
(2004) 10 BOM CK 0082

In the Bombay High Court

Case No : Criminal Writ Petition No. 1023 of 2004

Smt. Putul Provo Roy

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 11-10-2004

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 5A
Customs Act, 1962 — Section 108

Citation : (2004) 10 BOM CK 0082

Hon'ble Judges : Ranjana Desai, J;A.S. Oka, J

Bench : Division Bench

Advocate : Masood Khan, for the Appellant; A.S. Pai, APP, for the Respondent

Final Decision : Dismissed

Judgement

Ranjana Desai, J.—The petitioner is the mother of one Arko Provo Roy ("the co-detenu" for convenience). In this petition she has challenged the order of detention dated 17th March, 2004, issued by the Principal Secretary to the Government of Maharashtra, Home Department u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ("COFEPOSA" for short) with a view to preventing the co-detenu in future from smuggling goods.

2. The said order with the grounds of detention and the material in support thereof was served on the co-detenu on 24th March, 2004 and he was taken in detention.

3. Specific Intelligence was gathered by DRI officers that M/s. Aditya Recycling P. Ltd. Plot No. 216/B, G.I.D.C. Kabilpore, Navsari, Gujarat and M/s. Khaitan Textile Mills P. Ltd., Plot No. 2001 behind Annapurna Canteen, G.I.D.C., Ankleshwar, Gujarat, both registered as 100% E.O.U. were involved in massive evasion of duty by resorting to gross misdeclaration of the weight of their export products i.e. Copper and Brass ingots. Intelligence revealed that these units are engaged

in fraudulent exports of their finished goods viz. copper and brass ingots by mis-declaring the weight of the goods sought to be exported on a very higher side to the Central Excise and the Custom Authorities i.e. the weight of goods sought to be exported under export obligations was grossly over-declared and actually exporting goods weighing much lower than what was declared on the shipping bills and other documents. Both the above firms were carrying their exports from CWC Dronagiri Node, J.N.P.T.

4. In pursuance to the information, examination was carried out by the Officers of D.R.I. Mumbai under two separate panchanamas dated 23.09.03 at Shed No. 3, CWC, Dronagiri Node J.N.P.T. in respect of three shipping Bills of these units. The examination of the export goods revealed that in respect of one Shipping Bill, M/s. Aditya Recycling Pvt. Ltd. had carted Copper ingots weighing 1.583 MTs instead of 25.950 MTs, the weight mis-declared on the said Shipping Bill. Further, M/s. Khaitan Textile Mills pvt. Ltd. had carted Brass Ingots weighing 2.465 Mts instead of 2.443 Mts., the weight mis-declared on one Shipping Bill and Copper ingots weighing 2.935 Mts instead of 2.020 MTs, the weight mis-declared on another Shipping Bill. Thus in all, both the firms had carted 6.983 Mts of export material, in the Docks, instead of 30.413 MTs to be actually carted in as declared on the Shipping Bills, totally valued at Rs. 34,37,614/-. These goods were subsequently seized on 26.09.03 since found liable for confiscation under the Customs Act 1962.

5. Further, five more shipping bills of LCL consignments of the above firms, which were in the process of being loaded into the vessel in container No. TEXU 4272120 were called back from the port area. They were examined under panchanama, on 26.09.2003 at sheet No. IV, CWC, Dronagiri Node, JNPT. In respect of these five Shipping Bills also, the goods actually carted in for export were 12.881 MTs instead of 123.72 MTs totally valued at Rs. 1,30,78,458/-. Since there was misdeclaration in the weight and quantity of goods sought to be exported as against the weight declared by the above firms, all the above-mentioned goods were seized vide panchanama on 26.09.2003.

6. On examination, it was found that instead of declared 154.133 MTs, the weight found was 19.864 MTs. k Thus, 134.269 MTs of weight of ingots were found short. The estimated duty evasion in above referred eight Shipping Bills is Rs. 73 lakhs approx.

7. The eight live consignments of these exporters, at CWC-CFC, Nhava Sheva, which were already given "let export order" were examined in detail under panchanama by DRI. The goods sought to be exported were found much less than that declared in various export documents and hence were seized on 26.09.2003.

8. The officers of Surat Unit of DRI carried out searches at Factory premises of M/s. Aditya Recycling Pvt. Ltd. and M/s. Khaitan Textile Mills Pvt. Ltd. and some statutory records were withdrawn under panchanama dated 19/20.09.2003.

