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(2020) 02 GUJ CK 0009

In the Gujarat High Court

Case No : R/Special Civil Application No. 18941 Of 2019, Civil Application (For Temporary Bail) No. 1 Of 2020

Sanjaykumar Mulchandbhai Shah @ Khatod APPELLANT

Vs

Union Of India RESPONDENT

Date of Decision : 03-02-2020

Acts Referred:
Constitution Of India, 1950 — Article 14, 21, 22, 226
Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 — Section 3(1)
Customs Act, 1962 — Section 111

Citation : (2020) 02 GUJ CK 0009

Hon'ble Judges : S.H. Vora, J

Bench : Single Bench

Advocate : YS Lakhani, Hardik P Modh, Amit Laddha, Nirzar S Desa

Final Decision : Disposed Of

Judgement

S.H.Vora, J

1. Present petition under Articles 14, 21, 22 and 226 of the Constitution of India is directed against the detention order F.No.PD-12002/09/2018-COFEPOSA dated 11.05.2018 passed under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred as "COFEPOSA" for short) for the period of one year against the petitioner.

2. The petitioner is Indian habitant. The petitioner is Director of M/s.Somnath Metal Pvt. Ltd. for more than 9 years and is in business of import and trading of various types of metal scrap.

3. By way of present petition, Mr. Sanjaykumar Shah through his father Mr.M.J.Shah, presently in Sabarmati Jail since 03.09.2019, challenges legality and validity of detention order dated 11.05.2018 issued by Joint Secretary, Government of India in exercise of powers under section 3(1) of COFEPOSA. In

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terms of the said order of detention, the petitioner has been detained since 03.09.2019, with a view to prevent him from smuggling of goods, abetting smuggling of goods and engaging in transporting or concealing or keeping smuggled goods.

4. The petitioner made representation on 10.09.2019 through Jail Superintendent, Sabarmati Central Jail to the Chairman, Advisory Board, COFEPOSA. Despite direction of this Court vide order dated 27.08.2019 directing the Advisory Board to consider representation within 3 weeks from the date of receipt of this order but not later than 4 weeks, the said representation is not decided. Order dated 27.08.2019 passed by this Court was served upon the Detaining authority ie respondent no.2 on 29.08.2019. However, representation was required to be considered on or before 19.09.2019. Since the hearing itself was given to the petitioner on 25.09.2019 i.e. after three weeks from the date of receipt of the order, the detention order is required to be quashed.

5. In nutshell, it is case of the detaining authority that the petitioner is part of organized syndicate who planned and executed smuggling of gold, foreign brand cigarettes and betel nuts by concealing those under the heavy metal scrap thereby evaded duty and also liable to be prosecuted under the Customs Act, 1962. It is specific case of the detaining authority that the petitioner funded importers viz. M/s. Bhogyoday Enterprise and M/s. Radika Impex through the petitioner's firm viz. M/s. Somnath Metal Pvt. Ltd. for payment to overseas supplier as well as other expenses like customs duty, clearance and transportation charges for import consignment by the importer.

6. It is specific case of the detaining authority that the petitioner emailed important documents of M/s.Bhagyoday Enterprise and he took decision on behalf of the importer and for the said purpose, the petitioner visited Sharjah and made contact with Ms/. Metal World FZE and convinced them to ship the gold and cigarettes by way of concealment in the consignment of HMS and thus, evaded liable duty in terms of section 111 of the Customs Act, 1962. According to the detaining authority, the petitioner is key player of smuggling syndicate inasmuch as, the petitioner along with Shri Ramnarayan Laddha and others have meticulously executed the entire operation of smuggling of imported goods through Sea Bird CFS and Landmark CFS at Mundra with sole intention of evading payment of customs duty.

7. The contention of the detenue - petitioner before this Court is that the detention order was passed against him mainly on the alleged premise that the petitioner along withShri Ramnarayan Laddha and others formed orgainzed syndicate for smuggling of gold, cigarettes and betel nuts valued more than Rs.10 Crores approximately involving duty evasion of Rs.4 crores by importing goods through M/s. Bhagyodaya Enterprise and M/s. Radhika Impex at Mundra and Kandla port,

8. Learned Senior advocate Mr. Y.S.Lakhani for the petitioner has challenged

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detention order principally on three grounds (i) That there is inordinate delay in passing the detention order against the detenue - petitioner, which vitiates the detention itself. Detention order was passed on 11.05.2018, which is after a period of 10 months and alleged activities occurred in the year 2017. At this stage, learned Senior Counsel Mr. Lakhani referred to decision of the Hon'ble Apex Court in the case of T.A. Abdul Rehman v/s. State of Kerala reported in (1989) 4 SCC 741. The Hon'ble Apex Court in the said case, in para 10, has pointed out as under :-

"10. The conspectus of the above decisions can be summarised thus : The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the Court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the Court has to investigate whether the causal connection has been broken in the circumstances of each case."

