
(1988) 02 KAR CK 0020
In the Karnataka High Court
Case No : Writ Petition (HC) No. 98 of 1987

Mrs. Latha

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 02-02-1988

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
(COFEPOSA) — Section 3, 3 (1) (iii)
Customs Act, 1962 — Section 108, 11 M, 123

Citation : (1988) 16 ECC 216 : (1988) ILR (Kar) 810 : (1988) 3 KarLJ 71

Hon'ble Judges : Prem Chand Jain, C.J.; Shivashankar Bhat, J

Bench : Division Bench

Advocate : G. Chander Kumar, for the Appellant; Chandrashekharaiyah,
Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Shivashankar Bhat, J.—Petitioner is the wife of detenu, Devaraj Shet. His detention u/s 3(1)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "the COFEPOSA" Act) is challenged in this Writ Petition.

2. The relevant facts in nutshell are that on 19-5-87 Devaraj Shet was detained at the KSRTC bus stand at Mangalore and on search, gold were found in his possession. Thereafter he was taken to the customs office for further investigation. It was opined that 11 yellow metal pieces in biscuit shape, the yellow metal chain and the yellow metal buckle were gold of foreign origin, totally weighing 1515.850 gms. and valued at Rs. 4,35,953/-. Detenu's statement u/s 108 of the Customs Act (shortly called "the Act") was recorded. Thereafter, on his arrest he was produced before the Judicial Magistrate. Subsequently he was released on bail. Two mahazars - one at the bus stand and another at the Customs office - were prepared which reflect the search and seizure of the gold, as also the opinion of the goldsmiths, etc., Purporting to base

on the several materials placed before the detaining authority (which are elaborately stated in the grounds for the detention, furnished to the detenu), the detaining authority made the detention order on 9-9-1987, and the detenu was detained since 18-9-1987 in the Central Prison, Bangalore.

3. The averments in the Writ Petition are traversed by the detaining authority through the counter-affidavit of the Home Secretary, Government of Karnataka.

4. The following contentions were urged by Sri Chander Kumar, learned Counsel for the petitioner :-

(i) The detention order is vitiated since the subjective satisfaction was arrived at on the basis of the rebuttable presumption made u/s 123 of the Act, without affording the detenu an opportunity to rebut the presumption.

(ii) The detaining authority has not applied its mind to the fact that the authority which seized the gold entertained the "reasonable belief" referred in Section 123 of the Act, only after the seizure and did not entertain the said belief anterior to the seizure.

(iii) Vital material document, Annexure -D (i.e., a news item in a Kannada daily) which indicates that seizure was doubtful was not placed before the detaining authority; and

(iv) There has been inordinate delay in passing the detention order, after the incident out of which about 70 days are not at all explained.

RE: CONTENTION (i) :

5. Sri Chander Kumar referred to para-20 of the order of detention and contended that, the detaining authority relied upon the presumption u/s 123 of the Act, that the gold in question were smuggled gold. The relevant para in the detention order (Annexure-B) reads as follows :-

"The gold biscuits under seizure attracts the provisions of Section 123 of the Customs Act, 1962, and as such the burden of proof that the said gold biscuits had not been smuggled into India is cast on you, and on your failure to discharge the said burden to the authorities, the said gold biscuits came to be seized by the officers. Importation of gold into India has been prohibited under the provisions of Section 130) of Foreign Exchange Regulation Act, except with the general or special permission from the Reserve Bank of India. You have not produced any such permission obtained from the Reserve Bank of India for the importation of the said gold biscuits under seizure to the competent authorities at the time of the seizure, of the said gold biscuits. Therefore, the gold biscuits under seizure are liable for confiscation under the Customs Act, 1962, and deemed to be smuggled goods within the meaning of Section 2(e) of the Cofeposa Act, 1974, read with Section 2(39) of the Customs Act, 1962."

6. In support of his contention, the learned Counsel relied on the two decisions - one of Delhi High Court in Girdhari Lal Govinddas Agrawal Vs. Union of India and

Others, and another of Bombay High Court in AMIRALI SADAK THAMBY v. THE STATE OF MAHARASHTRA & OTHERS 1984 Cri.L.J. 22.

