
(2012) 08 BOM CK 0031

In the Bombay High Court

Case No : Writ Petition No. 1884 of 2012

Sangita Deepak Jare

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 24-08-2012

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 3(1)(i), 3(3)
Constitution of India, 1950 — Article 22, 22(5), 32
Customs Act, 1962 — Section 108, 113(d)

Citation : (2012) 08 BOM CK 0031

Hon'ble Judges : A.R. Joshi, J;A.M. Khanwilkar, J

Bench : Division Bench

Advocate : V.B. Singh assisted with A.K. Singh, for the Appellant; M.H. Mhatre, APP, a/w J.P. Yagnik, APP, for the Respondent Nos.1, 2 and 5 and Mrs. A.S. Pai, APP, for Resp. Nos.3 and 4, for the Respondent

Final Decision : Allowed

Judgement

A.M. Khanwilkar, J.—This Writ Petition of Habeas Corpus has been filed by the wife of the detenu Shri Deepak Sharad Jare, praying for quashing and setting aside of the preventive detention order passed against him on 14.3.2012 by the Principal Secretary (Appeals and Security), Government of Maharashtra, Home Department and the Detaining Authority in exercise of powers u/s 3(1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, hereinafter referred to as "the COFEPOSA Act"), with a view to prevent the detenu in future from smuggling goods. The detenu was served with the grounds of detention and the documents accompanying therewith. The grounds of detention served on the detenu were accompanied by material referred to and relied upon by the Detaining Authority and which was the basis for recording of subjective satisfaction that it was necessary to detain Deepak Sharad Jare to prevent him from indulging in prejudicial activities in future. The detenu was served with the grounds of detention, which advert to the continual

criminal activities of the detenu necessitating issuance of detention order, with a view to prevent him from indulging into smuggling activities in future. It is stated that on the basis of specific intelligence that a syndicate headed by the detenu alongwith Ajit Bapu Satam was engaged in smuggling of red sanders to Dubai, the offices of DRI intercepted three containers namely CLHU-8757522, BAXU-2594270 and BAXU2643415 at Punjab Conware CFS, Nhava Sheva on 2nd September, 2011. The Containers were declared to contain 1883 Nos. of "Plastic Moulded Crates - Model No. 2001", "White Guava Pulp" respectively, but, were found to contain huge quantity of red sanders. The red sanders recovered from the three containers, totally valued Rs. 5.03 crores, was seized under the provisions of the Customs Act, 1962.

2. It is further stated that simultaneous search operations were carried out at the stated places, allegedly used as residence and also office premises of the detenu and his companions including the permanent room booked at Hotel Taj Lands end at Room No. 1902, Bandstand, Bandra (W) 400050. The searches led to seizure of unaccounted cash amount of aggregate Rs. 2,65,70,000/-, Skoda Fabia Car, five high end cars i.e. two Bentley and three Mercedes, laptops, computer CPU and other incriminating items such as plain bottle seals without any markings, broken bottle seals, metal dies containing insignia of various Customs and Central Excise Officers, packets of metal fonts, stamping foils, numeric dies, etc.

3. The Detaining Authority then referred to gist of the statements recorded u/s 108 of the Customs Act of detenu and his companions, namely, Prakash Shewale, Shri Bhaskar Tate, Jayesh Natwarlal Panchal, Ajit Bapu Satam, Pradeep Kanu, Pawan Shah, Nitin Chougule, Alex Thomas Fernandez @ Anand. Reference is also made to statements of Lalchand Choudhury, Ram Singh, Jairaj @ Saleem, Vijay Jayawant Kowley, Mehabub Allauddin Shaikh, Parshram Ambi, Shri Rajkumar Basappa Kumbhar, Shri Rajesh Bhupal Rajput, Shri Deepak Raghu Kude, Shri Mohammed Jalaluddin, S/Shri Pramod Kumar Singh, Dushyant Singh, Suresh Singh and Shivanand Singh and Shri Aadil Abid Tapia.

