
(1994) 11 DEL CK 0058

In the Delhi High Court

Case No : Criminal Writ Petition No. 222 of 1994

Mansukh Chhagan Lal Bhatt

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 02-11-1994

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 11
Constitution of India, 1950 — Article 21

Citation : (1994) 4 AD 657 : (1994) 3 Crimes 1041 : (1994) 56 DLT 372 : (1994) 31 DRJ 317 : (1995) 1 RCR(Criminal) 288 : (1995) RLR 7

Hon'ble Judges : M. Jagannadha Rao, C.J.;A.D. Singh, J

Bench : Division Bench

Advocate : Arun Jaitley, H.A. Ahmadi and V.K. Shall, for the Appellant;

Judgement

M. Jagannadha Rao, C.J.

(1) Rule D.B.

(2) This writ petition is now coming back before us after the Full Bench rendered its opinion on October 20,1994. In the Full Bench, we decided a point which was common to this writ petition and certain other petitions. We may briefly refer to what we decided in the Full Bench case. We there held mainly that neither the delay in the issuance of a detention order under the Conservation of Foreign Exchange and Prevention of Smuggling Act (hereinafter called COFEPOSA) nor the delay in execution of the detention order, fall within any of the five exceptions referred to in Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, . These exceptions relate to contingencies in which a person could challenge his proposed detention, at the pre- detention stage. In the Full Bench case, we also referred to the rulings of the Supreme Court, namely N.K. Bapna Vs. Union of India (UOI) and Others, , State of Tamil Nadu Vs. P.K. Shamsudeen, , Administration of the National Capital of Delhi, Raj Niwas, Delhi Vs. Prem Singh, and Subhash Muljimal Gandhi 1994

(5) T. 358. We further held that the above categories o) delays concerning the detention order did not also come within the "same species" rule enunciated in Subhash Muljimal Gandhi's case. We overruled the decision of the Division Bench, of this Court in Subhash Chander Vs. Union of India and others, and other rulings taking the same view. We approved certain other rulings of this Court in so far as they were consistent with the view expressed by the Full Bench.

(3) Now, we shall consider two other important points additionally arising in this case. Before we do so, we shall briefly refer to the facts of the case.

(4) The petitioner in this case was the master of a small vessel which came from Dubai to Daman and the Customs authorities entered the vessel on the sea on 24.5.89 and recorded statements. They seized VCPs, tape recorders etc. on 26.5.89 on board the vessel. After the vessel reached the port, it was also seized under panchnama on 30.5.89. On 24.5.89, 26.5.89 and 30.5.89 they recorded statements. A detention order was passed under the Cofeposa on 31.7.89 but has not been served on the petitioner so far. On 24.8.92 the petitioner made a representation for revocation and there was no reply. He made a second representation on 8.5.93 and it was rejected on 29.6.93 treating it as the representation of the co-detenu, which was not correct. The petitioner filed a writ petition in the Gujarat High Court but withdrew the same on 20.8.93. He submitted a fresh representation on 13.9.93 that in the subsequent order of the adjudication authority dated 16.3.1992, there is a finding that there was no "smuggling" into India and Therefore the rejection of the said representation by letter dated 19.10.93 vitiates the original order of detention dated 31.7.89. Of course the prayer in the writ is for issue of a writ of certiorari quashing the order dated 19.10.93 refusing to revoke the order of detention, though unserved.

(5) The first additional point raised in this writ petition is whether a person not under detention can file an application and invoke Section 11 of the Cofeposa seeking revocation of the order of detention and also whether pending disposal of the application sent u/s 11, the petitioner can, at the pre- detention stage, seek a direction that the detention order be not served upon him. In the case before us, however, the point may arise, in the event of our quashing the order dated 19.10.1993 of the respondents refusing to revoke the earlier order of detention dated 31.7.1989 and if we remit the matter back for fresh disposal, reviving the application for revocation. The second additional point is the contention that there is no "smuggling" by the petitioner as per the order of the , judicating authority passed on 16.3.1992 and hence the case comes within the third exception in Alka Subhash Gadia.

(6) Now, Section 11 of the Cofeposa states that "a detention order may, at any time, be revoked". It is argued for the petitioner that the words "at any time" would mean, in the context of Article 21 (Article 22 not being applicable before detention), that a person against whom a detention order was issued under the Cofeposa, could seek its revocation even before the detention order is served or could be actually served on him. In that context, it is further argued that pending

decision by the concerned authority on the Section 11 application for revocation of the order of detention, the Court could injunct the authority from detaining the person against whom the detention order is passed. This is the gist of the first additional point arising in this case.

