
(2004) 05 DEL CK 0115

In the Delhi High Court

Case No : Writ Petition (Criminal) No. 170 of 2004

Ramesh Chandra Khurana

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-05-2004

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 5A
Constitution of India, 1950 — Article 22(5)

Citation : (2005) CriLJ 434 : (2005) 2 RCR(Criminal) 265

Hon'ble Judges : D.K. Jain, J; A.K. Sikri, J

Bench : Division Bench

Advocate : Sangita Bhayana, for the Appellant; K.K. Sud, A.S.G. and Barkha Babbar, for the Respondent

Final Decision : Allowed

Judgement

D.K. Jain, J.—Rule D.B.

2. In this habeas corpus writ petition under Article 226 of the Constitution, the petitioner, Ramesh Chandra Khurana, challenges the order made by the Joint Secretary to the Government of India (hereinafter referred to as "the detaining authority") u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (as amended) (for short "the COFEPOSA"). The order of detention dated 12 Nov. 2003 was served on the petitioner on 18 Nov. 2003 along with grounds of detention of even date, formulated by the detaining authority, based on his subjective satisfaction that it was necessary to detain the petitioner with a view to prevent him from smuggling goods in future.

3. Briefly stated, the facts, as can be culled out from the grounds of detention, which are in the narrative form, are as follows :

On the basis of specific information, gathered by the Directorate of Revenue Intelligence, New Delhi to the effect that the petitioner, a Director of one M/s.

Sun Informatics Pvt. Ltd., New Delhi, was engaged in the smuggling and sale of high value computer parts, it came to light that the petitioner had imported a small quantity of high value computer parts and other low value parts, packaging material and computer accessories through the legal channel. The documents of customs gathered from such legal imports, especially of high value computer parts, being brought clandestinely by different carriers from Nepal. The original packing material of such parts, separately imported legally, was being utilised for packing smuggled computer parts in an attempt to pass off the smuggled goods as legitimately imported original/OEM parts. The information so collected also revealed that one Shri Bhagwan Maheshwari and Gaurav Khurana alias Shekhar were assisting the petitioner in this activity of illegal acquisition and sale of computer parts by taking delivery of the smuggled goods from the carriers, looking after payments and recoveries and supervising the repacking of smuggled goods at the residence of the aforesaid Shri Bhagwan Maheshwari.

4. On the basis of the said information, on 22 April, 2003, searches were conducted simultaneously at different residential, and business premises of the petitioner and some other persons. During the course of search some documents, files and diaries, considered relevant to the investigation, were recovered and seized along with Indian currency from the residential premises of the petitioner. From the business of M/s. Sun Informatics Pvt. Ltd. computer parts valued at Rs. 37,66,940/- were recovered from a specially made cavity under the floor. The said goods were seized.

On the same day, the officers of the Directorate of Revenue Intelligence intercepted three carriers of smuggled computer parts, which had been smuggled clandestinely from Nepal. Smuggled computer parts so recovered from the carriers were seized. Search was also conducted at the office premises of one M/s. Venus Info Tech, where one Nitin Rawal, an employee of M/s. Sun Informatics Pvt. Ltd. was present. The said premises was being used by M/s. Sun Informatics Pvt. Ltd. for storage of smuggled computer parts. During the course of search, huge quantity of computer parts of foreign origin, valued at Rs. 83,12,650/- were recovered and seized. A search at the residential premises of said Shri Bhagwan Maheshwari also resulted in the recovery and seizure of computer parts of foreign origin, along with packing material, valued at Rs. 18,53,890/-.

5. As a follow up action, statements of the petitioner, Shri Bhagwan Maheshwari and Smt. Purnima Kar of M/s. Sun Informatics Pvt. Ltd. and some other persons were recorded u/s 108 of the Customs Act, 1962 (for short "the Act"). In his statement, the petitioner admitted that he was dealing in the purchase and sale of smuggled computer parts; he had bought fake bills of computer parts from other importers to cover up smuggled and illegal acquisition of the computer parts for monetary consideration; the smuggled computer parts were being received in loose and unpacked conditions; empty boxes of such computer parts were imported from Hong Kong and Singapore for packing the loose smuggled computer parts and that all the goods seized from his office on 22 April 2003

belonged to him. The petitioner was confronted with various incriminating documents recovered from his residence and while explaining the nature of these documents, stated that some of them were the print-outs of accounts of computer parts dispatched to various parties in India by him, which were prepared by Smt. Purnima Kar on his directions and that the figures shown in the computerized accounts were actually one hundredth of the actually transacted amounts. Nature of many of the documents, referred to in paragraph 4 of the grounds of detention, was also explained by the petitioner. He also disclosed the code numbers of some of the parties with whom he was doing the business of computer parts. Code number of Kanhaiya Duggal, who used to send computers from Nepal was also disclosed.