4. On the basis of the material placed before the Detaining Authority, subjective satisfaction was formed by the Detaining Authority that it was essential to issue preventive detention order against the detenu to prevent him from engaging in prejudicial activities in future.

5. While challenging the impugned detention order, the grounds urged on behalf of the Petitioner, at the time of hearing, can be itemised as follows:

A) The subjective satisfaction recorded by the Detaining Authority is vitiated as it completely overlooks the test of whether the normal law of the land would have been sufficient instead of invoking the powers of issuing preventive detention order.

B) That there is unexplained delay in issuance of the detention order. The preventive detention action is primarily based on the seizure of the red sanders on 2.9.2011 but the detention order has been issued on 14.3.2012.

C) The subjective satisfaction of the Detaining Authority is also vitiated because of the piecemeal consideration of the proposal though the Detaining Authority was under obligation to formulate the grounds and pass the detention order after considering it at a time.

D) The subjective satisfaction of the Detaining Authority is vitiated also because it is evident that the Detaining Authority has not formulated the grounds of detention herself but has verbatim reproduced it from the proposal received by her.

E) The detention order is vitiated also because of non-placement of vital documents for consideration before the Detaining Authority such as:

- i) accompaniments to the show-cause notice served on the detenu;
- ii) documents disclosing the weight of the containers; and
- iii) statements of CHA.

F) The pre-detention representations sent by the detenu were not placed before the Detaining Authority though it was mandatory to do so and resultantly the Detaining Authority could not and did not consider those representations. This has vitiated the detention order. The side argument is that in any case, the Detaining Authority ought to have considered the representations pre-issuance of detention order at least immediately after the same were received and communicate its decision to the detenu with dispatch.

G) There are palpable discrepancies regarding the details in the grounds of detention and the relied upon documents, which is indicative of non-application of mind by the Detaining Authority.

H) In absence of any material before the Detaining Authority to indicate previous arrests and detention of the detenu; coupled with the fact that the quashing of detention order issued in 2006 has not been mentioned in the subjective satisfaction reached by the Detaining Authority, the same is vitiated.

I) There has been failure on the part of the State Government to send the report to the Central Government within the specified period and the continued detention of the Petitioner is illegal.

J) The documents accompanying the grounds of detention on the detenu contain several irrelevant and extraneous documents. As a necessary corollary, it must follow that the subjective satisfaction recorded by the Detaining Authority suffers from non-application of mind. In any case, the detenu's right to make effective representation at the earliest opportunity has been abridged.

6. The Respondents have filed reply affidavits to counter the allegations about the acts and commission of the authorities and the grounds urged by the Petitioner. We have heard Counsel appearing for both the sides on the above points. Some of the legal points raised in this petition were also raised in the

companion writ petition, being W.P.(Cri.) No.1409 of 2012, filed on behalf of the co-detenu Ajit B. Satam. The Counsel for the Petitioner has adopted the arguments of the Petitioner in that Writ Petition. Indeed, he has relied on additional decisions to which we shall advert to a little later.

7. Although the Petitioner has raised several points reproduced hitherto, we do not deem it necessary to deal with each of them. For, we are of the considered opinion that the Petition ought to succeed on the ground urged in ground (7F) of Writ Petition at pages 21 and 22. The same reads thus:

7(F) The Petitioner says and submits that the detaining authority has not formulated the grounds of detention at all. The petitioner craves leave of this Court to produce a copy of the proposal of sponsoring authority, handed over to the detenu by a senior officer of sponsoring authority in expectation of bribe, as and when required during hearing of the petition. It is evident from the said copy of the proposal that detaining authority has merely replaced the names of detenu and co-detenu with words like "you" and "your" in the grounds of detention served on the detenu and co-detenu, implying that the grounds of detention have been formulated by the sponsoring authority and not by the detaining authority. The petitioner says and submits that the detention law, in the instant case, has been invoked against the detenu as he refused to bribe the concerned senior officers of the sponsoring authority. Nonetheless, it is enjoined upon the detaining authority to disclose to the Honourable Court as to when the said documents, set out in Exhibit-"C", were placed before the detaining authority and the time taken by the detaining authority for scanning and perusing the said documents and for formulating the grounds of detention. The petitioner says and submits that it was enjoined upon the detaining authority, in law, to have herself formulated the grounds of detention. The detaining authority in law could not have bodily adopted the draft grounds of detention, if any, formulated and prepared by the sponsoring authority, and submitted before the detaining authority as the grounds of detention, which course of action, if adopted by the detaining authority was impermissible in law for issuing the impugned order of detention. The petitioner says and submits that if such a course of action was so adopted by the detaining authority, then in that case, the satisfaction purported to have been arrived at, by the detaining authority, is sham in the eye of law and impugned order of detention, in that case, is per se mala fide and ab initio null and void.