In the case of Girdhari Lal Govinddas Agrawal Vs. Union of India and Others, challenge was to a detention order made u/s 3 of COFEPOSA Act, with a view to prevent the detenu from smuggling and abetting the smuggling of silver. There, it was presumed that the detenu had illegally exported or abetted the export of silver out of India and the presumption was drawn by virtue of Section 11M of the Customs Act. The Delhi High Court observed at para-7, --

"It would appear that the presumption raised u/s 11M of the Customs Act is rebuttable and this presumption can be raised only after affording an opportunity to the petitioner to prove that there was no justification for raising such a presumption."

Again at para-9 it is observed that, --

"It would thus appear that the scheme of the Act seeks to prevent illegal exports. The object of the Customs Act, 1962 as such is similar to what is sought to be achieved by COFEPOSA Act. We therefore find no reason why the detention could not be ordered on the basis of such a presumption. We may however observe that since the presumption is rebuttable, fair and adequate opportunity to rebut the same has necessarily to be afforded to a person against whom the presumption is sought to be raised. In the present case, it would appear that the petitioner has been detained on the basis of presumption raised u/s 11M Customs Act of 1962, without affording any opportunity to the petitioner to rebut the same."

7. Language of Section 11M is not the same as Section 123 of the Act. The actual words used in the grounds of detention in the said case before Delhi High Court also are not available in the order. The decision proceeds on the assumption that, the presumption against the detenu was drawn by the detaining authority. Facts narrated at paras 10 and 11 of the decision reveal that detenu's offer to identify the purchasers of silver was not availed of by the Department and at the time of hearing the Writ Petition, the sponsoring authority contended that those persons were not in existence. The investigation that should precede an action giving rise to the presumption u/s 11M of the Act, in the said case, was held to be defective and unfair by the High Court. Therefore, the High Court found at para-12 that, the detaining authority passed the order of detention in a most casual and mechanical manner. As will be presently seen, in the case before us here, the presumption u/s 123 of the Act was drawn only after the failure of the detenu to establish the licit nature of his possession of the gold. Only on failure of the detenu to show any document or furnish proper explanation regarding his possession of the gold, the seizing authority relied on Section 123 of the Act, in addition to its belief, which is referred to as a reasonable belief that the gold in question were smuggled. The presumption u/s 123 of the Act was not drawn by the detaining authority to substantiate the grounds of detention. Having regard

to these distinctive features, it is not necessary for us to express our opinion as to whether we concur with or differ from, the observations at paras 7 and 9 of the aforesaid decision of the Delhi High Court.

8. In *Amirali Sadak Thamby*'s case 1984 Cri.L.J. 22 detention u/s 3 of the COFEPOSA Act was under challenge. Earlier, diamonds had been seized from the detenu, kept in his premises. He had no ostensible means of living and failed to explain as to how he obtained the diamonds, valued at Rs.30 lakhs. In the order of detention, the detaining authority after narrating the facts and the seizure effected, stated (at page 24 top it is quoted), that, it was the duty of the detenu when contraband like diamond was seized in his premises "to show that the goods were not smuggled goods. "Therefore, COFEPOSA Act was invoked and the order of detention was made.

9. The entire argument of the Counsel in the said case proceeded on the assumption as to whether presumption u/s 123 of the Act can be raised by the detaining authority while passing order u/s 3 of the COFEPOSA Act (see page 25 col.2). There is a reference to a decision of this Court in WP. No. 23 of 1982, WP 23 of 1982 DD 12-10-1982. But the said decision is based on the fact that, except the raising of the presumption u/s 123, no basic material on which the authority arrived at the conclusion, was disclosed, in the grounds of detention; only position of law and not of facts, was informed to the detenu. Hence, this Court quashed the detention order therein. After referring to this decision and another decision of Bombay High Court reported in *M.G. Abrol and Another Vs. Amichand Vallamji and Others*, the Bench deciding *Amirali Sadak Thamby*'s case, proceeded to say, at para-11, --

"On the facts of this case, however, we find it unnecessary to decide the question as to whether the presumption u/s 123 of the Customs Act is available to the authority acting u/s 3 of the COFEPOSA Act. In our opinion, the detaining authority himself in the instant case has not relied upon the presumption arising u/s 123 of the Customs Act...."