Statement of co-detenu Sameer Jikar Godil were recorded u/s 108 of the Customs Act wherein he stated that he was one of the Directors of M/s. Khaitan Textile Mills Pvt. Ltd., Gujarat and an authorised signatory of M/s. Aditya Recycling Pvt. Ltd., Gujarat. He admitted that all the duty free imported raw material i.e. Copper and Brass Scrap was not used into production of ingots to be exported but part of it is illegally diverted and sold in local market.

9. It appears that the co-detenu is the active director of M/s. Aditya Recycling Pvt. Ltd. He appeared before the DRI and his statement came to be recorded on 10.11.2003 and 11.11.03 wherein he admitted his involvement. He gave all the minute details and the names of other persons who had lent him support in this well planned prejudicial activity.

10. Taking leads from the co-detenu's statement some more statements of persons concerned with prejudicial activities were recorded. It was revealed that the entire plot of illicitly diverting the duty free raw materials into the local market immediately after the import, from the factory itself and carting the export goods weighing much lower than the actual weight declared on the Shipping Bills for completion of the export obligation illicitly diverting balance quantity of finished goods to local market was a carefully thought out, well-planned and practiced modus operandi by the co-detenu along with his other conspirator Shri Sameer Jikar Godil.

11. On the basis of the material placed before her, the detaining authority was satisfied that considering the nature extended and gravity of the offence and the well organised manner in which the prejudicial activities have been indulged in by the co-detenu, it was clear that the co-detenu had high potentiality and propensity to indulge in such prejudicial activities in future.

12. The detaining authority was further satisfied that that unless detained, the co-detenu was likely to continue to engage in aforesaid prejudicial activities in future also, and, therefore, the present detention order came to be issued with a view to preventing the co-detenu in future from smuggling goods.

13. Mr. Khan the learned counsel appearing for the co-detenu has assailed the impugned order on two counts. He firstly contended that co-detenu Sameer Jikar Godil was arrested on 30-9-2003. He was produced before the remand court and was remanded to judicial custody till 9-10-03. The case was kept for hearing on 10.10.03. On 9.10.03 co-detenu Sameer Godil filed an application for bail. In the said application dated 9.10.03, co-detenu Sameer Godil stated that his various statements which were recorded were neither true nor voluntary and he retracted the statements. On 10.10.03 DRI refuted the retraction of the said Sameer Godil. On 14.10.03 the said Godil filed an interim bail application. In the said interim bail application he again refuted the department's replies to his retractions and reiterated his retractions.

14. Mr. Khan submitted that in the grounds of detention the detaining authority has described the said Sameer Godil as conspirator and stated that the co-

detenu along with his conspirator Sameer Godil had indulged in prejudicial activities. The detaining authority has further stated that the co-detenu's activities along with those of the said Godil amounted to smuggling of goods. Mr. Khan submitted that it was, therefore, incumbent upon the detaining authority to have noticed and considered that the said Sameer Godil in his bail application dated 9.10.03 had retracted his alleged statements and further in his bail application dated 14th October, 2003 he had refuted the department's rebuttal dated 10.10.03 to his retraction and had reiterated his retractions.

15. Mr. Khan submitted that the detaining authority was required to express her opinion regarding the said retractions of the co-detenu Sameer Godil. It was incumbent upon her to do so because she had referred to and relied upon the alleged statements of the said Sameer Godil. The learned counsel contended that since the detaining authority had not done so, her satisfaction is severally impaired. It displays non application of mind by the detaining authority and it also displays a casual and cavalier exercise of power by her and, therefore, the order of detention based on such satisfaction stands vitiated. He submitted that in the circumstances on this ground the order should be set aside.

16. In this connection, the learned counsel relied upon the decision of the Supreme Court in Mohd. Towfeek Mohd. Mulaffar " M.T.M. Mulaffar v. The Additional Secretary to Govt. of Tamil Nadu and Anr., Cri. Writ Petition No. 602/1989 decided on 23rd of February, 1990, K.T.M.S. Mohd. and another Vs. Union of India, , A. Sowkath Ali Vs. Union of India and Others, and a Division Bench decision of the Nagpur Bench of this Court in Amit Kantilal Jogan v. The State of Maharashtra and Anr., Cri. Writ Petition No. 87/96, decided by Ghodeswar & Vaidyanatha, JJ, on 27th September, 1996.

17. Mrs. A.S. Pai, the learned APP on the other hand contended that the retractions of the co-detenu were placed before the detaining authority and the detaining authority had considered them. She drew our attention to the affidavit of the detaining authority where the detaining authority has asserted that in view of the averments made by her in paragraph No. 57 of the grounds of detention, wherein the co-detenu of the co-detenu was termed as conspirator, the allegation that she had not considered the retractions of the co-detenu are baseless. The detaining authority has stated that she had considered all the relevant material placed before her for the purpose of arriving at her satisfaction and copies of all the documents were furnished to the co-detenu. The detaining authority has further stated that she was not bound to give her reaction to each and every piece of evidence placed before her in the grounds of detention. The learned APP submitted that this affidavit makes it amply clear that the detaining authority had applied her mind to the retractions of the co-detenu.

