(2019) 11 DEL CK 0337

In the Delhi High Court

Case No : Criminal Writ Petition No. 1826 Of 2019

Ram Niwas Mohar APPELLANT

Vs

Nion Of India & Ors RESPONDENT

Date of Decision : 26-11-2019

Acts Referred:

Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 — Section 3(1)
Customs Act, 1962 — Section 108, 110, 111

Citation : (2019) 4 JCC 4129

Hon'ble Judges : Manmohan, J;Sangita Dhingra Sehgal, J

Bench : Division Bench

Advocate : Rajesh Khanna, Arvind Kumar, Kirtiman Singh, Kavindra Gill, Rohan Anand, Satish Aggarwala

Final Decision : Dismissed

Judgement

Manmohan, J

1. Present petition has been filed seeking quashing of the Detention Order bearing No.PD-12002/04/2019-COFEPOSA dated 15th March, 2019 passed by respondent No.2 under Sub-Section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short 'COFEPOSA Act') against the petitioner.

2. This Court may mention that on 20th November, 2019 also the learned counsel for the petitioner had sought an adjournment to file a rejoinder-affidavit. However, the said request was declined as despite adjournments, the rejoinder had not been filed and the present petition challenges a preventive detention order at the pre-execution stage.

ARGUMENTS ON BEHALF OF THE PETITIONER

3. Learned counsel for petitioner contended that the satisfaction of the Detaining Authority was vitiated inasmuch as the retraction made by Mr. Adel Saeeed

Ghulam was not placed before the Detaining Authority. He submitted that had the retraction of Mr. Adel Saeeed Ghulam been considered by the Detaining Authority, it is possible that the Detaining Authority may not have passed the impugned order of preventive detention relying upon the prior confession of Mr. Adel Saeeed Ghulam.

4. Learned counsel for petitioner also stated that in order to reach the conclusion that the petitioner had the propensity to indulge in similar acts of smuggling, the Detaining Authority seems to have heavily relied on the fact that five consignments had been imported by the petitioner in the recent past. He, however, pointed out that the investigation with regard to those five consignments had not concluded and is still pending. He submitted that the inconclusive investigation could not have formed the basis to pass an order of detention against the petitioner and that too on the basis of perfunctory and inchoate material. In support of his submission, he relied upon the judgment of the Supreme Court in Kothari Filaments and Another Vs. Commissioner of Customs (Port), Kolkata and Others, (2009) 2 SCC 192.

ARGUMENTS ON BEHALF OF THE RESPONDENT NO.3-COMMISSIONER OF CUSTOMS

5. Per contra, Mr. Satish Aggarwala, learned senior Standing counsel for respondent No.3-Commissioner of Customs stated that the petitioner was absconding and he was not available at his last known address. He emphasised that Hon'ble High Court of Punjab and Haryana had dismissed the bail application of the petitioner after going through the statements of the petitioner as well as that of Mr. Adel Saeeed Ghulam.

6. Mr. Aggarwala pointed out that the retraction of Mr. Adel Saeeed Ghulam was filed in the Court of Additional Chief Judicial Magistrate, Amritsar, on 25th March, 2019, whereas the Detention Order had been passed on 15th March, 2019. In support of his contention, he relied upon the letter dated 19th July, 2019 written by Joint Commissioner, Customs, Amritsar, to him enclosing a letter written by the local counsel for the Customs Department to the Deputy Commissioner, Customs (Prevention), Amritsar. It is pertinent to mention that the said communications had been placed on record of this Court on 27th July, 2019.

7. Consequently, according to him, the Detaining Authority could not have considered the retraction made subsequently by Mr. Adel Saeeed Ghulam.

8. Mr. Aggarwala further alleged that the petitioner is the mastermind and the main conspirator in the case of smuggling of gold. In support of his contention, he relied upon the counter-affidavit filed by the respondent No.3-Commissioner of Customs, Amritsar. The relevant portion of the said affidavit is reproduced hereinbelow:-

"32......... The contention of the Petitioner that the Detaining Authority had relied upon perfunctory and inchoate material is irrelevant and misconceived. Detaining authority has clearly spelled out the grounds for the detention of the petitioner. The petitioner is the mastermind and main conspirator in smuggling of gold is clear from the following:

(a) The Petitioner was in the business of import and export for the last 10 years and came in contact with Mohd. Khalid, Vice-President of Export firm M/s Amini Sadri, Kabul, Afghanistan through an Afghan National Haroon Atal residing at Lajpat Nagar, Delhi who was introduced to him by another Afghan National Abeed of M/s. Fazli Star Trading Company.

The petitioner had stated that Mohd. Khalid, Vice-President of M/s Amini Sadri Ltd., and another Afghan national namely Adel Saeeed Ghulam are working under the charge of Mohd. Yusuf, an Afghan national who was handling the export consignment from Afghanistan and it was Mohd Yusuf who used to instruct Mohd Khalid for coordinating with the Petitioner at the time of arrival of import consignments.