(7) Such issues as these, indeed, arose before the Bombay High Court in *Manoharlal Narang vs. Union of India* (Special Civil Application No. 2752/75 (with CrI.Rev. 23/80) and were decided by Sawant, J (as he then was) and Pendse, J on 8.7.1980. It was held there by Sawant, J (as he then was) that at the pre-detention stage, the person who was proposed to be detained under the Cofeposa, could invoke Section 11 of the Act and seek revocation of the order of detention proposed to be served on him in view of the fundamental right guaranteed under Article 21 of the Constitution of India, which unlike Article 22, was applicable even at the pre-detention stage. It was further decided by Sawant, J in that case that till the Section 11 application was disposed of, the person had a fundamental right not to be detained and hence the High Court could pass an order injuncting the authorities not to detain the person till the Section 11 application is disposed of.

(8) But before Sawant J, the rights of a detenu at the pre-detention stage, came up for consideration in the Supreme Court more than ten years later and the petitioner naturally relied upon *Manoharlal Narang's* case decided by His Lordship while in the Bombay High Court. His Lordship summarised *Manoharlal Narang's* case as follows:-

"....the (Bombay) High Court held that a detention order is executable the moment it is passed. Hence, a person who is likely to be affected by such order has a right to approach the Court the moment he learns about it since he is sought to be deprived of his liberty by the said order. It may happen that an order is passed without there being a statute to support it or without complying with the provisions of the statute if any. The order may also be passed against a wrong person or for a wrong purpose, to insist in such cases that the person against whom the order is passed must first submit to the same and lose his valuable liberty before approaching the Court is, according to the Court, to insist upon an unreasonable condition. The Court further held that the fundamental rights granted by the Constitution particularly Articles 14,19 and 21 conferred on the persons likely to be affected by such order an implicit right to approach the court at any time and the Court cannot refuse relief to such a person by insisting that he first surrender his liberty. To the same effect are the view expressed by the High Courts in other cases later....."

The above passage shows that at the pre-detention stage the petitioner could be granted relief of injunction in view of Articles 14,19 & 21 as his application u/s 11 is pending.

(9) But, in *Alka Subhash Gadia* His Lordship was not prepared to approve the entirety of *Manoharlal Narang*. First His Lordship referred to five contingencies in

which the detention order could be challenged at the pre-detention stage and the relevant passage reads as under:

"THE Courts have the necessary power and they have used it in proper cases as has been pointed above, although such cases have been few and the grounds on which the Courts have interfered with them at the pre-execution stages are necessarily very limited in scope and number viz. where the Courts are prima face 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 the wrong persons (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."

It is clear that to this extent alone Manoharlal Narang's case was approved in Alka Subhash Gadia. It was not stated that the pendency of the Section 11 could be yet another ground for granting stay of the detention at the pre-detention stage. Though such a view was expressed by His Lordship in the Bombay High Court, the same was not accepted. Or else the pendency of the Section 11 application could have been included as the sixth contingency in Alka Subhash Gadia. In fact, Sawant, J significantly held in Alka Subhash Gadia that (see para 33, J.T. at page 567) the decisions of the Supreme Court and of the High Courts (must include the Judgment in Manoharlal Narang's case) to the extent inconsistent with Alka Subhash Gadia must be deemed to be overruled. His Lordship observed :

"TO the extent that the decisions of this Court in S.M.D. Kiran Pasha Vs. Government of Andhra Pradesh and Others, and the decisions of all the High Courts are contrary to or inconsistent with the view taken by us above, they will be deemed to have been disapproved and overruled".

(10) In our view, Therefore, it is clear from a reading of the Judgment of Sawant, J in Alka Subhash Gadia that while His Lordship approved Manoharlal Narang's case to the extent it referred to some or all the exceptions referred to later in Alka Subhash Gadia, the said decision of the Bombay High Court was correct to that extent. But, to the extent it held that the pendency of Section 11 application was treated by the Bombay high Court as another exception wherein the Court could interfere, the Supreme Court in Alka Subhash Gadia has overruled such a view.

(11) It may be asked whether after the recent decision of the Supreme Court in Subhash Muljimal Gandhi (supra), decided by Sawant and Mukherjee, JJ, is there any question of the contingency of the "pendency of Section 11 application" falling within the "same species" as the five contingencies referred to in Alka Subhash Gadia. In our opinion, not. We have explained the meaning of the words "same species" occurring in Subhash Muljimal Gandhi's case and we hold , on that basis, that the contingency of "pendency of Section 11 application" cannot be assimilated into the "same s"pecies" rule adumbrated by the Supreme Court

in Subhash Muljimal Gandhi's case.

(12) In the result, on the first additional point arising in this case, we hold that, at the pre- detention stage, it is open to the person against whom a detention order has been passed, to apply u/s 11 of the Cofeposa for revocation of the order, to the concerned authority seeking revocation of the order of detention and this right flows directly from Article 21 of the Constitution of India. The words "at any time" used in Section 11 do not mean "at any time after the execution", but mean "at any time after the passing of the detention order" But the fundamental right under Article 21 does not include a further right not to be detained till the application for revocation filed u/s 11 of the Cofeposa is disposed of. To the extent the Bombay High Court held in Manoharlal Narang's case (supra) that pending the Section 11 application, the person could not be detained, the said view must be deemed to have been overruled in Alka Subhash Gadia. The law remains the same even after Subhash Muljimal Gandhi's case (supra) decided recently.