6. In his statement Shri Bhagwan Maheshwari while confirming the seizure of computer parts, packing material, label stickers, etc. collectively valued at Rs. 18,53,890/- from his residence, stated that the goods recovered were received by him from the petitioner during the last 4-5 days and that the steel rollers seized from his residence were used to print "Intel Corporation" on polythene sheets.

7. Similarly in her statement Smt. Purnima Kar, Accountant of M/s. Sun Informatics Pvt. Ltd. confirmed that she had been maintaining accounts of petitioners concern; the figures shown in the computerized accounts seized from her residence were to be multiplied by 100 to arrive at the actual value and that the petitioner used to buy goods and pay in cash to different people in India as per the instructions of said Kanhaiya Duggal (KD).

8. The petitioner was arrested on 24 April 2003 along with some other persons including the said Gaurav Khurana and Shri Bhagwan Maheshwari. After initial judicial remands he was ultimately granted bail by the High Court of Delhi on 1 August, 2003. The petitioner and Shri Bhagwan Maheshwari retracted their statements by moving an application before the Additional Chief Metropolitan Magistrate on 8 May 2003. A complaint under Sections 132 and 135(1)(a) of the Act was filed against the petitioner on 21 June, 2003.

9. On the basis of the material placed before the detaining authority, briefly referred to above, he came to the conclusion that the petitioner was involved in smuggling of computer parts from third country, namely, Nepal from where, vide notification dated 22 January 1996 issued u/s 11 of the Act, import of such goods was restricted; the petitioner had arranged for the finances to procure smuggled computer parts and had provided necessary marketing support to keep the goods and money moving; had procured fabricated and bogus invoices to cast a curtain over his illegal acquisition of goods and had not made payments to the suppliers of smuggled goods in Nepal through licit banking channels but instead paid cash to representatives of Nepalese suppliers in India in an unauthorized and illegal manner. Taking into consideration these facts, the detaining authority felt satisfied that petitioner's activities amounted to smuggling within the meaning of Section 2(39) of the Act, as adopted in the COFEPOSA and felt satisfied that the

petitioner had the inclination, propensity and potentiality to indulge in smuggling activities in future. Hence the order of detention.

10. The petition is resisted by the respondents. Affidavit in opposition has been filed on their behalf. Subsequently an application was moved on behalf of the petitioner seeking permission to urge additional grounds of challenge, which was allowed. Reply to the said application has also been filed on behalf of the respondents.

11. We have heard Ms. Sangita Bhayana, learned counsel for the petitioner and Mr. K. K. Sud, Additional Solicitor General for India on behalf of the detaining authority.

12. Ms. Bhayana has assailed the order of detention as illegal and void ab initio on various grounds, namely : (i) there was inordinate delay in passing the order, which showed that there was no genuine need for detention of the petitioner; (ii) there was inordinate and unexplained delay in consideration of the representation filed by the petitioner before the detaining authority; (iii) a correct copy of the order dated 1 August 2003 passed by the High Court, granting bail to the petitioner was not placed before him, with the result that his satisfaction has been impaired on account of failure on his part to take into consideration the relevant material and; (iv) that the vital documents relied upon by the detaining authority have not been supplied to the petitioner, which amounts to denial of petitioner's right to make an effective and purposeful representation, violating Article 22(5) of the Constitution and thus, rendering the continued detention of the petitioner as illegal.

13. Taking the last point first, the stand of the learned Additional Solicitor General on it is that though in the grounds of detention there is mention of the searches at various places and the documents found there but these have been referred to only by way of completing the narration. Since these documents were not made the basis for formulating the grounds of detention, the petitioner was not entitled to the copies of these documents. In the alternative it is submitted by the learned Additional Solicitor General that even assuming that the documents referred to in the Panchanama were relied upon by the detaining authority but still it will not make the detention order bad in as much as it shall be deemed to have been made separately on each of the "grounds" as visualised in Section 5A of COFEPOSA and, Therefore, supply of even one relied upon document, which constitutes an independent ground would be sufficient to sustain the subjective satisfaction of the detaining authority, and thus, the impugned order. In support, reliance is placed on the decision of the Supreme Court in *Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others*, wherein, their Lordships have held that when the detention order has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly, if one ground is irrelevant or an inadmissible ground has been taken into consideration, that would not make the detention order bad because of the

availability of the other relevant or valid ground.

