
(1992) 02 P&H CK 0115

In the Punjab And Haryana At Chandigarh

Case No : Criminal Writ Petition No. 625 of 1992

Ram Lubhaya

APPELLANT

Vs

State of Punjab and anr

RESPONDENT

Date of Decision : 08-02-1992

Acts Referred:

Citation : (1993) 1 AICLR 786 : (1993) 1 CurLJ 543 : (1993) 2 RCR(Criminal) 168

Hon'ble Judges : Harmohinder Kaur Sandhu, J

Advocate : D.D. Sharma, D.S. Dhillon, Sukhbir Singh, Advocates for appearing Parties

Judgement

Harmohinder Kaur Sandhu, J.

1. Ram Lubhaya has filed this petition under Article 226 of the Constitution of India for quashing the detention order No. 1/26/92H. III (COFEPOSA) 78 passed by the State Government on 561992 under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smugling Activities Act, 1974 (for short the FOFEPOSA Act).

2. The events leading to the filing of this petition in briefly stated are that on September 26, 1991 the Customs Staff at L.C.S. Attari Rail thoroughly searched the LahoreAmritsar Samjhota Express Train which arrived from Pakistan. During the course of search the Customs Staff found two bandoliers of, cotton cloth containing some heavy material lying on the top of the battery box under bogie No. 10053. These were taken into possession and were opened in the presence of independent witnesses. The same were found to contain silver rods and silver slabs valuing at Rs. 2,74,380/. The silver and the containers were seized under Section 110 of the Customs Act, 1962 on a reasonable belief that the same were liable to confiscation having been illegally imported from Pakistan in contravention of the provisions of Import Control JUDGMENT No. 17/55. In a follow up action the Custom S Staff kept surveillance at Railway Yard Amritsar and apprehended the petitioner on the same day when he tried to retrieve the

consignment from the battery box under bogie No. 10053 of Amritsar Lahore Samjhota Train. Statements of the petitioner were recorded on September 27, 1991, September 29, 1991 and September 30, 1991 under Section 108 of the Customs Act wherein he disclosed that one person whose name and address he did not know but whom he could identify, had paid him Rs. 200/ for retrieving a packet which was said to contain some Machine parts from Amritsar Lahore Samjhota train. He also admitted having once retrieved a packet weighing about 1 Kilogram at the instance of that person on receipt of Rs. 200/. On the basis of these statements the impugned detention order was passed with a view to prevent the petitioner from indulging in prejudicial activities in future.

3. The petitioner in this writ petition challenged the legality of detention order on the ground that the prejudicial activity was of September 26, 1991 while detention order was passed on 561992 after a lapse of nine months and the detention order was executed on September, 1, 1992 after a lapse of 2.12 months. So there was no nexus between the prejudicial activity and the date of the passing of the detention order. There was delay in executing the detention order which casts considerable doubt over the genuineness of the subjective satisfaction of the detaining authority especially when the petitioner had been attending the court regularly. It was further pleaded that in the grounds of detention Annexure P2 the detaining authority relied upon the statements of the petitioner dated 27/9/1991, 29/9/1991 and 30/9/1991 but copies of the statement were not supplied to him except copy of the statement dated 27/9/1991. He was thus denied his right to make effective representation. His case was not referred to the Advisory Board within the stipulated period and it was not sent to the Central Government as required under the Act. Copy of the representation was not sent to the Central Government. So, Central Government was not in a position to consider his representation expeditiously as required under Article 22(5) of the Constitution of India. Even if ground of detention were to be taken as it were no case was made out for invoking the provisions of Section 3 of the COFEPOSA Act. The only allegation in the ground of detention was that an unknown person had given the petitioner Rs. 200/ to help him in taking out the two bundles containing machine parts and it was not the case of the detaining authority that the petitioner knew that there was silver or smuggled goods in the packets. So the question of the petitioner indulging in abetting the smuggling activities did not arise and the provisions of Section 3 of the Act could not be invoked.

4. The petition was resisted by the detaining authority and the averments made in the petition were denied. It was maintained that the detention order was passed on the basis of bonafide subjective satisfaction reached at after considering the material on record with due application of mind. The petitioner had admitted that on an earlier occasion he had helped one man in retrieving a packet weighing about 1 kilogram for which he was given Rs. 200/ and on the present occasion he had gone to retrieve the smuggled goods. There had not been any delay in passing the detention order and the case was dealt with great

promptitude. The petitioner was arrested on 19/11/1992 and it was felt necessary to detain him with a view to prevent him from indulging in prejudicial activities. Regarding supply of statements to the petitioner, it was contended that the statements were made by the petitioner himself before the Customs Authority while in a sound mind and he could make an effective representation.