8. This ground has been raised on the basis of assertion made in the Writ Petition that the Petitioner has come in possession of the photocopy of proposal forwarded by the Sponsoring Authority which has been given to the co-detenu by a Senior Officer of Sponsoring Authority in expectation of bribe. Photostat copy of the said proposal was handed in to the court. Relying on the said proposal, the argument of the Petitioner proceeds that the grounds of detention are substantially the same except some cosmetic changes made relating to the description of the detenu in the grounds of detention. Rest of the contents are

bodily lifted and adopted by the Detaining Authority, which is indicative of non-application of mind by the Detaining Authority.

9. Since the photostat copy of the proposal was produced before the Court, we called upon the learned APP to take instructions whether the document produced across the bar was the correct copy of the proposal. The learned APP, on instructions, has accepted that the document handed over to the Court was the copy of the proposal sent to the Detaining Authority. In the separate Judgement delivered today in the case of co-detenu, Ajit Bapu Satam, we have already observed that how copy of this proposal was leaked from the Office of the Sponsoring Authority or otherwise, is a matter to be enquired into Departmentally, and to be taken to its logical end as it is a serious matter. The question is: whether the Detaining Authority is precluded from adopting the contents of the proposal including bodily lifting the same and incorporating in the grounds of detention. The Counsel for the Petitioner has placed reliance on the decision in the case of Jai Singh and Others Vs. State of Jammu and Kashmir, .

10. The Detaining Authority has countered the ground urged by the Petitioner by filing reply dated 3.8.2012. It is one of mere denial. The same reads thus:

12. With reference to paragraph 7(F) of the petition, it is denied that the grounds of detention were not formulated by me. It is denied that the Detention Order is per se mala fide and ab initio, null and void.

Even in the further affidavit filed by the Detaining Authority, while dealing with the ground (F), it is stated as follows:

12. With reference to paragraph 7(F) of the petition, it is denied that the grounds of detention were not formulated by me. It is denied that the Detention Order is per se mala fide and ab initio, null and void.

I say that I have considered the proposal alongwith the relied upon documents and on my subjective satisfaction I have issued the Order of Detention on 14.3.2012.

11. The reply affidavit filed by the Detaining Authority is to say the least, vague denial of the case made out by the Petitioner in ground (F). Whereas, the Petitioner has substantiated his allegation in ground (F) by producing photocopy of the proposal submitted by the Sponsoring Authority. As aforesaid, the Respondents have admitted that the photocopy of the proposal produced by the Petitioner in Court is the mirror copy of the original proposal. Further, on comparing the contents of the said proposal with the grounds of detention served on the Petitioner, there is no manner of doubt that the contents of the proposal have been bodily lifted and incorporated in the grounds of detention, purportedly formulated by the Detaining Authority except modifying the description of the detenu and some cosmetic changes. In the proposal he has been addressed by name "Deepak Sharad Jare" whereas in the grounds of detention, para 18, reproduced in its entirety, is described as "You" and the other changes made are

cosmetic changes.

