

(1993) 04 DEL CK 0040

In the Delhi High Court

Case No : Criminal Writ Appeal No. 326 of 1992

Sunil Kumar Kamra

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 15-04-1993

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1)

Citation : (1993) 26 DRJ 561

Hon'ble Judges : Sat Pal, J

Bench : Single Bench

Advocate : Rohit Kochhar, Sashi Kiran and Sandeep Bhalla, for the Appellant;

Judgement

Sat Pal, J.

(1) The petitioner in this case was detained in terms of the order dated 31st March, 1992 passed by the Joint Secretary-to the Govt. of India, Ministry of Finance, Deptt. of Revenue, New Delhi in exercise of powers conferred by Section 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA").

(2) Without , for the grounds of detention being served upon him, the petitioner filed the present petition challenging the order of detention. Along with the writ petition, the petitioner has annexed a copy of the grounds of detention of the same date in respect of the other co-accused, namely, Sushil Kumar Kaura. It has been alleged in the writ petition that the grounds of detention in respect of the petitioner are exactly the same as those of Sushil Kumar Kaura.

(3) Briefly stated the facts of the case are that on 25.2.91 a Polish National, namely Tryba Marek traveling from Singapore to Amsterdam in transit at Indira Gandhi International Airport, New Delhi was apprehended with 116 gold biscuits of 24 carats purity weighing 13525.600 gms valued at Rs.30,29,734.00 (I.V.) and Rs.48,69,216.00 (M.V.). Statement of the Captain of the Aircraft was

recorded under Section, 108 of the Customs Act and in his statement he stated that Tryba Marek did not declare any gold or gold articles to him or to any member of his crew. Accordingly, said Tryba Marek was arrested on 26.2.1991.

(4) According to the information available with the Custom Deptt., the gold recovered from Tryba Marek, was to be delivered to one Avtar Singh @ Dolly. During investigation, it was also learnt that one Sunil Kumar Kamra, (the petitioner) was to take delivery of the said gold. On 1.3.91 an information was received by the Custom Deptt. that above mentioned 116 gold biscuits recovered from Tryba Marek were to be handed over by him to Sushil Kumar Kaura in the toilet lounge at I.G.I. Airport, New Delhi. Pursuant to this information, the residential premises of said Sushil Kumar Kaura were searched as a result of which some incriminating documents were recovered which were seized under a Panchnama and said Shri Kaura was also apprehended.

(5) In his statement recorded u/s 108 of the Custom Act, Sushil Kumar Kaura stated that he knew the petitioner through a common friend Harminder Singh. He further stated that in February, 1990 the petitioner took him to the transit lounge of I.G.I. Airport and showed him one Polish National who handed over one packet to him which as per instructions of the petitioner was brought out of the Airport and thereafter he handed over the said packet to the petitioner. He also stated that he had done this job twice for the petitioner in February and March, 1990. Thereafter efforts were made by the Custom Deptt. to apprehend the petitioner and he surrendered before the Court of A.C.M.M., New Delhi on 25.9.91 and was released on bail on 10.12.91.

(6) It is further alleged that Statement of Avtar Singh @ Dolly was also recorded u/s 108 of the Custom Act on 13.7.91. In his statement he stated that he became friendly with the petitioner in the beginning of 1991 and the petitioner made a proposal to start dealing in smuggled gold Along with him. He stated that according to the arrangement finalised, the gold was to be supplied by Iqbal of Singapore who used to send this gold through Tryba Marek to Delhi by Air and Tryba Marek while in transit at I.G.I. Airport, New Delhi would hand over the smuggled gold to Sushil Kumar Kaura who would hand over the same to the petitioner outside the Airport and the petitioner would deliver the same to Avtar Singh @ Dolly, Who was to dispose of the said gold to any person as desired by Iqbal.

(7) On 11th March, 1991 Tryba Marek was detained under Cofeposa Act. The order of detention dated 6th March, 1991 was challenged in this Court by filing of Crl.W.157/91 and a learned Single Judge of this Court vide Judgment dated 18th February, 1992 allowed the said writ petition and quashed the impugned detention order. A copy of this judgment has been annexed as Annexure "B" to the writ petition. On 31st March, 1992, the order of detention was passed against the petitioner as well as against Sushil Kumar Kaura. Pursuant to the aforesaid order, Sushil Kumar Kaura was detained but the petitioner, as stated hereinabove, without service of the order of detention upon him, filed the

present writ petition challenging the order of detention. It may be pointed out here that the Govt. Of India, Ministry of Finance, Deptt. of Revenue vide order dated 3rd June, 1992 revoked the detention order passed against Sushil Kumar Kaura after considering the report of the Advisory Board.

(8) The petitioner has challenged the order of detention in this writ petition on the basis of various grounds mentioned in the writ petition, Mr. Rohit Kochhar, the learned counsel appearing on behalf of the petitioner, however, confined his arguments on the following two contentions only :-

(I) That the impugned order of detention has been passed for a wrong purpose as the order of detention has to be preventive and not punitive.

(II) The impugned order of detention has been passed on vague, extraneous and irrelevant grounds.

(9) The learned counsel submitted that the above mentioned two contentions could be urged to challenge an order of detention at a pre-execution stage in terms of the law laid down by the Supreme Court in the case of Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, .