14. We are unable to subscribe to the stand of the learned Additional Solicitor General. It is well settled by a long line of decisions of the Supreme Court that the Constitutional imperatives in Article 22(5) of the Constitution are two-fold, namely, (i) the detaining authority must, as soon as practicable, of course within the specified time, after the detention, communicate to the detenu the grounds on which the order of detention has been made and (ii) it must afford to the detenu an earliest opportunity to make representation against the detention order. It is axiomatic that communication of grounds pre-supposes the formulation of the grounds, which in turn requires application of mind by the detaining authority to the facts and material before it. Therefore, for making representation, the detenu has a right to be supplied with not only the grounds of detention drawn up but all the material which formed the basis of the subjective satisfaction of the detaining authority. The detenu is entitled to obtain particulars of the grounds which will enable him to make effective representation against the order of detention. (See *Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others*, *Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others*, and *M. Ahamedkutty Vs. Union of India (UOI) and Another*, .

15. In *Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI) and Others*, , relying on its earlier decisions in *Ramchandra A. Kamat Vs. Union of India (UOI) and Others*, and *Shri. Tushar Thakker Vs. Union of India (UOI) and Others*, their Lordships of the Apex Court said that once the documents are referred to in the grounds of detention, it becomes the bounden duty of the detaining authority to supply the same to the detenu as part of the grounds or part passu the grounds of detention. It was observed that there is no particular charm in the expression "relied on"; "referred to" or "based on" because ultimately all these expressions signify one thing, namely, that the subjective satisfaction of the detaining authority has been arrived at on the documents noticed in the grounds of detention.

16. In *Lundup Tamang Vs. Union of India and Others*, a Division Bench of this Court, of which one of us (D. K. Jain, J.) was a member, has held that the expression "grounds" includes not only conclusion of fact but also all the "basic facts" on which those conclusions were founded: they are different from subsidiary facts or further particulars or the basic facts. It was observed that the concept of grounds used in the context of detention in Article 22(5) of the Constitution has to receive an interpretation which will keep it meaningfully in tune with contemporary notions of the realities of the society and the purpose of the COFEPOSA in the light of concepts of liberty and fundamental freedoms.

17. Thus, it is clear that a document, which is referred to; relied upon or taken into consideration by the detaining authority in order to form the requisite subjective satisfaction has to be supplied to the detenu to enable him to make an effective representation at the earliest opportunity, on receiving the order and grounds of detention. It is a constitutional mandate. Without copies of such

documents the "grounds" would not be complete. We may, however, hasten to add that it is not that non-supply of any or every document, however, irrelevant it may be for the detention, merely on the ground that there is a reference to it in the grounds of detention as a background fact would vitiate the detention order. In such a situation, it has to be shown by the detenu that failure to supply the document has impaired his right to make an effective representation. (See Kamarunnissa and Others Vs. Union of India and another,

18. Applying these broad principles to the facts in hand, we are of the view that the material/documents referred to in Para 4 of the grounds of detention were part of basic facts and material, which had influenced the mind of the detaining authority in coming to the aforementioned conclusion and recording his subjective satisfaction, Admittedly, the detenu was confronted with these documents; his Explanation was sought thereon and adverse inferences have been drawn there from. But only copies of the Panchnama under which these documents were seized, were supplied to the detenu and not the copies of these documents. It is pertinent to note that in the Panchanama dated 22 April 2003, prepared after the search at 303, Raja House, Nehru Place, New Delhi, it is noted that an employee of M/s. Sun Informatics Pvt. Ltd. was present. It is also recorded that during the course of search incriminating documents were also recovered, which pertained to the said company and one M/s. Venus Info Tech. Total value of the goods found there and seized under the said Panchanama was stated to be Rs. 83,12,650/-. As noted above, the said goods have been treated as belonging to the petitioner. Similarly, another Panchnama prepared on the same day in respect of the search at the residential premises of Shri Bhagwan Maheshwari, records that certain incriminating documents as per the details given in Annexure "B" to the Panchanama, were recovered and seized. Admittedly, only copies of the Panchnama and annexures thereto have been supplied to the petitioner and not the copies of the documents seized as being incriminating. As noted above, the petitioner was confronted with these documents also at the time of recording of his statements.

19. In view of the above, we find it difficult to accept the contention of learned counsel for the respondents that these documents were not relied upon documents and, Therefore, wee not required to be supplied to the petitioner. We are convinced that these documents provided the foundation for the detaining authority's subjective satisfaction and it was thus, imperative for him to supply the same to the petitioner pari passu the grounds of detention to enable him to make an effective representation. We are of the view that failure to supply copies of these documents has resulted in impairing the right of the petitioner to make an effective and purposeful representation and thus, violating the mandate of Article 22(5) of the Constitution.