12. The relevant portion of the proposal forwarded by the Sponsoring Authority and on which basis the subjective satisfaction has been recorded by the Detaining Authority, being verbatim except the cosmetic changes can be demonstrated by reproducing the relevant extract of the proposal and the grounds of detention, which reads thus:

RELEVANT CONTENTS OF PROPOSAL SUBMITTED TO THE DETAINING AUTHORITY
CORRESPONDING CONTENTS OF GROUNDS OF DETENTION

ROLE PLAYED BY DEEPAK SHARAD JARE

Deepak Sharad Jare was leading member of a organized syndicate involved in smuggling of red sanders (prohibited for export under EXIM policy) by using duplicate bottles seals of various Central Excise offices and Shipping Lines used for sealing the export containers. He entered in to a conspiracy with Ajit Satam for smuggling red sanders to Dubai by replacing the original export consignments with red sanders and then sealing the export containers with duplicate seals having identical serial numbers and markings. He arranged infrastructure and manpower for illegal export of red sanders. For providing the same he charged Rs. 40 lakhs per container(40 feet). He along with his associates Prakash Shewale, Bhaskar Tate etc. arranged for the genuine export consignments by placing orders using bogus e-mail Ids. These genuine export consignments stuffed under supervision of Central Excise officers at the factory premises of original exporter sealed with Central Excise bottle seal and Shipping Line bottle seal were diverted enroute to the godowns at Jainapur or Talegaon where the same were de-stuffed after breaking the Central Excise and Shipping Line bottle seals. The export containers were re-stuffed with red sanders and sealed with duplicate Central Excise and Shipping Line bottle seals. Thereafter they were transported to Nhava Sheva for export. He was responsible for arranging office space for placing export orders as well as making duplicate seals, arranging communication facilities between members of the syndicate. He had purchased an Embossing Machine from a manufacturing unit in Goregaon plain bottle seals from a Delhi based supplier and also arranged metal dies from one Jayesh Panchal for making duplicate seals through his associates Prakash Shewale and Santosh Shinde. He had also hired Alex Fernandes @ Anand and his known persons for transporting containers.

18. You are a leading member of a organized syndicate involved in smuggling of red sanders which is prohibited for export under EXIM policy by using duplicate bottles seals of various Central Excise offices and Shipping Lines used for sealing the export containers. You entered into a conspiracy with Ajit Satam for smuggling of red sanders to Dubai by replacing the original export consignments with red sanders and then sealing the export containers with duplicate seals having identical serial numbers and markings. You arranged infrastructure and manpower for illegal export of red sanders. For providing the same you got Rs.

40 lakhs per container (40 feet). You along with your associates arranged for the genuine export consignments stuffed under supervision of Central Excise officers at the factory premises of original exports sealed with Central Excise bottle seal and Shipping Line bottle seal were diverted enroute to the godowns at Jainapur or Talegaon where the same were de-stuffed after breaking the Central Excise and Shipping Line bottle seals. The export containers were re-stuffed with red sanders and sealed with duplicate Central Excise and shipping Line bottle seals. Therefore they were transported to Nhava Sheva for export. You were responsible for arranging office space for placing export orders as well as making duplicate seals, arranging communication facilities between members of the syndicate. You had purchased an Embossing Machine from a manufacturing unit in Goregaon, plain bottle seals from a Delhi based supplier and also arranged metal dies for making duplicate seals through your associates. You had also hired Alex Fernandes @ Anand for transporting containers.

EARLIER INVOLVEMENT IF ANY

Deepak Sharad Jare is a regular offender and in the past was involved in many smuggling cases. He was arrested in the year 2006 in a drawback case and a detention order under COFEPOSA Act, 1974 was also issued against him. ?.

CONCLUSION

....

Deepak Jare is a habitual offender and was detained under COFEPOSA Act, 1974 in the year 2008. He is an associate of Ajit Satam and used to handle the arrangement of empty containers from genuine exporters. He used to arrange for the duplicate bottle seals, used to reseal the containers after restuffing the same with red sanders. He had hired the services of Prakash Shewale, Bhaskar Tate and Santosh Shinde for booking the export consignments as well as for arranging duplicate seals. He had hired the services of Anand for transportation of containers. Apart from the smuggling of red sanders an environmentally endangered species and prohibited item for export the syndicate had been tampering with bottle seals. The sanctity of sealed containers rests with the integrity of one time bottle seal, hence tampering with the same poses a serious threat not only to the security of the supply chain but also to the country as this can be used to smuggle dangerous contraband in or out of the country. Considering the nature and gravity of the offence and the well organized manner in which he has engaged in such prejudicial activities, he is required to be detained u/s 3(1)(i) of the COFEPOSA Act, 1974 for smuggling goods, with a view to prevent him from indulging in smuggling activities in future.