8.1. Secondly, it is urged before this Court that it is obligation upon the sponsoring authority to supply all relevant material to the detaining authority. In the case of hand, the sponsoring authority failed to supply detention authority at the time of passing of order of detention following vital documents viz. :-

Sr.No

Particulars

1.

A copy of regular bail order dated 29.12.2017 passed by the Hon'ble Gujarat High Court in Criminal Misc. Application (For Regular Bail) No.30460 /2017

2

Letter dated 09.11.2017 addressed to the Ld. Additional Chief Metropolitan Court regarding retraction of the statement of the petitioner recorded on 07.11.2017 and 08.11.2017 recorded by the Directorate of Revenue Intelligence.

3

Letter dated 10.11.2017 addressed by the Deputy Superintendent, Ahmedabad Central Jail to the Registrar of the Hon'ble Additional Chief Metropolitan Magistrate regarding retraction of the statement.

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4.

Letter dated 13.11.2017 addressed by the Registrar of the Metropolitan Magistrate to the Hon'ble Additional Metropolitan Magistrate regarding retraction of the statement.

8.2. Similarly, it is submitted that authority failed to consider subsequent events which took place while order of detention was not being executed upon the petitioner on account of protective order passed by this Court for a period of 15 months i.e. from 11.05.2018 to 03.09.2019. As per submissions, following events happened which were not considered and /or taken into consideration before serving detention order upon the petitioner. :-

Sr.No.

Particulars.

1

A copy of Anticipatory bail order dated 17.07.2018 passed by the Hon'ble Gujarat High Court in Criminal Misc. Application No.1902 / 2018.

2

Statement dated 05.07.2018 of the petitioner recorded by DRI.

3

Letter dated 05.07.2018 retracting statement recorded on 05.07.2018

4

A copy of letter dated 11.07.2018 addressed by Senior Intelligence Officer, DRI to the petitioner.

5

A letter dated 13.07.2018 addressed by the petitioner to DRI reiterating the stand made by the petitioner in his letter of retraction of the statement dated 05.07.2018.

6

Show cause notice F.No.DRI/AZU/G1-01/ ENQ-35/2017 dated 23.07.2018 issued by the Additional Director General of Directorate of Revenue Intelligence, Ahmedabad.

7

Show cause notice F.No.S/43-05/SIIB/CHM/Radhika/2017- 18 dated 18.07.2018.

8

Order in Original No.MUN-CUSTM-000-COM-24-18-19 dated 25.02.2019 passed

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by the Principal Commissioner of Customs, Mundra.

9

Order in Original No.MUN-CUSTM-000-COM-20-18-19 dated 10.12.2018 passed by the Commissioner of Customs, Mundra

10

Order in Original No.AHM-CUSTM-000-COM-002-19-20 dated 28.06.2019 passed by the Commissioner of Customs, Ahmedabad.

11

Appeals filed by the petitioner challenging the order-inoriginal No.MUN-CUSTM-000-COM-24-18-19 dated 25.02.2019 and order in Original No.MUN-CUSTM-000- COM-20-18-19 dated 10.12.2018 passed by the Commissioner of Customs, Mundra.

8.3. In support of grounds so urged before this Court, learned Senior Counsel has placed reliance on three following decisions:-

(1) Sahil Jain v/a. Union of India reported in 2013 SCC Online Delhi 4540.

(2) Ashadevi wife of Gopal Ghermal v/s. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat reported in (1979) 1 SCC 222.

(3) R.Rani v/s. State of Tamil Nadu reported in 2002 (150) ELT 1395 (Mad.).