After a few sentences, it is observed that,

"We find that there is no material at all before the detaining authority to hold that the Customs Officers seized the goods in the reasonable belief that they were smuggled goods. For example, there is no writing of the Customs authorities wherein it has been mentioned that they acted in the circumstances mentioned in Section 123 of the Customs Act nor is there any statement by any Customs Officer who took part in the raid of Room 15 in the Papad Chawl to the effect that they acted in the circumstances giving rise to the presumption u/s 123 of the Customs Act."

The last sentence in para-11 again says, --

"One cannot quarrel with this proposition but in the instant case it has not been said by anyone who effected the seizure that he had done so in the reasonable

belief that the goods which were being seized were smuggled goods."

Therefore, the Court held that presumption u/s 123 of the Act was not available to the detaining authority, "on the facts of this case." The entire decision is thus rested on the facts of the case. If the seizing authority had seized the diamonds on a reasonable belief that they were smuggled and the customs authority had invoked Section 123 of the Act, the decision would have been different, as is clear from the approach of the learned Judges. Since the question of law was not decided in the manner raised by Sri Chander Kumar before us, the decision of Bombay High Court does not aid his contention.

10. Section 123 of the Act is similar to Section 178-A of the earlier Sea Customs Act, 1879, validity of which was involved in *The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another*, . As to its scope the Supreme Court observed, at para-26 (middle, at page 329),--

".....No doubt, on the language of Section 178-A the presumption of the goods being smuggled arises only when the seizure is made by an officer entertaining a reasonable belief that the goods are smuggled, and in that sense the reasonable belief of the seizing officer is a pre-requisite for the statutory onus to arise. It is also true that at the stage of the adjudication the reasonableness of the belief of the officer effecting the seizure that the goods are smuggled would be the subject-matter of investigation by the adjudicating officer. Nevertheless it is manifest that at the stage of the adjudication (when only the rule of evidence laid down by the Section comes into operation) the very facts which led the seizing officer to effect the seizure, as distinguished from their significance as affording a reasonable belief for the seizing officer to hold that the goods are smuggled are before the adjudicating officer. These facts which justified the seizing officer to reasonably believe that the goods were smuggled would certainly impart a rational connection between the facts on which the presumption is raised and the fact to be proved, so that whatever other constitutional infirmity might attach to the impugned provision, the lack of rational connection is not one of them."

From this it follows that the presumption arises at the moment of the seizure, subject to the pre-condition that, the authority seizing the goods should seize the goods in the reasonable belief that they are smuggled goods. The stage of discharging the burden, thus cast on the person from whose possession the goods were seized, arises later. The discussion in the decision of the Supreme Court also shows that, while forming the belief, which has to be reasonable, several factors may influence the mind of the authority seizing the goods. These factors will have to be tested by the adjudicating authority. At para-45, the Supreme Court observed, that, even a mahazar, referred as the detention mahazar (like the preliminary panchanama, preceding the regular panchanama) may disclose the reasonableness of the belief of the seizing authority. The observations are,--

"Even taking the record of the detention in the mahazar prepared at the Central Station as "the seizure" we do not agree with the learned Judges of the High Court that the seizing officer could not entertain a reasonable belief that the gold seized was smuggled. The reasonableness of the belief has to be judged by all the circumstances appearing at that moment."

11. Circumstances leading to the seizure read with the initial explanation offered by the persons in possession of the goods in question, may tend to raise a reasonable suspicion that the goods seized had been obtained illicitly. This is clear from the discussion on the question raised therein and dealt at paras 43 to 45.

