
(1989) 09 DEL CK 0044

In the Delhi High Court

Case No : Criminal Writ Appeal No. 8 of 89

Shiraj Ahmed

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-09-1989

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 1(1)
Customs Act, 1962 — Section 108

Citation : (1996) 82 ELT 467 : (1990) ILR Delhi 102

Hon'ble Judges : S. Duggal, J

Bench : Single Bench

Advocate : Urmil Khanna, U.K. Sharma, Kamini Lao, R.P. Lao and Adesh Aggarwal, for the Appellant;

Judgement

Santosh Duggal, J.

(1) In this writ petition, the petitioner challenges the detention made by other dated 4th November, 1988 passed by respondent No. 2, the Administrator of Union Territory of Delhi, invoking the provisions of section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "the Act"), and seeks issuance of writ of habeas corpus for any other order or direction quashing the order of detention, "and directing his release.

(2) The facts in so far as they are relevant for the disposal of the present petition, succinctly are that the petitioner on arrival from Dubai at Indira Gandhi International Airport, New Delhi on 29th June, 1988 was found to have carried in his baggage gold weighing 334 gms. (gross), 330 gms. (net) of 24 ct. purity, valued at Rs. 1,05,600.00 , the same having been concealed at the back of the speakers of three telephones and two transistors. The gold was seized. The petitioner was placed under arrest, and thereafter examined u/s 108 of the Customs Act. In his statement) he revealed that the gold that had been

recovered from the telephones (transistors had been handed over, to him by his friend Ali Sher in Dubai who was there for the last three years and had been coming and going back in between hut was presently in Dubai, and that it was said Ali Sher who had purchased petitioner's ticket to and from Dubai and .that he had been asked by him to take the gold out without payment of duty, and he would collect the same from him on reaching Delhi, but he was not aware as to how Ali Sher got gold melted for concealment in the telephones/transistors. In this very statement the petitioner revealed that this was his first mistake and he wanted to be excused as he had fallen a prey to greed.

(3) The petitioner was subsequently released on bail by order pasted by the Addl. Chief Metropolitan Magistrate on 11th July, 1988 on his furnishing personal bond in the sum of Rs 7000.00 with one surety in the like amount subject to the condition that he shall not leave the country without the written permission of the court, and shall report to the customs officer on every Monday at 10 a.m. till one month.

(4) On the basis of the aforesaid facts and circumstances it was considered to be a fit case to put the petitioner under detention so as to prevent him from smuggling goods, viz. gold into India.

(5) The writ petition has been filed, containing diverse pleas hut at the time of hearing Ms. Urmil Khanna, appearing for the petitioner, concentrated on one ground which has been urged vide facts stated in paragraph 4 of the writ petition to the effect that the petitioner's passport had already been seized by tile officers of the customs department at the time of his arrest arid that the petitioner had gone abroad for the first time and had already stood prevented from indulging in prejudicial activities by retaining his passport, and so the alleged ground made out against the petitioner i.e. to prevent him from smuggling gold into India was not sustainable. This plea is reiterated in ground (e) of the petition to the effect that the detention of the petitioner punitive and not preventive as the petitioner had already been prevented from smuggling gold into India by seizure of Ms passport by the customs authorities and hence there was no necessity to pass the impugned order.

(6) The learned counsel has placed reliance, besides earlier judgments, of this court, on a Full Bench judgment given in the case of Mohd. Saleem v. Union of India, reported as 1989 (3) DL 77, (1) where it has been held on a resume of the entire case. law on the subject that if a person is effectively prevented from leaving the country, by virtue of the fact that his passport was Do longer in his possession, then unless there was something else stated in the grounds of detention to the effect that he was still capable of indulging in smuggling, by making clandestine visits abroad, or employing other means, then the detention order passed with the sole object of prevention of smuggling cannot be sustained. Ms. Khanna, accordingly submitted, on the authority of this Full Bench judgment, that it was also a case of solitary incident as revealed by the passport of the petitioner as also by his statement u/s 108 of the Customs Act and when

his passport was already in the custody with the custom authorities, there was no basis or material for holding the belief that he was capable of indulging in smuggling and that no ground existed for passing of this detention order.