...

You are a regular offender and in the past were involved in smuggling cases. You were arrested in the year 2006 in a drawback case and a detention order under COFEPOSA Act, 1974 was also issued against you.

You are a habitual offender and were detained under COFEPOSA Act, 1974 in the year 2008. You are an associate of Ajit Satam and used to handle the arrangement of empty containers from genuine exporters. You used to arrange for the duplicate bottle seals, used to reseal the containers after restuffing the same with red sanders. You had hired the services of Prakash Shewale, Bhaskar Tate and Santosh Shinde for booking the export consignments as well as for arranging duplicate seals. You had hired the services of Anand for transportation of containers. Apart from the smuggling of red sanders an environmentally endangered species and prohibited item for export your syndicate had been tampering with bottle seals. The sanctity of sealed containers rests with the integrity of one time bottle seal, hence tampering with the same poses a serious threat not only to the security of the supply chain but also to the country as this can be used to smuggle dangerous contraband in or out of the country.

20. You were arrested on 03.09.2011 and released on bail on 27.09.2011.

21. I have considered your retraction dated 03.09.2011 and 14.09.2011 and rebuttal filed by the department on 19.09.2011 before passing the detention order.

22. I have considered your representations dated 10.01.2012 and 10.02.2012 before passing the Detention Order.

23. I have also considered the Show Cause

Notice dated 29.02.2012 before passing the Detention Order.

24. Considering the nature and gravity of the offence and the well organized manner in which you have engaged in such prejudicial activities, it is imperative that you should be detained under the provisions of COFEPOSA Act, 1974, with a view to prevent you from indulging in smuggling activities in future.

25. Your smuggling activities fail u/s 113(d) & (h) of the Customs Act, 1962.

26. While passing the detention order under COFEPOSA Act, 1974, I have referred to and relied upon the documents mentioned in the enclosed list which are also being served on you.

27. Whatever time was required for scanning the proposal containing about 2994 pages, and formulating the grounds for issuing the detention order, after receipt of the proposal, was for the purposes of better verification of the material placed before me and applying my mind and arriving at subjective satisfaction. Therefore, I am satisfied that the nexus between the date of incident and passing of the detention order as well as the object of your detention has been maintained.

28. I hereby communicate to you as required u/s 3(3) of the COFEPOSA Act, 1974 read with Article 22(5) of the Constitution of India, the grounds on which the Detention Order has been made by me. The copies of relevant statements and documents placed before me, as mentioned in the accompanying list, are

enclosed.

13. We have already mentioned that how a copy of this proposal has been leaked and became available to the Petitioner is a matter of investigation and enquiry. That being a serious matter ought to be taken to its logical end. Photostat copy of the proposal made over to the Court by the Counsel for the Petitioner shall be kept in sealed cover, to be preserved by the Registrar (Judicial) of this Court until the enquiry and / or investigation in that behalf is completed. We may observe that it is possible that a copy of the proposal may have been made available to the Petitioner after passing of the detention order. Even then, it is a serious matter as the file containing the proposal is required to be preserved as confidential record.