12. The detaining authority under the COFEPOSA Act, does not adjudicate any question. He acts in the arena of suspicion, and subjective satisfaction. His objective is to take preventive action and not punitive measure. Detention u/s 3 of the COFEPOSA Act is not a corrective measure at all. It is not the result of any adjudication. The detaining authority, it is true, should consider the available materials before arriving at the subjective satisfaction. The facts and circumstances of a case read with the materials placed before him, if rationally could lead to the subjective satisfaction contemplated by Section 3 of the COFEPOSA Act, this Court cannot interfere with this order. One such fact available to the detaining authority, may be that the goods in question were seized from a person, by the customs authority under a reasonable belief that they were smuggled goods and therefore, the statutory presumption u/s 123 attaches itself to the goods in question. Primarily, it is for the detaining authority to consider for itself as to whether it could accept this fact of seizure of the goods to which, a presumption arose at the time of seizure, that the goods were smuggled goods.

13. In this case, it is not necessary for us to decide whether the detaining authority itself can rely on Section 123 of the Act and draw the presumption and if so, before drawing the presumption, it should afford the detenu an opportunity to rebut the presumption. It looks such a procedure is not contemplated by Section 3 of the COFEPOSA Act. Said provision does not provide for any mini-trial before drawing any inference by the authority. The subjective satisfaction, as the very phrase indicates, cannot be the result of such an objective enquiry. The detaining authority, can always look into such papers, as the panchanama, statement of the person u/s 108 of the Act from whom the goods were seized and the explanation offered by him at the time of seizure regarding the nature of his possession etc. read with the reasonableness of the belief of the seizing authority regarding the goods being smuggled.

14. Almost a similar contention was raised before this Court in G. Pichaimani Vs. State of Karnataka, . The contention was that the detaining authority relied solely on the presumption arising u/s 123 of the Act without any other relevant circumstances and material in supporting the order. This was negated by the Division Bench. Relevant observations at paras 14 to 18 are apposite here :

"We are of the view that Government at para-14 read in the context in which that para occurs, does not state that it was acting on the presumption or burden of proof incorporated in Section 123 of the Customs Act. In para 14 Government was only referring to the presumption or burden of proof relied on by the Officers of the Customs Department under the Customs Act. Whether Government could or could not act on the presumptions drawn by the Customs authorities under the Customs Act is another matter. But, that is not the same as saying that Government itself had made the detention orders solely or mainly on the basis of presumptions or burden of proof incorporated in Section 123 of the Customs Act. We have no doubt that para 14 of the grounds of detentions is not capable of that construction at all. We see no merit in this contention and we reject the same Sri Kumar next contends that there can be no preventive detention by Government on presumptions, drawn by the Customs Authorities under the Customs Act.

Sri Hegde refusing the contention of Sri Kumar contends that u/s 123 of the Customs Act, the Customs authorities were free and competent to draw the presumptions on satisfying with the requirements of that provision and Government was free to act on the same as ruled by a Division Bench of this Court consisting of Malimath, CJ. and one of us (Mahendra, J) in BABA SAHEB v. STATE OF KARNATAKA & ANOTHER (WP.No. 1/85 dt. 12-3-85).

In the course of their investigation under the Customs Act, the Customs Authorities were free and competent to invoke Section 123 of the Customs Act if the terms and conditions provided in that Section are satisfied and its validity had also been upheld by the Supreme Court are not rightly disputed by Sri Kumar.

When the Customs Authorities are free and competent, to draw their presumptions or cast the burden of proof against the person from whom the goods are seized.

we cannot place any fetter on those authorities or on Government to rely on the same and act also under the Act. In Baba Saheb's case this very contention has been examined and rejected by this Court. We see no merit in this contention of Sri Kumar and we reject the same."

