.

21. We are, therefore, of the considered opinion that the impugned order of detention suffers from non application of mind and is contrary to law. It is illegal and must be set aside. Hence, the following order:

ORDER

The impugned order of detention dated 16/8/2006 issued by respondent 2 - the Principal Secretary (Appeals & Security), Home Department, Government of Maharashtra, against the detenu Niranjana Puthran is quashed and set aside. Detenu Niranjana Puthran is ordered to be released from detention forthwith unless otherwise required in any other case.

The petition is disposed of.