(7) Ms. Kamini Lao, appearing for Mr. R. P. Lao, for respondents 2 and 3, countered these arguments by contending that the detention was not for prevention of mere smuggling, but as revealed by the grounds of detention for the wider purpose of preventing the petitioner from indulging smuggling activities; which expression has a wider ambit, and would include the act of transportation, keeping as well as concealing smuggled goods, and that inasmuch as the petitioner had revealed in Ms statement that this gold had been given to him by his friend Ali Sher for being kept by him till said Ali Sher arrived in Delhi and retrieved the gold from him: it would also be a case where act of transportation and concealment would be inherent. She placed reliance in support of this contention on a judgment of this Court in Criminal Writ No. 119 of 1985 in the case of Om Prakash Kukreja v. The State, decided by a learned Single Judge on 12th September. 1985(2).

(8) Ms. Lao also argued that in this case the counter affidavit filed on behalf of the detaining authority makes it clear that there was every possibility of the detenu indulging in smuggling activities on the same passport or after obtaining any fictitious passport in some false name, adding that there were numerous instances when passports were seized and even then persons were found to indulge in Smuggling activities, and that the detention order was passed with the knowledge that the passport of the petitioner had been surrendered by him before the custom authorities, as also about the conditions of the bail order.

(9) The argument was developed further to the effect that there was a difference between "seizure" of a passport by the authorities, and "voluntary surrender" by the detenu as in the present case, because in the former event, passport was liable to be detained till conclusion of the case, whereas in the latter one, the petitioner could get it back any time, by making application to the concerned officers. She further contended that the court cannot substitute its judgment for the detaining authority and examine the propriety or sufficiency of the grounds. She placed reliance in support of this contention on the Supreme Court judgment Smt. K. Aruna Kumari Vs. Government of Andhra Pradesh and Others, .

(10) Ms. Lao further asserted that even when the detention order was based in one ground but if the grounds disclosed two grounds, then also the detention order could be said to have been passed with the object of preventing activities covered by twin grounds. Reverting to the judgment in the case of Om Prakash Kukrda ("supra), that act of smuggling also involves transportation and concealment; she further added, placing reliance on a Gauhati High Court judgment reported as 1984 Criminal Law Journal 101 (R. Lallawama v. District Magistrate, Dunglei, Mizoram) (4). that-since in this case the details set out in the grounds of detention clearly show that the petitioner if not intercepted would have brought the gold with him and kept it concealed till his friend came and to

that extent transportation and concealment was also involved, and thus Mohd. Saleem's judgment (*supra*) to that extent would not apply.

(11) M.S.. Lao developed arguments further .by contending that in case the documents, supplied with. grounds of detention contained relevant material, then the mere fact that the grounds were silent in respect thereto or did not contain full details, would not vitiate the detention order. She relied upon the Supreme Court judgment in support of this contention in the case of *State of Punjab and Others Vs. Jagdev Singh Talwandi*, . She argued that inasmuch as the documents supplied with the grounds of detention included copy of the passport, this constitutes sufficient indication that it was within the knowledge of the detaining authority that the passport when the petitioner was in the custody of the custom authorities and when the detention order has been passed inspire of this awareness, the logical inference is that the detaining authority felt satisfied that irrespective of the fact that the petitioner was not in possession of the passport at the relevant time, still he was required to be preventively detained to keep a check on his smuggling activities.

(12) Ms. Lao summed up her arguments by contending that as the affidavit filed in counter to the writ petition clearly states that irrespective of the fact that passport was not with the detenu, there were instances where by use of false or forged passports, smuggling activity had gone on, and thus petitioner's detention cannot be held to be not justified for the short reason that he was deprived of his passport at the time detention order was passed or that there were strict conditions imposed in the order of bail on account of which it was not possible for the petitioner to go out of India, so as to indulge in smuggling activities.