15. In this case, the earliest of the mahazars (Annexure-C), after reciting the factum of questioning the detenu at the bus stand and the recovery of the three yellow metal pieces in biscuits shape from him, the mahazar states "the officers expressed that they have reason to believe that the yellow metal found in possession of said Devaraj Shet appeared to be contraband gold and for security reasons and detailed examinations he has to be taken into the customs office." The second mahazar contains again that the officers informed the witnesses that they had reasonable belief that all the eleven yellow metal pieces, in biscuits shape, the yellow metal chain the yellow metal buckle, are all of gold of foreign origin. A licenced goldsmith was summoned, who weighed and verified the metal

and ascertained the description, markings and purity. It is further stated, that,--

"From the foreign markings found on the yellow metal pieces in biscuit shape and the purity of the same, also from the purity of the yellow metal chain and the yellow metal buckle Sri K. Subramanya Shet opined that all the above mentioned items from serial number 1 to 4 are all of gold of foreign origin. On demand Sri Devaraj Shet could not produce any licit documents or permit in respect of the above said items as detailed in serial number 1 to 4 for being in possession/ carrying/transporting or for having imported the same legally into India. The officers informed us that as Sri Devaraj Shet could not produce any valid documents for the legal possession of the 11 gold biscuits, one gold chain, one gold buckle all of foreign origin totally weighing 1515.850 gms. and the circumstances and prior information they had made them believe that there is every reason that the 11 gold biscuits, one gold chain and one gold buckle all of foreign origin found in possession of Sri Devaraj Shet have been smuggled into India in contravention of the Customs Act, 1962. The Officers further informed us that the possession of primary gold without valid documents is an offence under Gold Control Act, 1968 and importation of foreign gold is prohibited under Customs Act, 1962, and Foreign Exchange Regulation Act, 1973. Therefore, the Customs Officers seized the 11 gold biscuits, one gold chain and one gold buckle all of foreign origin totally weighing 1515.850 gms. on the reasonable belief that the same have been smuggled into India in contravention of Customs Act, 1962, Gold Control Act, 1968 and FERA 1973."

16. Thus, it is clear that the Officers formed a reasonable belief prior or at the time of seizing the goods in question as smuggled goods. If so, the applicability of Section 123 of the Act is only a matter of inevitable inference. We may also refer to Annexure-C2 which is the statement of the detenu u/s 108 of the Act, the statement, which is admissible in evidence, clearly supports the belief arrived at by the seizing authority being reasonable. The detenu practically admitted the illicit nature of his possession of the gold and the clandestine activity in which he involved, in their transportation, etc. The detenu was afforded opportunity by the seizing authority, to show that the possession of the gold with him was lawful, but he failed to do so. Consequently, we reject the contention of Sri Chander Kumar. This finding also negatives the second contention of the learned Counsel.

17. The third contention has to be stated only to be rejected. Annexure-D is a news item stating that the detenu was apprehended by the police, who handed over him with the gold articles to the Customs authorities. In the face of the two mahazars and the statement of the detenu recorded u/s 108 of the Act, no value can be attached to this news item. This news item cannot be a relevant material at all and its non-consideration by the detaining authority cannot vitiate its order.

18. Sri Chander Kumar, vehemently contended that, this news item falsifies the case of the authorities that gold in question were seized from the petitioner. He pointed out that, the first mahazar Annexure-C states that the panchas assembled at the KSRTC bus stand, on being called by the officers who identified

themselves to be from the police and customs. This was at 03.10 hours on 19-5-1987. The said mahazar is also signed, inter alia, by three police constables. This mahazar concluded at 5 a.m. and thereafter, detenu was taken to the customs office at Kodialbail. The opening sentence of the second mahazar (Annexure-C1) reads thus :-

"As requested by the officers of Customs we the pancha witnesses accompanied the officers and Sri Devaraj Shet along with his belongings from the KSRTC bus stand, Mangalore where the detention mahazar was drawn today between 0310 hours to 0500 hours on 19-5-1987 to the Customs Office situated at 5th Floor PVS Sadan, Kodialbail, Mangalore for detailed search and examination of Sri Devaraj Shet and his belongings we along with the Officers and Sri Devaraj Shet reached the office at about 0530 hours on 19-5-1987"

From the above, it was argued that even the police officers accompanied the party to the Customs Office and it was further argued that the said police officials did not sign this second mahazar.