8.4. Last but not least, it is urged before this Court that the detaining authority identically issued detention order No.PD-12002/10/2018 - COFEPOSA dated 11.05.2018 to one Shri Ram Narayan Laddha under section 3(1) of the Customs Act for his detention in connection with same case, for which petitioner has been detained. The Advisory Board after considering facts of the case of Shri Ram Narayan Laddha revoked detention order on 09.08.2018 and released him from COFEPOSA. According to learned Senior Advocate as held in the case of Madanlal Hiralal Savariya v/s. State of Gujarat reported in 1989 SCC Online Guj 450, it is case of clear violation of case of Article 14 of Constitution of India inasmuch as one of the co-accused having identical role was released, his detention was set aside and the detention of the petitioner was maintained and therefore, there is lack of non application of mind and order smacks of malafide action and that too without pointing out subjective satisfaction that there is likelihood of prejudicial activities on the part of the petitioner. At the end, learned senior advocate would submit that present petition may be allowed.

9. Per contra, respondent no.3 has filed affidavit in reply and maintained that detention order is legal and valid and refuted all the grounds more particularly above three grounds on which submission is made at bar to quash and set aside detention order.

10. Learned advocate Mr. Desai for respondent no.3 authority would submit that

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case of the petitioner and said Shri Ram Narayan Laddha is not same and identical though it is based on same set of relied documents. According to him, the petitioner is real conspirator behind smuggling and in support of such contention, he has placed reliance on averments made in para 16, which reads as under:-

"16. With regard to Ground I of the petition, I say that the petitioner has mentioned that as the co-detenue Shri Ram Narayan Laddha has been released on merit and the identical treatment be given to him also. Regarding the role of Shri Sanjaykumar Mulchand Shah @ Khatod in the smugglings, I say that it is unique and he is the real conspirator behind the smuggling. This fact can be verified from the following points :-

(i) Shri Sanjaykumar Mulchand Shah is the director of M/s. Somnath Metal Pvt. Ltd. And is involved in the import of HMS scrap and scraps of Steel, cooper, Aluminum by using the IEC. However, for smuggling of Gold and other items, Shri Sanjaykumar Mulchand Shah has used the IEC of M/s. Bhagyoday Enterprise. Also M/s. Radhika Impex has been used by him to smuggle areca nut. During the investigation process, Shri Sanjaykumar Mulchand Shah has created a ficitious character named Saleem to mislead the investigation. The creation of multiple layers of companies and using proxy IEC for smuggling reveals the criminal mind set of Shri Sanjaykumar Mulchand Shah.

(ii) Statement of Shri Kamlesh Bhai working for Ms/. Bright Shipping Pvt. Ltd., a CHA revealed that Shri Sanjaykumar Mulchand Shah has arranged the documentation work for customs clearance and transportation of containers. This shows that for all the activities related to clearance of the smuggled cargo, Shri Sanjaykumar Mulchand Shah was in the forefront.

(iii) Bank statement of M/s. Bhagyoday Enterprise and M/s. Radhikha Impex (both firms which has been used for smuggling) has revealed that it has been funded by M/s. Somnath Metal Pvt. Ltd. and M/s. H.B.Metal Pvt. Ltd. Which are owned by Shri Sanjaykumar Mulchand Shah. Huge amount have transferred into the accounts. This shows that Shri Sanjaykumar Mulchand Shah is the real man behind funding of smuggling activities.

The above facts tells that Shri Sanjaykumar Mulchand Shah is a part of organized criminal syndicate which creates, shadow companies for involving of smuggling of gold, cigarettes and betel nuts involving duty evasion of Rs.4 Crores which caused irreparable loss to the national economic security. Considering the unique role played by Shri Sanjaykumar Mulchand Shah, the plea of identical treatment cannot be accepted. The severity of the role played by Shri Sanjaykumar Mulchand Shah has been considered by both Detaining authority and Advisory Board for the detention of him."