(b) The petitioner had admitted arranging invoices amounting to Rs. 21 lacs approx resumed from his home during the search issued in the name of Adel Saeeed Ghulam and he also sent a dawatnama/invitation letter for facilitating visa for him.

(c) It is also an admitted position that that import consignments were off loaded in the Petitioner's godown. Petitioner's contention that these goods were sold by Mr. Khalid directly but there is no agreement to that effect and the Petitioner never declared/informed anywhere or to any department that he is making import on behalf of other person. The Petitioner also used to forge documents/ sale invoices of the import goods to justify his misdeeds.

(d) The Petitioner also used to gather details of trucks, truck number, driver number from his Customs broker and then used to send the same to exporter Mr. Yusuf and his partner Mr. Khalid and another Afghan national.

(e) The Petitioner has not made any payment to M/s. Amini Sadri, Kabul, Afghanistan based exporter for consignments imported by him.

(f) The Petitioner was offered amount of Rs. 50,000/- to Rs.1,00,000/- as commission/profit per consignment when entire value of imported consignment in the truck used to be the tune of Rs. 8 to 10 lacs only. The petitioner failed to explain the reasons for the same to the Investigating Officer.

(g) The whatsapp voice note/audios extracted from petitioner's mobile phone Samsung SM-A800F (Serial No.41002a9ff21bai4d, IMEI No. 353004071484013 & 353005071484010) through forensic, wherein Mohd. Yusuf of Afghanistan was offering him partnership in his business and the petitioner was asking him to deposit Rs. 2-3 crores each in two times in his account which he can manage easily and will transfer the money in Yusuf's account as a payment of the imported fruits consignment.

(h) The petitioner could not explain as to why Yusuf was asking him to offer USD 50000 or USD 100000 in audio conversation dated 06.12.2018 for the clearance of the seized consignment as the declared value of the import consignment was approx Rs. 8 lac only. The petitioner has admitted that Mohd. Khalid/Yusuf knew that there was gold in the consignment and so they were asking him to monitor the consignment from time to time on 05.12.2018 and Yusuf and Khalid had promised the petitioner huge commission of Rs. 50,000/- to Rs. 1,00,000/-. He admitted that if the said consignment would not be cleared safely, he will be in trouble and his commission and interest will also be jeopardized.

(i) The Petitioner also admitted that after knowing about the seizure of consignment of fresh fruits on 05.12.2018 by the Customs, he immediately requested Mr. Khalid to leave the country so that he may blame him for smuggling of gold and he took full responsibility for helping Mohd. Khalid in fleeing the country. The petitioner did not join the investigation and is still evading the Detention Order.

In view of the above the contention of the petitioner that there was no valid material for passing an order against the petitioner is unfounded and without any basis. The importer Ram Niwas Mohar, Proprietor of Universal Solutions having IEC (Import & Export Code) No. 0509003249 had imported the consignment of Apples from Afghanistan through Wagah Border on 05.12.2018 and he is responsible for goods imported as he had to make payment of goods imported and as a licence holder, he is solely responsible for the goods in the consignment and that he cannot escape from his liability by submitting that he had to receive the commission only. His after thoughts/submissions that "the petitioner had no effective control over the goods being imported" is baseless and not tenable as importer is solely responsible for the import of the consignment and he has provided all the logistics i.e. godown, import license, arranging Customs brokers etc for importation of prohibited goods and even the goods used to offload in his godown, thus he was the mastermind of the said gold smuggling racket.

The petitioner was actively involved in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or dealing with the prohibited goods which he knew and had reason to believe are liable for confiscation under Section 111 of the Customs Act, 1962. Even he was offered by Yusuf to offer USD 50000 or USD 100000 for clearance of the seized consignment as both were knowing the value of concealed gold in the apple consignment through illegal means which further proves his deep involvement in this smuggling racket.

The investigation in the seizure case of 27 gold bars weighing 32.654 kgs valued at Rs. 9.41 crores has been completed and a show cause stands issued....."

COURT'S REASONING

TWENTY-SEVEN GOLD BARS WEIGHING 32.654 KGS. HAVING MARKET VALUE OF RS.9.41 CRORE WERE RECOVERED FROM A CONSIGNMENT OF FRESH FRUITS

(I.E. APPLES AND POMEGRANATES) COMING FROM AFGHANISTAN VIDE BILL OF ENTRY FILED BY M/S UNIVERSAL SOLUTIONS, A PROPRIETORSHIP FIRM OF THE PETITIONER.

9. Having heard learned counsel for the parties, this Court is of the view that it is essential to first outline the relevant facts.

10. The facts of the present case as disclosed in the counter affidavit are that on 05th December, 2018, a consignment of fresh fruits (i.e. Apples and Pomegranates) coming from Afghanistan entered into India at Integrated Check Post Attari, Amritsar vide Bill of Entry No.9128587 dated 05th December, 2018, Invoice No.43 dated 01st December, 2018, (SAFTA reference No.11288 dated 01st December, 2018, TIN No.9000308693) filed by M/s Universal Solutions, a proprietorship firm of the petitioner.