(13) Ms. Urmil Khana in short rejoinder contended that here was a case, not of awareness of the detaining authority being supplemented by the reply affidavit filed on his behalf by the Deputy .Secretary, Home Department of Delhi Administration but a fresh material is being indicated, and that none of the authorities cited by Ms, Lao lay down the principles that even material can be supplemented by counter affidavit. She further pointed out that this was a case, where the reply affidavit was based on non-existent material because there is no averment that there was any information or any other basis to hold a belief that the petitioner had means of making trips out of India in spite of not being in possession of a passport, or that there was likelihood of his forging a passport or traveling on a false passport or that he had been indulging in any other smuggling activity or was likely to do so.

(14) The learned counsel submitted that the case of *Om Prakash Kukreja* (*supra*) was entirely on a different footing because in that case the statement of the detenu recorded u/s 108 of the Customs Act had revealed that he had made two earlier trips abroad when he had smuggled watches into India, which he had subsequently sold in the market, and in the third trip also, when he was intercepted, he had brought large number of watches stealthily, with the object

of selling them in the market, and that it was in that context that the learned Single Judge held that the activities of the detenu therein, revealed that it was not a solitary act of smuggling, but a regular business involving not only bringing into India prohibited goods, but also keeping them in concealment, and selling them in market for profit, and as against that, there is a very recent judgment of this court reported as 1989 (2) DL 420, (Suwa Ram through Raghu Ram v. Union of India and others), (6) where it has been held that detention order passed on an isolated act of smuggling, where the ground of detention do not state even that if the person was not detained, he was likely to smuggle gold in future, would made it a case where the detention was passed on non-existent material.

(15) She pointed out that the present case was identical because here also the petitioner in his statement has very clearly fold the custom authorities that this was his first trip when he agreed to carry gold stealthily by a friend, and that he had no Intention or design to go out of India again. Surrender of passport, the counsel argued, was evidence of this state of mind of the petitioner, and that once it was handed over to the customs authorities, it made least difference whether it had been seized or voluntarily surrendered because the net result would be the same, to the effect that it remained in the custody of the customs authorities, and experience showed that it was never returned except under orders of the court, so long as the proceedings remained pending. She reiterated that there was a case where the ratio laid down in the case of Mohd. Saleem (supra) will fully apply because apart from the fact that the counter affidavit is based on non-existent material, otherwise also even if there was any material in existence to the knowledge of the detaining authority, the detention order would suffer from the vice of non-disclosure of the relevant material, in the grounds of detention, if any, taken into consideration by the detaining authority, so as to enable the detenu to make a complete and effective representation in respect thereto.

(16) Ms. Khanna further placed reliance on a Supreme Court judgment, Deben Das Vs. The State of West Bengal, to the effect that where the affidavit indicates that order was based on some material not communicated to the detenu, then the detention order was bad on account of non-disclosure. She also cited an earlier judgment of this court reported as 1989(2) DL 23, (Erukulangara Kunhumamed v. Union of India and others), (8) holding that where some material facts had been taken into consideration, not communicated to the detenu, and that material is disclosed for the first time in the counter affidavit to the petition, then the detention order is bad, and liable to be quashed for the reason that the constitutional right of effective representation of the detenu is violated.