11. First ground of challenge to the detention order is such that inordinate delay in passing the detention order dated 11.05.2018 against the petitioner vitiates detention itself. In the case on hand, last prejudicial act recorded against the

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petitioner was in the month of August, 2017, whereas, detention order is passed on 11.05.2018, which is after a period of 10 months. As such, test of proximity is not mechanical test by merely counting number of months between the offending acts and the order of detention, but when there is undue delay, then, the Court has to scrutinize whether the detaining authority has satisfactorily examined such a delay occurred. The only explanation provided by the respondent authority is such that the petitioner joined investigation on 25.10.2017 and that too he appeared for investigation only after High Court order dated 16.10.2017 passed in Criminal Misc. Application (for anticipatory bail) No.25454 of 2017. So in nutshell, justification for delay is on account of non appearance and non cooperation on the part of the petitioner. As such, explanation is per-se irrelevant because nexus of causal connection is required to be established between prejudicial activities and passing of the detention order. In the case on hand, the detaining authority has not afforded reasonable explanation to show that causal connection has not been broken and it was still alive at the time of passing of detention order. It is a matter of fact that no any offence has been registered against the petitioner either by the Customs Department or State or Central Department about any prejudicial activities. Therefore, the Court finds that the case on hand is squarely covered by decision of T.A. Abdul Rehman v/s. State of Kerala (supra).

12. So far as second ground is concerned, it appears that Sponsoring authority has not supplied all relevant material to the detaining authority, more particularly, documents viz. copy of regular bail order dated 29.12.2017 passed by the Hon'ble Gujarat High Court in Criminal Misc. Application (For Regular Bail) No.30460 /2017, letter dated 09.11.2017 addressed to the Ld. Additional Chief Metropolitan Court regarding retraction of the statement of the petitioner recorded on 07.11.2017 and 08.11.2017 recorded by the Directorate of Revenue Intelligence, Letter dated 09.11.2017 addressed to the Ld.

Additional Chief Metropolitan Court regarding retraction of the statement of the petitioner recorded on 07.11.2017 and 08.11.2017 recorded by the Directorate of Revenue Intelligence and Letter dated 13.11.2017 addressed by the Registrar of the Metropolitan Magistrate to the Hon'ble Additional Metropolitan Magistrate regarding retraction of the statement. The above documents noted herein-above has bearing on the issue and if provided and considered by the detaining authority, it would influence the mind of the detaining authority one way or other, but unfortunately, they are ignored or not considered by the respondent authority before passing detention order. In this connection, it is relevant to record observations made by the Hon'ble Delhi High Court in the case of Sahil Jain (supra), more particularly, para 29, 47 and 50, which reads as under :-

"29. It is well settled that the subjective satisfaction requisite on the part of the Detaining Authority, the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the Detaining

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Authority one way or the other are ignored or not considered by the Detaining Authority before issuing the detention order. If material or vital facts which would influence the mind of the Detaining Authority one way or the other on the question whether or not to make the detention order are not placed before or are not considered by the Detaining Authority, it would vitiate its subjective satisfaction rendering the detention order illegal. After all, the Detaining Authority must exercise due care and caution and act fairly and justly in exercising the power of detention and if taking into account matters extraneous to the scope and purpose of the statute vitiates the subjective satisfaction and renders the detention order invalid, then failure to take into consideration the most material or vital facts likely to influence the mind of the authority one way or the other would equally vitiate the subjective satisfaction and invalidate the detention order. (Ashadevi v. K. Shivraj, Addl. Chief Secy. to the Govt. of Gujarat & Anr., (1979) 1 SCC 222).

47. In view of the above discussion, we have no hesitation to hold that the Bail Order dated 26.05.2009 passed by the Delhi High Court in the earlier case under the Customs Act was vital and relevant material to be considered by the Detaining Authority before passing the detention order. The Bail Order having not been considered, the detention order is vitiated and is liable to be set aside.

50. It is not in dispute that the replies to the show cause notices were not considered by the Detaining Authority. In fact, the same were not even placed before it. The stand of the Respondents is that the documents in regard to the proceedings before the Commissioner of Customs and replies to the show cause notices were not ?relied upon? while framing the grounds of detention by the Detaining Authority hence the same were not supplied to the Detenue. A perusal of the detention order falsifies the stand of the Respondents that the three show cause notices were not taken into consideration by the Detaining Authority while passing the order of detention. Para 22 of the detention order makes a reference not only to the three show cause notices but also to the adjudication order dated 31.01.2011 whereby the penalty proposed against the Detenue was ordered to be dropped. The Detaining Authority goes on to mention that the adjudication order in question had not attained finality as an appeal W.P. (Crl.) 1136/2013 Page 33 of 38 had been preferred by the Commissioner of Customs before CESTAT, New Delhi. The replies to the three show cause notices have been placed on record by the Detenue. There were serious allegations of illegal import of high end gold jewellery and misuse of SEZ facility against the Detenue and others. Show cause notice is a charter of allegation and by replies to the notices, the Detenue claimed innocence and therefore, the replies to the show cause notices were vital, important and relevant material to be considered by the Detaining Authority. By considering only the show cause notices against the Detenue without considering these replies, there was a serious prejudice caused to the Detenue as we do not know how the Detaining Authority would have reacted on considering the replies."