11. Upon random checking of corrugated boxes containing fresh apples being carried out on 05th December, 2018, one of the empty boxes was observed to be much heavier. When the base of the box was torn apart by the examining Inspector of Customs, two solid materials wrapped in black rubber tube cut pieces were recovered from the base of the box. On further cutting the rubber packing, solid materials were found wrapped in black electric tape which were further wrapped in black carbon paper. On removing all the covering material, two pieces of metal bars appearing to be raw gold were recovered. Thereafter, hundred per cent examination of all the packages imported under invoice No.43 dated 01st December, 2018 against Bill of Entry No.9128587 dated 05th December, 2018 filed by M/s. Universal Solutions, New Delhi, was conducted. Upon such further examination, a total of twenty seven pieces of metal bars appearing to be raw gold were recovered from 11 corrugated boxes. The recovered twenty-seven bars weighing 32.654 Kgs. found to be of gold having market value of Rs.9.41 Crore, 11 empty corrugated boxes and other packing material, 16000 kgs of fresh apples + 120 Kgs pomegranates and one truck bearing No.LXK-7011 (make Mercedes Benz, Colour Cool Red) Chasis No.61913825366863 used in the smuggling of gold were seized under Section 110 of the Customs Act, 1962 vide recovery cum seizure memo dated 05th December, 2018.

12. An Afghan National Mr. Adel Saeeed Ghulam made a statement under Section 108 of the Customs Act, 1962 on 27th February, 2019 and subsequent to his arrest, he made a further statement under Section 108 of the Customs Act, 1962 on 28th February, 2019 in which he incriminated the petitioner.

13. It is the case of the Customs Department that the petitioner was in touch through mobile phone with Yusuf, so called Afghanistan exporter and Mr. Khalid Orya, Vice-President of M/s. Amini Sadri Ltd, who had sent the fresh fruit consignment to India from which 27 bars of gold weighing 32.654 Kgs had been recovered on 5th December, 2018. Even the petitioner is stated to have asked Yusuf in voice note dated 4th December, 2018 to transfer Rs. 2-3 crores in his

account which he can manage easily and that he will transfer the money in their account as he had to make payment of the imported fruits consignments.

14. Despite few opportunities, neither any rejoinder affidavit to the counter-affidavit dated 16th October, 2019 was filed nor any reply to the communications placed on record by the Customs Department on 27th July, 2019 were filed. Since the counter-affidavit is uncontroverted, this Court has to believe the averments therein.

THE PETITIONER'S CONTENTION THAT INVESTIGATION IS INCOMPLETE IN THE PRESENT CASE OR THAT THE DETENTION ORDER IS BASED ON PERFUNCTORY AND INCHOATE MATERIAL, IS CONTRARY TO THE FACTS. IN FACT, AS SMUGGLED GOLD HAD BEEN FOUND CONCEALED IN THE CONSIGNMENT IMPORTED BY THE PETITIONER, THERE IS NO DISPUTE OR INCONCLUSIVENESS OF THE ALLEGATIONS IN THE PRESENT CASE. THE JUDGMENT IN KOTHARI FILAMENTS AND ANOTHER (SUPRA) HAS NO APPLICATION TO THE PRESENT CASE AS IT WAS NOT A CASE OF PREVENTIVE DETENTION.

15. This Court is of the view that the petitioner's contention that investigation is incomplete in the present case or that the detention order is based on perfunctory and inchoate material, is contrary to the facts. In fact, as smuggled gold had been found concealed in the consignment imported by the petitioner, there is no dispute or inconclusiveness of the allegations in the present case.

16. Moreover recovery of smuggled gold proves that the petitioner has the propensity as well as potentiality to indulge in similar acts of smuggling of goods into India and it further proves existence of live-link. The Apex Court in Union of India and Anr. Vs. Dimple Happy Dhakad, 2019 SCC OnLine SC 875 has held as under:-

"42. ......we are conscious that the Constitution and the Supreme Court are very zealous of upholding the personal liberty of an individual. But the liberty of an individual has to be subordinated within reasonable bounds to the good of the people. Order of detention is clearly a preventive measure and devised to afford protection to the society. When the preventive detention is aimed to protect the safety and security of the nation, balance has to be struck between liberty of an individual and the needs of the society.

43. Observing that the object of preventive detention is not to punish a man for having done something but to intercept and to prevent him from doing so,......"

(emphasis supplied)

17. Further, the judgment in Kothari Filaments and Another (supra) has no application to the present case as it was not a case of preventive detention.

THE DETAINING AUTHORITY COULD NOT HAVE CONSIDERED THE RETRACTION MADE SUBSEQUENTLY BY MR. ADEL SAEEED GHULAM.

18. Also, as there is no denial by the petitioner to the fact that the retraction by

Mr. Adel Saeeed Ghulam had been made post the detention order dated 15th March, 2019 having been passed, there was no occasion for the Detaining Authority to have considered the same prior to passing the impugned order.

19. Consequently, as there is no illegality in the impugned order, present writ petition is dismissed but with no order as to costs.