5. I have heard the learned counsel for the parties and have perused the record.

6. It was urged on behalf of the petitioner that the impugned order was passed on 5/6/1992 but it was not served on the petitioner till September 1, 1992 and thus a period of 2 months 25 days elapsed. It was not the case of the respondent that during this period the petitioner was not available or that he was absconding. Rather the petitioner alleged in the petition that he had been attending the court regularly. The respondent has not given any explanation in reply to para No. 7 of the Petition for delay in executing the order and when the delay is not explained a doubt is cast regarding the genuineness of the subjective satisfaction of the detaining authority. In support of his contention, the learned counsel placed reliance on the case of *Sh. Niramuddin v. State of West Bengal* AIR 1974 SC 2353 and also on the case of *T. A. Abdul Rahman Versus State of Kerala and others* 1989(2) Recent Criminal Reports 459. In this latter authority the person against whom the detention order was passed was arrested three months after passing of the order. It was held that delay in arrest caused a doubt on genuineness of the subjective satisfaction of Detaining Authority leading to an inference that the Detaining Authority was not really and genuinely satisfied as regards the necessity of detaining the detenu.

7. A perusal of the reply filed by the respondent shows that the detaining authority did not try to explain the delay of about three months in securing the arrest of the detenu from the date of the passing of the order. There is no denial of the specific averment made in the petition that since after the passing of the order, the petitioner had been attending in the court regularly. So it is not a case where the petitioner was absconding or his presence could not be secured. In the absence of any explanation in the reply filed by the respondent a considerable doubt on the genuineness of the subjective satisfaction of the detaining authority is thrown which vitiates the validity of the order of detention. The order of detention was quashed on similar ground in the case of *Subhash Chand Versus Union of India and others* 1991(2) Recent Criminal Reports 75.

8. It was next urged on behalf of the petitioner that under Section 3(2) of the COFEPOSA Act, the report of the case was required to be sent to the Central Government within ten days from the date of the passing of the detention order but this provision was not complied with which was to be strictly construed. SubSection 2 of Section 3 of the COFEPOSA reads as under :

"When any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall within ten days, forward to the Central Government a report in respect of the order."

9. Reply to para 11 of the petition shows that the report was sent after three months. Thus mandatory provisions of the Act were violated and the order of detention was liable to be quashed on this ground also. This contention of the learned counsel appears to be valid as when the liberty of a person is involved the provisions of law are to be construed strictly. Similar provision is made in Section 3(5) of the National Security Act, 1980 where the State Government was to report the fact to the Central Government within 7 days together with the grounds on which order had been made and such other particulars as in the opinion of the State Government had bearing on the necessity of the order. In the case of *S. Harpreet Singh Versus The State of Punjab* 1986(1) Current Law Journal 182 it could not be shown that the impugned order was communicated to the Central Government within the statutory period of seven days. It was held that mandatory provision of Section 3(5) was violated and the order of detention was quashed. In the instant case also, the report in respect of the order was not sent to the Central Government within the prescribed period of 10 days and the detention order stood vitiated on this score also.

10. The detention order in this case is based only on three statements alleged to have been made by the petitioner. The contention of the petitioner was that he was not supplied copies of the two statements so he was debarred from making effective representation. In reply to para 8 of the petition, the respondent did not state that copies of the statements were supplied to the petitioner and rather it was maintained that as the statements were made by the petitioner himself while he was in sound mind he knew the contents and no prejudice had been caused to him for making an effective representation. This assertion of the respondent does not hold good in view of the observations made in the case of *Mehrunissa Vs. State of Maharashtra*, A.I.R. 1981 Supreme Court 186). It was held therein that nonsupply of material documents referred to in grounds of detention prevented the detenu from making effective representation and the detention was vitiated. The fact that detenu was aware of the contents of document was immaterial.

11. Lastly it was urged that when representation was made to the State Government a prayer was made that copy of the same be sent to the Central Government for its consideration. This fact is admitted that copy of the representation was not sent to the Central Government add this deprived the detenu of his constitutional right under Section 22(5) to have his representation considered by Central Government and in similar situation the order of detention was quashed by the apex court in the case of *Amir Shad Khan Aziz Ahmed Khan alias Aziz Mohd. v. L. Hmingliana and others*, 1991(3) Recent Criminal Reports 375.

12. For the above reasons the petition stands allowed and the petitioner's detention is quashed. He shall be released forthwith if not required in connection with any other case.