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13. Third ground of challenge to the detention order is such that the detention authority identically issued detention order to one Mr. Ram Narayan Ladhha in connection with same case, for which the petitioner has been detained, was released and his detention order was set aside. This issue is overlooked by the detention authority, more particularly, at the time of rejecting representation of the petitioner because it is a matter of fact that detention order issued to the petitioner and said Shri Ram Narayan Laddha is almost on identical facts. While considering issue of imposing penalty on Shri Ram Narayan Laddha, it is specifically recorded by the Principal Commissioner, Customs House, Mundra, Kutch in the proceedings being Order-in-Original No.MUN-CUSTM-000-COM-24-18-19 dated 25.02.2019 that Shri Ramnarayan Laddha was actively engaged in creating the firm in the name of M/s. Radhika Impex for the purpose of smuggling of contraband goods and he controlled all the business and banking transactions of M/s. Radikha Impex along with present petitioner. It is further found and observed in the said proceedings that the present petitioner adopted a modus operandi in creating firms / companies in the name of others and thus, he played vital role in smuggling of goods and betel nuts. Such factual finding if examined viz-a-viz grounds of detention alleged in the impugned order, then only conclusion can be drawn is such that both said Mr. Ramnarayan Laddha and the petitioner stand almost on identical footing. The Court did not find any different and distinct role attributable to the petitioner, more particularly, in view of avements made in para - 16 of the reply, so as to infer that the petitioner is real culprit behind smuggling. But if overall grounds of detention of both the petitioner and Shri Ramnarayan Laddha is conjointly read and examined, then the only conclusion which can be drawn is that Shri Ramnarayan Laddha and petitioner are part of organized criminal syndicate which created shadow companies for involving of smuggling of gold, cigarettes and betel nuts, as per respondents case.

14. At this juncture, it is relevant to note observations recorded by the Hon'ble Delhi High Court in the case of Boris Sobotic Milkolic v/s. Union of India reported in 2018 (361) ELT 609 (Del.), more particularly, para 34 and 35, which reads as under :-

"34. Mr. Diwakar was unable to point out how the case of the Petitioner on merits was any different from that of the co-detenues. The only explanation offered is that while the co-detenues underwent some period of detention, the Petitioner did not. If on merits, the case of the Petitioner is no different from that of the co-detenues and the detention orders in respect of the co- accused have not been confirmed by the Advisory Board, the Court sees no purpose being served in the Petitioner being detained on the basis of the impugned detention order, the grounds for which are no different from the detention orders issued in respect of the co-detenues, which have not been confirmed by the Advisory Board.

35. As reminded by the Supreme Court in Rajesh Gulati v. Govt. of NCT of Delhi (supra), the purpose of a detention order is to prevent the commission of crime.

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However, in the present case with the Respondents unable to explain how the Petitioner?s case in this regard is any different from that of the co-detenues whose detention orders have ceased to exist, the question of W.P. (Crl) 577/2018 Page 16 of 17 the Petitioner having the propensity to commit a crime does not arise. In any event his passport is with the DRI and as of now he is available in this country."

15. Thus, the detaining authority has meted out differential treatment to the petitioner, if the petitioner's case is examined, in view of detention order passed against one Mr. Ramnarayan Laddha and grounds of subjective satisfaction arrived at by the authority concerned.

16. The offshoot of above discussion is such that the detention order stands vitiated on account of inordinate and explained delay in passing detention order, non supply of vital material / documents, more particularly bail orders of the Competent Court and release of co-detenue Shri Ramnarayan Laddha, on identical fact situation, his detention order was revoked by the Advisory Board. So on these three grounds, present petition deserves to be accepted and accordingly, it is hereby allowed. Detention Order F.No.PD-12002/09/2018-COFEPOSA dated 11.05.2018 passed by respondent no.2 is hereby quashed and set aside. The petitioner shall be released forthwith, if he is not required in any other offence. Direct service is permitted, today.

17. In view of above, Civil Application would not survive. Accordingly, Civil Application stands disposed of.

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