(13) We shall then take up the second additional point raised before us in this writ petition. It is contended that subsequent to the order of detention dated 31.7.1989 passed against the petitioner, the adjudicating authority under the Customs Act, passed an order on 16.3.1992, and it is argued that that order decides that there was no "smuggling" by the petitioner on 26.5.1989. It is contended that by virtue of the order of the adjudication dated 16.3.1992, the very foundation of the order of detention dated 31.7.1989 has gone. According to counsel, a person who imports goods into India could declare the goods within 24 hours of the arrival of the goods at the Customs station and pay the duty etc and avoid confiscation. If the goods are not liable for confiscation, it is argued, there is no "smuggling" within the meaning of the said expression in Section 2(39) of the Customs Act or within Section 2(e) of the COFEPOSA. The case would then, it is argued, fall within the third contingency mentioned in Alka Subhash Gadia, namely, that the detention order is passed for a wrong purpose, that is to say, not for the purpose of preventing smuggling in future by the petitioner. Counsel requests us to look into the note-file and see if the authority which disposed of the Section 11 application, applied his mind to the above aspects said to arise out of the adjudication order.

(14) On the other hand, the learned counsel for the respondents contended that merely because of the subsequent adjudication order dated 16.3.1992, it did not follow that there was no "smuggling" within Section 2(39) of the Customs Act read with Section 30 thereof and within Section 2(e) of the COFEPOSA. It is also alternatively argued that the detention order is based on various material and even if the incident dated 26.5.1989 is excluded, the earlier acts of the petitioner several years ago and the fact that the petitioner changed the name of the vessel, and other circumstances permit the authority to sustain the detention order dated 31.7.1989. It is argued that, if there is some material before the authorities for the purpose of refusing to revoke the order of detention, then this

Court need not quash the order refusing revocation of the said order, it is also argued that the point raised by the petitioner does not bring the case within the third exception in *Alka Subhash Gadia*.

(15) We have considered these aspects and we are of the view that if the petitioner raises a question in the Section 11 application that the detention order falls within the exceptions (third exception, here) mentioned in *Alka Subhash Gadia*, then the concerned authority is bound to consider the said contention u/s 11, in the light of the material available before it. Or else, a right available at the pre- detention stage under Article 21 will be violated. The concerned authority exercising powers u/s 11 cannot say that as the petitioner has not submitted himself to the detention order, that could also be treated as a point against the person. In our view, the person sought to be detained can contend, as in this case before us, that his case comes within one of the five exceptions referred to in the *Alka Subhash Gadia* and in that event it is necessary for the concerned authority while exercising powers u/s 11, to consider the said contention.

(16) The Supreme Court has laid down in *Haradhan Saha Vs. The State of West Bengal and Others*, that the order u/s 11 which is communicated to the affected party need not contain the reasons for refusing to revoke the detention order. This position, in our view, holds good even in the pre- detention cases. But, at the same time, though the reasons for refusal to revoke the order need not be communicated to the person sought to be detained, it will be necessary for the concerned authority to record its reasons in its file. In such a context, it is also open to the High Court under Article 226 to look into the said reasons recorded in the file and consider whether the case of the person comes within the five exceptions mentioned in *Alka Subhash Gadia* or within the "same species" rule stated in *Subhash Muljimal Gandhi's* case (supra), as explained by us in the Full Bench case.

(17) In the present case, we have gone through the reasons recorded in the file by the concerned authority u/s 11 and we are satisfied that the contention of the petitioner that the adjudication order amounted to a finding of "no smuggling" the case fell within the third exception in *Alka Subhash Gadia* was not considered from that angle by the said authority. We are, therefore, of the opinion, that this is a fit case for quashing the order dated 19.10.1993 passed u/s 11 of Cofeposa and remitting the matter to the respondents for fresh consideration. We make it clear that we are not, on facts, going into the question as to what is the real effect of the adjudication order. We do not propose to express our view on that, one way or the other. That will be for the concerned authority u/s 11 to consider. All that we say is that if the contention of the petitioner is to be accepted, it will be necessary for the authorities to decide whether the case comes within the third exception mentioned in *Alka Subhash Gadia* whether the order of detention is for a "different purpose" than the one contemplated by the Act. No argument was advanced before us that the case comes within the "other species" rule in *Subhash Muljimal Gandhi's* case (supra).

(18) In the result, under the second additional point, we quash the order dated 19.10.1993 passed by the concerned authority u/s 11 refusing to revoke the order of detention and remit the petitioner's Section 11 application for fresh disposal by the same authority in accordance with law, in the light of the above decision .However, as already held while dealing with the first additional point, the revival of Section 11 application and its pendency once again, does not entitle the petitioner to the grant of any injunction that the detention order cannot be served on him in the meanwhile. Even during the pendency of Section 11 application, it is open to the authorities to execute the detention order.

(19) The writ petition is partly allowed to the extent indicated above.