(10) In support of the first contention, the learned counsel referred to the preamble of the Cofeposa Act, 1974 and submitted that the purpose of an order of detention is to prevent anticipated nefarious activities of a proposed detenu and the purpose is not to punish him. He submitted that in the present case, the alleged incident is of 26th February, 1991 and after making necessary investigation, the complaint was filed on 26th April, 1991. He further submitted that the order of detention in respect of another co-detenu Tryba Marek was passed on 6th March, 1991, but in the case of the petitioner and Sushil Kumar Kaura the order of detention was passed as late as on 31st March, 1992. He, Therefore, contended that there was long unreasonable and unexplained delay of about 13 months from the date of alleged incident and in any case of about 11 months from the date when the complaint was filed in the Court. In this connection, the learned counsel drew my attention to paras 13 and 17 and grounds Viii and IX of the writ petition. The learned counsel also contended that the order of detention passed against Sushil Kumar Kaura on the same date i.e. 31st March, 1993 has already been revoked by the Govt. of India itself and as such the impugned order was liable to be quashed. In support of his contention the learned counsel placed reliance on the following judgments:-

1. Lakshman Khatik Vs. The State of West Bengal, .. 2. Anand Prakash Vs. The State of Uttar Pradesh and others, . 3. 1990 (2) PLJR 77 (SC) 4. Om Prakash Vs. Delhi Administration and Others, . 5. .Shri Joginder Sharma VS. The Administrator, Union Territory of Delhi., 1992 (3) DL 198 . Subhash Chander VS. Uoi, 43 (1991). DLT 517. Prem Singh Vs. Administrator, National Capital Territory of Delhi, Crl. W. 637/92 decided on 16th February, 1992. (1993 () DRJ)

(11) The law is now well settled that a detention order can be challenged even at pre execution stage but the grounds of challenge are very limited in scope and number. As held in Alka Subhash Gadia's case (Supra) the grounds of challenge are " (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so."

(12) As stated above one of the ground available to challenge the order of detention at pre-execution stage is that the order is passed for a wrong purpose. In the present case the order of detention has been challenged on this ground and it has been alleged that there is a long and unexplained delay between the date of the alleged incident and the date of passing of the detention order which would snap the nexus of the live link and any unreasonable delay in passing the detention order would make such an order punitive. It is not explained why there was such a long delay in passing the order.

(13) In the case of Lakshman Khatik (supra), the Supreme Court held that "the authorities concerned must have due regard to the object with which the order is passed and if the object was to prevent disruption of supplies of foodgrains, one should think that prompt action in such matters should be taken as soon as incidents like those which are referred to in the grounds have taken place."

(14) From the decision referred to above, it is clear that there should not be unreasonable delay in passing the order of detention from the date of the alleged incident and if there is delay in passing the order, such delay must be explained satisfactorily. In the present case as stated hereinabove, there is a delay in passing the detention order of about 13 months from the date of alleged incident and of about 11 months from the date of filing the charge sheet.

(15) A short counter-affidavit has been filed on behalf of the respondents and it has been stated therein that case of the petitioner does not fall under any exceptions mentioned in Smt. Alka Subhash Gadia's case (supra) and since the petitioner was absconding, the order of detention could not be served upon him. The allegation regarding alleged unreasonable delay in passing the impugned order and as such the order having been passed for a wrong purpose has not been controverted in the counter-affidavit.

(16) Since the delay in passing the impugned order of detention had not been explained in the counter-affidavit, on the very first date of hearing i.e. 2nd March, 1993, I directed the learned counsel for the respondent to produce the original file from the concerned Ministry containing the impugned order of detention. Though the arguments were heard on 2nd March, 1993, 4th March 1993, 9th March, 1993, 10th March, 1993 and 11th March, 1993 but the original records of the Ministry were not produced before me. Accordingly by my order dated 11th March, 1993, I directed the Under Secretary concerned to be present

in the Court Along with relevant file on 15th March, 1993. On 15th March, 1993 the concerned Under Secretary, Mr. Roop Chand appeared before me but he stated that the relevant file was not traceable and at his request, the case was adjourned to 22nd March, 1993- The relevant file, however, has not been produced before me, though an affidavit dated 19th March, 1993 duly signed and sworn by Shri Mahendra Prasad, Joint Secretary to the Govt. of India, Ministry of Finance Deptt. of Revenue has been filed and it has been stated therein that the relevant file was not readily forthcoming inspite of best efforts made to trace the same and non-production of the file before the Court was regretted.

(17) In view of these facts mentioned hereinabove, I am constrained to hold that the delay of 11 months from the date of filing the complaint is unexplained and as such unreasonable. It will be relevant to point out here that the order of detention passed on the same date in respect of another co-detenu namely, Sushil Kumar Kaura, has been revoked by the Govt. of India itself on the basis of the opinion received from the Advisory Board.

(18) The learned counsel appearing on behalf of the respondent however, referred to a judgment of the Supreme Court in the case of M. Ahamedkutti Vs. Union of India (UOI) and Another, . In this judgment it was held that considering the given Explanation of the period in between the interception on 30.1.88 and the order of detention on 25.6.88, the nexus was not snapped and the ground was not rendered State and the order of detention was not rendered invalid thereby. Since in the present case, no Explanation for the delay has been given by the respondents, the ratio of this judgment is not applicable to the facts of this case.

(19) In view of the above discussion, I am of the opinion that the impugned order of detention has been passed for a wrong purpose and cannot be sustained. Accordingly, the writ petition is allowed and the impugned order of detention dated 31st March, 1992 is set aside. Since the order of detention has been set-aside on the basis of first contention, I do not deem it necessary to deal with the second contention urged by the learned counsel for the petitioner.