18. Relying upon the decision of the Supreme Court in State of Gujarat Vs. Sunil Fulchand Shah and Another, the learned APP contended that it is not necessary for the detaining authority to express her opinion about every piece of evidence placed before her. She submitted that in view of this legal position this

submission of Mr. Khan be rejected.

19. It is an admitted position that the co-detenu's statements and his retraction were placed before the detaining authority. The detaining authority has stated in the affidavit that she had considered all the documents placed before her including the retractions of the co-detenu. However, in the grounds of detention she has not expressed her opinion about them.

20. In Sunil's case (supra) it was urged before the Supreme Court that in the grounds served on the co-detenu, the fact that the detaining authority was of the view that no credence should be given to the statements in the petition dated 3.10.1984, whereby the other accused had retracted their statements, ought to have been mentioned because the state of mind of the detaining authority while holding that much credence could not be given to the documents should be treated to be a ground essential to be served on the co-detenu. It was argued that factual inference is included in the expression "grounds" and has to be expressly and specifically stated. This submission was rejected by the Supreme Court. The Supreme Court observed that the objection of the respondent was that the reason why the detaining authority is not impressed by a particular piece of evidence or on the other hand the reason why he prefers to rely on any other evidence should be detailed in the grounds. The Supreme Court observed that there was no merit in the said contention and held that it was not necessary to mention in the grounds the reaction of the detaining authority in relation to every piece of evidence separately.

21. In K.T.M.S. Mohd.'s case (supra) the Supreme Court was again considering the similar question. There the Supreme Court was dealing with a criminal appeal filed by the accused who was convicted under the provisions of the Indian Penal Code and the Income Tax Act. The court was considering the admissibility and evidentiary value of a statement recorded by an Enforcement Authority in exercise of his power as in the Supreme Court observed that the core of all the decisions is to the effect that the voluntary nature of any statement made either before the customs authorities or the officers of the Enforcement under the Relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means that statement must be rejected. The Supreme Court further observed that at the same time it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that such improper means has been adopted.

22. The Supreme Court further observed that, however, even if the maker of the statement fails to establish his allegations of inducement, threat etc. against the officer who recorded the statement, the authority while acting on the inculpatory statement of the maker is not completely relieved of his obligations in at least subjectively applying its mind to the subsequent retraction to hold that the

inculpatory statement was not extorted. The Supreme Court further observed as under:

"It thus boils down that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law, this Court in several decisions has ruled that even in passing a detention order on the basis of an inculpatory statement of a co-detenu who has violated the provisions of the FERA or the Customs Act etc. the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order will be vitiated. Reference may be made to a decision of the Full Bench of the Madras High Court in a Roshan Beevi and Others Vs. Joint Secretary to Government of Tamil Nadu and Others, to which one of us (S. Ratnavel Pandian, J.) was a party."

23. In Kamleshkumar Patel v. Union of India and Ors., 1994 M.L.J. 1669, Full Bench of this court has held that when two decisions pronounced by a Bench of the Supreme Court, consisting of the same number of judges take different view on any question, then the High Court should follow that decision which seems to it better in point of law and not necessarily the one which is later in point of time.

24. Both the judgments of the Supreme Court i.e. K.T.M.S. Mohd.'s case (supra) and Sunil Fulchand's case (supra) are judgments of Benches of equal strength. Though K.T.M.S. Mohd.'s case (supra) is later in point of time there the Supreme Court was dealing with an appeal. In Sunil Fulchand's case (supra) the Supreme Court was dealing with preventive detention case. Hence the view taken by the Supreme Court in Sunil Fulchand's case (supra) would, in our opinion, be applicable to the present case and, therefore, even if the detaining authority has not specifically expressed her opinion about the retractions of the co-detenu in the grounds of detention that cannot invalidate the order of detention on the ground of non-application of mind of the detaining authority.