14. Be that as it may, the leakage of the copy of the proposal forwarded by the Sponsoring Authority to the Detaining Authority has unravelled the casual approach of the Detaining Authority. Similar situation obtained in the case of Jaysingh & Ors. (supra). As it is a short judgment, we deem to apposite to reproduce the same in its entirety as under:

The order of the Court was delivered by

CHINNAPPA REDDY, J. - These seven writ petitions under Article 32 of the constitution have to be allowed on the sole ground that there has been a total non-application of the mind by the detaining authority, the District Magistrate of Udhampur. We had called for the records and the learned counsel for the State of Jammu and Kashmir has produced the same before us. First taking up the case of Jai Singh, the first of the petitioners before us, a perusal of the grounds of detention shows that it is a verbatim reproduction of the dossier submitted by the senior Superintendent of Police, Udhampur to the District Magistrate requesting that a detention order may kindly be issued. At the top of the dossier, the name is mentioned as Sardar Jai Singh, father's name is mentioned as Sardar Ram Singh and the address is given as village Bharakh, Tehsil Reasi. Thereafter it is recited "The subject is an important member of Thereafter follow various allegations against Jai Singh, paragraph by paragraph. In the grounds of detention, all that the District Magistrate has done is to change the first three words "the subject is" into "you Jai Singh, s/o Ram Singh, resident of village Bharakh, Tehsil Reasi". Thereafter word for word the police dossier is repeated and the word "he" wherever it occurs referring to Jai Singh in the dossier is changed into "you" in the grounds of detention. We are afraid it is difficult to find greater proof of non-application of mind. The liberty of a subject is a serious matter and it is not to be trifled with in this casual, indifferent and routine manner. We also notice that in the petition filed by the detenu, he had expressly alleged that he and the others had already been taken into custody in connection with a criminal case on July 6, 1984 itself and all of them were in custody since then. The detenu has given details of where he was taken and when. He has also referred to the circumstances that an application for bail was moved on his behalf on the eighteenth before the High Court and it was only

thereafter that the order of detention was made. These facts have not been denied in the counter-affidavit filed by the respondents. In fact we are unable to find anything in the records produced before us, either in the police dossier submitted to the District Magistrate for action or in any other document forming part of the record that the District Magistrate was aware that the petitioner was already in custody. There is nothing to indicate that the District Magistrate applied his mind to the question whether an order of detention under the Jammu & Kashmir Safety Act was necessary despite the fact that the petitioner was already in custody in connection with the criminal case. The cases of the other six petitioners are identical and in the circumstances, we have no option, but to direct their release forthwith, unless they are wanted in connection with some other case or cases.

(Emphasis supplied)

15. Once again, in another recent case from the State of Maharashtra, similar grievance made by the detenu came up for consideration before the Apex Court, in the case of *Rajesh V. Adnani vs. State of Maharashtra*, reported in (2005) 8 SCC 390. Even in that case, similar cosmetic changes were noticed in the grounds of detention purportedly formulated by the Detaining Authority. Counsel appearing for the State did make an attempt to persuade the Court to take the view that the record would evince that there has been due application of mind on the part of the Detaining Authority. The Court rejected that argument and instead, observed as follows:

11... This may be so but keeping in view the safeguards envisaged under Article 22 of the Constitution it was absolutely essential for the second respondent herein to apply her mind not only at the time of grant of approval to the proposal for detention but also when the actual order of detention and grounds thereof are prepared. To the aforementioned extent there has been no application of mind on the part of the second respondent herein, and, thus, we are of the opinion that the impugned order of detention dated 3-11-2004 cannot be sustained.

16. A priori, we have no option but to follow the dictum of the Apex Court and while doing so, express our deep sense of anguish that notwithstanding the verdict of the Apex Court in *Rajesh V. Adnani's* case (*supra*), the Detaining Authority has not made any amends to ensure that the grounds of detention, and more particularly, the basis on which the subjective satisfaction has been reached must be formulated by the Detaining Authority on his own and not by bodily lifting the contents of the proposal sent by the Sponsoring Authority by making cosmetic changes thereto. Such approach of the Detaining Authority has been repeatedly frowned upon by the Courts considering the fact that the exercise of power to detain a person without a trial on the basis of circumstances of suspicion is a very drastic order to be passed, which cannot be and ought not to be resorted to lightly.

17. In view of the above, we need not deal with the other points raised in this petition. This petition, therefore, succeeds and the same is made absolute in terms of prayer clause (a). We accordingly direct the State Authorities to forthwith release the detenu Deepak Sharad Jare, if not otherwise required in any other criminal case. Rule made absolute accordingly.