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(1983) 11 DEL CK 0035

In the Delhi High Court

Case No : Civil Writ No. 969 of 1983

Sh. Abdul Aziz Mohammad APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 02-11-1983

Acts Referred:

Citation : (1983) 11 DEL CK 0035

Hon'ble Judges : Prakash Narain, J;Charanjit Talwar, J

Bench : Division Bench

Judgement

Talwar, J.—Abdul Aziz Mohammad alias Aziz Chuba claiming to be a resident of Dubai has filed this petition through his brother, Ahmed Hazi Mohd., a resident of Bombay, seeking setting aside of the order of detention passed against the former by the Government of India on 11th July, 1978 under S. 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (hereinafter called ''the Act'').

2. The petitioner''s case is that he is a citizen of India and is carrying on business in the name of M/s. Aziz & Co., at Dubai. He has been residing there for the last over 15 years. It is averred that through a press release which was given publicity on the television in India it came to be known that an order of detention under the Act had been passed against the petitioner. Thereupon he filed a writ petition bearing No. 45 of 1982 in this High Court seeking quashing of the same. As he had not been served with the detention order he was unable to annex a copy of the same with the petition. On issuance of a show cause notice of that petition, the respondents herein, the Union of India, filed the impugned detention order as also the grounds of detention with their answer. The Government also filed copies of orders passed under S. 7(1)(a) and 7(1)(b) of the Act. Thereupon, the said writ petition was withdrawn and the present petition based on the facts disclosed in the affidavit filed in answer to show cause notice, was moved on behalf of the petitioner.

3. The gravamen of the petitioner''s case is that there has been a complete non-

application of mind by the detaining authority while passing the impugned detention order as well as the grounds of detention. It is his case that the detaining authority was not informed that the petitioner was not residing in India and had not even visited the country for the last 15 years. The order of detention showing that be is resident of Bombay which was passed with a view to preventing him from smuggling goods in India, is thus illegal. The detention order has been issued to the petitioner at 296/A, Abdul Rehman Street, Bombay. The address of the petitioner given on the grounds of detention is also the same. The grounds of detention dt. 11th July, 1978, i.e., the same date as that of toe detention order were to be served through the officer-in-charge of the Prison, Nasik Road, Bombay. A copy of the grounds was endorsed to the officer-in-charge of that prison with a request "to serve the original copy meant for the detenu on him under a proper acknowledgment which should be forwarded to the undersigned. If the detenu so desires, the grounds may also be read over and explained to him in the language known to him." A copy of the detention order was endorsed to the Commissioner of Police, Greater Bombay, who was authorised to arrange for the execution of the order. Vide notification dt 2nd September, 1978, published in Part II of the Gazette of India, the Central Government in exercise of powers under S. 7(1)(b) of the Act directed the petitioner to appear before the Commissioner Greater Bombay within seven days of the publication of the order. The ground for passing this order has been mentioned in para 2 of the notification which reads :-

"2. Whereas the Central Government has reason to believe that the aforesaid person has absconded or concealing himself so that the order cannot be executed."

4. Thereafter, on 29th February, 1980, a report under S. 7(1)(a) of the Act was made before the Court of Chief Metropolitan, Magistrate, Bombay, by Sh. R. K. Thawani, Deputy Secretary to the Government of India, praying that the proceedings under sections 82, 83, 84 and 85 of the Criminal P.C. 1973, be initiated against the petitioner as the Central Government had reason to believe that he had absconded or was concealing himself to avoid execution of the detention order.