25. This case can be looked at from one more angle. In State of Gujarat Vs. Chamanlal Manjibhai Soni, , the Supreme Court was dealing with the validity of the detention order issued under the COFEPOSA. The High Court allowed the writ petition on the ground that as one of the grounds was irrelevant the entire order of detention is vitiated. The Supreme Court observed that the High Court had put a wrong interpretation on Section 5A of the COFEPOSA. The Supreme Court considered Section 5A and observed that it is manifest that whenever the allegations of smuggling are made against a person who is sought to be detained by way of preventing further smuggling, there is bound to be one act or several acts with the common object of smuggling goods which is sought to be prevented by the COFEPOSA. It would, therefore, not be correct to say that the object of the COFEPOSA constitutes the ground for detention. If this is so, in no case there could be any other ground for detention, except the one which relates to smuggling. The Supreme Court observed that this is neither the object of the COFEPOSA nor can such an object be spelt out from the language in which

Section 5A is couched. What the COFEPOSA provides is that where there are a number of grounds of detention covering various activities of the co-detenu spreading over a period or periods, each activity is a separate ground by itself and if one of the grounds is irrelevant, vague or unspecific, then that will not vitiate the order of detention.

26. In *Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others*, , the retractions of the co-detenu were not placed before the detaining authority. It was contended that on account of non-placement of retraction the order of detention was vitiated. The Supreme Court referred to Section 5A of the COFEPOSA, which says that grounds of detention are severable. The Supreme Court then noted those several facts of the case and observed that these materials were in addition to the statements and confessions made u/s 108 of the Customs Act, by the father, the sons and the daughter of the co-detenu and so even if the statements made u/s 108 of the father, the sons and the daughter are ignored and obliterate the other facts remain and these are good enough materials to the prima facie belief that the detention of the co-detenu was necessary. The Supreme Court observed that Section 5A stipulates that when detention order has been made on two or more grounds, such order or detention have been deemed to have been made separately on each of such grounds and accordingly, if where the irrelevant or one inadmissible ground has been taken into consideration that would not make the detention order bad. It was observed that even if the confessional statement which was retracted could not be taken into consideration, there are other facts independent of the confessional statement which can reasonably lead to the satisfaction of the detaining authority. The order of detention was thus held to be valid as on account of non-placement of the retraction of the co-detenu only the ground which pertain to such statement could be said to be vitiated. The rest of the order can be held to be valid. While coming to this conclusion the Supreme Court also referred to *Chamanlal Soni's case* (supra) .

27. We have already noted the gist of the prejudicial activity in which the co-detenu is involved. It is not a simple act of smuggling. Several persons are involved in this racket. Several statements have been recorded. As stated by the Supreme Court in *Chamanlal Soni's case* (supra), there are a number of grounds of detention covering various activities of the co-detenu spread over a period or periods and each activity is separate ground by itself. Therefore, if co-detenu's retraction is not placed before the detaining authority, at the most the ground which pertains to co-detenu's statement recorded u/s 108 of the Customs Act may become invalid. In view of Section 5A of the COFEPOSA, it cannot be said that because the grounds which pertain to co-detenu's statement are invalidated, the entire order of detention must be set aside.

28. To counter the above argument, Mr. Khan referred to *A. Sowkath Ali's case* (supra) where the Supreme Court was dealing with order of detention issued under the COFEPOSA. The order of detention was passed on the basis of

confessional statement of co-accused. The Supreme Court observed that grounds of detention being one composite ground with numbered paragraphs setting out facts, non-placement of retraction of the co-accused cannot be justified by application of Section 5A of the COFEPOSA. The Supreme Court held that the detention order therein suffered from patent irregularity and was not sustainable.

29. In that case the co-detenu had concealed foreign currencies in chappals and attempted to send them out of India. In our opinion, the activity in which the co-detenu was involved in that case was not of such magnitude as the one with which we are concerned here. Here there are several statements of persons connected with the prejudicial activity. Several documents indicating the magnitude of the co-detenu's prejudicial activities were placed before the detaining authority. The co-detenu has indulged in several activities each one of which can be described as a separate ground of detention. We certainly cannot call the present grounds of detention as single composite ground. We feel Chamanlal Soni's case (supra) would be clearly applicable to the facts of this case and, therefore, principle of severability would be applicable to it. A Swokath Ali's case (supra) is not applicable to the present case.

30. Mohd. Towfeek's case (supra) would also not be applicable to this case because in that case the detaining authority had described the statement of the co-detenu in the grounds of detention as a voluntary statement. The co-detenu had retracted his statement. The retraction was not placed before the detaining authority. The Supreme Court, therefore, observed that in the grounds of detention there was no application to the fact that the vital confessional statement considered to be a voluntary one by the detaining authority, had in fact been retracted by the co-detenu. In the present case the detaining authority has not described the statement of the co-detenu as voluntary statement. Mr. Khan contended that the detenu's statements have been quoted in extenso and, therefore, it must be inferred that the detaining authority had treated them as voluntary. We are unable to draw such inference. In any event that was a case where there was non-placement of the confessional statement. Such are not the facts here. Besides Section 5A of the COFEPOSA was not considered by the Supreme Court. This judgment in our opinion, will, therefore, not be applicable to the facts of the present case. In the circumstances of the case, we hold that the order of detention is not vitiated because the detaining authority has not expressed in the grounds of detention her opinion about the retraction of the co-detenu.