19. This interpretation, according to us, is not correct. The three constables signed the first mahazar prepared at the bus stand - but it does not follow that they accompanied the party to the customs office. The opening sentence of the second mahazar clearly shows that the panch witnesses who signed the said second mahazar accompanied the officers of customs. Hence the basis on which the learned Counsel developed his argument is itself faulty. However, the learned Counsel argued that the second mahazar ended at 8 a.m. on 19-5-1987, but, he was shown as being arrested only at 6 p.m. on 20-5-1987 and produced before the I Additional Chief Judicial Magistrate at 4.20 p.m. on 21 -5-1987. The attack of the learned Counsel was that the detenu was unconstitutionally detained for a long period and the statement allegedly recorded u/s 108 of the Act was under coercion. It is contended that the detaining authority did not consider these relevant circumstances, before arriving at its satisfaction u/s 3 of the COFEPOSA Act and hence the order got vitiated.

20. Sri Chandrasekharaiah, learned Govt. Advocate, met this contention by pointing out that, when all the materials were before the detaining authority, it should be assumed that it considered them, including the circum-stances disclosed from them. Here, the mahazars, arrest memo, the remand application and other documents were before the detaining authority from which the circumstance urged by the learned Counsel reveals itself and hence, the detaining authority must have considered all of them. Reliance is placed on a few decisions:

In Smt. LATA JAIN v. STATE OF KARNATAKA & ANOTHER, W.P. (HC) No. 53 of 1982 DD 9-12-1982 it was observed at para-8, --

"....It is, therefore, fair to assume that the authority, when went through the remand order, must have seen the contents therein. Further, it may be noted that that complaint of ill-treatment was of a general nature and they did not

state then that their statements were recorded by the customs officials using force or by ill-treating them. A copy of the remand order has been also given to the detenu and this will further indicate that the detaining authority had applied his mind to the contents of the remand order. In the circumstances, it cannot be said that there was no application of the mind of the detaining authority to the complaint of these persons before the Magistrate."

Similarly in Smt. KALPANA v. THE STATE OF KARNATAKA & ANOTHER, W.P. (HC) No. 150 of 1986 DD 9-1-1987 the awareness of the relevant material (there, the provision of Gold Control Act) was assumed and from it, it was also opined that the detaining authority must have considered the effect of the same. Similarly, the contention that the detaining authority did not consider the effect of the bail granted to the detenu was also negated, at para-11 thus :-

"This contention of the learned Counsel again is wholly untenable, firstly on the ground that all this material was present before the detaining authority and the same must have been taken into consideration before passing the detention order."

21. When all the relevant documents are placed before the detaining authority, it should be assumed that, the said authority considered not only the contents of them, but also possible circumstances of a case that are disclosed from them. In this case, it has to be held that the detaining authority must be assumed to have considered the various stages of mahazars, interrogation, arrest and production before the Judicial Magistrate, before arriving at his subjective satisfaction.

22. The next contention pertains to the alleged delay in making the detention order after the incident. The seizure was on 19-5-1987. The order of detention is dated 9-9-1987 and he was detained since 18-9-1987. The delay of 3 months and 20 days are attacked, as resulting in snapping of the link between the object of detention and the incident.

23. In Shivaji Jadhav Vs. State of Karnataka and Another, , we have considered a similar contention at paras 34 to 39. On a consideration of the principles enunciated by the Supreme Court, we observed, at para-37 thus :-

"It is only when the delay is unexplained by the detaining authority, which drinks the nexus between the incident and the order of detention, the said order is liable to be set aside. This essentially involves appreciation of facts placed by the detaining authority as to the cause for the delay."

24. The detaining authority has, in the counter affidavit filed by Sri Alexander, Secretary to Government, Home Department, explained the delay, at paras 19 to 23. It is not necessary to repeat them once again here. We are satisfied with the explanation and are of the view that there is no such delay so as to render the detention invalid. Consequently the plea of the petitioner is rejected.

25. Since all the contentions urged by the learned Counsel for the petitioner are rejected, this petition fails and is dismissed.