5. At this stage it may be noticed that the averment of the petitioner in para 1 of his petition that he is carrying on business in the name of M/s. Aziz and Co., at Dubai and has been residing there for the last over 15 years, has not been replied to by the respondents in their reply on merits in the counter-affidavit. This averment, Therefore, has to be taken to be correct. At any rate, in view of the admitted fact that an earlier show cause notice under S. 124 of the Customs Act issued on 19th August, 1977, by the office of the Collector of Customs and Central Excise, Ahmedabad, was served on the petitioner at Dubai, the respondents could not have possibly denied it. However, the allegations in the said show-cause notice dealing with the smuggling activities of a number of persons including the petitioner, have been noticed in detail in the grounds of

detention. It appears from the grounds of detention that the petitioner was considered to be kingpin in those activities. It is also noticed by the detaining authority that the Collector of Customs had held in abeyance his order regarding the penal liability of the petitioner under S. 112 of the Customs Act, inter alia, on the ground that it was quite possible that he had been falsely implicated by Najaf Ali, a member of the petitioner''s alleged gang and further that no one else had implicated him in the proceedings apart from Najaf Ali.

6. The plea is that from the detention order, the grounds of detention, the notification of the Central Government under S. 7(1)(b) and the complaint by the Central Government under S. 7(1)(a) of the Act moved before the Chief Metropolitan Magistrate, Bombay, it is abundantly clear that at least two relevant facts, namely, first that the petitioner was a resident of Dubai and secondly that he was not available in India, were not placed before the detaining authority. So, the satisfaction is vitiated.

7. The detention order and the grounds of detention, it is admitted in the counter-affidavit, were drafted on the same day. The detaining authority was given to believe that the petitioner was residing or was available at 296/A Abdul Rehman Street, Bombay. The grounds of detention were also addressed to the petitioner at the same address and were to be served through the officer-in-charge of the Central Prison, Nasik Road, Bombay. The presumption was that the Commissioner of Police, Greater Bombay, would have got the detention order executed on the petitioner who by the time the grounds were served, would be lodged in that prison. This net having materialised, the said notification, copy P/6 and complaint to the Chief Metropolitan Magistrate, Copy P/7, were made on the ground that the petitioner had absconded or was concealing himself and as such the detention order could not be executed.

8. As noticed above, the petitioner''s case is that he has not even visited India for the last 15 years. He was never served with a copy of the detention order or the grounds of detention. The impugned detention order and the grounds of detention which were made available to his counsel in the earlier petition have been filed in the present petition. Thus the argument of Mr. Rohtagi, counsel for the petitioner, that the detention order is in fact an order amounting to externment of the petitioner seems to have force.

9. Mr. C. L. Chaudhary, learned counsel for the respondents, contended, that the detaining authority was subjectively satisfied that the detention order in respect of the petitioner was necessary with a view to preventing him from smuggling goods in India although he had not visited the country for the last fifteen years. There is no doubt that an order of detention against a person who is not available in India at the time the order is proposed to be passed, is permissible but in such a situation the detaining authority must show awareness of this fact. It is well-settled that a material fact which could have influenced the mind of the detaining authority either way ought not only be placed before it but ought to be considered by it. The awareness of the detaining authority of such a fact must

appear either in the order or in the grounds or in the affidavit justifying the passing of that order of detention. As noticed above, is their reply the respondents have not even referred to the averment of the petitioner that he has not visited India for over fifteen years. There, is no Explanation as to why the detente order was not served on the petitioner at Dubai. The emphasis in para 8(xi) of the counter-affidavit is that "Since the petitioner was absconding and avoiding service of the order of detention on him, an order under S. 7(1)(b) of the Act was passed on 19-8-1978 and was published in the Gazette of India dt. 2-9-78. Thereafter action under S. 7(1)(a) of the Act was also initiated and a report dt. 29-2-1980 was made in writing to the Chief Metropolitan Magistrate, Bombay."

10. The detention order as well as the counter-affidavit clearly disclose non application of mind. It must, Therefore, be held that the order of detention having been mechanically made suffers from the vice of non-application of mind. The order is thus vitiated.

11. The result is that the impugned detention order dt. 11th July, 1978, is hereby quashed. In consequence all subsequent orders and reports have also to be held to be bad in law and are, Therefore, quashed.

12. Petition allowed.