31. Mr. Khan then urged that the representation addressed by the co-detenu to the detaining authority and the State Government has not been considered independently. He submitted that the representation ought to have been considered without being influenced by the opinion of the Advisory Board and inasmuch as it is not so considered the order of detention is liable to be set aside.

32. We are unable to accept this submission. In the affidavit in reply the detaining authority has stated as under:-

"With reference to para No. 4(vii) of the petition, it is submitted that combined representation dated 30.4.2004 of the co-detenu addressed to the Advisory Board, State Government, Detaining Authority, and Central Government was received in the office of the Detaining Authority along with the report and opinion of the Advisory Board on 13.5.2004. It is submitted that the combined note was prepared by the concerned Assistant on the said representation and opinion of the Advisory Board on 14.5.2004 and the papers were forwarded to the Desk Officer. The Desk Officer gave his endorsement on 15.5.2004 and forwarded the file to the Deputy Secretary. It is submitted that the Deputy Secretary after carefully considering the same gave his endorsement on 17.5.2004 and forwarded the papers to the Addl. Chief Secretary (Home) for his consideration. It is submitted that Addl. Chief Secretary (Home) was empowered to consider the said representation on behalf of the State of Maharashtra and after carefully considering the same rejected the representation and confirmed the Order of Detention on 19.5.2004. It is submitted that thereafter the representation and files were received in the office of the Detaining Authority on 20.5.2004. It is submitted that thereafter the concerned Assistant prepared the detailed note on 21.5.2004 and forwarded the same to the Deputy Secretary. It is submitted that the Deputy Secretary gave his endorsement on 24.5.2004 and forwarded the papers to the Detaining Authority on the same day. It is submitted that the Detaining Authority asked for meeting with the Deputy Director of DRI and accordingly the matter was discussed on 26.5.2004. It is submitted that after the meeting with the Deputy Director of DRI the noting were prepared by the Desk Officer on 27.5.2004 and they were forwarded to the Deputy Secretary. The Deputy Secretary gave his endorsement on 28.5.2004 and forwarded the papers to the Detaining Authority. It is submitted that the Detaining Authority after carefully going through the same, rejected the said representation on 29.5.2004. The rejection reply was sent to the co-detenu by speed post on 3.5.2004 which was served upon the co-detenu in Nasik Road Central Prison, Nasik on 2.6.2004. It is, therefore, submitted that the representation addressed to the Detaining Authority was considered independently and expeditiously."

33. This affidavit clearly shows that before rejecting the representation the detaining authority had asked for a meeting with the Deputy Director of D.R.I. There was a discussion. Notings were prepared by the Desk Officer. They were forwarded to the Deputy Secretary. Deputy Secretary's endorsement was put on 28.5.2004 and the papers were forwarded to the detaining authority and the detaining authority considered eh representation and rejected it on 29.5.2004. It is categorically stated that detaining authority had considered the representation independently.

34. Shri J.N. Patil has filed his affidavit on the basis of the record and information gathered from the file of the Home Department. So far as representation addressed to the State Government is concerned, he has offered the following explanation:-

"5. With reference to para 4(ii) of the petition, it is humbly submitted that the representation dated 30.04.2004 which was addressed to the Detaining Authority, the State Government, the Central Government and the Advisory Board was received along with report of the Advisory Board in the Hoke Department on 13.05.2004. It is submitted that the said representation along with report of the Advisory Board was placed through the Desk Officer who gave his endorsement on 5.05.2004 and forwarded the same to Deputy Secretary who endorsed on 17.05.2004 and the same was submitted to the Addl. Chief Secretary (Home) as the powers of State Government were delegated to him. The Additional Chief Secretary (Home), considered the representation independently and rejected the same on 19.5.04 without influenced by the opinion of the Advisory Board and intimated the co-detenu about the rejection of the same vide letter dated 21.05.2004 which was served on the co-detenu in Nashik Central Prison, Nashik on 24.05.2004. Thus the said representation was considered independently and expeditiously by the Government."

35. From the above paragraph it is clear that the Deputy Secretary (Home) had considered the representation independently without being influenced by the opinion of the Advisory Board. This submission of Mr. Khan must, therefore, fail. No other submissions were advanced by Mr. Khan.

36. In the circumstances, we hold that the impugned detention order is perfectly legal. Hence petition is rejected.