(17) On a resume of the foregoing discussion, it becomes manifest that here is a case where the petitioner had handed over his passport voluntarily to the custom authorities, in continuation of his statement given u/s 108 of the Customs Act that this was his first trip abroad, when he had committed this mistake, and that

he had no intention of repeating the said act in future. Ms. Khanna has rightly argued that the statement of the petitioner has to be read as a whole and cumulatively and it was not open to the authorities to single out the confessional portion of his statement to the effect that he had knowledge of concealment of gold by his friend but ignoring his plea that this was his first visit out of India, and that he repented the act, and would never repeat it in future. In face of this statement of the petitioner, and in view of the fact that the passport corroborated his plea about this being his first visit, because otherwise the grounds of detention would have indicated that the entries in the passport belie the petitioner's plea that he had gone abroad for the first time ; it becomes clearly a case where there was no material before the detaining authority to form the : subjective satisfaction that the petitioner's preventive detention was necessary to prevent him from smuggling goods.

(18) It is pertinent to note that Ms. Kamini Lao, in spite of her vehement arguments, raising different points, had to concede that the records do not contain any information or material to the effect that the petitioner had means of forging a passport or was likely to travel on a false passport, or make clandestine trips or that he had been indulging in diverse smuggling activities, besides this act of bringing gold into India on his first visit abroad. It is thus a case where not only the material now stated or the first time in the counter affidavit is nowhere disclosed in the grounds of detention, thus bringing the case within the mischief contemplated in the Full Bench judgment in the case of Mohd. Saleem (*supra*); it is further a case where the officer filing the counter affidavit referred to non-existent material, and it is nothing but his ownipse dixit.

(19) This type of counter affidavit cannot be taken into consideration. The authorities cited by Ms. Lao only lay down that in a given case the counter affidavit may supplement the awareness of the detaining authority by a relevant or material fact, but not a single judgment would say that the counter affidavit filed on behalf of the detaining authority by an officer can also supplement the material itself, which never existed on the file. which was put up before the detaining authority.

(20) It is, Therefore, a case where it is not a question of assessing the sufficiency or propriety of the grounds of detention but a case where it has been passed in a situation where preventive detention was not called for, because he stood effectively prevented from leaving India, by being deprived of his passport, and also by strict conditions of bail.

(21) It is also pertinent to note that the detention order very unequivocally states that it was being made with a view to "preventing you from smuggling goods viz. gold into India". Provisions of Section 3 of the Act cover within its range activities such as :

"(ii) abetting the smuggling of goods. or (iii) engaging in transporting or concealing or storing smuggled goods, or (iv) dealing in smuggled goods otherwise

than by engaging in transporting or concerning or keeping smuggled goods, or (v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,"

(22) The detention is only with the conscious object of prevention of smuggling. The authority of Gauhati High Court relied upon by Ms. Lao in the case of R. Lallawama Vs. District Magistrate, . rather defeats her arguments because it is clearly stated in this judgment that when although the grounds of detention indicate that there were twin objects of maintenance of public order and security of the State but the fact that the detention order mentioned only one object, showed that the authority by application of mind consciously chose the object, it wanted to advance by detaining the detenu and passed the detention order with that object although the material for detention indicated that another object could also be achieved.

(23) This judgment, Therefore, can be of no avail to the State, because the detaining authority has chosen to confine itself only to one objective, namely, prevention of smuggling of gold into India; although on facts also, in the present case the grounds of retention do not disclose any material to the effect that the petitioner had been or was likely to indulge in activities, such as transportation and concealment etc. By merely employing the expression "smuggling "activities" in the grounds of detention, it is not open to say that the detaining authority had in mind activities, other than mere "smuggling" There is no application of mind for prevention of any other smuggling activity, nor is there any material on record to form any subjective satisfaction, and even if there was any, it is a case where the said material was not disclosed to the detenu.

(24) In view of the above, and on the strength of the judgments of this Court in Kunhumamed (supra) and Suwa Ram (supra). and Full Bench judgment in the case of Mohd. Saleem (supra), it becomes clearly a case where the detention order is not sustainable. and is liable to be revoked.

(25) I accordingly allow the writ petition and hold that the detention order dated 4th November, 1088 is liable to be quashed. The rule is confirmed hereby and it is directed that the petitioner be set at liberty forthwith if not required to be detained in any other case or proceedings.

(26) No order as to costs.