20. It has been emphasised time and again that where the liberty of a citizen is involved, it is the bounden duty of the Court to satisfy itself that all the safeguards provided by the law have been scrupulously observed and the citizen

is not deprived of his personal liberty otherwise than in accordance with law. In *Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others*, , their Lordships of the Supreme Court have observed that preventive detention is an area where the Court has been most strict and scrupulous in ensuring observance with the requirements of the law, and even where a requirement of the law is breached in the slightest measure, the Court has not hesitated to strike down the order of detention. Similarly, in *Hem Lall Bhandari Vs. State of Sikkim and Others*, the Apex Court said that it is not permissible, in matters relating to the personal liberty and freedom of a citizen, to take either a liberal or a generous view of the lapses on the part of the officers. In matters where the liberty of the citizens is involved, it is necessary for the officers to act in strict compliance with the mandatory provisions of law.

21. Thus, having come to the conclusion that in the instant case the requirements of Article 22(5) of the Constitution have not been strictly complied with, the result is obvious. However, before recording the final verdict, we may deal with the alternative submission of the learned Additional Solicitor General. In a desperate bid to save the order of detention from being voided on account of non-compliance with the requirements of Article 22(5) of the Constitution, the learned senior law officer has pressed into service Section 5A of the COFEPOSA. Section 5A stipulates that when an order of detention u/s 3(1) of the COFEPOSA has been made on two or more grounds, such order shall be deemed to have been made separately on each of such grounds and accordingly such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds are vague, non-existent, etc. or invalid for any other reason whatsoever.

22. Explaining the meaning of the word "grounds" within the contemplation of Section 8(1) of the Maintenance of Internal Security Act, 1971, in *Vakil Singh Vs. The State of J. and K. and Another*, the Supreme Court observed that it means "materials" on which the order of detention is primarily based. Apart from the conclusions of facts, "grounds" have a factual constituent also. They must contain the pith and substance of primary facts but not subsidiary facts or evidential details. The scope and ambit of Section 5A and in particular the meaning of the word "grounds" appearing in the said Section has been succinctly explained by the Apex Court in *Prakash Chandra Mehta's case* 1996 LJ 786 (supra). Referring to their earlier decision in *Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others*, , wherein it was held that "grounds" in Article 22(5) do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences, their Lordships have observed that while the expression "grounds" for that matter includes not only conclusions of fact but also all the "basic facts" on which those conclusions were founded. They are different from subsidiary facts or further particular or the basic facts.

23. In view of these decisions. Section 5A has to be understood by treating each primary fact and the inference drawn there from as a single ground. In other

words, each of the incriminating fact and inference drawn there from, even if all of them relate to a single transaction of smuggling, have to be treated as a separate ground for the purpose of Section 3(3) read with Section 5A of COFEPOSA. Thus, if the detaining authority has relied upon a solitary offending act or an incriminating circumstance, which is irrelevant for the purpose of COFEPOSA, being a sole ground, the detention order would fail but if there are other offending or incriminating facts relevant to smuggling, the detention order can be sustained by re sorting to Section 5A of COFEPOSA.

24. Tested on the touchstone of the afore-noted ratio of various decisions, we are of the considered view that on the facts of the instant case, Section 5A is of no avail to the respondents. In the instant case the satisfaction of the detaining authority to the effect that with a view to preventing him from smuggling goods in future the detention of the petitioner is necessary, has been arrived at as inferences from the material recovered and seized during the course of searches on 22 April, 2000 and referred to in the grounds of detention. As noted above, though the investigations into the alleged nefarious activities of the petitioner were initiated on the basis of some secret information, but all the same incriminating facts and documents surfaced only on account of the searches conducted on the said date. Undoubtedly each incriminating fact or document in regard to the allegation of smuggling constituted a separate and independent ground and as such was put to the petitioner during the course of his interrogation. It is evident from para 4 of the grounds of detention that except for the documents recovered during the course of the said searches, no other factor forms the basis of the aforesaid subjective satisfaction of the detaining authority. No other document or incriminating circumstance has been brought to our notice to show that the said satisfaction was arrived at as inference from such document/ factor.

25. In the light of the factual scenario projected above, we are of the view that in the present case, by not supplying the documents referred to in para 4 of the grounds of detention the authorities concerned have failed to comply with the mandate enshrined in Article 22(5) of the Constitution and Therefore, we have no hesitation in holding that the order of detention against the petitioner stands vitiated on this short ground alone.

26. Since we have come to the conclusion that the detention of the petitioner is rendered illegal on the afore-noted ground, we deem it unnecessary to deal with the other points raised by learned counsel for the petitioner.

27. Consequently, we allow the writ petition; make the rule absolute and quash further detention of the petitioner under order of detention dated 12 November 2003 and direct that he shall be released forthwith unless required to be detained in any other case.

28. The operative part of the order shall be communicated to the jail authorities forthwith for compliance.